



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
ELECTION PETITION NO. 2 OF 2017

FRANCIS MWANGANGI KILONZO.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

RETURNING OFFICER

YATTA CONSTITUENCY.....2ND RESPONDENT

CHARLES MUTAVI KILONZO.....3RD RESPONDENT

JUDGMENT

1. Kenyans went to the polls on 8th August 2017 to elect their president, governors, senators, women representatives, members of the National Assembly and members of the County Assembly. In Yatta constituency of the Machakos County, the 3rd respondent Charles Mutavi Kilonzo was declared elected as the member of the National Assembly when he got 18,320 votes. He had vied as an independent candidate. The petitioner Francis Mwangangi Kilonzo contested for the seat on CCU party. He was declared second by having 11,383 votes. The other candidates were Michael Kasimbi Ngui (10,610 votes), Robert Ngui Basil (5,498 votes), Christopher Mutua Mutie (4,442 votes), James Mutiso Mutua (2,701 votes), Timothy Nganga Naason (1,550 votes), Steve Mutuku Mutua (1,365 votes) and Henry Musau Kimiti (444 votes). The election was conducted by the Independent Electoral and Boundaries Commission (1st respondent) whose Returning Officer was Nicholas Kalimi Kamandali (2nd respondent).

2. The petitioner was not satisfied with the conduct of the election and the declaration of results, and filed this petition on 7th September 2017 to challenge the same. The petition was based on various grounds, prominent among them being that:

(a) the 1st respondent abdicated its role and duty to exercise, protect and safeguard the sovereign will of the people of Yatta constituency by deliberately failing and/or neglecting to act in accordance with the Constitution and the **Elections Act No. 24 of 2011**;

(b) there was substantial non-compliance with the Constitution and the **Act** sufficient enough to invalidate the election;

(c) the election was so badly conducted and was marred with irregularities that it did not matter

who was declared the winner;

(d) the petitioner and his agents, despite their presence at the polling stations in time, were not allowed to enter into the same stations;

(e) the petitioner and/or his agents were present at the polling stations but were not allowed by the presiding officers to sign the results in Forms 35A, were not provided with Forms 35A by the presiding officers, and the presiding officers did not record the fact of their refusal or the reasons for their refusal;

(f) some of the employees and/or agents and presiding officers of the 1st respondent sought to engage in mischievous illegal acts of intimidation and/or misleading voters and in particular those who were illiterate and/or aged who were in need of assistance by not showing them how to vote thereby sabotaging the will of the people;

(g) the 2nd respondent who conducted the election and declared the results was not the one gazetted for Yatta Constituency;

(h) the 2nd respondent was partisan and openly sided with the 3rd respondent;

(i) the 2nd respondent refused and/or failed to hear and entertain the complaints by the petitioner and/or his agents;

(j) in numerous instances during the election day, the 3rd respondent and/or his agents engaged in electoral malpractices of bribing voters and campaigning past deadline set by the 1st respondent;

(k) several Forms 35A were filled and signed by one hand which was illegal;

(l) several Forms 35A were signed and/or remarked upon by the 2nd respondent which was an unexplained anomaly;

(m) in several polling stations KIEMS kits stopped working for some time but the time was not compensated by increasing the time within which voting would end;

(n) the agents were asked to sign blank declaration forms which made it possible for the presiding officers to make changes to the votes each candidate received;

(o) the election was not administered in a free, impartial, neutral, efficient, accurate and accountable manner as required by **Articles 81 and 86** of the Constitution, **sections 39, 44 and 44A** of the **Elections Act**, and **section 25** of the **Independent Electoral and Boundaries Commission Act (IEBC Act) No. 9 of 2011**; and

(p) the results declared did not meet the threshold of verifiability as is required under the Constitution because from the different elections the total number of votes cast was different and the same was not explained.

3. The petitioner swore a supporting affidavit, and got his chief agent Samuel Mulei (PW 2) to swear a witness affidavit. The other affidavits were sworn by his agents Mutinda Mbola (PW 3), Ndunda Luka Wambua (PW 4), Charles David Muandiko (PW 5) and Samuel Mwanzia Makau. Of these only Samuel Mwanzia Makau did not testify.

