



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NO. 14 OF 2017

IN THE MATTER OF THE GUBERNATORIAL ELECTIONS FOR WAJIR COUNTY

BETWEEN

AHMED ABDULLAHI MOHAMAD.....1ST PETITIONER

AHMED MUHUMUD ABDI.....2ND PETITIONER

AND

HON. MOHAMED ABDI MOHAMED.....1ST RESPONDENT

GICHOHI GATUMA PATRICK.....2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....3RD RESPONDENT

J U D G M E N T

Background

1. Following the general election held on 8th August, 2017 in the County of Wajir, the 2nd respondent declared the 1st respondent as Governor for Wajir County having garnered 49,079 votes against his closest rival, the 2nd petitioner who had 35,572 votes. Being dissatisfied with the declaration, the petitioners, who were also contestants in the gubernatorial election for that County, filed their Petition on the 6th September, 2017 challenging the said declaration. In support of the Petition, the petitioners filed a total of seven Affidavits sworn by themselves and five other persons whom they intended to call as witnesses.

2. The petitioners made various allegations in the Petition. They alleged that the 1st respondent was not constitutionally and statutorily qualified to participate as a candidate for the Governor's seat. That he did not satisfy the requirements of **Section 22 (2) of the Elections Act, 2011** in that, the degree certificate from Kampala University which he had submitted to the 3rd respondent for his clearance was but a fraud. That in the premises, the 2nd and 3rd respondent had erred in clearing to contest for the seat of Governor.

3. Regarding the conduct of the elections, the petitioners charged the 2nd and 3rd respondent of committing grave errors, flaws, fraud, illegalities and irregularities which in their opinion had contravened the letter, spirit and object of the **Constitution of Kenya** and the electoral framework of this Country. They contended that; there was irregular, unprocedural and unlawful assisted voting as the Presiding Officers were inquiring loudly from voters the candidate they preferred which was in breach of **Articles 38 and 81 of the Constitution**. That in the premises, the 2nd and 3rd respondent were in breach of **Regulation 72 of the Elections (General) Regulations, 2012 (hereinafter "the Regulations")**.

4. The petitioners contended that the 2nd respondent relied on invalid and unauthenticated results from various polling stations to declare the 1st respondent as the winner of the impugned elections; that there were various irregularities in the declaration forms including unsigned, undated and/or unstamped Forms 37A; that some Forms 37A were suspect, others had alterations that were not countersigned and that their agents were ejected from polling stations.

5. The petitioners further claimed that in some polling stations, the votes cast exceeded the number of registered voters as per the results posted on the 3rd respondent's public portal. They charged the officials of the 2nd and 3rd respondent of making false entries and the loss of some of the Kenya Integrated Electronic Management Systems (KIEMS) equipment thereby undermining the election results for Wajir

Gubernatorial seat.

6. It was the petitioners' further contention that in four constituencies, namely, Tarbaj, Wajir East, Wajir West and Eldas, there was an orchestrated, prearranged, pre-determined and manipulation of results. That in the complained areas, there was a striking similarity of figures which to the petitioners was not scientifically, mathematically or logically possible. According to them, there was manipulation of figures by officers of the 3rd respondent which affected the true outcome of the elections. In their estimation, the said manipulation affected a total of 13,632 votes.

7. The petitioners accused the 2nd and 3rd respondent of breaching **sections 44 and 44 A of the Elections Act**. That contrary to the communication by the Chairman of the 3rd respondent, there was no electronic transmission of results from the polling stations to the constituency tallying centres. That due to the failure to use technology, the elections were not free and fair as required under **Article 81 (e) (iv) and (v) of the Constitution**. The petitioners also charged the 1st respondent with claims of bribery of voters.

8. In conclusion, the petitioners alleged that the 2nd and 3rd respondent failed to secure ballot papers and boxes. That a ballot box and unmarked ballot papers were found in the possession of an unauthorized person. That there was violence and intimidation at the Wajir East Tallying Centre. The petitioners therefore charged that as a result of the aforesaid irregularities, the 1st petitioner's Chief Agent did not sign the results of the gubernatorial election as he considered them to be a product of doctoring, manipulation and padding.

9. For the foregoing reasons, the petitioners sought various declarations including a declaration that the 1st respondent was not validly cleared to contest the seat of Governor; that the elections in Wajir County were not conducted in accordance with the Constitution and law and for the nullification of the election. They also prayed for the costs of the Petition.

10. The Respondents duly filed their responses to the Petition. The 1st respondent did not file any response to the Petition. He only filed a Replying Affidavit, which the Court treated as a Response, and five other Affidavits of his witnesses. In the said Affidavit, the 1st respondent dismissed the allegation of his non-qualification and produced pleadings from a matter undertaken in the High Court of Uganda wherein a complaint challenging his degree was dismissed. He asserted that a similar complaint to the 3rd respondent had been dismissed.

11. As regards the conduct of the election, the 1st respondent asserted that the same was conducted diligently, efficiently and in fidelity to the law and Constitution. That the 3rd respondent had been undated with many legal challenges in the years 2016 and 2017 by NASA alliance to which the petitioner's parties belonged. That despite as aforesaid, the 3rd respondent was able to deliver a free and credible election on the 8th August, 2017.

12. The 1st respondent set out in detail the steps that the 3rd respondent had undertaken to ensure a free and credible election, including; the increased polling stations and the capping of voters at 700 for each polling station which ensured efficiency; the introduction and use of the KIEMS kits; the engagement of stakeholders in the preparation for the elections; implementation of the electoral Code of Conduct amongst others. According to the 1st respondent, the 3rd respondent acquitted itself in the conduct of the 8th August, 2017 election considering the circumstances under which it was operating including the late enactment of the applicable laws as well as late procurement of electoral materials.

13. The 1st respondent denied the alleged irregular, unprocedural and unlawful assisted voting. He also denied the allegation of inaccurate vote counting and tallying. He denied that some Forms 37A were not signed by the Presiding Officers and their deputies. He produced copies of signed Forms 37A for some of the impugned polling stations. On the electronic transmission of results, he contended that that was not a Constitutional requirement. He concluded that the Petition was devoid of any merit and urged that it be dismissed.

14. On their part, the 2nd and 3rd respondent filed a Response and a total of fifteen (15) Affidavits. In their response, they set out in great detail their obligations under the Constitution and the electoral law as far as the conduct of elections is concerned. That they complied with **section 44 of the elections Act** in the use of KIEMS kit. They explained the steps taken from the opening of polling stations until its closure.

15. Regarding the qualification of the 1st respondent, the 2nd and 3rd respondent stated that the 1st respondent had produced a degree from the Kampala University, which is a university recognized by the Commission for University Education. That during nomination, no complaint was received regarding the alleged non-qualification of the 1st respondent and that therefore, nothing turned upon that allegation.

16. On the conduct of the election, the 2nd and 3rd respondent denied all the allegations of irregularities made by the petitioners. They admitted that **Regulation 72 of the Regulations** makes provision for assisted voters but averred that, there was no evidence of any breach of that Regulation. They also denied any incorrect tallying of votes on the part of their officers.

17. On the alleged votes cast exceeding registered voters in some polling stations, the 2nd and 3rd respondent denied the same and supplied figures in support of their position. They denied that any KIEMS equipment was lost or that there was any false entries made by their officers. They further denied any vote padding or manipulation or any commission of offence on their part of their officers. They asserted that the KIEMS equipment was satisfactorily used in the Wajir County elections as required contrary to the petitioners' allegations. They denied that they failed to secure ballot papers and boxes or that there was any election violence or intimidation. They prayed that the Wajir Gubernatorial election be upheld and the Petition be dismissed with costs.

18. It is against these allegations and counter allegations that a total of 18 witnesses appeared and testified before me. Seven Affidavits on behalf of the 2nd and 3rd respondent were admitted by consent without the witnesses being called. However, a Dr. Noah Akala Oduwo whose Affidavit on behalf of the petitioners had been filed did not appear to be cross-examined on it. Likewise, although the 1st respondent filed a replying affidavit in opposition to the Petition, he never appeared to be cross-examined on it. I will have something to say on the status of

the said Affidavits shortly. Further, I shall make reference to the testimonies of the witnesses as and when necessary as it relates to the issues under consideration.

(b) Issues for determination

19. I have carefully considered the testimony of witnesses and pleadings on record. I have also had the opportunity to consider the written submissions by Learned Counsel. At the pre-trial conference held on the 9th October, 2017, the parties agreed on the following broad issues for determination:-

(a) Whether the Gubernatorial Election for Wajir County held on 8th August, 2017 was in accordance with the Constitution and electoral laws.

(b) Whether there were any electoral malpractice and/or offences during the Wajir County Gubernatorial Election held on 8th August, 2017 which affected the outcome of the Gubernatorial Election.

(c) Whether the 1st respondent was lawfully qualified to vie for the Wajir Gubernatorial Election on the 8th August, 2017.

(d) Whether the 1st respondent was validly elected as Governor for Wajir County in the Election held on 8th August, 2017.

(e) Who should bear the costs of the Petition and what should be the instructions fee on the Petition.

20. Before considering the above issues, I consider it appropriate at this stage to analyse some legal matters that are appurtenant to election petitions such as the one under consideration.

21. An election Petition is not an ordinary civil dispute. It is a special dispute which calls upon an Election Court to determine whether the political rights of citizens under **Article 38** have been upheld. It is the political right of every citizen to, inter alia, participate in free, fair and regular elections. That right is exercised when a citizen registers as a voter and casts a vote for his preferred candidate in an election. Once that has been exercised, the filing of an Election Petition amounts to a contest between opposing sides that represent the many citizens who voted in such an election on different sides. In the premises, election petitions are highly emotional and draw a lot of public interest. It is for that reason that courts have always applied a different standard of proof from the one applicable in normal civil disputes.

22. Whilst in ordinary civil disputes 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. It is referred to as the intermediate standard of proof. The Supreme Court of Kenya has re-affirmed this position in the case of **Raila Odinga and Another v. The Independent Electoral and Boundaries Commission and Others [2017] eKLR** wherein it held:-

“In many other jurisdictions including ours, where no allegations of criminal or quasi-criminal nature are made in an election petition, an “intermediate standard of proof”, one beyond the ordinary civil litigation standard of proof on a “balance of probabilities”, but below the criminal standard of beyond reasonable doubt”, is applied. In such cases, this court stated in 2013 Raila Odinga case that the threshold of proof should in principle be above the balance of probability, though not as high as beyond reasonable doubt ...”.

23. However, where there are allegations of a criminal or quasi-criminal nature, the standard of proof applicable is the one beyond reasonable doubt. In **Khatib Abdalla Mwashetani v. Gideon Mwangangi Wambua [2014] eKLR**, the Court of Appeal delivered itself thus:-

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

24. Accordingly, in an electoral dispute such as the one before me, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of a criminal or quasi-criminal nature are made, such as in this Petition, the proof is beyond reasonable doubt.

25. Having established the standard of proof, who then bears the burden of proof? Under **section 107 of the Evidence Act, Cap 80 of the Laws of Kenya**, it is he who alleges that must prove. In this regard, in an electoral dispute, the burden is on the petitioner throughout to prove to the satisfaction of the court that there was not only non-compliance with the Constitution and electoral law, but also that the said non-compliance affected the outcome of the election.

26. Collorary to the foregoing, an Election Court will not easily upset an election by substituting its decision, conviction or will to that of the electorate. The Election Court has to be satisfied that the alleged irregularities affected the will of the electorate. In **Raila Amolo Odinga v. IEBC and 3 Others [2013] eKLR**, the Supreme Court of Kenya held that:-

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long standing common Law approach in respect of alleged irregularity in the acts of public bodies, Omnia praesumuntur rite et solemniter esse acta; all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority’s

departures from the prescriptions of the law.”

27. In this regard, the petitioners not only bear the burden to establish that there were violations, omissions, malpractices, irregularities and illegalities in the conduct of the Wajir gubernatorial election held on 8th August, 2017, but must also illustrate to the satisfaction of the Court that those violations, omissions, malpractices, irregularities and illegalities affected the result of the election. That the result did not reflect the will of the people of Wajir County. It is only then, that the evidentiary burden shall shift to the respondents to establish the contrary.

