



**THE REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KITUI**

**ELECTION PETITION NO 4 OF 2017.**

**IN THE MATTER OF THE ELECTIONS FOR THE GOVERNOR OF KITUI COUNTY**

**BETWEEN**

**DR. JULIUS MAKAU MALOMBE.....PETITIONER**

**VERSUS**

**1. CHARITY KALUKI NGILU.....1<sup>ST</sup> RESPONDENT**

**2. INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....2<sup>ND</sup>RESPONDENT**

**3. GOGO ALBERT NGUMA.....3<sup>RD</sup> RESPONDENT**

**RULING**

**The Applications**

1. This ruling is on two applications for scrutiny and recount filed by the Petitioner herein, by way of Notices of Motion dated 4<sup>th</sup> and 10<sup>th</sup> October 2017 respectively. The applications arise from a Petition the Petitioner filed dated 7<sup>th</sup> September 2017, in which he is challenging the election of the 1<sup>st</sup> Respondent as the Governor of Kitui County in the general elections held by the 2<sup>nd</sup> Respondent on 8<sup>th</sup> August 2017. The Petitioner was a candidate in the gubernatorial elections.

2. Some of the prayers in the Notice of Motion dated 4<sup>th</sup> October 2017 were dispensed with by way of consent and directions given in a pre-trial conference held on 5<sup>th</sup> October 2017, and the outstanding prayers in the said Notice of Motion are as follows:

a) This Hon. Court do order the 2nd Respondent to avail to this Court the following materials, items and or information in its custody for purposes of assisting this court in hearing and determination of the application for scrutiny and recount of votes filed herein and or the Petition herein.

i. The Polling station diaries for all polling stations in Kitui County.

ii. Both the electronic and hard copy of the register of voters as contains the biometric and alpha numerical details of the voters entitled to vote at all voting stations in Kitui County.

iii. The Kenya Integrated Electronic Machine System (KIEMS) used in Kitui County for purposes of accessing the information stored therein.

b) That the Court do order the Director of Public Prosecutions to avail all the witness statements with regard to all cases of accused persons charged with election offences in Kitui County.

c) The cause (sic) of this Application be provided for

3. The Petitioner's counsel during the hearing also submitted that he had abandoned prayer (b) hereinabove of the said Notice of Motion.

4. The grounds for the application as stated on the face of the Notice of Motion and a supporting affidavit sworn by the Petitioner on 4<sup>th</sup> October 2017, are that the Petitioner's agents were denied access to various polling stations and were therefore unable to sign the Form 37A's and verify the declared results in the said polling stations, which the Petitioner listed in his supporting affidavit. Further, that the Form 37A's were not stamped in various polling stations, and the transmission and results declaration according to the Form 37A's, 37B's and 37C's in various named polling stations do not tally.

5. Reliance was placed on Regulation 72 (6) and 73(2) of the Elections (General) Regulations 2012 for the request for Polling Station Diaries, so as to ascertain how many voters required assistance, and for the verification of the votes cast, the spoilt votes, the rejected votes, the valid votes, and any invalid vote cast by a voter who voted more than once or by a person who was not a registered voter.

6. Further, that under Regulations 61 (4) (a) of the Elections (General) Regulations 2012, the Returning Officer is obliged to provide each Polling Station with both electronic and hard copy of the Register of Voters or such part thereof as contains the biometric data and alpha numerical details of the voters entitled to vote at the Polling Station, and that if the same is availed to the court it will assist the court verify the names and the number of the voters who voted as against the votes cast and contained in declaration of Results Forms 37A, as well as the actual ballot papers or votes contained in the ballot boxes for each Polling Station.

7. Lastly, that section 44 of the Elections Act, 2011 establishes an integrated electronic electoral system for purpose of biometric voter registration, electronic voter identification and electronic transmission of results, which is required to be simple accurate, verifiable, secure, accountable and transparent. Therefore, that if the Kenya Integrated Electronic Machine System (KIEMS) is availed in court it will show the names and number of the voters who voted; the declaration of results in Forms 37A transmitted from the Polling Stations to the Constituency and County Tallying Centers; and the day and time this was made, which is important in verification of the actual valid votes cast at every Polling Station.

8. The Petitioner's Notice of Motion dated 10<sup>th</sup> October 2017 seeks the following additional orders:

a) This Hon. Court be pleased to order for the scrutiny of all statutory forms and recounts of votes cast in all Polling Stations in Mwingi North, Mwingi Central, Kitui West, Kitui Central and Kitui South Constituencies relative to the election of the Governor of Kitui County held on 8<sup>th</sup> August, 2017.

b) This Hon. Court upon granting of prayer 1 to direct that the scrutiny do include the examination of the followings:-

(i) The signatures of Presiding Officers and Deputy Presiding Officers;

(ii) The affixing of stamps by IEBC on statutory forms;

(iii) Alteration of forms without countersigning;

(iv) Transposition errors;

(v) Statutory forms where there are no signatures of Wiper Agents.

