



IN THE HIGH COURT AT KISUMU

ELECTION PETITION NO. 3 OF 2017

IN THE MATTER OF ELECTION FOR GOVERNOR FOR

KISUMU COUNTY

BETWEEN

JACKTON NYANUNGO RANGUMA PETITIONER

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 1ST RESPONDENT

THE COUNTY RETURNING OFFICER, THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION, KISUMU COUNTY 2ND RESPONDENT

H.E. PETER ANYANG' NYONG'O 3RD RESPONDENT

JUDGMENT

Introduction and background

1. This petition filed by Jackton Nyanungo Ranguma contests the return of Peter Anyang' Nyong'o as the Governor of Kisumu County following the general elections held on 8th August 2017. Although petitioner did not set out the declared results of the election in his petition contrary to **rule 8** of the *Elections (Parliamentary and County Election) Petitions Rules, 2017 ("the Rules")*, they were as follows;

Peter Anyang Nyong'o	227,127
Jackton Nyanungo Ranguma	156,963
Christine R. A. Atieno	2,383
Peter Charles Owino Omollo	1,955
David Otieno Waiyera	821

2. The gravamen of the petition dated 5th September 2017, is that the gubernatorial elections in Kisumu County ("the County") were not free and fair contrary to the principles outlined in **Article 81** of the Constitution as read **section 39** of the *Elections Act, 2011* ("the Act") and the *Regulations* made

thereunder.

3. The petitioner's case is founded on four broad grounds set out in Part C of the petition (paragraphs 20 – 30). These are as follows; first, the relay and transmission of results, second, the lack of impartiality, neutrality, efficiency, accuracy and accountability on the part of the 1st respondent, third, the lack and failure of operational transparency and last, the improper voting, counting and tabulation of results.

4. The 1st and 2nd respondents filed a joint response to the petition dated 18th September 2017 in which they denied the allegations against them by the petitioners. For ease of reference I shall refer to the 1st and 2nd respondents collectively as the Independent Electoral and Boundaries Commission (“the IEBC”) unless the context otherwise admits. They contended that they carried out a free and fair election. The 3rd respondent, in his response to the petition dated 18th September 2017, denied all the allegations against him.

5. At the close of pleadings, the parties agreed that the IEBC furnish all parties with Forms 37A for the County. The parties also agreed that the IEBC provide access to all the necessary electronic information collected and stored through the Kenya Integrated Election Management System (KIEMS) through the KIEMS kit. At this stage, I will adopt the description given to the KIEMS kit by Omondi J., in ***Thomas Matwetwe Nyamache v Independent Electoral and Boundaries Commission & Others HC Kisii EP No. 8 of 2017 [2017]***

[77] What is a KIEMS KIT? This is the Kenya Integrated Election Management System – which is a form of laptop tablet with an electronically generated system through which a voter is automatically identified in an automated poll book known as the Electronic Voter Identification. It has attached to it a hand held device with an inbuilt finger print reader. The system identifies the voters biometrically so as to curb impersonation during the voting exercise and ensures that only those that have been registered are allowed to cast their votes. This is because it has the biometric voter registration.

[78] The system also enables the Presiding Officers to present and transmit results to the tallying centres. It also simultaneously transmits the tallied results to the constituency, county and national final tallying centres. This is information obtained at a training for judicial officers on electoral preparation and take judicial notice.

[79] The use of the KIEMS KIT has been introduced in Kenya so as to enhance transparency through electronic transmission of results from the polling stations. The KIEMS KIT just like any other information management gadget has a memory card which stores information. Infact it is this information which the law requires the Independent Electoral and Boundaries Commission to keep in safe custody for three years.

6. The parties, though, did not agree on the necessary electronic information to be provided hence, in my Ruling No. 1 dated 7th November 2017, I ordered that, “[13] *The 1st and 2nd respondents shall provide access to all the electronic information related to the Kisumu County Governor Election to the petitioner and 3rd respondent. Since no polling stations are cited in the petition, the terms of access shall be read only access and shall be done between 10th and 17th November 2017.*”

7. At the close of the petitioner's case, I heard the petitioner's application for audit, scrutiny recount and re-tallying of the vote. After considering the application and arguments, I dismissed the plea in my Ruling No. 2 dated 16th November 2017.