28. An Election Petition is but an audit undertaken by an Election Court, on the basis of the complaints raised in a Petition, to confirm if an election was undertaken in accordance with the Constitution and the electoral law. In our case, the Constitutional principles are to be found in **Articles 38, 81, 83 and 86 of the Constitution of Kenya**. These are to the effect that; the elections should be free and fair which reflect the will of the electors; elections that are by secret ballot; elections that are free from violence, intimidation, improper influence or corruption, transparent; that are administered impartially, efficiently, accurately and in an accountable manner; that the voting method used is simple, accurate, verifiable, secure, accountable and transparent; that the votes are counted, tabulated and results announced promptly and that mechanisms are put in place to eliminate electoral malpractice including the safekeeping of electoral materials.

29. In auditing an election, the Election Court is not to substitute its will for that of the voters. In the case of **John Fitch v. Tom Stephenson & 3 Others [2008] EWHC 501 QB6**, the Court held:-

“The decided cases, including those which Lord Denning considered in Morgan –v- Simpson, establish that the courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches. ... This is because where possible, the courts seek to give effect to the will of the electorate.”

The foregoing then are the legal parameters and beacons within which this court shall determine the allegations in this Petition.

30. Before I consider and determine issues agreed by the parties, there was an issue that arose during the trial and the Counsels did address it in their submissions which require to be determined *in limine*. This is, what is the position of the Affidavit evidence that is on record in respect of which the deponents were not called to be cross-examined on?

31. Mr. Omwanza teaming up with Mr. Oduor for the petitioners submitted that, the Court should ignore such Affidavits as they are worthless. Learned Counsel relied on the cases of **Hosea Mundui Kiplagat v. Sammy Komen Mwaita & 2 Others [2013] eKLR**, **Moses Wanjala Lukoye v. Benard Alfred Wekesa Sambu & 3 Others [2013] eKLR**, **Noah Makhalang’ang’a Wekesa v. Albert Adome & 3 Others [2013] eKLR**, **John Murumba Chikati v. Returning Officer, Tongaren Constituency & 2 Others [2013] eKLR** among others in support of their submission. Counsel urged the Court therefore not to consider the Replying Affidavit of the 1st respondent which was filed on 15th September, 2017 and to draw adverse inference on him.

32. On his part, Mr. Macharia, Learned Counsel for the respondent submitted that, the fact that a deponent of an Affidavit does not appear for cross-examination is not in itself a ground for disregarding his evidence. He urged the court not to infer any adverse inference on the 1st respondent since he had not been summoned by the court and refused to appear. The case of **Peter Kimori Maraga & Another v. Joel Omgwa & 2 Others [2013] eKLR** was cited in support of those submissions.

33. As indicated at the beginning of this judgment, the petitioners filed an affidavit by one Dr. Noah Akala Oduwo but did not produce him for cross-examination. The 1st respondent filed a Replying Affidavit to the Petition but closed his case without appearing to be cross-examined on it. The 2nd and 3rd respondent filed the Affidavits of Mohamed Garadi Ali, Abdullahi Khalif Dagane, Ismail Muhumed Mohamed, Abudllahi Abdi, Ibrahim Illo Abdille, Mohamed Salat Mohamed and Mohamed Haret Abdi who did not appear to be cross-examined on them. However, the parties recorded a consent to admit the aforesaid Affidavits of the 2nd and 3rd respondent’s witnesses without them being cross-examined. The Affidavits in issue therefore are those of Dr. Noah Akala Oduwo and Hon. Mohamed Abdi Mohamed.

34. There is no dispute that gubernatorial electoral disputes are tried by way of Affidavit evidence. The relevant provision is **Rule 12 of the Elections (Parliamentary and County elections) Petition Rules, 2017 (hereinafter “the Election Petition Rules”)**. That rule provides, at the relevant parts, as follows:-

“12 (3) Each person who the petitioner intends to call as a witness at the hearing, shall swear an Affidavit.

...

(6) Each person who the respondent intends to call as a witness at the hearing, shall swear an affidavit.

...

(12) An Affidavit shall form part of the record of the hearing and may be deemed to be the deponent’s evidence for the purposes of an examination-in-chief.

(13) Every deponent shall, subject to the election court’s direction, be examined in chief and cross-examined:

Provided that the parties may, by consent, accept not to cross-examine the deponent but shall have the deponent’s evidence

admitted as presented in the affidavits.” (Emphasis supplied)

35. Courts have had an opportunity to pronounce themselves on this issue. In Moses Wanjala Lukoye v. Benard Wekesa Sambu & 3 Others [2013] eKLR, Gikonyo J. held:-

“The only safeguard design of the law is either the Court does not consider such evidence at all or exercises its discretion under section 80 (1) and (2) of the Elections Act and summon the witnesses. It must be appreciated that rule 12 of the election rules was deliberately tailored that the affidavits filed in an election petition are by persons whom the petitioner intends to call as a witness. As an election petition is not an interlocutory application, but a substantive cause, affidavit evidence should be tested in cross-examination unless the parties consent to the admission of the evidence without calling the maker. If, therefore, it bears repeating, the petitioner does not call the deponents to testify; their evidence should not be considered, ... The court will not consider the evidence of witnesses who were not called to testify.”

36. In Noah Makhalang’ang’a Wekesa v. Albert Adome & 3 Others (supra) the court held that:-

“In as much as the rest of the petitioner’s witnesses who deponed supporting affidavits were not availed in court for cross-examination for purposes of testing the veracity of their averments, their evidence though forming part of the petitioner’s case may be treated as being inconsequential and devoid of probative value ...”. (Emphasis added).

37. In Josiah Taraiya Kipelian Ole Kores v. Dr. David Ole Nkendienye & 3 Others [2013] eKLR, the Court had this to say:-

“I now turn to the issue of the petitioner failing to testify; I find fault with the petitioner’s argument that there is no rule in law or evidence that requires verbal evidence for an affidavit to be deemed credible. In my opinion, an election petition is no ordinary suit and the facts deponed therein must be interrogated. Such interrogation can only be done by testing the evidence through cross-examination of the deponent. Failure to attend court for the testing of such allegations in such a deposition makes the affidavit just that, mere allegations. It is evidence without any probative value.”

38. The net effect of the foregoing is that, an affidavit under **rule 12 of the Election Petition Rules** forms part of the evidence of the party in support of whose case it is sworn. However, the deponent of such affidavit is to be examined in chief and cross-examined. That is mandatory by virtue of the use of the term **shall** in **sub- rule 13 of Rule 12 of the Election Petition Rules**. It is therefore expected that once a party has filed affidavits in support of his case in an election petition, he shall offer the deponents thereof for cross-examination. Those affidavits being part of the record, they are part of the case of the party in support of whom they are sworn. They are not to be struck out or expunged. Since the veracity of the witness’ testimony is confirmed through cross-examination, failure to test such evidence only waters down the probative value of such Affidavits. The evidence remains on record but with little if any no probative value. It is in cross-examination that the truth or otherwise of an allegation or the veracity thereof is gauged. Denying a party the right to cross-examine a witness who has made allegations in an affidavit is to deny such a party a right to a fair trial.

39. Mr. Omwanza invited the court to draw adverse inference against the 1st respondent for failure to turn up for cross examination. Counsel relied on the cases of Jacinta Wanjala Mwatela v. IEBC & 3 Others [2013] Eklr, Prest v. Petrodel Resources Limited & Other [2013] UK SC 34 and an article from the Maryland Law Review Volume 44 in support of his submissions.

40. In Jacinta Wanjala Mwatela v. IEBC & 3 Others (Supra), the Court held:-

“I do agree with Counsel for the petitioner that the court will eventually be at liberty to draw an adverse inference from the failure of these witnesses to avail themselves for cross-examination. In the United Kingdom case of Wisniewski v. Central Manchester Health Authority 1997 PIQR 324, the Court of Appeal held as follows:-

“In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in any action.”

41. In the article by Robert H. Stier Jr. ‘Revisiting the Missing Witness Inference – Quietening the Loud Voice from the empty Chair’, 44 Md. L. Rev. 137 [1985], it is observed:-

“The doctrine that has evolved over time to handle the missing witness problem is sometimes called the “empty chair doctrine”, because it holds that “a litigant’s failure to produce an available witness who might be expected to testify in support of the litigant’s case, permits the fact finder to draw the inference that had the witness chair been occupied, the witness would have testified adversely to the litigant.”

42. The traditional view therefore seem to be that, if a witness is available to one of the parties alone and the anticipated testimony of that witness would elucidate or shed light on some material issue, and the party who fails to produce the witness offers no explanation, then the court may be permitted to infer that the testimony would have been unfavorable to the party who failed to call the witness. That inference however does not supply affirmative proof or substantive proof, but it affects the weight or credibility of the evidence.

43. My view therefore is that, a court may in certain circumstances be entitled to draw adverse inferences from the absence of a witness who might be expected to have crucial evidence. In such circumstances, the inferences may go to strengthen the evidence adduced on that issue by the opposite party or weaken the evidence, if any, adduced by the party who was reasonably expected to call the witness. However, there must first be some evidence, however weak, adduced by the opposite party on the issue before the court can draw the desired inference.

44. If however, the reason given for the absence of the witness is satisfactory, then in my view, the court should not draw any such adverse inference. On the other hand, if there is some credible explanation given, even though not wholly satisfactory, the potentially detrimental effect of the witness' absence may be reduced.

45. In this regard, it is within the above parameters that this court will treat the affidavits of the "missing witnesses," that is, Dr. Noah Akala Oduwo and Hon. Mohamed Abdi Mohamed.

46. I will now delve into the issues framed by the parties for determination. Since the first and second issue are inter-twined, I will combine them.

(a) Was the Wajir County gubernatorial election held in accordance with the Constitution and electoral law or were there electoral malpractices and/or offences which affected the outcome of the election?

47. This issue points towards the general conduct of the elections by the 2nd and 3rd respondent and their agents. It is always to be presumed that the official acts of the 3rd respondent and its agents are lawful, valid and in accordance with the Constitution and the law unless satisfactory evidence is tendered to prove the contrary. In this case the petitioners made various allegations in an attempt to remove or discharge the said presumption. I will now interrogate those allegations:-

(i) Irregular, unprocedural and unlawful assisted voters

48. The petitioners alleged that in various polling stations, there was breach of **Regulation 72 of the Regulations** in that, the Presiding Officers were inquiring loudly from the voters as to whom they wanted to cast their vote for in the full view and hearing of crowds of people. PW1, Ahmed Abdullahi Mohamad told the court that a majority of voters in Wajir County are illiterate and therefore require assistance in voting. He testified that the Presiding Officers were inquiring loudly from voters who needed assistance as to whom they wished to cast their vote for in the polling station whereas crowds of people hung around the polling stations. He was firm that this affected the election because, the voters grew apprehensive for fear of victimization. He gave examples of the affected polling stations as Abakore Girls Boarding, Abakore dispensary, Abakore Secondary, Akal-Ar-Primary (sic) (Aqar-Ar-Centre), Fini Primary, Sabuli Primary, Sabuli dispensary, Dagahaley dispensary, Dagahaley Primary, Dagahaley Old Bore hole, Nambaraha (sic) Primary, Shidle Primary, Sala Primary and Lafala (sic) Primary. He alleged that no Forms 32 were filled for the assisted voters.

49. PW2 Abukar Gaal Mohamed was the Chief Agent for the Party for Democracy and Reforms ("PDR") in the Wajir county gubernatorial elections. He testified that after casting his vote at about 7.00am at Abakore Primary School, he went around the polling stations and discovered that the Presiding Officers were openly asking the assisted voters whom they wished to vote for. In his view, this greatly affected the free will of the voters to exercise the secret ballot due to clan victimization within that County. In cross-examination, he told the court that the premises hosting the polling stations did not have windows and the people "hanging" outside the windows could hear the Presiding Officers asking the assisted voters who their preferred candidate was. He stated firmly that there was no voter education in the County and that this affected the people's ability to vote.