(vi) Similarities in handwritings in the forms;

(vii) Both the electronic and hard copy of the Register of voters as contains the biometric data and alpha numerical details of the voters entitled to vote at all the stated Polling Stations;

(viii) The Kenya Integrated Electronic Machine System ("KIEMS") and the information stored by it or the print outs in respect thereof;

(ix) The Declaration of Results Forms 37C;

(x) The packets of spoilt ballots;

(xi) The marked copy register;

(xii) The packets of Counterfoils of used ballot papers;

(xiii) The packets of counted ballot papers;

(xiv) The packets of rejected ballot papers;

(xv) The information contained in the poll diaries;

9. The Petitioner further averred in the said application and supporting affidavit thereof he swore on 10<sup>th</sup> October 2017 that at the time of filing the Petition, he did not have the benefit of reviewing all the statutory election forms used during the electioneering process, and that upon being supplied with most of these forms pursuant to an order of the Court, he had noted the following anomalies:-

- a) Some of the forms 37A were not signed by the Deputy Presiding Officers and in some cases the Presiding Officer, and he listed the polling stations where he claims this was evident.
- b) The Forms 37A's in some polling stations do not bear the IEBC stamp.
- c) There were alterations in some of the Forms 37A's in the polling stations which could only mean that the number of votes indicated on the forms was altered after the initial tallying process. Further, that there was no countersigning of these alterations or cancellations by the Presiding Officer or Deputy Presiding Officer which rendered the forms defective. In addition, that most of the results recorded in forms 37A are materially different from the ones tallied in Forms 37B and 37C.
- d) Most of the form 37As did not show that the party agents for the wiper party or the Petitioner were present while in some stations, there were no agents at all for all the candidates.

10. It is also the Petitioner's case that the election results for Kitui County were based on false figures arrived at as a result of forgery of the statutory Forms 37A, Forms 37B, and Forms 37C, which were falsely created to tamper with the actual voting by the people of the County of Kitui. Examples were given by the Petitioner as follows:

- a) The Form 37C which shows the declaration of the results of all polling stations in all the constituencies of Kitui County is a computer generated form with a number of figures introduced to tamper with the actual results.
- b) The rejected votes were not factored in and added to the votes cast, and the total number of valid votes instead of reducing in such instances where there were rejected votes, the figures remained the same. An example was given of Mwingi North Constituency, where the total number of votes cast was 46,975 while the number of rejected votes is 303, but the number of valid votes still remained the same as 46,975 as if the rejected votes were not factored in. It was averred that this anomaly is consistent throughout the other constituencies
- c) In Yumbisye Secondary Polling Station in Kitui Central Constituency, there were two polling streams and in the declaration of the results under Form 37C, the figures for the two streams are similar. Further, that there were 540 voters in the first stream while there were 541 voters in the second stream, while the Form 37C shows that the number of votes cast for each candidate in the two streams is 70 for Dr. Julius Malombe, 17 votes for David Musila, while Charity Ngilu had votes are 361.
- d) The results of the gubernatorial contestants in Mwingi North Constituency and Mwingi Central Constituency (6 wards) were arrived at through a pre-determined formula leading to an almost similar number of votes allegedly cast in favour of the respective candidates.
- e) The Certificate of the Elected County Governor for Kitui County (Form 37 D) is dated, stamped, signed and issued on the 11th day of August 2017, while the tallying of the results as shown in form 37C is purportedly done dated and signed on the 12<sup>th</sup> day of August 2017.

11. Lastly it was also averred that there is an Election offence case in Court, namely **Criminal Case No . 30 of 2017 - Republic vs . Morris Mulei**, wherein it is alleged that the accused person was issuing two (2) ballots for gubernatorial and women's rep elections.

12. The Petitioner contended that an order for scrutiny and recount of the votes is the most appropriate, reliable, qualitative, objective and scientific means for reassuring the people of Kitui County as to the freeness, fairness, transparency, accuracy, verifiability of the election.

### **The Responses**

13. The 1<sup>st</sup> Respondent opposed the application in Grounds of Opposition dated 13<sup>th</sup> October 2017 and filed in Court on 16<sup>th</sup> October 2017. The grounds relied upon are as follows:

- a) The Petition does not raise any issue on the Register of voters.
- b) Presidential election and gubernatorial election are distinct and there is no legal requirement for electronic transmission in gubernatorial election, hence the order for accessing the Kenya Integrated Management System (KIEMS) has no legal basis .
- c) Under Article 50 (2) (a) of the Constitution of Kenya accused persons are presumed innocent until the contrary is proved, and production of witness statements recorded for purpose of criminal proceedings, which are untested in cross examination are of no probative value and courts do not issue orders in vain.
- d) The Petitioner cannot expand the scope of the Petition through interlocutory applications.
- e) There is no legal requirement to stamp Forms 37A's.
- f) The Court does not have in its disposal hand writing experts to examine disputed handwritings .
- g) The irregularities in the pleaded polling stations, even if proved, do not affect the result of the election.

- h) There is no legal or factual basis established by the Petitioner to warrant scrutiny and or recount of votes.
- i) The application lacks specificity and particularity.
- j) The difference in votes received by the Petitioner and the 1st Respondent is so huge, (95,309) , such that scrutiny and or recount of votes is a palpable waste of judicial time.
- k) The application for scrutiny & recount is a fishing expedition.
- l) The discretion to order scrutiny and or recount must be exercised judiciously.

14. The 1st Respondent also relied on the further affidavit sworn by Simon Saili Malonza on 12th October, 2017 in response to the Petition. The said deponent stated therein that he had reviewed all the Forms 37A deposited in Court by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, and confirmed that the Forms 37A were signed by agents of Wiper Democratic Movement –Kenya (WDM-K), the party that nominated the Petitioner, or by agents of other political parties and independent candidates. In addition, that the Forms 37A in the polling stations specifically pleaded by the Petitioner were signed by agents of WDM-K and dispels the allegations that the agents were denied access to the polling stations or ejected therefrom.

15. In addition, that the difference in votes between the Petitioner and 1<sup>st</sup> Respondent is 95,309 and the total votes cast in the pleaded polling stations amount to 13,238, and even if they were to be allocated to the Petitioner the outcome of the gubernatorial election would remain the same.

16. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents on their part opposed the applications in a replying affidavit sworn on 16<sup>th</sup> October 2017 by Gogo Albert Nguma, the 3<sup>rd</sup> Respondent, which was filed in Court on 17<sup>th</sup> October 2017. The 3<sup>rd</sup> Respondent deponed that the Petitioner's party agents scrutinized the ballot papers and result forms at the respective polling stations, and they did not make a request for recount as provided in Regulation 80 of the Elections (General) Regulations 2012. Further, that the agents were also present at tallying centers as is provided in law and that every candidates' and party agent duly signed the respective Polling Station Diary as having been present at the polling station.

17. The 3<sup>rd</sup> Respondent averred that the allegations that the Petitioner's agents were turned away from polling stations is therefore not correct and that the Petitioner's party agents received a copy of the Forms 37As, Forms 37Bs and Form 37C depending on whether they were present at the polling station or at the respective Constituency and County tallying centre. Further, that if the agents did not sign some of the forms as alleged by the Petitioner, it was either willful or largely through their own negligence, and such failure did not invalidate the election that took place on 8th August 2017. In addition, that the Petitioner's chief agent, one Mr. Bernard Kitheka, was present at the County tallying centre and he scrutinized all the Forms 37A from the polling stations, the respective Forms 37B from the eight constituencies in the county and witnessed the preparation of, and signed the Form 37C and received a copy thereof.

18. The 3<sup>rd</sup> Respondent attested that a review of the Forms 37A that the Petitioner alleges not to have been signed by the Deputy Presiding Officers, were actually signed by the Presiding officers, and that Regulation 79 (1) of the Elections (General) Regulations enjoins the Presiding Officer, candidate or agents to sign the Form 37As and not a Deputy Presiding Officer. As regards the failure to stamp Forms 37A, that under Regulation 79(2)(b) it is not a requirement that the Forms be stamped by the Presiding Officers.

19. It was also averred that the Petitioner had failed to demonstrate what figures in the Forms 37A were altered and how they were altered in favour of the 1st Respondent. Furthermore, that the actual tallying of votes at the polling stations was done manually, and it was probable that a few human errors which did substantially alter the outcome of the election could be made and, in the unlikely event that such errors were made, they would very easily be corrected once the same were brought to the attention of the 2nd Respondent. In any event the Petitioner's agents were present at the polling stations and witnessed the rectification of those errors, if any.

20. The 3<sup>rd</sup> Respondent admitted that the results in Form 37C for Yumbisye Secondary Polling station are the same for the two polling stations, and that this was as a result of inadvertent human error which occurred at the point of transposing the results and the same affected all the three candidates, including the 1st Respondent. In addition, as regards the different dates on the Form 37D and the Form 37C, that the same was the product of an inadvertent error on his part caused by the strict timelines he was operating under, coupled with exhaustion arising from overseeing the conduct of the elections in the entire County of Kitui .

21. The 3<sup>rd</sup> Respondent further averred that the Petitioner has not presented evidence that there was a predetermined formula that was used to determine the votes cast in certain constituencies, and that the totals can be tracked to respective Forms 37A that agents witnessed as they were being collated at the respective constituency tallying centre. Furthermore, that the elections of 8th August 2017 were done by secret ballot, and it was not possible for the Petitioner to establish who did and did not vote for him. On the KIEMS data, the 3<sup>rd</sup> Respondent argued that although the Petitioner alleges that the data in the KIEMS is not consistent with the entire results in the Forms 37A, he has not mentioned which polling station or tallying centers had different data, and neither has he presented evidence of any difference in the transmitted results and what was presented in court.

22. According to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the Petitioner has not demonstrated the link between the present applications and the Petition filed in court, and that the two are inconsistent with each other. Further, that the application dated 10th October 2017 seeks to amend the Petition through the backdoor by introducing new issues that are not pleaded in the main Petition. Lastly, that the Petition lacks specificity, details and particulars, and the Petitioner has failed to meet the threshold that would warrant issuance of the orders of scrutiny and recount.

### **The Determination**

23. The parties at a pre-trial conference held on 24<sup>th</sup> October 2017 agreed to canvass the applications by way of written submissions, which were highlighted during a hearing held on 1<sup>st</sup> November 2017. Mr. Okong'o Omogeni SC submitted for the Petitioner, and relied on written submissions dated 30<sup>th</sup> October 2017 filed on the same date. Mr. Kioko Kilukumi, the counsel for the 1<sup>st</sup> Petitioner also made oral submissions and relied on written submissions dated and filed in Court on 27<sup>th</sup> October 2017, while Mrs D. Mageto for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent highlighted written submissions dated 30<sup>th</sup> October 2017.

24. The ruling on the applications was initially scheduled to be delivered on 15<sup>th</sup> November 2017, however after reading the pleadings and arguments made by the Petitioner and Respondents, this Court was of the view that the interests of justice required that the Petitioner's applications be heard and determined with finality, and that it was not possible to do so before the Petitioner presented his evidence and the same was tested by way of examination. The ruling was therefore deferred to a date after the Petitioner had closed its case.

25. I have now considered the arguments and evidence put forward by the Petitioner and Respondents during the hearing of this Petition, and find that the issues before the Court for determination are firstly, whether the Petitioner should be availed all the Polling Station Diaries, the electronic and manual register of voters and the information in the KIEMS Kits with respect to the gubernatorial elections for the Governor of Kitui County held on 8<sup>th</sup> August 2017. Secondly, whether a scrutiny and/or recount of votes should be undertaken, and if so on what terms.