4. The 1st and 2nd respondents filed a response to the petition. The 2nd respondent swore a replying affidavit. They stated that the election were conducted in a free and fair manner, and in accordance with the Constitution and election laws. They denied that the petitioner and his agents were denied access to the polling stations, or that were denied an opportunity to sign Forms 35A. It was stated that all agents

present were allowed to scrutinize and append their signatures in Forms 35A, to witness the counting of the votes, and that the agents were supplied with copies of Forms 35A. The respondents denied that the election had any irregularities that were of a magnitude that could invalidate the results. They denied that they or their employees were partisan, or that they refused to hear any complaints by the petitioner or his agents. They stated that no complaints were lodged. It was denied that any presiding officer signed any Forms 35A for an agent, and it was stated that where the 2nd respondent made any comments on Forms 35A he had noticed a variance or anomaly on the forms. It was their case that the 2nd respondent had been validly appointed and gazetted to conduct the Yatta constituency election. Regarding the KIEMS kits, the 1st and 2nd respondents stated that they were fully functional, there were ICT personnel on standby to maintain the kits, and that time was duly compensated. The 1st and 2nd respondents, and indeed the 3rd respondent, stated that the declaration and announcement was made on 9th August 2017, hence the petition was filed out of time and was incompetent. Lastly, that the results indicated in paragraph 5 of the petition (11,350 for the petitioner and 17,888 for the 3rd respondent) were not the results declared by the 2nd respondent in Form 35B. The 2nd respondent testified, being the only witness called by the 1st and 2nd respondents.

5. The 3rd respondent swore a replying affidavit to deny the allegations in the petition, and the averments by the petitioner and his witnesses. He denied that the election was marred with any irregularities. In regard to the results in Forms 35A, he stated that his agents were supplied with copies. He stated that similar copies were displayed on the door of every polling station. His case was that even if the petitioner's agents did not sign Forms 35A, which he denied, that in itself would not invalidate the results. He stated that he was validly elected in an election that was conducted in accordance with the Constitution and election laws. He gave evidence, and did not call a witness.

6. The petitioner was represented by Mr. Makundi and Mr. Kituku. The 1st and 2nd respondents were represented by Mr. Okuta, while the 3rd respondent was represented by Mr. Nyamu, Mr. Mungata and Mr. Nthiwa.

7. During the pretrial conference the following were agreed to be the issues for determination:-

- a) is there a competent petition: when was the declaration of results made?;
- b) was the election conducted in accordance with the principles laid down in the Constitution?;
- c) were there irregularities and illegalities committed during the election, and were they substantial enough to affect the validity of the election?;
- d) were elections offences committed during the election, and did they affect the validity of the election?;
- e) was the returning officer validly and legally appointed for this election, and was he partisan?;
and
- f) who is to pay costs, and how much?

The court will determine these issues, but not necessarily in the order that they appear.

8. Before any such determination, I will briefly outline the constitutional and legal principles governing elections. These principles spring from the fact that Kenya is a sovereign and democratic country based on the values of democracy, human rights and the rule of law. Under **Article 1(2)** of the Constitution the people may exercise their sovereign power either directly or through their democratically elected representations. Democratic elections provide the most legitimate mechanism for constituting the government. For there to be a democratic government, it is essential that the elections be regularly held, and, when held, be free and fair based on universal suffrage and the free expression of the will of the

electors (**Article 38** of the Constitution). In **Richard Kalembe Ndile & Another –v- Patrick Musimba Mweu & 2 Other [2013]eKLR**, it was observed that:-

“Under our democratic form of government, an election is the ultimate expression of the people and the electoral system is designed to ascertain and implement the will of the people. The bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect whenever possible....”

Articles 81(e) and **86(a)** of the Constitution command the IEBC to conduct free and fair elections by secret ballot, and in a manner that is simple, accurate, verifiable, secure, accountable and transparent. IEBC is required to establish appropriate structures and mechanisms to eliminate fraud and malpractice.

9. Under **section 83** of the **Elections Act**:

“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 non-compliance did not affect the results of the election.”

The provision recognizes the sanctity of the right of the people to choose their political leaders. It forbids the court from trivializing that right by nullifying an election merely because errors and irregularities have been shown to have been committed, or that a provision of the law relating to elections has not been complied with. The errors and irregularities, or the non-compliance with election law, must be of such gravity that the integrity of the election is materially compromised.