50. The 2nd and 3rd respondent denied the allegations and stated that there was no evidence of any incident of inappropriate assisted voting. That they never received any such complaint from anyone. The 2nd respondent who testified as R2W1 told the court that, in all instances of assisted voting, it was done in accordance with the law. R2W4, Antony Kirori Kimani, the Returning Officer for Wajir South, testified that he never received any complaint of any alleged incidences of irregular, unprocedural and unlawful assisted voting. He told the Court that the standard practice is that there are two educators for every ward to undertake voter education. That there was no special consideration on voter education for Wajir South Constituency notwithstanding its vastness. The 1st respondent only swore that there was no evidence of such irregular and unprocedural assisted voting as alleged by the petitioners.

51. Mr. Omwanza for the petitioners submitted that, while it was common ground that there was massive assisted voters in the Wajir gubernatorial election, the 2nd and 3rd respondent failed to produce Forms 32 to demonstrate that the assistance was done in accordance with the law. Mr. Macharia for the 1st respondent submitted that the scrutiny revealed the presence of Forms 32 which showed that the assisted voting was done in accordance with the law. He further submitted that the petitioners did not produce any illiterate voter to testify about the irregular, unprocedural and unlawful voting.

52. On her part, Ms. Okimaru appearing for the 2nd and 3rd respondent submitted that, PW2 did not give any names of the Presiding Officers who loudly assisted voters; that none of the agents of the petitioners swore any affidavit to this fact and that no such illiterate voter was called to testify. She concluded that the witnesses for the 2nd and 3rd respondent had reiterated that any voter within Wajir County who required assistance in voting was assisted strictly in accordance with **Regulation 72 of the Regulations**. That in any event, the political parties and candidates' agents signed the respective Forms 37A signifying the authenticity of the results.

53. **Regulation 72 of the General Regulations, 2012** provides:

"72 (1) On the application of a voter who is, by reason of disability or being unable to read or write, and therefore unable to vote in the manner prescribed in these regulations, the presiding officer shall permit the voter to be assisted or supported by a person of the voter's own free choice, and who shall not be a candidate or an agent.

(2) Where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her the presiding officer shall assist such voter, in the presence of the agents.

(3) ...

(4) ...

(5) *The following shall apply with respect to a person who assists a voter under this regulation:-*

(a) *the person shall, before assisting or supporting the voter, make a declaration of secrecy before the presiding officer in form 32 set out in the Schedule.*

(6) *Where a presiding officer grants the request of a voter under this regulation, the presiding officer shall record in the polling station register against the name of the voter the fact that the voter was assisted and the reason for the assistance.”*

54. The above Regulation takes cognizance of the obvious fact of the illiteracy among our population. The fact of being illiterate does not bar or prejudice a voter from exercising his political rights under **Article 38 of the Constitution**. **Regulation 72** is clear on the steps the 3rd respondent, through the Presiding Officers, has to undertake to guarantee that those who are illiterate in our society also exercise their right to vote in a free and fair election. The right to a secret ballot is sacrosanct in any democracy as it is through it that people surrender their right to governance to a chosen few. It is a right to be jealously protected.

55. In order to confirm that a voter was assisted in voting and in accordance with the law, the person assisting the voter is required to fill Form 32 and execute it before the Presiding Officer. These Forms 32 are some of the documents that are supposed to be returned to the Returning Officers together with the ballot boxes after voting is concluded. In the event the voter is not accompanied by someone to assist him, the Presiding Officer is supposed to assist the voter in the presence of agents. The fact of a voter being assisted and the reason for assistance must be recorded in the polling station register.

56. I agree with the submissions of Mr. Macharia and Ms. Okimaru that when an allegation such as the one made by the petitioners, of irregular assisted voters is made, it is imperative that such illiterate voter or voters and the agents who witnessed the fact in any of the affected polling stations should testify to the fact. In this case, there was no such illiterate voter who testified or any agent of the petitioners who appeared.

57. The record shows that all the witnesses who testified agreed that the level of illiteracy within Wajir County is very high. They also agreed that in the premises, there was high incidence of assisted voters. R2W1 swore that, in all cases where there was assisted voting, the Presiding Officers complied with **Regulation 72** and the requisite Forms 32 were filled.

58. PW2 Abukar Gaal Mohamed told the court that he was the chief agent for the Party for Democracy and Reforms. That on the 8th August, 2017, he voted at 7.00 a.m. at Abakore Primary School Polling Station in Wajir South. That he then started going round the polling stations. He visited several polling stations including Abakore Girls Boarding, Abakore dispensary, Abakore Secondary, Akal-Ar Primary (sic), Meri Primary, Dalsen Primary, Fini Primary, Sabuli Primary, Sabuli dispensary, Dagahaley dispensary, Dagahaley Primary, Dagahaley Old borehole, Nambaraha Primary, Shidle Primary, Sala Primary and Lafaley Primary. That he witnessed this irregularity in all these polling stations. He was firm in cross-examination that, in the polling stations he visited, he heard Presiding Officers asking the assisted voters loudly who their preferred candidate was in the full view and hearing of the people. That the classrooms where voting was taking place had no windows and people were peeping from outside and could hear what the voter's answer was.

59. PW2 was also firm that because of the inter-clan rivalry within the County, public disclosure of one's preferred candidate could invite victimization. In his view, the principle of secrecy of ballot was not upheld.

60. In the face of all these allegations and despite specific polling stations having been named, the 2nd and 3rd respondent did not call any of the Presiding Officers from the said polling stations to either deny or confirm them. The only Presiding Officer who swore an Affidavit was Ismail Muhumed Mohamed of Abakore Girls Boarding Station. He admitted that most of the voters at that polling station were illiterate and required to be assisted. However, he did not produce a single Form 32 to back up his contention that **Regulation 72 of the Regulations** was adhered to. Further, he did not produce any marked register to confirm that he marked it as required by **Regulation 72** in respect of the assisted voters. According to Form 37B produced by R2W1, a total of 152 voters cast their vote in Abakore Girls Boarding station.

61. Further, when the court ordered for scrutiny in 53 polling stations, despite the overwhelming evidence that the rate of illiteracy in Wajir County is very high and that the number of assisted voters was likewise high, only four (4) Forms 32 were found in all those 53 polling stations. These were for Wagberi Primary School (001-03), Ama Primary School (017-01) Tarbaj Library (019-01) and Gunana Primary School. As regards the register none was found to have been marked.

62. According to the scrutiny report, the total number of registered voters in the said 53 polling stations is 22,089 out of which 16,170 (73.2%) voted. It is inconceivable that out of 16,170 who voted, the 2nd and 3rd respondent could only produce evidence in respect of only four assisted voters despite there being evidence that the majority of people there are illiterate and many of them were assisted voters!

63. It is a fact that there were two registers in the 8th August, 2017 elections, electronic and a hard copy. The requirement in **Regulation 72** that Form 32 be filled and that the Presiding Officer does mark the register in respect of an assisted voter whom he assists is for good reason. It is meant to comply with the constitutional requirement that an election should be transparent, accountable, verifiable and credible. In the absence of the Forms 32 and marked register, how is the 2nd and 3rd respondent to account for the assisted voters? In the absence of such evidence, this Court doubts if that election is verifiable? Having failed to mark the registers as required by **Regulation 72 (6)** of the Regulations, the Presiding Officers were committing an offence under **Section 6 (j) of the Election Offences Act, 2016**.

64. To my mind, the production of only three Forms 32 in 53 polling stations is a serious indictment on the 3rd respondent on how it conducted the exercise. It is not verifiable how many of the 16,170 voters in those polling stations were assisted voters in light of the admission of witnesses as to the huge number of assisted voters.

65. Further, the Presiding Officers in the impugned polling stations having failed to appear, the evidence of PW2 that the Presiding Officers were asking the assisted voters loudly who their candidate of choice was, remains unrebutted. It was not for PW2 to give the specific names of the particular Presiding Officers as submitted by Ms. Okimaru. It was enough that he specified the particular polling stations and the 2nd and 3rd respondent knew who they had deployed there as presiding officers. In the circumstances, I am satisfied that there was irregular, unprocedural assisted voting which seriously compromised the principle of secrecy of ballot.

(ii) Votes cast exceeding registered voters as posted on the 3rd Respondent's Public Portal

66. The petitioners alleged that in certain polling stations, the number of votes cast exceeded the registered voters. The petitioners identified the following polling stations as the culprits; Ahmed Liban Secondary School, Livestock Market, Qarsa Primary, Basineja Centre, Basir North Centre, Jabder Centre, Buna Old Dispensary, Ogomoi Dispensary, Eldas Primary, Harwale Water Point, Gararoba Village and Ajawa Primary. They contended that as a result, the total number of votes affected in the cited polling stations was 3326. PW1 admitted that he relied on the information relayed on the 3rd respondent's public portal for these allegations. He also admitted that in most of the said polling stations, the results of the Governor was unaffected.

67. The 2nd and 3rd respondent denied this allegation and sought to demonstrate how the total votes cast did not exceed the registered voters. R2W1 gave a detailed explanation demonstrating how many the registered voters were and the total number of votes cast in each of the impugned polling stations.

68. Mr. Omwanza submitted that from the screenshots of the 3rd respondent's public portal, it was demonstrable that the votes cast in the position of Governor exceeded the registered voters. Neither Mr. Macharia nor Ms. Okimaru submitted on this issue.

69. The petitioners relied on the information contained in the 3rd respondent's public portal. At pages 144 to 188 of exhibit "AMMA16 to 24" of PW1's Affidavit in Support, are the screenshots of the 3rd respondent's public portal for the impugned polling stations. They clearly show that in some cases the total number of votes cast exceed the registered voters. The Court notes that this was in respect of other elections, that of the President, Senator and Member of National Assembly except in three of them which related to the Governor's position.

70. R2W1 explained that there was an error in the 3rd respondent's public portal. He explained that what was shown as rejected votes in the public portal screenshots was actually the figure for registered voters.

71. This Court has examined the said copies of screenshots and compared the same with Forms 37A produced by R2W1 at pages 52 to 71 of the exhibit "PGG7". The conclusion I arrive is that the explanation given by R2W1 is credible and satisfactory. The figures given as rejected votes were clearly meant to be registered votes.

72. Accordingly, there was no proof that there were instances where the total number of cast votes exceeded the registered voters in the identified polling stations. It is only at Rabsu Centre – 025 in Wajir North where the total votes cast was 390 against 389 registered voters. This is clear from Form 37C produced by R2W1. This polling station was however not one of those complained of. The allegation is accordingly not proved.

(iii) Incorrect tallying and invalidity of Statutory Forms used to declare results

73. The petitioners alleged that the 2nd respondent relied on invalid and unauthenticated results from various polling stations to declare the 1st respondent as the winner. PW1 testified that the 2nd and 3rd respondent and/or persons under their authority misconducted themselves which undermined the election. He complained that they relied on results that had neither been signed nor dated and stamped by the Presiding Officers which amounted to tabulation of unauthenticated results. He gave examples of polling stations where Forms 37A were not signed by the Presiding Officers and/or their deputies as; Aboore Primary, Hodhan Dispensary, Ahmed Liban Secondary and Katote Primary. The Form 37A for Litado Waberi, had several cancellations that were not counter-signed. He concluded that there was treachery in entering the results.

74. In his Replying Affidavit, the 1st respondent averred that the results that were announced were accurate, that they were signed, dated and stamped by Presiding Officers. He produced Forms 37A for Aboore Primary which was signed by the Deputy Presiding Officer and Ahmed Liban Secondary which only had the names of the Presiding Officer and the Deputy. Further, R1W1, the Chief Agent for the 1st respondent in Wajir North testified that the declared results were in conformity with the results tabulated and/or recorded in Forms 37A. This was also reiterated by R1W2, R1W3 and R1W4 who were the 1st respondent's Chief Agents in Wajir West, Eldas and Wajir East Constituencies, respectively.

75. The 2nd and 3rd respondent denied this allegation. They produced the Forms 37A for the impugned polling stations. R2W1 testified that where there was lack of signature, date or stamp on those forms, it was due to human error caused by fatigue as the Governor's election was the last one to be counted and tallied in accordance with the Regulations; that the results needed to be transmitted promptly in order to manage public expectation and that some forms were carbon paper.