Issues for determination

8. Although the parties filed statements of issues for consideration, I think the issues can be distilled from the four grounds challenging the election and outlined in the petition. These are as follows;

(a) Whether the process of relay and transmission of results from polling stations was accurate, verifiable, secure, accountable, transparent, open and prompt and in accordance with **Article 81** of the Constitution.

(b) Whether the IEBC conducted the election in an impartial, neutral, efficient, accurate and accountable manner.

(c) Whether there was lack of and failure of operational transparency.

(d) Whether the votes were counted and tabulated in accordance with the Constitution and the law.

Issues (a) and (d) are related hence I shall consider them together.

9. In order to support these grounds, the petitioner called 12 witnesses while the 1st and 2nd respondents called 4 witnesses. The 3rd respondent called 3 witnesses. The parties also filed written submissions at the conclusion of the case. I shall now proceed to consider these issues in light of the testimony, evidence and submissions received during the trial but before I do so let me set out some general principles applicable to election petitions.

General principles applicable

10. The general principles governing elections and election disputes are not in doubt and been set out in the parties' written submissions. The electoral process is a realisation of the principle of the sovereignty of the people of Kenya which is articulated in **Article 1** of the Constitution. **Article 38** which sets out political rights underpins this sovereignty. It provides;

38(1) Every citizen is free to make political choices, which includes the right -

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for-

(a) any elective public body or office established under this Constitution; or

(b) any office of any political party of which the citizen is a member.

(3) Every adult citizen has the right, without unreasonable restrictions-

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

11. The rights protected by **Article 38** are realised through the electoral system set out in **Chapter Seven** titled, "**Representation of the People.**" Under **Article 81(e)**, the electoral system should comply with the principle of free and fair elections. According to this provision, elections are free and fair when they are by secret ballot, free from violence and intimidation, improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

12. As regards the conduct of voting, the Constitution imposes specific obligations on the IEBC. It is an independent body established under **Article 88(1)** and **Independent Electoral and Boundaries Commission Act (No.9 of 2011)**. **Article 86** states that:

86. At every election, the Independent Electoral and Boundaries Commission shall ensure that-

(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;

(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;

(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer, and

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

13. Since an election is the ultimate expression of sovereignty of the people, the electoral system is designed to ascertain and implement the will of the people. Thus the bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect to the fullest extent while upholding the principles that underlie a free and fair election.

14. An election petition is not do-over of the just concluded election. It is not an opportunity to conduct another election through the court as every election conducted in accordance with the law is presumed valid unless it is set aside by the court. The burden of establishing the allegations of non-compliance with the Constitution and the law, electoral malpractice and misconduct which would result in the election being declared invalid rests on the petitioner. The court will not interfere with the results of the elections unless it is established to the required standard of proof that such non-compliance with the Constitution and the law, the irregularities and electoral malpractices complained of render the said elections invalid.

15. In ***Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 Others SCK Petition No. 5 of 2013 [2013]eKLR***, the Supreme Court held that the petitioner bears the burden of proof. It observed that;

[196] 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 be 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 laws.

16. As regards the standard of proof, the Court went further and held that;

[203] The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question.

17. Related to the burden of proof is that fact that the petitioner is bound to prove the case it has pleaded. A petitioner is not permitted to make a case outside the pleadings and his affidavits and testimony must be consistent with and support the case pleaded. In ***Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and 2 Others SCK Presidential Petition No. 1 of 2017 [2017]eKLR***, the Supreme Court quoted with approval the Supreme Court of India in ***Arikala Narasa Reddy v Venkata Ram Reddy Reddygari and Another Civil Appeal Nos. 5710 -5711 of 2012[2014] 2 SCR*** where it stated that;

In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and

parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.

18. In addition to the aforesaid, I approve of the position so clearly stated by Kimaru J., in **Mahamud Muhumed Sirat v Ali Hassan Abdirahman and 2 Others Nairobi EP No. 15 of 2008 [2010]eKLR** as follows;

From the outset, this court wishes to state that the petitioner adduced evidence, and even made submissions in respect of matters that he had not specifically pleaded in his petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate relief. In the present petition, this court declined the invitation offered by the petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of aspects of the petitioner's case which he adduced evidence but which were not based on the pleadings that he had filed in court, and in particular, the petition.

19. I shall accordingly limit my observations and judgment to what is pleaded in the petition and supported by the testimony and other evidence.