10. In **Gatirau Peter Munya –v- Dickson Mwenda Kithinji & 2 Others [2014]eKLR**, the Supreme Court acknowledged the practical reality that imperfections in the electoral process are expected; that, therefore, an election court should not lightly overturn the election, especially where neither a candidate nor the voters have engaged in any wrong doing. The court laid down the following principles:-

“216. It is clear to us that an election should be conducted substantially with the principles of the Constitution, as set out in Article 81(e). Voting is to be conducted in accordance with the principles set out in Article 86. The Elections Act, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.

217. If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities.

218. Where, however, it is shown that the irregularities were of such magnitude that they affected the election results, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection are not enough, by and of themselves, to vitiate an election.”

The court in **Raila Odinga –v- IEBC & 2 Others, Supreme Court Presidential Petition No. 1 of 2017** reiterated this interpretation of **section 83**. It is notable that the petitioner’s counsel made reference to **section 83** and the interpretation given to it in **Raila Odinga** (above) case. He asked the court to find that the petitioner had established the occurrence of irregularities and illegalities, and that they were enough to nullify the election. It was the case of the 1st and 2nd respondents that the petitioner had failed to prove that any alleged irregularity or malpractice had been proved, and urged the court to find that the integrity of the election had not been compromised. They relied on the case of **Moses Masika Wetangula –v- Musikari Nazi Kombo & 2 Others [2014]** and **Albeity –v- Abu Mohamed Abu Chiaba & Another [2013]eKLR**. The counsel for the 3rd respondent relied on these decisions, and submitted that no irregularities and malpractices were proved, and, further that, it was not shown how they had affected the results, given the big margin of votes between him and the petitioner. The difference between the 3rd

respondent and the petitioner was 6,937.

11. The burden of establishing the allegations of non-compliance with the Constitution and the election laws, irregularities, and electoral malpractice and misconduct, which would result in the election being declared invalid, rests with the petitioner (**Raila Odinga** (above)).

12. On the standard of proof, while in ordinary civil cases the standard of proof is that of a balance of probability, in an election petition, the standard of proof is beyond the balance of probability but lower than beyond reasonable doubt that is applicable in criminal cases (**Raila Odinga** (above)). The petitioner's counsel made no reference to the burden or standard of proof, but the respondents' counsel were in agreement with these principles.

13. Lastly, in an election petition the petitioner is bound by his pleadings, and bound to prove the case that he has pleaded. He is not permitted to make a case outside the pleadings, and his affidavits and testimony must be consistent with, and support the case he has pleaded. On this point, the Supreme Court in the **Raila Odinga** case cited with approval the Supreme Court of India in **Arikala Narasa Reddy –v- Ventaka Ram Neddy Reddygari & Another, Civil Appeals Nos. 5710 -5711 of 2012 [2014] 2SCR** in which the court stated as follows:

“In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”

14. I will begin with the question whether election offences were committed during the election, and whether they affected the validity of the election. In paragraph 9(b) of the petition it was alleged that in numerous instances before and during the election day, the 3rd respondent and/or his agents were engaging in electoral malpractices by bribing voters and campaigning past the deadline set by the 1st respondent. Bribery is an offence under **section 9 of the Election Offences Act, No. 37 of 2016**. However, no particulars of bribery were given either in the petition or in the affidavit sworn to support the petition, and no evidence was led to prove the allegation. It should be appreciated that the Supreme Court in **Raila Odinga –v- IEBC & 3 Others, Supreme Court Petition No. 5 of 2013** held that whoever alleges the commission of an election offence must prove such offence beyond all reasonable doubt. I find that bribery was not proved. Similarly, the allegation that there was a campaign past the deadline was not particularized. In evidence, the petitioner stated that his supporters and agents had reported to him that the 3rd respondent was having night meetings; that he reported to the 2nd respondent who took no action. This claim was not in his affidavit. He did not give the names of his supporters or agents who reported to him. He did not call any of them to testify.

15. It was pleaded in paragraph 9(c) of the petition that some of the employees of the 1st respondent and/or the presiding officers and/or their agents intimidated and misled illiterate and/or aged voters who were in need of assistance; and that employees and clerks of the 1st respondent misled the voters by not showing them how to vote but by showing whom to vote for, and thereby sabotaged the will of the people. No name of employee, presiding officer, clerk or agent was given in the petition in regard to this allegation. No name of voter, whether old or illiterate, was given in the petition as having been misled or told how to vote, or at all. No voter was pleaded as having been intimidated. No evidence was tendered to prove these allegations.