76. According to the Affidavits of Abdullahi Khalif Dagane, Mohamed Haret Abdi, Ibrahim Illow Abdile and Abdullahi Abdi, who were the Presiding Officers for Aboore Primary, Hodhan dispensary, Ahmed Liban Secondary and Katote Primary polling stations, the said Presiding Officers forgot to sign and date the Forms 37A due to fatigue and pressure out of intense process of counting of votes.

77. Mr. Omwanza submitted that apart from the Forms 37A for the subject polling stations not being signed and dated, during the cross-examination of the witnesses for the 2nd and 3rd respondent, other irregularities emerged in respect of Forms 37B for Wajir North, Tarbaj,

Wajir East and Wajir South Constituencies. That the said forms were not the ones provided for under the Regulations. He pointed out the irregularities as being; missing water marks and serial numbers or that the Forms were altogether different from the ones provided for under the law.

78. In answer to the petition, the 2nd and 3rd respondent delivered to court various documents that were used in the conduct of the impugned election. Among these were; copies of Forms 37A for polling stations where complaints had been raised, copies of Polling Station Diaries for several polling stations, six Forms 37B and one Form 37C.

79. On his part, Mr. Macharia submitted that in the instances where Forms 37A had errors, it was where the petitioners had the most votes and gave the examples of Mathow Primary, Aboore Primary, Hodham Dispensary, Aqar-Ar-Centre, Serif Primary, Hadado Waberi, Jabder and Buna Old Dispensary polling stations. That the errors in the forms had been properly explained.

80. Counsel further submitted that the petitioner's agents had signed the forms that had minor errors. That this also applies to the Forms 37B for Wajir North and Wajir East, Constituencies. He cited the cases of Noah Makhalang'ang'a Wekesa v. Albert Adome & 3 Others (supra), Hosea Mundui Kiplagat v. Sammy Komen & 2 Others [2013] eKLR, and John Murumba Chikati v. Returning Officer Tongaren Constituency & 2 Others [2013] eKLR in support of the submission that failure by agents to sign a statutory form does not invalidate the form; that where a party's agent signs a form, he confirms the accuracy of the results; that if a form is signed by the deputy presiding officer, it is valid. The said cases further support the view that the petitioner must demonstrate that the errors in the forms affected the results. The case of Mohamed Ali Mursal v. Saadia Mohamed & Others [2013] eKLR was also cited in support of that proposition.

81. Ms. Okimaru on the other part submitted that, the petitioners had only questioned the forms in six (6) polling stations but not the results entered in those forms. That the presiding officers of the subject polling stations had tendered affidavits explaining the errors which had not been questioned; that the 2nd and 3rd respondent had given an explanation as to the circumstances under which the Al-Ghurair Statutory Forms were not used. Ms. Okimaru further submitted that the errors were minor and cited the Nigerian case of Olusola Adeyeye v. Simeion Oduoye [2010] L PELR - CA-1/EPT/67/08 in support of the proposition that, minor errors in the forms are excusable. On tallying and collation of results, Ms. Okimaru submitted that there was no evidence to back the allegations raised by the petitioners. That R2W1 had testified that the agents in Wajir County were too vigilant to allow any election official to make a mistake.

82. *Regulation 79 of the General Regulations* provides:-

“(1) The presiding officer, the candidates or agents shall sign the declaration in respect of the elections.

...

(3) Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.

(4) Where a candidate or agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form.

.....

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

...”.

83. The statutory form which the presiding officer is required to fill, sign and date under **Regulation 79** aforesaid for the election of Governor is Form 37A. On the other hand, the results in Forms 37A from all polling stations are collated and entered in Forms 37B by the Constituency Returning Officer. Finally, the results in Forms 37B from all constituencies are collated and entered in Form 37C.

84. In Manson Oyongo Nyamweya v. James Omingo Magara & 2 Others [2009] eKLR, Musinga J (as he then was) held:-

“There was sufficient evidence that some presiding officers failed to sign and stamp forms 16A,

In fact, it is an election offence for a presiding officer, without a reasonable cause, to fail and/or refuse to sign and stamp a form 16A including completing all the parts as required of him under the said regulation. These include the statistical part just above the names of the candidates, reason for refusal and/or failure of a candidate and/or his agent to sign the form and any necessary statutory comments. Such an officer is liable to imprisonment for a term not exceeding five years, see section 4 (g) of the Election Offences Act. Where a Presiding Officer presents to a Returning Officer a form 16A which is neither signed by that Presiding Officer and/or any of the candidate's agent, that declaration is of no value and cannot be used or authenticate any declared results.”

85. In Abdikhaim Osman Mohammed & Another v. IEBC & 2 Others [2014] eKLR, the Court of Appeal held:-

“the learned judge estimated the affected votes to have been about 1000. That is clearly wrong because the results in respect of twelve forms 35 which had neither the seal of the 2nd respondent nor the presiding officer’s signatures should have been excluded on the ground that their authenticity could not be vouchsafed.

In James Omingo Magara vs Manson Nyamweya & 2 Others Civil Appeal No. 8 of 2010, this Court held that when a document is not signed by its author, it means that the author does not own it. It follows therefore that in this case the forms 35 with no presiding officer’s signature were worthless and their results should have been excluded from the final tally.” (Emphasis supplied).

86. This particular finding by the Court of Appeal was not upset by the Supreme Court of Kenya in the subsequent appeal to that court in Nathif Jama Adam v. Abdikhaim Osmah Mohamed & 3 Others [2014] eKLR. The Supreme Court only criticized the Court of Appeal in its application of the standard of proof but left that finding intact.

87. In Raila Amolo Odinga & Another v. Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR the majority decision of the Supreme Court of Kenya held:-

“Of the 4,229 forms 34A that were scrutinized, many were not stamped, yet others, were unsigned by the presiding officers, and still many more were photocopies. 5 of the Forms 34B were not signed by the returning officers. Why would a returning officer, or for that matter a presiding officer, fail or neglect to append his signature to a document whose contents, he/she has generated? Isn’t the appending of a signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such officer, that he stands by the “numbers” on that form?

Where do all these inexplicable irregularities that go to the very heart of electoral integrity, leave this election? It is true that where the quantitative difference in numbers is negligible, the court, as we were urged, should not disturb an election.

But what if the numbers are themselves a product, not of the expression of the free will and sovereign will of the people, but of the many unanswered questions with which we are faced?”

88. From the foregoing, it is clear that while the non-signing of the statutory form by a candidate or his agent is excused under **Regulation 79 (6)**, it is not so for the presiding officer or the returning officer. It is a criminal offence for any of those officers to fail to sign the statutory forms under **section 6 (j) of the Election Offences Act**. Statutory Forms that are not signed by the said officers are but worthless pieces of paper whose contents would not count in the final tally of results. It is the signing of those statutory forms by the said officers that gives the forms credence and make the results therein accountable and verifiable. Failure to sign a statutory form is not a mere error, it is a grave irregularity that destroys the credibility and authenticity of the results contained therein.

89. As regards the signing of the declaration forms by agents, the regulations give a caveat as to when the failure of agents or candidate to sign the declaration forms will be excused. The failure to sign is excused if the Presiding Officer records that fact in the declaration form itself. This is what **Regulation 79 (4)** decrees. The requirement is mandatory. In this regard, I hold the view that for **sub Regulation 6 of Regulation 79** to apply and excuse the failure by an agent to sign the form, the Presiding Officer must record the fact on that form. The recording of the fact is for purposes of accountability, credibility and verifiability of the results in the declaration Form.

90. While failure by agents or candidates to sign Form 37A does not invalidate the results, the fact of such failure must clearly be noted or recorded in the form by the Presiding Officer in terms of **Regulation 79 (4) of the Regulations**. Where such forms are not signed by agents and the presiding officers fail to note or record that fact, a question of credibility of the results therein arises.

91. In the present case, the Forms 37A for Hodhan Dispensary, Ahmed Liban Secondary, Katote Primary, Hadado Waberi and Aqar-Ar-Centre polling stations were not signed by either the Presiding Officer or his deputy. That of Aboore Primary Polling Station was signed by the Deputy Presiding Officer and therefore cured by dint of **Regulation 5 (4) of the Regulations**. Although the explanation given by R2W1 and the Presiding Officers for the said polling stations was not challenged or denied, that cannot authenticate the said forms and their results. Therefore, the results therein should have been excluded from the final tally. R2W1 himself testified that if an unsigned Form 37A was presented to him, he would not accept it.

92. In his testimony R2W1, the County Returning Officer admitted other irregularities in the Forms 37A. These were; the use of generic forms which were not the ones provided for. These included Forms 37A for Aqal-Ar-Centre, Mathow Primary and Watiti B polling stations. Form 37A for Macheza Dam polling station had blanks. There were Forms 37A with cancellations that were not countersigned. Some Forms 37A had not been signed by agents and there were no remarks or reasons given by the Presiding Officers in terms of **Regulation 79 (4) of the Regulations**. These included forms for Mathan Baqay, Meri Primary, Lahaley Primary, Dambas Primary, Tarbaj Library amongst many other polling stations. In addition, there were Forms 37A that had no official stamp of the 3rd respondent.

93. R2W1 and the Returning Officers who testified on the use of non-official Forms 37A tried to explain the failure. This court was not satisfied with the explanations offered by the said witnesses. It would seem the said witnesses were prepared to lie on oath. For example, in paragraph 34 of his Affidavit in Response to the Petition, R2W1 stated that *“... Forms 37A for the polling stations referred therein have been duly signed, dated and stamped by the presiding officer and/or duly witnessed by the candidates accredited agents.”* He produced a bundle of Forms 37A which were all signed by the Presiding Officers. However, the Forms 37A for Ahmed Liban Secondary School polling station 1 of 2, Katote Primary polling station 1 of 1 and Hodhan Dispensary polling station 1 of 2 bore no signature of either the Presiding Officer or the deputy. This is despite having sworn that all the Forms 37A complained of had been signed, dated and stamped. Later on, he produced in his Affidavit producing documents filed on 31st October, 2017 Form 37A for Katote Primary which was allegedly signed by the agents. It was not clear when and where it was signed. The court took the view that the 2nd and 3rd respondent were doctoring documents because, some of the documents filed originally in court had no signatures or stamps. However, copies of the same documents that were later

on introduced had signatures and stamps.

94. R2W7, Siyat Mahat Sabul, was the Returning Officer for Tarbaj Constituency. He swore in paragraph 9 of his Affidavit that, “... **to the extent that they allege invalidity of forms 37A in Tarbaj Constituency, I reiterate the contents of paragraph 4 herein and further that all the Forms 37A put in Tarbaj Constituency were signed by all the agents in the polling stations ...**”. He failed to produce Forms 37A for Katote Primary and Ahmed Liban Secondary polling stations that were duly signed as he had sworn. When cross-examined, he only referred the court to the Affidavits of the Presiding Officers who had admitted that they had not signed the subject Forms for reason of exhaustion.

95. As regards Forms 37B, these were six in number. In its ruling on directions dated 11th December, 2017, this Court directed that the original Forms 37A, 37B and 37C be scrutinized by use of any necessary gadgets. Forms 37B for Wajir East, Wajir West and Eldas Constituencies were original, they had serial numbers and had the security water mark. However, Form 37 B for Wajir North had no water mark, it had no serial number and was not an original but a print out. The one for Wajir South had no watermark, no serial number and was also a print out. While that of Tarbaj had no watermark, had a serial number and was a scanned copy.

96. Ms. Okimaru submitted that the respective Returning Officers and R2W1 had explained the inability to print the correct Al-Ghurair Forms due to defective printers. Mr. Macharia submitted that the defect in those forms are curable under **section 26 (2) of the Statutory Instruments Act, 2013**.

97. As regards Form 37B for Tarbaj Constituency, there was no explanation why only a scanned copy was availed to the Deputy Registrar during scrutiny. The whereabouts of the original was not explained. It did not bear a watermark although it had the serial number and agents signed.