### ***The Supply of Information***

26. Mr. Okong'o Omogeni SC submitted that the only prayers they would argue from the Notice of Motion dated 4<sup>th</sup> October 2017 were the ones for the availing of certain materials and information in the custody of the 2<sup>nd</sup> Respondent, as they had abandoned the prayer seeking the Director of Public Prosecutions to avail witness statements.

27. In this regard, Mr. Omogeni submitted that Article 35 of the Constitution provides that every citizen has the right to access to information held by the state, and that the Access to Information Act No.21 of 2015 in section 4(i)(b) gives every citizen the right to access information held by the state, or another person, where the information is required for the exercise of any right or fundamental freedom. In addition, that under Article 86(d) of the Constitution the 2<sup>nd</sup> Respondent is obligated to ensure safe custody of election materials.

28. Furthermore, that section 27(1) (2) (a) of the Independent Electoral and Boundaries Act, also puts an obligation on the 2<sup>nd</sup> Respondent to supply information, and the Elections (Technology) Regulations of 2017 provides for information security and data storage under regulations 15,16 and 17, and parties are allowed to access election technology materials under Regulation 18. Reliance was placed on the Supreme Court ruling on scrutiny in **Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & 2 Others, SC Election Petition No.1 of 2017** for the position that information includes all records held by a public entity regardless of the form the information is stored. Mr. Omogeni also stated that the issue of access to technology had been pleaded in paragraph 16 and 17 of the Petition.

29. Mr. Kilukumi on his part argued that Article 35 of the Constitution has been operationalised by the Access to Information Act, which provides for a procedure to be followed to access information from public bodies. Further, that the Petitioner had not shown that he had followed the said procedure, nor written to the 2<sup>nd</sup> Respondent for the said information and indicating which of his rights have been violated. In addition that the process of resolving election disputes is in the Constitution and Elections Act, and Article 35 of the Constitution is a much wider provision. It was urged in this respect that the Petitioner's prayer to access the information is not tied to the dispute before the court, nor shows how it will assist the resolution of the election dispute herein.

30. Mrs. Mageto for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that they have not declined to supply the polling diaries, and that the prayer for the same is dependant on the outcome of the application for scrutiny, particularly as regards specific affected polling stations that will be identified by the Court. Further, that the 2<sup>nd</sup> Respondent is an independent body guided by Article 81 and 82 of the Constitution, and Article 81(e) provides that election shall be by secret ballot as provided in Article 38(3) (b). The court should therefore guard the secrecy of the ballot, and the Petition before the Court is not a constitutional petition on access to information but an election petition guided by specific legal principles.

31. Mrs. Mageto further submitted that they have supplied all the Forms 37A Forms 37B and Forms 37C to the Petitioner, thereby indicating their willingness and openness. However, that the KIEMS kit will be of no use as it has already been used in fresh presidential elections, but that the information in the KIEMS kit from the 8<sup>th</sup> August 2017 gubernatorial elections in Kitui County is however available.

32. I am alive to the position stated Article 35 of the Constitution as follows:-

**“35. (1) Every citizen has the right of access to**

**(a) information held by the State; and**

**(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom”.**

I am also guided by the Access to Information Act, 2016 which provides that access to information held by a public or private entity shall be provided expeditiously on request at a reasonable cost, subject to the limitations specifically provided for under section 6 of that Act. Likewise, section 27 of the Independent Electoral and Boundaries Commission Act, 2011 provides for access information held by the Commission subject to the limitations also sets out in the section.

33. In the present application, the Petitioner did not provide any evidence of a request made to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent of the information he seeks, so as to enable him exercise his rights in relation to this Election Petition. This notwithstanding, it is my view that the constitutional right to access to information must as much as possible be given effect to, and also given that there are statutory provisions being which oblige the 2<sup>nd</sup> Respondent to provide the information requested from it.

34. This finding notwithstanding, it is also my view that the Courts ought to proceed with caution as regards the enforcement of the right to information by way of interlocutory applications in the hearing of an election Petition, to avoid the introduction of a new evidence once pleadings have closed. The request for information as an interlocutory prayer in an election petition can only logically be in relation to issues which have been pleaded in the Petition, and must also take into account the specialized rules and procedures that apply to the hearing of election petitions and rationale thereof, particularly the time-bound nature of election petitions.

35. It is notable in this regard that the Elections (General) Regulations define a polling station diary to mean a record of all the activities at a polling station on the polling day, and Regulation 75(6) specifically requires that at the end of voting and before counting of the ballots and in the presence of candidates and agents, the presiding officer shall enter in the polling station diary the number of persons identified during polling using the printed register of voters. Under Regulation 81(2), after the counting of votes or recount, the presiding officer is required to hand over the polling station diary to the returning officer.

36. A polling station diary will therefore only be relevant and useful in relation to any concerns raised as regards the activities that took place in a specified polling station, which basis needs to be shown by the Petitioner to amplify the possible effect that the information will have on the protection of his rights.

37. The same principle applies as regards the request for the electronic and hard copy of the register of voters used in Kitui County, as this is one of the electronic materials availed to a polling station during voting under Regulation 61(4) of the Regulations, and the Petitioner ought to show the specific concerns he has with respect to the number of registered voters and/ or named voters in the register to justify the availing of this information.

38. On the information from the KIEMS Kit, section 44 of the Elections Act as amended in 2016 provides that:

**“(1) Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.**

The Kenya Integrated Elections Management System (KIEMS) integrates the three components required by section 44 (1), namely the biometric voter registration, electronic voter identification and electronic transmission of results. On the polling day, the KIEMS only records the electronic voter identification and electronic transmission of results, as the biometric voter of registration can only take place prior to the voting day.