16. It was pleaded in paragraph 9(e) of the petition that the 2nd respondent was partisan and that he openly sided with the 3rd respondent. There was no evidence in the supporting affidavit on this; leave alone the fact that the claim was not particularized. The affidavits of the witnesses called by the petitioner made no

reference to this. However, in the cross examination of the 2nd and 3rd respondents it was admitted that the chief agent of the 3rd respondent was a contractor with the 1st respondent; that he transported election materials during the election. First, an issue not pleaded cannot be the basis of testimony. Even then, it was not shown how the fact of the chief agent being a contractor could have influenced how people voted in the constituency, or how this could have affected the results. The 2nd respondent was also made to admit during cross-examination that he was a voter at Kithimani HDU polling station in Yatta constituency and therefore he ought not to have been the returning officer in the constituency. Again, this had not been pleaded, and had not been deposed to in the supporting affidavit, or any other affidavit. Still, it was not demonstrated how this alone could have affected the election. Lastly, it was submitted that the agents of the petitioner had not been trained by the 1st respondent whereas the agents of the 3rd respondent had been trained, and that there was no explanation for the favour given to the 3rd respondent. First, this issue was not pleaded, and neither did it find mention in the supporting affidavit by the petitioner. Secondly, the petitioner did not say that he complained to the 1st and 2nd respondents about the failure to train his agents, and with what result.

17. In short, I find that the petitioner did not prove that any of the respondents committed any election offence.

18. The next issue is whether the 2nd respondent was validly and legally appointed as the Returning Officer for the Yatta constituency election. The issue was pleaded in paragraphs 9(d) and 9(i) of the petition. The petitioner gave evidence that the person appointed to manage the election was one Lucy Mbithe John; and that the 2nd respondent was not appointed and gazetted to manage the Yatta constituency election. When he was referred to the Gazette dated 26th May 2017 appointing the 2nd respondent as the Returning Officer, he stated that he was not notified of this. The 2nd respondent testified, and it was evident, that Lucy Mbithe John was gazetted on 5th May 2017 to conduct the Yatta constituency election, but that on 26th May 2017 there was a corrigenda by which the 2nd respondent was appointed instead. The 2nd respondent explained that this followed his complaint that he came from Masinga constituency and yet he had been appointed as Returning Officer there. This is what led to his re-assignment to Yatta Constituency. I find that the 2nd respondent was validly and legally appointed to conduct the election in Yatta constituency. I have shown in the foregoing that the claim that he was partisan was not substantiated.

19. There was the claim that the election was riddled with irregularities and illegalities, and that they were substantive enough to invalidate the election. In paragraph 9(a) of the petition, the claim was that the petitioner and/or his agents, despite their presence at the polling stations in time, were not allowed to enter into the stations. In paragraph 9(b) the allegation was that, despite their presence at the polling stations, the petitioner and/or his agents were not allowed by the presiding officers to sign any declaration in respect of the election in most of the polling stations; and that they were not asked to append their signatures on Forms 35A; that they were not provided with copies of the declaration of results by the presiding officers; and that the presiding officers did not record the fact of the refusal or reasons for the refusal to sign.

20. There was no dispute that Yatta constituency had 169 polling stations. The 170th polling station was for the presidential election only. The petitioner stated that he had an agent for each polling station. His chief agent was PW 2. He (the petitioner) stated that on the day of voting he received phone calls from most of his agents who were complaining that they had been denied access to the polling stations to witness the voting. He (himself) was not denied access to any polling station. PW 2 had a polling station but was not denied access. The petitioner rung the 2nd respondent to report the denial of access of his agents. The 2nd respondent did nothing about the report. On his part, the 2nd respondent denied ever receiving the complaint. He stated that there was no report from any of the polling stations of any agent having been denied access.

21. The petitioner called PW 3, who was his agent at St. Stephen's Kalala, PW 4, who was his agent at

Kauukuni Primary School and PW 5, who was his agent at Makila Primary School. Each stated that he was allowed access to the station and oversaw the election. There was no agent called to say that he was denied access to a polling station to which he was assigned. In any case, it was expected that in the pleadings the petitioner gives the names of the agents who were denied access, and he gives the names of the polling stations that were not accessed. PW 2 swore in his affidavit that the report of non-access was in respect of 69 polling stations. He did not name the polling stations concerned. He did not indicate who the agents were. In short, the petitioner called three agents to testify in support of his case. None of them was denied access to his polling station.