98. Regarding Form 37B for Wajir South, the same had no security bar code, no serial number and no agent signed. R2W4, Anthony Kirori Kimani the Returning Officer who prepared that form explained that he printed the results in an A4 paper because the printer he was provided with did not have capacity to print all that was required. That he captured this in the incident report. However, the court notes that he did not produce that incident report. Neither did he tender any evidence to show that the entries he made in that form were from the Forms 37A submitted to him by the various Presiding Officers.

99. To my mind, for the results in that Form to be said to be accountable, credible and verifiable, it was imperative for the said Returning Officer to produce Forms 37A from all the 119 polling stations so as to verify that what was in that an unofficial form, was what had been transferred from acceptable verifiable statutory Forms 37A. He produced none. I have seen the copies of Forms 37A produced by the 1st respondent in his Repeating Affidavit to scrutiny application. They are for only 80 polling stations out of the 119 polling stations in the Wajir South Constituency. A total of 29 Forms 37A were not produced. The results in that Form 37B cannot therefore be said to be verifiable. I should point out here that the 2nd and 3rd respondent did not produce in court Forms 37A for all the polling stations.

100. As regards Form 37B for Wajir North, it neither had the serial number nor the security bar code. In addition, the signing page was that for the presidential election. It showed the handing and taking over of Forms 34A instead of Forms 37B. It did not even have the logo of the 3rd respondent. It was also not original but a print-out. Although this Form was said to be generic like Forms 37B for Wajir South and Tarbaj, it was completely different from those others.

101. Unlike all the other Forms 37B, including the ones for Wajir South and Tarbaj, in which the page for signing by the agents and the Returning Officer is a continuation of the pages containing the results, the one for Wajir North is completely separate and distinct. There was no explanation why a page for Presidential Form 34B was used to declare the results for the election of Governor. R2W1 stated that that was a typo error. This cannot be the case. During the scrutiny ordered, there was no original of that form. Only a print out that was produced.

102. In addition, one cannot vouch for the results therein since the Returning Officer did not produce all the Forms 37A for the particular Constituency to support the entries therein. For example, polling station No. 0080330163025 Rabsu Centre had more votes cast (390) than registered voters (389).

103. As regards Form 37C, it was also not without its own challenges. Whilst an original standard Form with serial number and security bar code was provided during scrutiny, its entries had issues. There were 17 polling stations from Wajir South Constituency whose results were entered but names not indicated. This is clear from Form 37C produced by R2W1 at pages 41 to 42 of the Response to the Petition. While in all other constituencies the names of each polling station is given, there are blanks totaling 17 in which results are entered but the names of polling stations are not disclosed.

104. It is the view of this court that this is in breach of **Regulation 87 (2) (b) (i)**. That Regulation makes it mandatory for each polling station to be named and the results in each entered. Anyone looking at the said Form 37C cannot be able to discern for which polling stations those results are. There was no explanation that was given for this anomaly. This is the Form which was used to declare the results for governor in Wajir County. This anomaly in my view makes those results unaccountable and unverifiable.

105. This then was the unsatisfactory nature of the declaration forms which the 2nd and 3rd respondent relied on to declare the results in the Wajir Gubernatorial election.

106. The explanation given by the 2nd and 3rd Respondent for the irregularities were shocking. It was explained that the Presiding Officers were tired, that the printers “ate” the official Form 37B for Wajir North (to use the words of R2W5 Noor Gedi, the Returning Officer for Wajir North) or that the printers supplied could not print all the required information for Wajir South.

107. As regards the Presiding Officers, R2W4 admitted that the training given to them was inadequate. That it is a four (4) day marathon “training” whose content include the applicable law, processes, technology and the operational rules. There is also the aspect of simulation.

He admitted that there is barely time to get feedback or confirm that the Presiding Officers are clear on what they are tasked to do because of lack of time.

108. The view the Court takes is that, it is due to of lack of proper and adequate training that the actions of some Presiding Officers in this case exhibited sheer incompetence. Some failed to sign statutory forms contrary to law, others failed to countersign alterations while others decided to seal all the results from the polling stations in the ballot boxes. Clearly a marathon training of such crucial officers of only 4 days for such an important exercise is completely inadequate.

109. On the alleged “paper eating printers” or faulty and ineffective printers, that is the least that would be expected of the 3rd respondent. An institution which gobbled over KShs.49 billion for the said election would not be expected to supply its officers with faulty equipment for use in such an important exercise. For the 3rd respondent therefore to have supplied its officers with such equipment which affected the accuracy and efficiency of the election, is a tragedy. This allegation was therefore proved.

(iv) Striking coincidences, vote padding and manipulation

110. The petitioners alleged that the figures of votes garnered by each candidate in the six elections held within Wajir County in several polling stations were so strikingly similar that they lacked credibility. PW1 testified that it was scientifically, logically and humanly impossible for figures of votes obtained by all the candidates to remain consistently similar in multiple polling stations in four Constituencies namely, Tarbaj, Wajir East, Wajir West and Eldas. According to him, this was evidence of an orchestrated and pre-arranged scheme of manipulation of votes that was calculated to arrive at pre-determined results. He singled out a total of fifty one polling stations. He also questioned the high voter turnout in the impugned elections.

111. The 2nd and 3rd respondent denied any vote padding or manipulation. R2W1 testified that there was nothing sinister with the similarity of the number of votes cast for various elections as suggested by the petitioners. He supported the high turnout of voters. R1W1 Mohamed Abdullahi Maalim, R1W2 Abdijabar Mohamed Sheikh, R1W3 Mohamed Abass Abdulahi, R1W4 Ismail Sheikh Issack and R1W5 Adan Daud Mohamed, who were the Constituency chief agents of the 1st respondent and the chief agent of the Jubilee Party, testified that the results announced by the 2nd respondent were accurate and in conformity with the results tabulated in Forms 37A.

112. Mr. Omwanza and Mr. Macharia did not submit on this issue. Ms. Okimaru on her part submitted that, the voter turnout was normal. That none of the polling stations recorded any incident of the number of voters exceeding the registered voters. That the voter turnout was between 69.3% and 79.9% which was within acceptable parameters as the national turnout for the 8th August, 2017 election was 79.51%. Counsel relied on Petition 2B of 2014 Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others [2014] eKLR in support of the proposition that an allegation of votes cast exceeding the registered voters is a serious issue that must be strictly proved. She urged the court to reject the allegation.

113. The 2nd and 3rd respondent administered six elections on the same day, the presidential, gubernatorial, senatorial, women representative, member of the National Assembly and member of the County Assembly. A voter entering the polling booth was supposed to be given six ballot papers, one for each of the election. In this regard, save for the number of rejected or spoiled votes differing, it is expected that the total number of votes cast for each of the election is to be the same. This is because, it is the same voters who cast their vote for each election.

114. The petitioner’s complaint was that it is not mathematically or scientifically possible for the valid votes cast to be similar in all the six elections. There would be one or several rejected votes, stray votes or spoiled votes in one or two or three of the elections. This means that unless all votes cast are valid and there is no rejected or spoiled or stray vote, which is not possible, there is no way the number of valid votes cast will be the same in all the six elections. The petitioners contention therefore was that, the results posted for gubernatorial election did not reflect the correct votes cast in the polling stations complained of.

115. Because of this complaint, the court ordered a recount of the votes in all the fifty one polling stations complained of to ascertain whether the results announced by the 2nd respondent reflected the actual ballot cast. Upon recount of votes in those 51 polling stations, discrepancies in the number of votes cast from the ones reflected in Forms 37A was noted in twenty three (23) polling stations as contained in the scrutiny report. The inaccuracy in posting the results was about 45% in the polling stations that were subjected to a recount. However, the inaccuracy did not reveal a systematic scheme or pattern. It was between one and seven votes in the affected polling stations.

116. As regards the allegation of abnormal high turnout of voters, this was not proved. There was no cogent evidence to show that although the residents of Wajir County are nomadic, they had moved away from their residencies at the time of the election so as to have affected the turn out in the election. In any event, the court notes that the voter turnout was not out of the ordinary as it compared well with the national average voter turnout.

(v) Violence and Intimidation

117. The petitioners alleged that the 1st respondent and/or his agents or persons on his behalf used violence and intimidation against the petitioner’s agents. They further alleged that violence broke out along Nairobi-Wajir road next to the Wajir East Tallying Centre on 10th August, 2017 when the Wiper candidate was declared the winner of Wajir East Member of “Parliament”. PW1, PW2 and PW5 testified that their polling agents were harassed and kept out of polling stations.

118. All the respondents denied these allegations. In his testimony R2W2 told the court that when the alleged chaos of 10th August, 2017 broke out, the results for the gubernatorial election had already been announced.

119. The Court notes that, neither the nature of intimidation, the names or identities of the persons who intimidated the petitioners’ agents

nor the names of the agents who were intimidated was either stated in the petition or disclosed in the testimony of witnesses. The least that was expected of the petitioners was to parade in court any of the agents who were allegedly intimidated to testify on the allegation. This they did not do and the court finds that the allegation was not proved.

120. As regards the violence that broke out along the Nairobi-Wajir road, the evidence on record shows that it did not relate to the impugned election. It was not directed at or intended to or did in any way whatsoever affect either the election or the counting or tallying of the gubernatorial election. Having not affected the gubernatorial election, the same is of no relevance.

(vi) Conduct of the Officials of the 3rd Respondent and the alleged electoral offences

121. The petitioners alleged that the Returning Officer for Wajir East Constituency implicated his deputy at the Wajir High School Tallying Centre of stealing the KIEMS equipment and manipulating the results in favour of the Jubilee candidate. That the Returning Officer for Wajir Township Ward declared the results and issued the Certificate for Member of County Assembly twice. That the County Returning Officer (2nd respondent) ordered for manual verification of results at Wajir East Tallying Centre contrary to **section 44 (1) of the Election Act**. It was further alleged that the officials of the 3rd respondent failed to secure ballot papers and boxes whereby one person was arrested for being in possession of a ballot box and ballot papers. Finally, the petitioners complained that the officials of the 3rd respondent wrongly opened ballot boxes which had been sealed.

122. These allegations that were levelled against the conduct of the electoral officials amounted to electoral offences under the ***Election Offences Act, 2016***. They must therefore be proved beyond any reasonable doubt. That is the standard required.

123. As regards the alleged implication of the Deputy Returning Officer for Wajir East by his Superior, R₂W₂ Mr. Abdikadir Sheikh Abdi, the Returning Officer denied the allegation. He gave a detailed explanation how two KIEMS equipment were misplaced within the tallying centre. That when he suspected of their missing, he ordered a search which revealed that they had been surrendered to the tallying centre together with non-strategic material. The court was satisfied with the explanation and that allegation was therefore not proved.

124. The allegation that the Returning Officer for Wajir Township Ward issued two certificates for Member of County Assembly was irrelevant. Firstly, there was no evidence that there could be a Returning Officer for Wajir Township Ward. A Returning Officer can only be for a Constituency and not a Ward. Secondly, the election or results for the Member of County Assembly has nothing to do with the gubernatorial election.

125. PW1 alleged that the 2nd respondent went to the Wajir East Tallying Centre and stopped the live streaming of results. R₁W₄ who was the 1st respondent's chief agent at Wajir East Tallying Centre admitted in cross-examination that, the results for the gubernatorial elections were declared by the 2nd respondent. The explanation given by R₂W₁ was that after he had received results from all the other five Constituencies, he noted that the results from Wajir East had delayed to come in. He therefore went to the Wajir East Tallying Centre to assist the Returning Officer in collating the results. He denied taking over the duties of the Returning Officer at the tallying centre and contended that he was doing his supervisory role.

126. Mr. Omwanza submitted that the 2nd respondent's action was contrary to ***Regulation 3 (3) of the Regulations*** and in breach of ***Regulations 4 and 5 of the Regulations***. That the Returning Officer wrongly delegated his duties to the 2nd respondent. Counsel relied on the case of ***Geoffrey Kiragu Njogu v. PSC & 3 Others [2015] Eklr*** on the proposition that the Returning Officer could not delegate his duties to the 2nd respondent.

127. On Ms. Okimaru's part, she submitted that the allegations of offences on the part of the 3rd respondent's officials has to be proved beyond any reasonable doubt. That the visit by the 2nd respondent to Wajir East Constituency Tallying Centre was meant to offer administrative assistance to the Returning Officer. She saw nothing wrong with that.