39. As regards transmission of the results using the KIEMS, section 39 of the Elections Act provides as follows:

**39(1) The Commission shall determine, declare and publish the results of an election immediately after the close of polling.**

**(1A) The Commission shall appoint constituency returning officers to be responsible for-**

**(i) tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;**

**(ii) collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly and**

**(iii) submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.**

**(1B) The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.**

**(1C) For purposes of a presidential election the Commission shall —**

**(a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;**

**(b) tally and verify the results received at the national tallying centre; and**

**(c) publish the polling result forms on an online public portal maintained by the Commission.**

40. Under section 39(1C) of the Act, electronic transmission and publication of results from polling stations, to tallying centres and the

publication of the said results in a public portal is only a statutory requirement for the Presidential election. In all other cases, including the county Governor election, the transmission of results under section 39(1A) and (1B) of the Act is that the votes at the Polling Station are counted and recorded in Form 37A which is forwarded to the Constituency Tallying Centre. After tallying the votes are subsequently then recorded in Forms 37B and 37C at the Constituency and County tallying centres respectively.

41. In this respect, the only information from KIEMS that is relevant in this Petition and applications is that of electronic voter identification, and even then only in the polling stations which the Petitioner demonstrates as having had irregularities in this regard with respect to specific and named voters.

42. The sum total of the foregoing is the orders sought on access to information can only be granted after the Petitioner has shown by evidence the issues that he has raised and require verification from the polling station diaries, the electronic and manual voter register and the information on electronic voter identification, and with respect to specific polling stations, to avoid a fishing expedition for evidence. A finding in this regard shall therefore be made after examination of the irregularities alleged by the Petitioner and evidence adduced thereof .

### ***The Scrutiny and Recount of Votes***

43. Mr. Omogeni SC relied on the provisions of section 82 of the Elections Act and Rule 28 and 29 for the application for scrutiny and recount. Reliance was also placed on various judicial decisions on scrutiny and recount in election petitions, including the decisions in **Philip Mukwe Wasike vs James Lusweti Mukwe & 2 others, (2013) eKLR** , **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, [2014] eKLR**, and in **Arikala Narasa Reddy vs Venkata Ram Reddy & Anor, (2014) SCR** that was cited in the Supreme Court ruling on scrutiny in **Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & 2 Others, SC Election Petition No.1 of 2017**.

44. According to Mr. Omogeni SC, the Petitioner is alleging irregularities during the elections for Kitui Governor and has laid the basis in his pleadings in paragraphs 17 and 20 (d) of the Petition, and the supporting affidavits and annexures . Mr. Omogeni was also of the view that if the court is in doubt, the court can suspend its ruling and test the Petitioner's evidence first before delivery of the ruling .

45. Mr. Kioko Kilukumi submitted that this court possesses discretion to order a scrutiny and recount if there are sufficient reasons. However, that the discretion has to be exercised the basis of settled legal principles, and the Petitioner has to satisfy that he has met the legal threshold. According to Mr. Kilukumi, paragraph 22 of the Petition lays the genesis of the application for scrutiny, and lists 6 constituencies where there was mismanagement of the election process. However, that this is a generic pleading wholly lacking in particulars, and the law requires the petitioner to specify and particularize his pleadings.

46. Furthermore, that an analysis of the Petition disclosed that 44 polling stations were named in the context of the Petitioner's agents not being allowed access, and intimidation and violence. Mr. Kilukumi urged this Court not to concern itself with anything else other than the polling stations that have been pleaded in the Petition in accordance with Rule 29 of the Petition Rules. The counsel also added that four of the polling station pleaded in the petition are not gazetted, namely Masoka, Katoko, Kavoi and Majani pollings stations.

47. Other contentions made by Mr Kilukumi are that the petitioner is pleading new grounds that were not in the petition , namely that the Forms 37 A's were not stamped and not signed by the Presiding Officers ad Deputy Presiding Officers; and that the Petitioner has admitted that he became aware of new materials after he had filed his petition based on information supplied by the 2<sup>nd</sup> Respondent, and it is only then that he was able to raise grounds for scrutiny. Reliance was in this respect placed on the decision in **Nicholas Kiptoo arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 Others (2015) e KLR** that the purpose of scrutiny is not to aid the unearthing of new evidence to assist in sustaining an election petition.

48. Lastly, that the case law on scrutiny where the margin of votes is wide has held that where the outcome of scrutiny will not make a difference then there is no justification for scrutiny. Reference was made to the decision **Hassan Mohammed Hassan – Vs –Independent Electoral & Boundaries Commission & 2 Others, (2013) e KLR** that irregularities or mistakes established by evidence must substantially and materially affect the outcome of the election for a scrutiny or recount to be granted.

49. Mrs Mageto's submissions on scrutiny and recount reiterated the position stated by Mr. Kilukumi.

50. The applicable law on scrutiny and recount of votes is **Section 82 of the Elections Act No. 24 of 2011** as read together with **rules 28 and 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017**. **Section 82 of the Act provides as follows;**

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

51. **Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017** in addition provides as follows on scrutiny;

***“The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast***

***On an application under sub rule (1), an election Court may, if it is satisfied that there is sufficient reason, order for scrutiny or recount of the votes.***

With regard to recount, **Rule 28 of the said Rules provides** as follows:

***“A petitioner may apply to an elections Court for an order to recount the votes; or examine the tallying, if the only issue for***

*determination in the petition is the count or tallying of votes received by the candidates”.*

52. The issue of scrutiny and recount was discussed at length by the Supreme Court of Kenya in the case of **Gatiratu Peter Munya vs Dickson Mwenda Kitinji & 2 others** [2014] eKLR, where it was held as follows:

*“The right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition. The trial Court is vested with discretion under Section 82(1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for the order for scrutiny or recount.*

*The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.*

*Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules”*

53. It is clear from the foregoing that where an application for scrutiny and recount is made, the court must be satisfied that an order for scrutiny and recount has been justified by the party applying, and secondly, that the order is necessary for the just resolution of the election Petition. In addition, the Supreme Court also held that an application for scrutiny and recount must be couched in specific terms, and clothed with particularity as to which polling stations within a constituency are to attract such scrutiny.