22. In paragraph 7 of the petitioner's supporting affidavit he stated that he and his agents were denied the chance by the presiding officers to confirm and sign declaration Forms 35A. In paragraph 8 of the affidavit he stated that he and his agents were denied the opportunity to sign Form 35B. In his testimony he did not state that he sought to sign any Form 35A or Form 35B and that he was denied. He produced Form 35A for Katani Secondary School polling station and stated that his agent for the polling station had not signed and was denied the opportunity to sign it. It is true that CCU agent did not sign the results. However, he did not call his agent for the station to say whether he indeed participated in the election, and whether or not he was denied the opportunity to sign the result.

23. PW 2 was the agent at Matuu Primary School. He testified that he signed his Form 35A. He then went to the Tallying Centre. He did not say in his affidavit that he sought to sign Form 35B but that he was denied. PW 3, PW 4 and PW 5 each witnessed the voting in his respective station, but stated that he did not sign Form 35A. PW 3 testified that he was not asked to sign the Form 35A, and neither did he ask to sign. PW 4 stated that he was present during the counting of votes after voting. He asked for Form 35A but was told it was not available. He produced Form 35A which had his ID card number and phone number. He stated that when he asked to sign it he was told it was at night and because he was sleepy he was asked to go home and return next day. He then found out that another person had signed it at his space. In his affidavit, he stated that he was not issued with Form 35A and when he asked for it police officers ordered him to vacate the place. Certainly, PW 4 had two versions of what happened at the polling station that led him not to sign Form 35A. PW 5 stated in his affidavit that he did not sign, and when he asked he was told it was not to be provided and he was ordered to vacate the station.

24. According to the 2nd respondent, the instructions to the presiding officers were that all agents present were to sign the results. He, relying on **Regulation 79(6) and (7) of the Elections (General) Regulations, 2012**, contended that the refusal or failure of a candidate or the agent to sign a declaration form or to record their reasons for the refusal to sign cannot by itself invalidate the results announced.

25. PW2, PW 3 and PW 4 did not say that the results of their respective polling stations were in dispute. PW 5 stated the petitioner had got 293 but that Form 35A showed he had got 279. He was asked to substantiate the figure of 293. He stated he had kept it in his head. He had no record or notebook of the same.

26. I have looked at the petitioner's supporting affidavit. He did not challenge the results declared. He challenged the process and its integrity. This is why in paragraph 22 of the affidavit he stated:-

“22. That if the electoral process is compromised and unprocedural then the outcome is null and void”

27. It was alleged in paragraph 9(f) of the petition that the 2nd respondent refused and/or failed to hear and entertain complaints by the petitioner. This was repeated in the supporting affidavit and testimony in court. This was denied by the 2nd respondent. It is material that the petitioner did not make any formal complaint. The petitioner stated that he rung the 2nd respondent. PW 2 stated the same. I want to imagine that if one is a candidate for a particular seat (and this was not the petitioner's first time to contest) the alleged refusal of the 69 of his agents to attend the voting, and the alleged massive refusal of his agents to sign results, were such serious acts that would have elicited a formal protest and complaint. He did not formally complain.

28. The petitioner claimed in paragraph 9(o) of the petition that his agents were made to sign blank Forms 35A which made it possible for the presiding officers to make changes to the votes each candidate had got. The 2nd respondent denied this. The petitioner, again, did not give the particulars of the agents, the presiding officers and the polling stations in question. In evidence, he did not call the agents concerned to confirm the allegation.

29. In paragraph 9(i) of the petition it was alleged that several Forms 35A had been filled and signed by one hand. This allegation was denied. No particulars of the Forms 35A were given in either the petition or the supporting affidavit. No evidence on such Forms 35A was tendered.