128. The appointment and duties of the Constituency and County Returning Officers is set out in ***Regulations 3 and 4 of the Regulations***. In those Regulations, the County Returning Officer has no role whatsoever in a Constituency Tallying Centre. The Regulations do not provide that the County Returning Officer has any supervisory duties over the work of a Constituency Returning Officer during the tallying of votes at the Constituency Tallying Centre. While the Regulations define the Returning Officer to include the County Returning Officer, ***Regulation 5 (3)*** allows a Returning Officer to preside at a polling station. If it was the intention of Parliament that the County Returning Officer supervise and undertake duties in the Constituency Tallying Centre, nothing would have been easier than to expressly state so as it did in ***Regulation 5 (3) of the Regulations***.

129. Further, neither the 2nd respondent nor the 3rd respondent produced any evidence to show that in his letter of appointment, the 2nd respondent's duties included supervisory duties at the Constituency Tallying Centre. It was not shown that the 3rd respondent had extended this mandate to the 2nd respondent under ***Regulation 4 (1) (d) of the Regulations***.

130. The 2nd respondent testified that he visited the Wajir East Constituency Tallying Centre to find out why there was delay in the submission of the results from that Constituency. That he found that the Returning Officer (R₂W₂) unable to proceed with the tallying because of the over vigilant agents who were objecting to every step taken by the Returning Officer. He took over the process and finalized the same. He then proceeded to declare the results for that constituency as testified by R₁W₄.

131. On the foregoing, this court makes a finding that the 2nd respondent acted ultra vires by taking over the process of the tallying of the results at the Wajir East Tallying Centre and declaring them. However, the court notes that Form 37B which contains the results for that Constituency was signed by the Returning Officer gazetted for the area, R₂W₂. Nevertheless, the conduct of both R₂W₁ and R₂W₂ was contrary to ***Regulations 3 and 4 of the General Regulations***. This however did not affect the results of the election.

132. The petitioners alleged that the 2nd and 3rd respondent failed to secure ballot boxes and ballot papers. That a driver of one Mohamed Elmi was found in possession of a ballot box and ballot papers. He was arrested for that offence. A police report made at Wajir Police Station was produced as “AMM 26” at page 194 of the Petition. That fact was not disputed.

133. The court notes however, that the subject materials related to the position of Member of National Assembly. The Petitioners did not demonstrate how the loss and recovery of the subject ballot box and Form 34B affected the gubernatorial election and the allegation is therefore rejected.

134. The petitioners alleged that there was wrongful opening of ballot boxes from Basineja Centre and Batalu Primary School polling stations. PW6 Ahmed Abdikadir Nunow testified that on the 9th August, 2017, he recorded the Returning Officer for Wajir North forcefully opening 12 ballot boxes for the two named polling stations. He produced photographs and a video clip (“AAN 2A and B”) which captured the entire exercise which took place at the Wajir North Tallying Centre. Protests from him and other people fell on deaf ears. The video clip was played in court during the hearing which confirmed his testimony.

135. R₂W₅, Noor Gedi, the Returning Officer for Wajir North Constituency admitted this allegation. He explained that this was occasioned by the fact that the ballot boxes were delivered to the tallying centre with the results sealed inside. That since he needed to declare results, he informed those present of the fact and then proceeded to open the ballot boxes as stipulated under the ***Training Manual and Guide for Returning Officers***. That he removed the results, declared them and had the ballot boxes resealed. That these facts were captured in the polling station diaries for the respective polling stations. He contended that his action of opening the ballot boxes prejudiced no one.

136. Mr. Omwanza submitted that the opening of the ballot boxes was in total disregard of ***Regulation 93 (1) of the Regulations***. That the fact that there was no copy of the results posted at a public place within the affected polling stations, or the side of the ballot boxes or in the possession of any of the agents was also a violation of ***Regulation 79 (2A) (c) and (d) of the Regulations***. That the said action of breaking the ballot boxes interfered with the integrity of the election.

137. Ms. Okimaru submitted that the breaking of the ballot boxes had been explained by R₂W₁ and R₂W₅. That there was nothing sinister with the said act as it was only meant to procure the results for the two polling stations. That the same was an irregularity that did not affect the results of the election. She cited the Court of Appeal decision in ***Richard Nchapi Leiyagu v. IEBC and 2 others [2014] eKLR*** in support of that proposition.

138. A reading of ***Regulations 81, 83, 86, and 93 of the Regulations*** will show that, once the ballot boxes are sealed at the polling station, there is no authority whatsoever to break open those ballot boxes without an order of the court. The attempt by the 2nd respondent and R₂W₅ to rely on what they called “***the Training Manual and Guide for Returning Officers***” cannot do. The 3rd respondent cannot arrogate to itself power which it does not have under the law. It cannot amend the law through internal manuals. If that is its intention, it should lay those amendments before the people’s representatives in Parliament for enactment. By attempting to allow the Returning Officer to break open ballot boxes at the tallying centre after they had been properly sealed at the polling station, the 3rd respondent and its Returning Officer acted ultra vires.

139. I hold that once ballot boxes have been sealed at the polling station, no amount of consensus by electoral officers and agents/candidates can validly lead to their opening without a court order. The act of voting is an exercise of the sovereign will by the citizen which once exercised and the process finalized at the polling station, no one is allowed to tamper with the material that contains that sovereign act unless by authority of a court of law. In this regard, it does not matter that the Returning Officer only wanted to retrieve the results from the ballot boxes. That the 3rd respondent would employ presiding officers who are ignorant of what is required of them is an act of sheer inefficiency and incompetence.

140. I am alive to the holding of the Court of Appeal in ***Richard Nchapi Leiyagu v. IEBC & 2 Others (supra)*** relied on by Ms. Okimaru. The court was emphatic in that case that, the opening of the ballot box was irregular notwithstanding that the parties were in agreement that the subject ballot box be opened and figures be balanced. It only observed that that act did not affect the election in that case.

141. In the present case however, there was strong opposition by some parties including PW6 to the opening of those ballot boxes. This was clear from the video that was produced and played in court. Further, the regulations require the presiding officers to prepare six copies of Form 37A (the results) and distribute them as submitted by Mr. Omwanza. The Court was not told why none of the said copies could be used. The Court concludes that the copies were simply not there. The Presiding Officers for the subject polling stations never testified to explain that anomaly.

142. In this regard, the opening of ballot boxes which had been properly sealed at the polling stations was highly irregular. The court noted, and it was admitted by R₂W₅ that in both instances, there were alterations on Forms 37A whereby the votes relating to the 3rd respondent had been adjusted. To my mind, the opening of the ballot boxes interfered with the integrity and credibility of the results from the said two polling stations.

(vii) Implementation of Technology

143. The petitioners complained that while the 3rd respondent was required to transmit the results electronically, the system failed. That the transmission of results from polling stations to the Constituency and County Tallying Centres failed. That the results being streamed to both the Constituency and County Tallying Centres were not credible. The 2nd and 3rd respondent denied the allegation. They told the Court that the results used to declare the outcome of the election were obtained from Forms 37A.

144. This court has evaluated the evidence tendered and the submissions of Learned Counsel. Firstly, the evidence on this issue was expected to come from Dr. Noah Akala Oduwo who swore an Affidavit but failed to turn up for cross-examination. As already held at the

beginning of this judgment, the said Affidavit is of no probative value. Secondly, as correctly submitted by Mr. Macharia and Ms. Okimaru, the High Court held in the case of ***National Super Alliance (NASA) Kenya v. IEBC & 2 Others [2017] eKLR*** that notwithstanding the provisions of **sections 39 and 44 of the Elections Act**, the elections of 8th August, 2017 were not to be exclusively electronic.

145. The evidence on record shows that majority of voters were identified biometrically. They had been registered biometrically. The only complaint is on the transmission of the results from the polling stations to the Constituency and County Tallying Centres. While I am in agreement with the petitioners that technology was meant to be central in the elections of 8th August, 2017, nevertheless it was not the only mode of transmission of results. Indeed, a reading of **Regulations 5 (1A) (d) and 82 of the Regulations**, will show that the Presiding Officer is only mandated to electronically transmit presidential results. The results he transmits under **Regulation 82** are only provisional. The results that count under **Regulation 76** are those in the physical Form 37A. However, this does not mean that the 3rd respondent should not endeavour in future to fully operationalize **section 44 of the Elections Act**. Electronic transmission of results was meant to make the results declared at the polling station accountable, credible and verifiable.

146. In this regard, in order to meet the Constitutional standards of accountability, credibility, transparency and verifiability in **Articles 81 and 86 of the Constitution**, the 3rd respondent should embrace technology in all elections as it has in Presidential elections in **section 39 (c) of the Elections Act**. That will call for an amendment to **Regulations 5 (1A) and 82 of the Regulations**.

147. In my view therefore, there was no evidence to show that failure to properly transmit the results electronically to both the Constituency and County Tallying Centres affected the results of the elections. That allegation fails.

(viii) Other complaints

148. The petitioners alleged, through their witnesses, that there was bribery of voters by representatives of the 1st respondent and that people associated with him were being allowed entry to the polling stations at will yet they were not accredited agents or authorized personnel. These allegations fail *in limine* for two reasons. Firstly, there was no satisfactory evidence to back them and secondly, they were not pleaded in the Petition. A petitioner is only allowed to submit for trial matters that are raised and crystallised in his Petition. These two therefore do not fall for consideration. See the case of ***IEBC & Another v. Stephen Mutinda Mule & 3 Others [2014] eKLR*** wherein the Court of Appeal was categorical that the Election Court cannot delve into matters that have not been pleaded in the Petition.

149. The petitioners also complained that their agents were ejected from polling stations and were not given Forms 37A. The presence of agents at polling stations as well as tallying centres is a crucial aspect of any election. Their presence is meant to assure the transparency, accuracy, accountability and credibility of an election. Their ejection from a polling station or tallying centre for no good reason is therefore a serious dent on the credibility of any election.

150. In the present case, not a single agent was called to testify on this allegation. It was expected of the petitioners to call some of the more than 400 agents whom they had deployed across the County to testify. This they failed to do. The allegation was therefore not proved.

Outcome of Scrutiny

151. On 10th November, 2017, the court ordered a scrutiny in 53 polling stations and a recount of votes in 51 others. On recount, as already held, there were discrepancies in results returned in 23 polling stations out of the 51 ordered. That constituted 45% of the sample taken.

152. The report submitted by the two Deputy Registrars who conducted the scrutiny, Hon. Sharon Mwayuli and Hon. Esther Mburu, contained comments by the parties. The Deputy Registrars failed to crystallize their findings and the court had to rummage through the bulky individual documents and comments of the parties to arrive at its findings. Those comments were notably countersigned by the Deputy Registrars.

153. Several Forms 37A were found not to be of the standard Forms. The 3rd respondent did supply all originals of Forms 37A as ordered. Some forms were copies while others were carbon copies. There were those in which the Forms 37A found in the ballot boxes differed with the ones supplied by the 3rd respondent at the scrutiny. Polling station diaries were not sealed in the ballot boxes as required. They were in the possession of the 2nd respondent. Some of them had alterations that were not countersigned. Ballot boxes from sixteen (16) polling stations did not have counterfoils. As indicated earlier, Forms 37B from three Constituencies were found to have issues. These were for Wajir North, Tarbaj and Wajir South. I have already analysed what those issues were.

(b) Whether the 1st Respondent was lawfully qualified to vie for the Wajir Gubernatorial seat

154. The next issue for determination is the educational qualification of the 1st respondent. The petitioners alleged that the 1st respondent was not qualified under **section 22 (2) of the Elections Act, 2011** to participate as a candidate for the Governor's seat; that his clearance was obtained on the basis of a forged degree certificate alleged to be from Kampala University. That the 1st respondent had neither sat for "O" nor "A" level examinations to have been able to be enrolled in any university for a degree course. They further alleged that by 3rd September, 2014, the 1st respondent had not yet acquired a degree as he had admitted as such during the vetting by the Parliamentary Departmental Committee on Defence and Foreign Relations for the position of Ambassador to Riyadh.