20. The circumstances under which the election court will invalidate an election are set out in **section 83** of the **Act**. Although this provision was amended by the **Election Laws (Amendment) Act, 2017 (Act No. 34 of 2017)**, the amendment, which came into force on 2nd November 2017, is not applicable to these proceedings as it is not retrospective (see **John Harun Mwau & Others v Independent Electoral and Boundaries Commission SCK Presidential Petition Nos. 2 & 4 of 2017 (UR)**). Prior to the amendment, **section 83** of the **Act**, which is applicable to this case, read as follows;

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

21. The Supreme Court in **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and 2 Others, Presidential Election Petition No. 1 of 2017 [2017]eKLR** expounded on the meaning and application of **section 83** of the **Act**. It stated that the provision comprised two limbs; the first regarding compliance with the Constitution and the law on elections and the second, concerning irregularities that may affect the result of the election. The court noted;

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

22. The Court reiterated what it had stated in **Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others SCK Petition No. 2B of 2014[2014] eKLR** that;

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

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

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

[219] *By way of example, if there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial Court would not be justified, merely on account of such shortfalls, to nullify such an election. However, a scrutiny and recount that reverses an election result against the candidate who had been declared a winner, would occasion the annulment of an election. Examples of irregularities of a magnitude such as to affect the result of an election, are not however, closed.*

[220] *Where an election is conducted in such a manner as demonstrably violates the principles of the Constitution and the law, such an election stands to be invalidated.*

23. What the Supreme Court recognised is that an election is a process where mistakes will be made and malpractices may occur but in order to succeed in annulling the election, the petitioner must establish either that there was non-compliance with the Constitution and the law governing election or that election malpractices and irregularities that took place were of such magnitude that they substantially and materially affected the results of the election.

24. I now turn to consider the issues framed, by reference to the petition, in light of the principles I have highlighted.

Voting, Counting, Tabulation and Transmission of results

25. The petitioner's case was that the process of relaying and transmission of results from polling stations to the Constituency and to the County Tallying Center was not simple, accurate, verifiable, secure, accountable, transparent, open and prompt contrary to **Article 81(e), (iv) and (v)** of the Constitution. As a result of these flaws, he avers that the respondents committed malpractices, election offences which compromised the entire election.

26. At paragraph 22 of the petition, the petitioner set out the following allegations:

- (a) *Use of unofficial ballot papers which were ultimately counted in favour of the 3rd respondent,*
- (b) *Stuffing ballot boxes with votes that were not marked and or cast by any voter but marked by the 3rd respondent's agents with the connivance of the 1st respondent.*
- (c) *Use of extra ballot papers.*
- (d) *Introduction of unofficial, illegal and or irregular ballot paper booklets.*
- (e) *Alteration of the entries in Forms 37A, 37B and 37C in favour of the 3rd respondent.*
- (f) *Failing to arithmetically and numerically and serially count the votes and hence making a declaration in favour of the 3rd respondent.*
- (g) *Counting spoilt votes in favour of the 3rd respondent.*
- (h) *Irregularly discarding correct and valid votes that were case in favour of the petitioner.*

(i) Failing to act on the complaints and or issues raised by the Petitioner's agents at both the polling stations, the constituency tallying centres and the County tallying centre.

(j) Irregularly and in the absence of the petitioners agents breaking the seals on ballot boxes so as to interfere with the votes.

(k) Using documents in the exercise which had no consistent and universal security features.

27. The petitioner also alleged that the IEBC, though its agents, illegally and unlawfully, logged onto their servers and deleted several entries relating to Forms 37A and manipulated them in favour of the 3rd respondent. The petitioner further alleged that that the data and information recorded in the Forms 37A at individual polling stations were not accurately and transparently entered into KIEMS Kits at individual polling stations.

28. The allegations concerning voting, counting and tabulation of results are at paragraph 30 of the petition. The key allegation is that the votes cast in a significant number of polling stations were not counted, tabulated and accurately collated as required under **Article 86(b)** and **(c)** of the Constitution. The petitioner complained that the votes captured in Forms 37A differ from the results captured in Form 37B and those displayed on the IEBC portal. Further, the results displayed in Forms 37B contained substantial errors and inaccurate mathematical additions in favour of the 3rd respondent. As a result of these errors, the petitioner claimed that the purported results contained in the Form 37C are not the results contemplated under **Article 86** of the Constitution as they were fundamentally flawed and are therefore a nullity

29. At first glance, the allegations I have set out above are imprecise to the extent that they do not identify the specific polling stations where the errors, malpractices and irregularities took place. This, of course, made it difficult for the respondents to answer those allegations with particularity. As I state elsewhere, it is the petitioner's duty to plead his case with specificity and this defect is not cured by having a detailed affidavit making broad allegations.