30. In paragraph 9(k) of the petition it was pleaded that several Forms 35A were signed on and/or endorsed on by the 2nd respondent which was an unexplained anomaly. The 2nd respondent testified that his comments on Forms 35A were merely administrative and intended to cross-check the totals for valid votes cast and to point out if there was any error in summation; that the comments were to enable him to track the results, but were never intended to affect the results, and did not change the results. There was no evidence on the Forms 35A that the 2nd respondent, on making the comments, changed any results. It is trite that the results recorded in Form 35A by the presiding officer are final (**IEBC –v- Maina Kiai & 5 Others [2017]eKLR**).

31. In paragraph 9(n) it was alleged that in several polling stations KIEMS kits stopped working for some time but that the time was not compensated by increasing the time within which voting would end. The 2nd respondent, in response, stated that out of the 170 KIEMS kits only 6 failed. Out of them, 3 were successfully re-launched. 2 were replaced in the morning, and 1 was replaced in the afternoon. He stated that in each case the time taken to re-launch or replace the kit was compensated. To start with, the petitioner, in the petition and supporting affidavit, did not indicate in which polling stations there was failure of the KIEMS kits. In evidence he did not indicate the stations. The court could only go by the specific evidence given by the 2nd respondent. Further, he did not call any respective agents to state that time was not compensated. The petitioner sought the production of KIEMS kits and stated that the kits were critical in showing what had transpired throughout the polling day, and how people had voted. Now that the 1st and 2nd respondents did not produce the kits, it was contended, an adverse inference should be drawn. It was the petitioner who claimed that KIEMS kits had failed in various polling stations. He was required to name the polling stations, and call evidence to establish the claim. Now that the 2nd respondent stated the failure was in 6, he was required, if he disputed, to show that they were more. The KIEMS kits were not supposed to be produced for a fishing exercise.

32. Were the KIEMS kits intended to be produced to prove the claim in paragraph 9(j) of the petition? That each of the 6 elections produced different results, and therefore the election was not verifiable! Again, the petitioner did not table the results of each election (presidential, governor, senator, women representative, members of the National Assembly and the members of the County Assembly) to show the variance, or that there was inconsistency. As a candidate he knew the registered voters in each polling station. He did not claim that in any polling station more people, than those registered, voted.

33. In an election petition, it is upon the petitioner to prove, using cogent and credible evidence, all the allegations of irregularities, malpractices or breaches of the law and the Constitution cited in the petition. The court cannot interfere with the results of the election unless it has been demonstrated to the required standard that the irregularities, malpractices and breaches of the Constitution and the election law complained of in the petition have rendered the election invalid (**Jackton Nyanungo Ranguma –v- IEBC & Others [2017]**). The other way of putting it is this: were the alleged irregularities and malpractices such that the integrity of the election was impugned? Were they such that the victory of the 3rd respondent was put to doubt? (**Moses Masika Wetangula** (above)). In short, I find that the allegation that the election of the member of the National Assembly for Yatta constituency was marred with irregularities and illegalities was not proved.

34. The last issue is related to the competence of the petition. The petitioner pleaded that the results were declared on 10th August 2017. If that is true, the petition, which under **Article 87(2)** of the Constitution

and **section 76(1)(a)** of the **Elections Act** was supposed to be filed within 28 days of the declaration, was competent. But the respondents' case was that the declaration of the results was on 9th August 2017, and therefore the petition ought to have been filed by 6th September 2017. The petition was filed on 7th September 2017. The last day for filing of the petition was on 6th September 2017. On their part, testimony was tendered by the 2nd and 3rd respondents that the results were declared on 9th August 2017 between 9.00pm and 10.00 pm. The 2nd respondent produced Form 35B which aggregated the results in Forms 35A and it was dated 9th August 2017. He produced the results certificate form (Form 35C) that declared the 2nd respondent the winner. It was dated 9th August 2017. Form 35C was signed by the 2nd respondent. Form 35B was signed by the 2nd respondent, and also by 4 agents: two for Wiper Party, one for NARC(K) and one for independent. Against each signature of the agent there is a date of 9th August 2017.

35. The petitioner and PW 2 did not have any document to show that the results were declared on 10th August 2017. There was no dispute that the declaration of results was the business of the 2nd respondent.