155. In support of their allegations, the petitioners produced a copy of the Bachelor of Business Administration degree certificate from the Kampala University dated 1st March, 2012 as "AMMA5". They also produced as "AMMA6", the booklet containing the graduation list for the 1st March, 2012 for Kampala University. Also produced was a copy of the Minutes of 3rd September, 2014 for the Departmental Committee on Defence and Foreign Relations of Parliament as well as the proceedings of the National Assembly for 10th September, 2014

for the adoption of Report of that Committee.

156. In his testimony, PW1 was emphatic that he believed that the 1st respondent was not a holder of any degree. He defended the letter written by his Advocates to the National Assembly requesting for the minutes and proceedings of that house regarding the nomination of the 1st respondent to a diplomatic position. He also told the court that since the 3rd respondent hails from Wajir, many people there know that he never attended any university.

157. In the Replying Affidavit which he swore in answer to the Petition, the 1st respondent contended that the issue of his education requirements had been litigated upon and decided by the Ugandan High Court which dismissed the complaint against him. He produced pleadings filed in the **Uganda High Court Misc Application No. 366 of 2017 Abdirahman Mohamed Abdille v. Kampala University & Abedi Mohamed Mohamud** wherein his Bachelor's degree in Business Administration was being challenged. He also produced an order made by the High Court of Uganda sitting at Kampala made on 14th June, 2017 dismissing the said Judicial Review Application.

158. In addition, the 1st respondent contended that the petitioners had raised the same concerns with the 3rd respondent but the same was dismissed. He produced a copy of the complaint made by Abdirahman Mohamed Abdille to the 3rd respondent on 5th June, 2017 in support of his contention. He produced a copy of a Bachelor's degree in Business Administration Certificate dated 1st March, 2012, a copy of the Academic transcript from Kampala University and a Letter of Recognition from the Commission for Higher Education dated 11th January, 2013. He concluded by stating that the issue of his clearance was a pre-nomination matter which should not be raised at this stage.

159. On their part, the 2nd and 3rd respondent denied that they had wrongly cleared the 1st respondent for nomination. They produced a copy of a Master's Degree in Business Administration dated 12th March, 2015 from the Kampala University and a Letter of Recognition by the Commission for Higher Education dated 11th January, 2013. They contended that in the premises, they had properly and procedurally cleared the 1st respondent to vie for the Governor's seat.

160. Mr. Omwanza for the petitioners submitted that the 1st respondent swore an affidavit refuting the claims of disqualification but made a conscious choice not to avail himself for cross-examination on it. That academic qualifications in electoral contest is crucial and that certificates produced to the 3rd respondent must be valid. He cited the Ugandan decisions in **Abdul Balingira Nakendo v. Patrick Mwendha EP Appeal No. 09/2007 (UR)** and **Paul Mwiru v. Hon. Igeme Nathan Nabeta Samson & 2 Others E.P. Appeal No. 6/2011 (UR)** in support of those submissions.

161. Counsel further submitted that since the contention of the petitioners had not been rebutted, the petitioners had discharged their evidentiary burden of proof which had then shifted to the 1st respondent. He relied on the decision in **Moses Wanjala Lukoye v. Benard Alfred Wekesa Sambu & 3 Others [2013] eKLR** and the Ugandan case **of Banan Kissa Patrick v. Papchemeiko Machinjach & Another EP No. 24 of 2016** in support of the said proposition.

162. On his part, Mr. Macharia for the 1st respondent submitted that the petitioners had not sought to challenge the 1st respondent's education qualification before his electoral victory. That they had not initiated investigations on the 1st respondent's degree with either the Ethics and Anti-Corruption Commission, the Directorate of Criminal Investigations, the Commission for Higher Education (which had certified Kampala University as a University recognized under **Section 22 (2) of the Elections Act**) or Kampala University itself. That the petitioners had only sought to rely on a harsard report that made reference to a "post graduate" degree that the 1st respondent was pursuing and which he had in due course obtained.

163. Counsel further submitted that, one cannot be disqualified from participating in an election on grounds of uncertainty or ineligibility unless all possible appeal avenues have been exhausted. That one cannot be ineligible to vie for an elective post on the mere grounds of being adversely mentioned in an inconclusive report. He relied on **Peter Gichuki Kingara v. IEBC & 2 Others [2013] eKLR** in support of that proposition. He also cited the cases of **International Centre for Policy and Conflict & 5 Others v. Attorney General & 5 Others [2013] eKLR** and **Michael Wachira Nderitu & 3 Others v. Mary Wambui Munene [2013] eKLR** for the proposition that the responsibility for inquiring and determining the suitability and eligibility of candidates for elective office lies with IEBC. That in this case, IEBC had satisfied itself that the 1st respondent had met the educational requirement to vie for the seat of governor.

164. It was Mr. Macharia's further submission that there are independent institutions with jurisdiction to settle nomination disputes. That the IEBC and the Ethics and Anti-corruption Commission are such like bodies. That the petitioners had not sought any redress before the IEBC on the nomination of the 1st respondent. That the Commission's Dispute Resolution Committee had heard and dismissed the challenge on the 1st respondent's qualification and there had been no challenge on that dismissal. In the premises, the election court cannot sit to supervise the decision of that committee but rather determine the validity of the election of 8th August, 2017. In his opinion, the petitioners could not contest the validity of the 1st respondent's nomination at this stage. Counsel relied on the decision of **Jared Odoyo Okello v. IEBC & 3 Others [2013] eKLR** in support of his said propositions.

165. Mr. Macharia cited the decision **of Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** for the submission that there has to be conclusive proof of allegations in such cases which was not the case here. He concluded that once a degree is shown to have been conferred, it cannot be questioned. He relied on **Janet Ndago Ekumbo Mbete v. IEBC & 2 Others [2013] eKLR** for this submission.

166. On her part, Ms. Okimaru submitted that the 3rd respondent had complied with **section 22 (2) of the Elections Act** as well as **Regulation 47 of the General Regulations**. That there was no requirement for a Form IV Certificate or graduation list for the 3rd respondent to clear a candidate. That the complaint before the 3rd respondent was never prosecuted. Counsel cited the case of **Dr. Thuo Mathenge & Another v. Nderitu Gachagua [2013] eKLR** for the proposition that in election petitions there has to be cogent evidence not surmises and

conjecture.

167. Ms. Okimaru urged the court to hold that the evidence of the petitioners on the issue was not conclusive. That the words “**he is yet to graduate**” in the minutes of the Departmental Committee on Defence and Foreign Relations of Parliament was not clear whether it referred to the degree or the diploma. She concluded that the allegations were criminal in nature in respect of which the proof should be beyond any reasonable doubt.

168. *Section 22 (2) of the Elections Act, 2011* provides:-

“(2) Notwithstanding subsection (1) (b), a person may be nominated as a candidate for election as President, Deputy President, County Governor or deputy County Governor only if the person is a holder of a degree from a University recognized in Kenya.”
(Emphasis added).

169. *Regulation 47* on the other hand provides:-

“47. (1) For purposes of ascertaining the educational qualification of persons for an elective post, a person seeking nomination shall submit to the Commission certified copies of certificates of the educational qualification.

(2) Where the body that issued the certificate is not based in Kenya, a candidate shall be required to seek authentication of that body with the Kenya National Examinations Council, in the case of form four certificates, or the Commission for University Education, in the case of university degrees.”

170. From the foregoing, it is crystal clear that for a person to be validly nominated and cleared to vie for position of Governor, he must be a holder of a degree recognized in Kenya. If the degree is from outside Kenya, the said person should seek the authentication of the body issuing the certificates from either the Kenya National Examinations Council or the Commission for Higher Education.

171. In the present case, there were two documents that were produced in court. The first was a copy of a Bachelor’s degree in Business Administration dated 1st March, 2012 from Kampala University. The second was a copy of a Master’s degree in Diplomacy and International Relations dated 12th March, 2015 from the same University. The first one is in the name of Mohamed Abdi Mahamud while the second is in the name of Mohamed Abdi Mohamud. I believe both refer to the 1st respondent. There is also a letter of recognition dated 11th January, 2013 from the Commission for Higher Education stating that the Kampala University is a recognized University in Kenya.

172. Before delving into the issue of the qualification or otherwise of the 1st respondent, I need first to address several objections that were raised by Mr. Macharia. The first challenge was that this Court lacks jurisdiction to deal with the issue of the 1st respondent’s qualification as that is a pre-nomination dispute. That this had been raised by someone else at the petitioners’ behest with the Commission’s Dispute Resolution Committee and dismissed. The case of *Jared Odoyo Okello v. IEBC & 3 Others (supra)* was cited in support of that submission.

173. *Article 88 (4) (e) of the Constitution* and *Section 74 (1) of the Elections Act*, provide to the effect that, it is the Commission (IEBC) that is responsible for **‘the settlement of electoral disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results’**. In the *Jared Odoyo Case* relied on by Counsel, the court found that since the petitioner had not appealed against the decision of dismissal of his complaint by the Commission’s Dispute Resolution Committee, he was precluded from raising the issue before the Election Court. That the petitioner should have challenged the decision before the High Court and not the Election Court.

174. My view of the matter is different. In the *Jared Odoyo Okello Case*, the nomination had been challenged before the Commission’s Dispute Resolution Committee and a decision made. In the present case, although one Abdirahman Mohamed Abdille is shown to have lodged a complaint with the said Committee, that complaint was not prosecuted and no decision was made thereon. Nothing was produced to show that a decision was made on it. The petitioners cannot therefore be said to be appealing against the decision of that Committee here.

175. Mr. Omwanza referred the court to the decision of the Supreme Court of Uganda in the cases of *Abdul Balingira Nakendo v. Patrick Mwodha (Supra)* and the case of *Paul Mwiru v. Hon. Igeme Nathan Nabeta Samson & 2 Others (supra)*. With due respect, those decisions are not applicable to the present case. Whilst the issue in question in those cases was educational qualification in elections, the said courts were interpreting *Article 80 of the Uganda Constitution* and *section 4 of Elections Act of Uganda*. The said provisions are akin to *Article 105 of the Constitution of Kenya* and *section 22 (1) of the Elections Act*, which are not applicable in the present case.

176. The provisions of law applicable in our case are; *Article 180 of the Constitution* which provides for the election of a Governor and *sections 22 (2) and 75 of the Elections Act* which provides for qualification of Governors and County Election Petitions. *Section 75 of the Elections Act* provides:-

“(1) A question as to the validity of an election of a County governor shall be determined by the High Court within the County or nearest to the County.”

177. The term election is defined in section 2 of the Elections Act as:-

“a presidential, parliamentary or county election and include a by-election”

In *Concise Oxford English Dictionary, 12th Edition*, the term election is defined as:-

“a formal procedure whereby a person is elected, especially to a political office ...”.

178. In *Blacks Law Dictionary 9th Edn, 2009*, the term ‘election’ is defined to mean, inter alia;

“The process of selecting a person to occupy an office”.

While *Biswas Encyclopedia Law Dictionary, 3rd Edn, 2008*, defines election as:-

“an act or process of electing ...”.

179. The meaning of election has also been subject of judicial pronouncements. In the *State of Karnataka v. Gunjalalli Nagappa AIR 1975 SC 1708* the Court held:-

“... election means the entire process consisting of several stages and embracing several steps by which an elected member is returned, whether or not it is found necessary to take a poll.”

180. In *Raila Amolo Odinga & Another v. IEBC & 2 Others (supra)* the Supreme Court of Kenya held:-

“Elections are not events but processes. ...Incidentally, IEBC’s own Election Manual (Source Book) recognizes that an election is indeed a process. ...

Here in Kenya, the issue of elections as a process was discussed in the case of *Karanja Kabage vs Joseph Kiuna Kariambegu Ngana and 2 Others*, where the High Court observed that:-

“an election is an elaborate process that begins with registration of voters, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally declaration of the winner by Gazettement.

In determining the question of the validity of the election of a candidate, the court is bound to examine the entire process up to the declaration of results ...

The concepts of free and fair elections is expressed not only on the voting day but throughout the election process ... Any non-compliance with the law regulating the processes would affect the validity of the election of the Member of Parliament.”