30. Before I proceed to consider the petitioner's allegations and right off the bat, I find that although pleaded, there was no evidence of unofficial ballot papers counted in favour of the 3rd respondent. There was no evidence of stuffing ballot boxes with votes that were not marked and or cast by any voter but marked by the 3rd respondent's agents with the connivance of the 1st respondent. There was also no evidence of use of extra ballot papers, no evidence of introduction of unofficial, illegal and or irregular ballot paper booklets and no evidence of the use of documents without consistent and universal security features. I now turn to the testimony led in support of this ground.

31. Jacob Onyango K'odera (PW 2), an IT specialist, engaged by the petitioner as the overall campaign and poll day coordinator, testified that he received all the Forms 37B and noted several issues. First, that no results were captured for the following polling stations within Kisumu East Constituency and no explanation had been offered by the IEBC; Mamboleo Market (No. 3), Koyango Market (No. 3), Nyalenda 'A' Community Hall (No. 4) and Nyalenda 'A' Community Hall (No. 5).

32. Second, he noticed a high number of rejected votes in 95 polling stations across the County averaging between 5 and 10 votes. PW 2 opined that the incidence of these rejected voted coincided with the polling stations where the petitioner's agents alleged malpractices. Third, PW 2 sourced and downloaded election results for the Kisumu Presidential and Senatorial race from the IEBC portal, aggregated them and worked out the differences between the votes cast for each race. He noted marked differences between the tallies of the said results. Based on those parameters he concluded that the results presented by IEBC were neither accurate nor verifiable and lacked credibility.

33. There was also the testimony of Levi Oduor Otieno (PW 3), who testified that he was telecommunication expert. He told the court that he was given access to the IEBC servers and found that several deletions were made to files containing the results as transmitted using the scanned copies of Forms 37A. He was able to confirm and verify the correctness of the results downloaded from the server

and those from Form 37C and he came to the conclusion that there was massive variance between the two which indicated interference with the data in the IEBC server. He further deposed that the person who logged onto the system, interfered with the results in favour of 3rd respondent.

34. In my view, PW 2 and PW 3 were not particularly helpful to the petitioner's case. Their conclusions were founded on opinion. Apart from the fact that these issues were not pleaded, nothing could be inferred from the spoilt votes or extrapolated from the results of the Presidential or Senatorial election that could assist the petitioner without establishing a factual basis for the alleged malpractices or irregularities in each polling station which led either to the spoilt votes or the difference or variation in the number of votes in the Gubernatorial election on one hand and the Presidential and Senatorial election on the other.

35. Coming to the issue of collation, tabulation and transmission of results, I would do no better than reiterate what I stated in Ruling No. 2 where I emphasized that the results recorded in Form 37A form basis of determining the will of the people. In ***Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others*** NRB CA Civil Appeal No. 105 of 2017 [2017]eKLR which was cited with approval by the Supreme Court in ***Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others*** [2017] (Supra at para. 264), the Court of Appeal underpinned the finality of results recorded at the polling station as follows:

It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters' will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion. It sounds ill that a contrary argument that is so anathema and antithetical to integrity and accuracy should fall from the appellant's mouth.

36. Neither PW 3 nor PW 4 founded or extrapolated their tallies or other findings from Forms 37A hence their evidence could not assist the petitioner's case.

37. The issue of transmission of results is to be found in **section 39** of the **Act** which provides as follows:

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

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

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

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

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

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

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

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

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

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

38. A reading of **section 39(1C)** of the **Act** shows that electronic transmission and publication of polling result in a public portal is only a statutory requirement for the Presidential election. Further, except for voter registration and voter identification; voting, counting, tallying and transmission of results for the election of the other elective posts including that of the Governor are mainly manual. In all other cases, including the county Governor election, the transmission of results contemplated by **section 39(1A)** and **(1B)** of the **Act** is that the votes at the Polling Station are counted and recorded in Form 37A. Each Form 37A is forwarded to the Constituency Tallying Centre. The Constituency Returning officer tallies all the results from all the polling stations and records them in Form 37B. Forms 37B from all the Constituency Tallying Centres are forwarded to the County Tallying Centre where the County Returning Officer tallies all the results from the Forms 37B and announces the election results based on Form 37C.