36. PW 2 did not, in his affidavit, make any reference to the date and time of the declaration of results. In the petitioner's supporting affidavit he did not mention anything about what time or date the results were declared. In paragraph 5 of the petition he had stated that the 2nd respondent declared the results on 10th August 2017. That plea was not followed by sworn evidence contained in the affidavit. However, in the replying affidavit by the petitioner to the applications dated 27th September 2017 by the 1st and 2nd respondents to strike out the petition for having been filed out of time, he stated that the results were declared on 10th August 2017. I note that in paragraph 5 of the petition the petitioner stated:

“5. The petitioner asserts that the 2nd respondent on 10th August 2017 announced the results of the member of the National Assembly for Yatta as follows:

- (a)
- (b) **Francis Mwangangi Kilonzo.....11,350 votes**
- (c) **Charles Mutavi Kilonzo.....17,888 votes**
- (d)
- (e)
- (f)
- (g)
- (h)
- (i)

Critically, the results attributed to the petitioner and the 3rd respondent were not the one declared by the 2nd respondent. According to the declaration by the 2nd respondent in Form 35B, the petitioner got 11,383 votes and the 3rd respondent got 18,320 votes. Where did the petitioner get his results from? Was he present on 10th August 2017 when the results were declared? Was PW 2 present? Were they given a copy of Form 35B? It was the evidence of PW 2 that on 10th August 2017 the 2nd respondent gave him 163 Forms 35A out of 169 Forms 35A. He discovered that some Forms had arithmetic errors and others had tallies done by the 2nd respondent, and not the presiding offices. Now that the petitioner states that the results were declared on 10th August 2017 was there any Form 35B issued? Did he or his agent sign

it? In evidence when asked he stated that:

“I have no document declaring the results on 10th August 2017.”

In effect, the petitioner did not produce any evidence, either in his affidavit or in testimony, to back the allegation in paragraph 5 of the petition that the results were declared on 10th August 2017.

37. The petitioner sought to rely on the cross examination of the 2nd respondent in regard to Yumbuni and Kitheuni polling stations whose Polling Day Diaries were dated 9th August 2017, at 8.05pm and 11.30pm, respectively. The Diaries were filed by the 1st and 2nd respondents. He was saying that the two stations were a long way from the Tallying Centre; that there was no way those results could have reached the Tallying Centre on 9th August 2017 between 9.00pm and 10.00pm to form the basis of Form 35B. Quite unfortunately, these two stations were not made an issue either in the petition or in the supporting affidavit. In **IEBC & Another –v- Stephen Mutinda Mule & 3 Others [2014]eKLR**, the Court of Appeal cited with approval the case of **Adetoun Oladeji (NIG) Ltd –v- Nigeria Breweries PLC S.C 91/202**, in which Judge Pius Aderemi J.S.C. expressed himself as follows:

“.....it is now a very trite principle of law that the parties are bound by their pleadings and that the evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

38. In short, there is sufficient material and evidence to show that the declaration of results for the member of the National Assembly for Yatta constituency was on 9th August 2017. I find so. It follows that, the petition that was filed on 7th September to challenge the declaration was out of time by one day. It was an incompetent petition that cries for striking out.

39. In the final analysis, I find that the petition by the petitioner challenging the election of the 3rd respondent as the member of the National Assembly for Yatta constituency in Machakos County was not competent, and had no legal or factual basis. I find that, on the whole, the election was free, fair and accountable, and the results declared reflected the will of the people of Yatta constituency.

40. On the question of costs, I consider it trite that they do follow the event. The court has to consider the nature of the case, and the work done in the preparation and conduct of the case. Then the time taken during the case. In the submissions, the petitioner asked for Kshs.2.5 million. The 3rd respondent asked for Kshs.5 million. The 1st and 2nd respondents did not offer any figure in the written submissions, but asked for Kshs.2.5 million in the oral submissions. Costs should not be too high as to make it impossible for parties to access electoral justice. Doing the best that I can, it is ordered that the 1st and 2nd respondents will get Kshs.2.5 million and the 3rd respondent shall get Kshs.2.5 million. The costs shall be borne by the petitioner.

41. Under **Article 105** of the Constitution, the court determines and confirms that Charles Mutavi Kilonzo was at the general election held on 8th August 2017 validly elected as the member of the National Assembly for Yatta constituency. Accordingly, the certificate of court as to the validity of the election, pursuant to **section 86** of the **Election Act**, shall issue to the Independent Electoral and Boundaries Commission and Speaker of the National Assembly.

DATED and DELIVERED at MACHAKOS on the 19TH day of JANUARY 2018.

A.O. MUCHELULE

JUDGE