54. I will now proceed to consider the irregularities pleaded in the present applications by the Petitioner as laying the bases for the orders he seeks, and the evidence adduced in support thereof, in light of the applicable law and guiding principles on scrutiny and recount set out in the foregoing.

55. The first irregularity pleaded is that the Petitioner’s agents were denied access to various polling stations and were not present at the polling stations, and thus unable to witness the counting and tallying of votes and to get copies of the Forms 37A from the polling stations and the Forms 37B from the tallying centres. The Petitioner also alleged that there were polling stations that had no agents representing candidates.

56. The Petitioner provided a list of the affected polling stations in paragraphs 4 and 5 of the Notice of Motion dated 4<sup>th</sup> October 2017, and in paragraph 4(d) of the Notice of Motion dated 10<sup>th</sup> October 2017. This irregularity is also pleaded in paragraphs 10 to 13 of the Petition filed in this Court by the Petitioner on 7<sup>th</sup> September 2017, with the affected polling stations being specified in paragraph 10 of the affidavit in support of the Petition the Petitioner swore on 7<sup>th</sup> September 2017, and paragraph 4 of his Further Affidavit that he swore on 16<sup>th</sup> October 2017 and filed in Court on 23<sup>rd</sup> October 2017. The Petitioner’s expert witness, Martin M. Kasina also provided a similar list in paragraph 8 of a supplementary affidavit he swore on 16<sup>th</sup> October 2017 that was filed in Court on 23<sup>rd</sup> October 2017.

57. I have also considered the Petitioner’s evidence that was presented to Court as regards the access by his agents to polling stations, which was a list of the Wiper Democratic agents at various polling stations, and the evidence of three of the Petitioner’s agents and his Chief agent. I am of the view that not only is the said evidence insufficient to provide a basis for scrutiny or recount of votes in light of the number of affected polling stations pleaded by the Petitioner, but also that a scrutiny or recount of votes will not serve any purpose in clarifying the issues he raised, in light of the explanations given during the hearing as to the presence or otherwise of party agents at the polling stations.

58. The second irregularity pleaded was that the 2<sup>nd</sup> Respondent did not adhere to laid down procedures, and did not stamp some of the Forms 37A with its stamp. This irregularity is also pleaded in paragraph 13 of the Petition. The list of the affected polling stations was given in paragraph 6(a) of the Notice of Motion dated 4<sup>th</sup> October 2017 and paragraph 4(b) of the Notice of Motion dated 10<sup>th</sup> October 2017, and the Petitioner and his expert witness also gave a list of Polling stations in the Further Affidavit and Supplementary affidavit they respectively filed in response to the Petition.

59. The evidence to show that there is a requirement for the stamping of Form 37A was also insufficient to warrant a scrutiny and recount on this ground. In addition, evidence was brought of other verification methods of the said Forms 37A in the affected polling stations, and a scrutiny and recount on the basis of the forms not being stamped by the 2<sup>nd</sup> Respondent will therefore not add any additional value.

60. The third irregularity pleaded in paragraph 4(a) of the Notice of Motion dated 10<sup>th</sup> October 2017 was that some of the Forms 37A were not signed by the Deputy Presiding Officers and in some cases the Presiding Officers. The list of affected polling stations were given in the said paragraph, as well as in the Petitioner’s Further Affidavit and his expert witness’s supplementary affidavit in support of the Petition.

61. I will however not consider this particular allegation for reasons that I agree with the 1<sup>st</sup> Respondent’s submissions that the Petitioner did not plead the particularity of Forms 37A not being signed by the Presiding Officers and Deputy Presiding Officers of Polling Stations in his Petition, and cannot rely on the same in his application for scrutiny.

62. I am guided in this respect by the decision of the Supreme Court of Kenya in Nathif Jama Adam v Abdikhaim Osman Mohamed & 3 Others [2014] eKLR where it was held as follows:-

**“It emerges that, the primary considerations in determining whether to grant scrutiny, are where there are polling stations with a dispute as to the election results; whether such a state of affairs has been pleaded in the petition; and whether a sufficient basis has been laid – to warrant the grant of the application for scrutiny.**

This position was reiterated by the Supreme Court in Gatiratu Peter Munya –vs- Dickson Mwenda Kitinji & 2 others (Supra).

63. The fourth irregularity pleaded in paragraph 6(a) of the Notice of Motion dated 4<sup>th</sup> October 2017 and paragraph 4(c) of the Notice of Motion dated 10<sup>th</sup> October 2017, is that there were alterations in some of the Forms 37A, and that the results in the Form 37A were materially different from the ones tallied in Forms 37B and Form 37C.

64. The fact that the results in some of the Forms 37A were altered, and some did not match the results in Form 37B was admitted by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, who attributed the arithmetic or posting errors in the Forms 37A, and errors in the transposition of the results in Forms 37A to Forms 37B to fatigue on the part of its officers. It was also stated that some of the errors did not affect the individual candidate’s respective results, and where they did, would not materially affect the final outcome. In some cases, the Forms 37A also failed to show the number of registered voters in the polling station.