39. Even accepting the errors, omissions and inconsistencies highlighted by PW 4 and the other witnesses, the legal position remains that the votes as recorded in Form 37A are final. Unless Forms 37A are disputed, any errors in electronic transmission of results or publication in IEBC public portal cannot, of themselves and without more, invalidate Forms 37A. Where the results are electronically transmitted from the polling station to any other portal as the IEBC may direct, such results can only be termed as provisional thus underlining the primacy and finality of Form 37A. **Regulation 82** of the **Elections (General) Regulations, 2012** suggests that these results are provisional. It provides that;

82(1) The presiding officer shall, before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in electronic form, in such a manner as the Commission may direct.

(2) The results submitted under sub-regulation (1) shall be provisional and subject to confirmation after the procedure described in regulation 76.

40. Thus, even if I accept the testimony of PW 4 that the results in the IEBC server were manipulated, that fact does not change the substance of the Forms 37A received by the Constituency Returning Officers. In essence, the evidence of PW 4 does not assist the petitioner's case.

41. The substantial issue that arose, though not pleaded, related to the collation and tally of results from the 5 polling stations which were omitted from Form 37B for Kisumu East Constituency and Form 37C. These were Mamboleo Market (No. 3), Koyango Market (No. 3), Nyalenda 'A' Community Hall (No. 4) and Nyalenda 'A' Community Hall (No. 5) and Akado Polytechnic (No. 2) all in Kisumu East Constituency. This omission was admitted by the 2nd respondent (DW 4). DW 4 also admitted that he announced the Gubernatorial results without the results from the 5 polling stations.

42. I find that failure to record the results of 5 polling stations in the Form 37B and Form 37C is an irregularity. It is not in dispute that voting took place in the 5 polling stations and indeed the Form 37A for each of them were produced Mary Otili (DW 2), the Deputy Returning Officer for Kisumu East Constituency, to confirm that voting took place and that the results were announced at each polling station.

43. At the end of the day, the failure to record the results of the 5 polling stations within Kisumu East Constituency on Form 37B and Form 37C would not in any way affect the results as the petitioner was the winner of the election even assuming that the petitioner would have garnered all the votes in those stations. Applying the provisions of **section 83** of the **Act**, I find that these irregularities would not have

affected the ultimate result given the margin of votes and the fact that the irregularity occurred in only 5 out of over 1000 polling stations in the County.

44. I also note that the petitioner had full access to the electronic information from the KIEMS kit. This would have highlighted what took place in each of the 5 polling stations complained of. Despite this access, the petitioner did not provide or point to anything that would undermine the electoral process. Nothing that emerged from the analysis of the electronic data was produced and put to any of the respondents' witnesses in cross-examination.

Lack and failure of operational transparency

45. At paragraph 28 of the petition, the petition averred that there was massive and deliberate failure of operational transparency in that the IEBC deliberately and intentionally disregarded the decision in the **Maina Kiai Case (Supra)** and that it failed to electronically collate, tally and transmit the results accurately in accordance with the court decision. He further averred that the IEBC colluded with the 3rd respondent in ejecting the petitioner's agents from various polling stations within the County.

46. I have already dealt with the issue of collating, tallying and transmitting the results in the context of the **Maina Kiai Case (Supra)**. I once again emphasise that electronic transmission of the Gubernatorial results was not a mandatory requirement under **section 39** of the **Act**.

47. The only other allegation under this head was about the ejection of agents from polling stations is also vague as it does not set out which polling stations the petitioner's agents were evicted. Samuel Otieno Oyamo (PW 6), the petitioner's Chief Constituency agent for Nyakach Constituency testified that some of the petitioner's agents were barred from accessing polling stations because of lack of badges. Apart from this statement, no evidence was provided for the specific polling stations or the names of Presiding officers who allegedly barred the petitioner's agents from the polling stations. In fact, it turned out that some in some of the polling stations he named, for example Kogola Primary School and Kodum Primary School, the petitioner's agents were present and indeed signed Form 37A. I accordingly dismiss this allegation.