181. This was also the holding in *Kituo Cha Sheria v. John Ndirangu Kariuki [2013] eKLR* wherein, while upholding the position that nomination disputes are a preserve of the Commission’s Committee, Kimondo J. held:-

“That is not to say that the High Court is divested of jurisdiction in all matters relating to nomination. For example, by negligence or otherwise, a non-citizen was nominated for election and elected, it would perfectly be in order for the court to right the wrong. In *Luka Lubwayo and Another v. Gerald Otieno Kajwang and Another Nairobi Petition 120 of . 2013 [2013] eKLR* the court found that where IEBC had failed to exercise its mandate under statute, the High Court could intervene ... The question of validity may encompass the clearance to run.”

182. It is clear from the foregoing that the term ‘election’ does not refer to the single event that occurs on the voting day, but to a long process of electing leaders. In my view therefore, the term election in **section 75 of the Elections Act** means, the entire electoral process commencing with the registration of voters up to the declaration of results.

183. That being the case, the meaning to be given to **section 75** is that, the election court has the jurisdiction to determine a question as to the validity of the electoral process leading to the return of a person as a governor.

184. The term validity is defined as **“legal sufficiency, in contradistinction to mere regularity”** in **Black’s Law Dictionary, 6th Edn, 1990**. Accordingly, a question as to the legal sufficiency of an election is not to be restricted only to the day of election. The Election Court has the jurisdiction to audit the entire process provided the issue has been raised in the election petition.

185. In the present case, neither **Article 88 (4) nor section 74 of the Elections Act** precludes the Election Court from determining whether the election of the Wajir Governor was valid or not. Accordingly, that objection is rejected.

186. The second objection was that the issue of eligibility or qualification of a candidate is the responsibility of the Commission and not this Court. The case of ***Michael Wachira Nderitu & 3 Others v. Mary Wambui Munene (supra)*** was cited in support of the contention.

187. The decision in the ***Michael Wachira case*** is not applicable. In that case, he court was not considering a question of validity of an

election but a Constitutional Petition as to whether an aspirant was eligible to run for position of Member of National Assembly. In the present case, the Petition seeks to question the validity of the election of the 1st respondent under **section 75 of the Elections Act**. One of the issues that have been raised for determination is whether he was qualified in law to vie for that position. The fact that the Commission has that responsibility does not in itself preclude the Election Court from satisfying itself that a candidate was eligible to stand for election when the issue arises, as in this case.

188. This now paves the way for me to consider the issue of whether or not the 1st respondent was legally qualified to vie for the governor's seat. As earlier stated, two certificates of degrees were produced; a Bachelor's degree in Business Administration and a Master's degree in Diplomacy and International Relations. They are from a University recognized in Kenya vide the Letter of Recognition dated 11th January, 2013 from the Commission for Higher Education.

189. The petitioners contended that the Bachelor's degree dated 1st March, 2012 was not genuine. PW1 swore that the 1st respondent could not enroll in any university as he had neither sat for "O" level nor "A" level examinations. He also swore that the 1st respondent did not appear in the list of graduands for the graduation of 1st March, 2012 for Kampala University. He produced the graduation booklet as "AMMA 6". He further testified that the 1st respondent had admitted, during his vetting for position of Ambassador to Riyadh before the Departmental Committee on Defence and Foreign Relations on 3rd September, 2014, that he had not acquired a degree. PW1 produced the minutes of that Committee as "AMMA-7". He stood firm on that testimony despite intense cross-examination.

190. On the other hand, the 1st respondent did not specifically deny in his Replying Affidavit any of these allegations. He only stated that the issue had been litigated in the Ugandan High Court and dismissed. Further, he failed to turn up for cross-examination on his said Affidavit at the trial.

191. I have noted that there was no any specific or even general denial of the allegations raised by the petitioners as to the qualifications of the 1st respondent. I have noted at page 91 of the Petition that in the list of graduands for the Bachelor of Business Administration for 1st March, 2012, the name of the 1st respondent is missing. I have also noted that in the minutes of the Departmental Committee of Defence and Foreign Relations, on the vetting of the 1st respondent as nominee for the position of Ambassador to Saudi Arabia, it is indicated that the 1st respondent **"... joined Kampala University to pursue a Bachelor's degree in business Administration and Post Graduate Diploma in Internal (sic) Relations. He is yet to graduate"**.

192. I have taken note of the fact that although the 1st respondent had the opportunity to either deny or challenge all these facts, he did not do so in his Replying Affidavit. He also failed to appear in court and shed light on this issue. The petitioners' evidence therefore remained uncontroverted. The petitioners had therefore succeeded in shifting the evidentiary burden of proof to the 1st respondent. The moment they produced the graduation list and the alleged admission made before the Committee of the House of not having had a degree by 2014, the burden shifted to the 1st respondent to prove that the Bachelor's degree dated 1st March, 2012 had been genuinely issued to him by Kampala University. This he failed to.

193. As regards the letter by the Commission for Higher Education dated 11th January, 2013, the same only confirmed that the Kampala University is a recognized institution whose certificates are recognized in Kenya. It did not authenticate the degree certificate in question. Indeed the letter has a disclaimer to the effect that:-

"NB: The Commission is not accountable for the authenticity of the certificate or the identity of the Certificate holder presented for recognition or equation."

194. As regards the case in Uganda, the question of authenticity of the certificate was not determined. The order made on 14th June, 2017 was as follows:-

"1. THAT the Applicant has never instructed the law firm of M/s Arcadia Advocates to file this Application and Miscellaneous Cause No. 200 of 2017.

2. THAT this Application be and is hereby dismissed.

3. THAT the costs of the application shall be borne by M/s Arcadia Advocates."

195. It is therefore clear that the matter in Uganda was dismissed on a technicality, that is, for lack of authority to the Advocate concerned to lodge the same in court. That means, the issue was not determined as contended by the 1st respondent.

196. In this regard, the issue of the authenticity of the degree dated 1st March, 2012 still remained unresolved. A prima facie case having been established by the petitioners about its invalidity, the evidentiary burden of proof shifted to the 1st respondent to discharge which he failed under **section 112 of the Evidence Act**.

197. As regards the Master's degree in Diplomacy and International Relations, this Court takes judicial notice that one cannot obtain a Master's degree before obtaining a Bachelor's. As at 3rd September, 2014, the 1st respondent had not yet graduated with any degree. It is therefore not possible that he would have obtained a Master's degree six months later, on 12th March, 2015.

198. In my view, the 1st respondent failed to show that he had actually obtained the two degrees from Kampala University. The petitioners

proved this allegation to the required standard. The source and how the two degrees came into being are facts that were in the special knowledge of the 1st respondent. In view of the uncontroverted evidence on record, they are not what they purport to be.

199. The case of *Janet Ndogo Ekumbo Mbete v. IEBC (supra)* relied on by Mr. Macharia is therefore not applicable. In that case, the court found that the respondent had undertaken the studies for conferment of the subject degree and was only waiting to formally graduate. In the present case, the graduation took place long time ago but the 1st respondent's name was missing from the graduation list. He did not explain why that was the case. Neither did he show that the alleged degrees were genuinely issued and/or conferred on him.

200. As regards the report of the Departmental Committee for Defence and International Relations, I do not agree with Mr. Macharia that the same is inconclusive. Serious but firm allegations were made in respect of that report touching on the 1st respondent. He decided not to deny or rebut them. To my mind, the Minutes and report are conclusive evidence that; the 1st respondent appeared before that Committee on 3rd September, 2014 to be vetted for position of Ambassador that during the vetting, he informed that Committee that he was yet to graduate.

201. Accordingly, I make a finding that as at 8th August, 2017, the 1st respondent did not have the academic qualifications to vie for position of governor. He was therefore not legally cleared to vie for that position as he did not satisfy the provisions of **section 22 (2) of the Elections Act**. The case of *Peter Kingara v. IEBC (supra)* is not applicable as the reports relied in this case are conclusive.

(c) Whether the 1st respondent was validly elected as Governor of Wajir County

202. The principles set out in Articles 81 and 86 of the Constitution are to the effect that; the electoral process must be accurately and competently conducted; the election should have a proper and verifiable record made on prescribed forms and executed by the relevant authorized election officials; an accountable election whose record is capable of being audited. That the sanctity of secrecy of ballot should be jealously upheld in order to maintain the free will of the people when exercising their sovereign will of choosing those they wish to surrender their power to rule over them. An election must reflect the people's free will through credibility, verifiability, efficiency and accuracy.

203. An Election Court should always strive to secure and retain the will of the people. Mere irregularities in the conduct of an election that do not affect the results cannot by themselves invalidate an election. Same with procedural and administrative irregularities and other errors occasioned by human imperfection. See *Evans Odhiambo Kidero & 4 Others v. Ferdinand Ndungu Waititu & 4 Others [2014] eKLR* and *Mercy Kirito Mutegi v. Bearice Nkatha Nyaga & 2 Others [2013] eKLR*. No election can be perfect without any errors. Elections are not perfect and not all malpractices will lead to nullification of the result. **Section 83 of the Elections Act** is apt about that. See also *Harun Meitamei Lempaka v. Lemanke Aramat & 2 Others [2013] eKLR* and *Steven Kariuki v. George Mike Wanjohi & 2 Others [2013] eKLR*.

204. Our own Supreme Court held in the *Raila Amolo Odinga & Another v. IEBC & 2 Others* (supra):-

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

205. The Court then stated of **section 83 of the Elections Act** as follows:-

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

206. The resident of Wajir County who woke up early on the 8th August, 2017 armed with the promise of the Constitution, travelled a long distance to reach the polling station where he was registered, queued the whole day with the hope that he would cast his vote in secret. That after casting his vote, it will count and that in the event of an audit, it will be verifiable.

207. The aspirations of Kenyans are embedded in the Constitution of Kenya 2010. Those aspirations were not intended to remain as just that. They were intended and are expected to be a reality. That every Kenyan should live them. It is only then that the citizens of this country will feel settled. It is for that reason that every individual as well as institution charged with the realization of the principles contained in the Constitution must strive to achieve them. These include the principles of a free and fair election as set out in **Articles 81 and 86 of the Constitution**. Anything short of that is unacceptable and the Courts will compel compliance therewith.

208. In the present case, the Court has found that the principle of the secrecy of the ballot was breached. The record of the election through the prescribed Forms 37A, 37B and 37C was neither accountable nor credible. That because of the irregularities committed by the 2nd and 3rd respondent, the elections could not be verified. From the irregularities committed, the 3rd respondent cannot be said to have conducted the elections competently and efficiently. It employed election officials who were incompetent or negligent and whose conduct made the elections unaccountable and unverifiable. Accordingly, this Court holds that the election of Wajir County for the Governor's seat was not conducted in accordance with the Constitution and the law. The totality of the irregularities that were proved, were so grave that they not only affected the credibility of the election but they affected the results of the election itself. No reasonable tribunal can uphold that election.

209. It follows therefore that the 1st respondent was not validly elected as the Governor of Wajir County.

210. As to costs, the parties did not address me on it. I will award the costs to the petitioners. However, since the claim and award of costs in election petitions has hitherto been erratic, I will cap instructions fees at KShs.2,000,000/= (two million only). Ordinarily, it is the guilty party to bear the costs. In this case, not only has the Court found the election officials guilty of the irregularities that affected the election, the 1st respondent has also been found to be culpable. He presented himself to the 2nd and 3rd respondent to be cleared as a candidate yet he was not legally qualified to vie for the seat of Governor.

211. Accordingly, the costs will be shared by all the respondents.

Final Declarations

The Petition succeeds and is hereby allowed.

- (a) the 1st respondent was not validly cleared to vie for the seat of Governor for Wajir County as he did not possess the educational qualifications;
- (b) the 1st respondent was not validly elected to the position of Governor and his election is hereby declared null and void;
- (c) the 3rd respondent do hold a fresh election in conformity with the *Constitution and the Elections Act, 2011*.
- (d) the respondents do jointly and severally, pay costs to the petitioners to be taxed by the Deputy Registrar provided however that the instructions fee is capped at KShs. 2 million.

It is so decreed.

DATED and DELIVERED at Nairobi this 12th day of January, 2018.

A. MABEYA

JUDGE

12/1/2018