65. There were however allegations made by the Petitioner that the alterations in some polling stations arose from there being similar results in polling stations with more than one stream, and the forms being filled in the same handwriting, which were not supported by sufficient evidence. There were also instances where it was shown that the results in some of the polling stations that were listed by the Petitioner were correctly entered in Forms 37A, Form 37B and Forms 37C.

66. The polling stations that will therefore be considered by this Court, out of those that are specified by the Petitioner in his application and Petition on this ground, are those in which he demonstrated that there were alterations and errors in the Forms 37A, Forms 37B and/or Forms 37C as explained in the foregoing, and which were either not disputed or sufficiently rebutted by the Respondents.

67. In determining the appropriate orders to make, this Court notes that the main fact demonstrated by the Petitioner as regards the said polling stations is that it is not clear what the true results were from the recording, tallying and declaration of the results in Forms 37A, Form 37B and Forms 37C.

68. There was insufficient evidence of any other basis for challenging the validity of the votes cast in the said polling stations. Therefore, the appropriate relief in the circumstances is one that will assist the Court the number of registered voters in the said polling stations, the number of persons who voted, the results that were actually recorded, and where necessary, the correct results.

69. The fifth irregularity alleged by the Petitioner as a basis for scrutiny or recount of votes was on false figures in the Forms 37A, Forms 37B and Forms 37C, arising from forgery, computer generated forms with false figures introduced to tamper with results, and the results having been arrived through a pre-determined formula. This irregularity is pleaded in paragraph 17 of the Notice of Motion dated 4<sup>th</sup> October 2017 and paragraph 9 of the Notice of Motion dated 10<sup>th</sup> October 2017. It is also pleaded in paragraph 20 of the Petition.

70. There was scanty evidence on these allegations, and in addition no polling stations were specified as having been affected by the irregularity other than Yumbisye Secondary Polling Station, where a transposition error was admitted by the 2<sup>nd</sup> Respondent. It was in this respect alleged that the predetermined formula was evident in Mwingi North and Mwingi Central Constituencies, but no specific polling stations in the said Constituencies were identified in this regard to form the basis of scrutiny or recount.

71. The last irregularity alleged in paragraph 6(e) of the Notice of Motion dated 4<sup>th</sup> October 2017 and paragraph 6 of the Notice of Motion dated 10<sup>th</sup> October 2017, is that there was an election offence in one of the polling stations by a polling clerk of the 2<sup>nd</sup> Respondent, who was charged with the offence of issuing extra ballot papers in the gubernatorial elections. This particular irregularity is not pleaded in the Petition, and neither is the affected polling station specified in the applications to lay a basis for scrutiny.

72. Finally, in the course of hearing the Petition, pre-trial directions were given for the preservation of the KIEMS SD Cards and ballot boxes used in the election for Governor for Kitui County on 8<sup>th</sup> August 2017, and the Petitioner and 1<sup>st</sup> Respondent were granted leave to affix additional seals to the said ballot boxes. The inventory that was filed in Court arising from this process showed that a number of the ballot boxes either had seals which were not numbered, had some broken seals, and that some boxes had been damaged.

73. The Petitioner’s counsel then sought to recall the 2<sup>nd</sup> Respondent’s witness for cross-examination on these findings, which application was declined by this Court for reasons that this was evidence that had come to the Petitioner’s knowledge after the filing of his Petition, and on which no advance notice had been given to the Respondents. The Court however did indicate that it would give appropriate directions on the ballot boxes that appear to have been interfered with in this ruling.

74. I have perused the inventories filed in Court with respect to the ballot boxes that appeared to have been interfered with, and note that majority of the ballot boxes involved polling stations on which no complaints were made by the Petitioner, and/or on which no basis has been laid for scrutiny. There were also number of ballot boxes whose polling stations could not be identified. This Court can only therefore address the import if any, of the interference with these ballot boxes in its judgment.

75. There were nevertheless some ballot boxes from polling stations which the Petitioner has demonstrated there were errors in recording, transposition and/or tallying of results in the Form 37A, Forms 37B and Form 37C as follows:

### **In Kitui Central Constituency**

- Kitui Regional Research Centre Polling Station
- Ndiani Primary School Polling Station
- Central Primary School Polling Station

### **In Kitui West Constituency**

- Musengo Secondary School Polling Station

### **In Kitui East Constituency**

- Makuku Primary School Polling Station

### **In Mwingi Central Constituency**

- Kyanika Primary School Polling Station

76. It is my view that the orders that will be given by this Court so as to clarify the number of registered voters in the said polling stations, the number of persons who voted, and the results that were recorded *vis-a-vis* the correct results will be sufficient to confirm if there has been any interference with the voting in these polling stations, and will adequately address the dilemma presented by the said ballot boxes in this regard.

77. The sum total of the foregoing is that the Petitioner's Notices of Motion dated 4<sup>th</sup> October 2017 and 10<sup>th</sup> October 2017 only partially succeed to the extent of the following orders:

1. A scrutiny of the information and logs in the SD Cards of the Kenya Integrated Electronic Machine System (KIEMS) used during the gubernatorial elections for the Governor of Kitui County held on 8<sup>th</sup> August 2017 is hereby ordered, limited only to the polling stations listed in Order 4 herein below, and only for purposes of ascertaining the number of registered voters in the said polling stations and the number of persons who voted in the said polling stations.
2. A scrutiny of the original Forms 37A, Forms 37B and Forms 37C arising from the gubernatorial elections for Governor of Kitui County held on 8<sup>th</sup> August 2017 is hereby ordered, limited only to the polling stations listed in Order 4 herein below, and only for purposes of ascertaining the results that were recorded, tallied and declared therein.
3. A recount and re-tallying of the valid votes cast for each candidate, the total votes cast, the rejected votes and the spoilt votes in the gubernatorial elections for the Governor of Kitui county held on 8<sup>th</sup> August 2017 is hereby ordered, but limited only to the polling stations listed in Order 4 herein below.
4. The orders hereinabove as regards scrutiny, recount and re-tallying of votes shall be limited to the following polling stations:

<b>Constituency</b>	<b>Polling Station</b>	<b>Code</b>
Kitui Central		
	Yumbisye Secondary School 1 of 2	092-1of2
	Yumbisye Secondary School 2 of 2	092-2of2
	Mikuyuni Primary School	008
	Ngumbwa Primary School	132
	Kangundo Primary School	124
	Kwa-Ukungu Primary School 1 of 2	133-1of2

<b>Constituency</b>	<b>Polling Station</b>	<b>Code</b>
	Kitui Medical Training College	054
	Syongila Youth Polytechnic 1 of 2	037-1of2
	Ndiani Primary School	028
	Central Primary School 6 of 7	044-6of7
	Mutune Girls Primary School	125
	Kitui Primary School	149
	Mutulukuni Secondary School	145
	Ngwani Market 1of2	143-1of2
	Kaliakakya Primary School	074
	Isaangwa Primary School	081
	KWODEP Community Hall	088
	Kitui Regional Research Centre	048
	Kilukuya School	Primary 121
Mwingi Central		
	Kanyunga Dispensary	018
	Syongii Secondary School	013
	Syomikuku Primary School	038
	Kalalani Primary School	080
	Kyanika Primary School	030
	Kasina Primary School 2of2	004- 2of2
	Thonoa Primary School	167
	Thitha Primary School	039
Mwingi North		
	Miramba-Ikamba Primary School	193

<b>Constituency</b>	<b>Polling Station</b>	<b>Code</b>
	Kanyengya Primary School	216
Kitui South		
	Mukwakwani Nursery School	196
	Ikutha Primary School 1of2	147-1of2
	Kavete Primary School	135
	Kyanyaa Primary School	172
Kitui West		
	MutIni Primary School	061
	Kiukuni Primary School	016
	Kivulu Primary School	012
	Kwa Mumo Primary School	103
	Musengo Secondary School	038
	Kombu Primary School	118
	Kathivo Poly	110
	Kyeni Primary School 2of2	082-2of2
	Kwa Mboya Market	111
Kitui Rural		
	Seuco	055
	Ngiluni Primary school	004
	Kalivini Primary School	060
	Maito Primary School	091
	Kanzau Secondary School	044
Kitui East		
	Masikalini Primary School	091
	Mulolongo Nursery School	103

Constituency	Polling Station	Code
	Makuka Primary School	110

5. It is hereby ordered that the scrutiny, recount and re-tallying shall be conducted for five days between 23<sup>rd</sup> and 28<sup>th</sup> January 2018 at the 2<sup>nd</sup> Respondent's warehouses in Kitui County.

6. The Deputy Registrar of the Kitui High Court is hereby ordered to preside over the said scrutiny, recount and re-tallying, and he or she shall be assisted by such officials as the Deputy Registrar in his or her discretion deems sufficient for the task, which scrutiny, recount and re-tallying shall be carried out according to the following directions:

- a) The election materials shall be held and stored at a room to be agreed on and provided by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
- b) The Deputy Registrar shall open each SD Card, ballot box and other election materials in the presence of the parties, advocates and representative and commence scrutiny, recount and re-tallying immediately.
- c) The contents of the SD Cards, ballot box and other election materials shall be scrutinized, recounted and re-tallied in accordance with the orders given herein by this Court, and each party shall sign a matrice set out for the exercise.
- d) Upon completion of scrutiny, recount and re-tallying, the SD Cards shall be sealed, and the other scrutinized and recounted materials shall be returned into the ballot boxes and/or sealed. The 2<sup>nd</sup> Respondent shall provide the Deputy Registrar with the requisite seals for the purpose.
- e) The Deputy Registrar and the parties' advocates and representatives shall signify the scrutiny, recount and re-tallying by signing on the scrutiny, recount and re-tallying matrice adopted for that purpose.
- f) In the event of any disagreement or dispute arising on any issue at any stage during the scrutiny, recount and re-tallying, the Deputy Registrar shall make a record and shall preserve the documents and materials forming subject of the dispute or disagreement for the court to rule on at such time and in such manner as the court directs.
- g) Upon conclusion of scrutiny and recount, the Deputy Registrar shall record his or her findings in a report on the scrutiny, recount and re-tallying, copies of which shall be supplied to the parties who may make representations therein before this court gives judgment. The report shall be submitted to and filed in this Court on 30<sup>th</sup> January 2018.
- h) The SD Cards and ballot boxes and any other election materials shall in the presence of all parties be handed back by the Deputy Registrar to the 2<sup>nd</sup> Respondent for safe custody, save for any documents and materials forming subject of a dispute that will be retained by the Deputy Registrar for preservation.

7. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents are hereby ordered to immediately supply the Deputy Registrar of the Kitui High Court with the following documents and election materials with respect to the polling stations listed in Order 4 hereinabove:-

- a) the original Forms 37A's , Forms 37B and Forms 37C;
- b) the KIEMS Kit SD Card logs showing the number of registered voters and number of voters who voted in the gubernatorial elections for Governor of Kitui County held on 8th August 2017 ; and
- c) all the ballot boxes including the packets of rejected ballot papers and spoilt ballot papers with respect to the gubernatorial elections for Governor of Kitui County held on 8th August 2017.

8. The costs of the applications will abide the outcome of the Petition.

**DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF JANUARY 2018**

**P. NYAMWEYA**

**JUDGE**