Impartial, neutral, efficient, accurate and accountable manner

48. At paragraph 27 of the petition, the petitioner set out the grounds upon which the court should find that the elections were not administered in a manner that was not impartial, neutral, efficient, accurate and accountable contrary to **Article 81(e)(v)** of the Constitution and **section 39, 44** and **44A** of the **Act** and **Regulations** made thereunder and **section 25** of the **IEBC Act**.

49. The petitioner alleged that in numerous instances, "*the IEBC selectively, manipulated, engineered and/or deliberately distorted the votes cast and counted in the petitioner's favour thereby affecting the final results tallied to the advantage of the 3rd respondent.*" The petitioner further averred that in a substantial and significant number of instances, the IEBC grossly inflated the votes cast in favour of 3rd respondent thereby affecting the final results tallied.

50. Once again, these allegations are vague and embarrassing. Such vagueness is not cured by stating in the petition that the grounds, information and evidence are detailed in the supporting affidavits which are, "*indicators of a deliberate and/or systematic interference and manipulation of the results of the gubernatorial elections in Kisumu County by the 1st respondent.*"

51. The significant and substantial number of instances cited in the petition were not proved. I have already dealt with the issue of voting, counting, tallying, collation and transmission of the results elsewhere and I find and hold that the petitioner has not proved that the election results were interfered with or manipulated in the manner suggested by the petitioner or in a manner that would lead me to invalidate the elections.

Other allegations

52. As I pointed out elsewhere in this judgment, the petitioner case is confined within the four corners of the petition. Any evidence that falls outside these confines must be disregarded (see para. 17 above).

53. A number of witnesses gave evidence on matters that fell outside the boundaries of what is permitted by the petition. This evidence includes testimony by the petitioner of malicious propaganda and defamation made against him by the 3rd respondent. Martha Achieng Okano (PW 3), George Ouko Oyoo (PW 5), Tobias Ambrose Oloo (PW 7) and Yusuf Masudi Onyango (PW 8) spoke of canvassing of voters within polling stations, intimidation of voters and campaigning on voting day yet these matters are absent from the petition. The testimony of Bonventure Ondiek (PW 10) and Dan Kidha Kidha (PW 11) referred to bribery and violence without any foundation from the pleadings. All these cannot form the basis of the challenge are accordingly disregarded.

Conclusion

54. In his submissions, counsel for the petitioner contended that petitioner's evidence was not challenged and that it remained unshaken and that the only way it would have been countered is by the IEBC calling the Presiding officers and polling clerks and the 3rd respondent calling his agents to testify after swearing affidavits. This submission ignores the fact that the burden of proof rests of the petitioner. In the ***Raila Case [2013] (Supra)***, this Court echoed the principle that:

[195] [A]n electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswerable case has been made. [emphasis supplied].

55. The respondents could not be called upon to answer a case whose basis had not been pleaded or proved to the extent that it required them to answer. The totality of the findings I have made is that the petitioner has failed to prove his case against the respondents. The petition is therefore dismissed.

Costs

56. **Section 84** of the **Act** provides that, “An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.” Such costs are to follow the event and the Court has broad jurisdiction to determine costs **Rule 30 (1)** of the **Rules** provide as follows:

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

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

If the Court does not determine the costs, the Registrar of the Court is required to tax such costs under **rule 31** of the **Rules**.

57. At the beginning of these proceedings I directed the parties to give their sealed proposal of estimated instruction fees as the preparation for the petition had already been done and what was remaining was the hearing of the case. The petitioner suggested **Kshs. 5,000,000/00**. The 1st and 2nd respondents suggested **Kshs. 5,000,000/00** and the 3rd respondent suggested **Kshs. 7,000,000/00**.

58. In ***Kalembe Ndile and Another v Patrick Musimba and Others Machakos HC EP No. 1 and 7 of 2013 [2013]eKLR*** I stated that,

[C]osts awarded should be fairly adequate to compensate for work done but at the same time

should not be exorbitant as to unjustly enrich the parties or cause unwarranted dent on the public purse or injure the body politic by undermining the principle of access to justice enshrined in Article 48 of the Constitution.

59. This petition was not complex and the issues were fairly straight forward as manifested by the pleadings and submissions tendered, the number of witnesses and the nature of their evidence on record. In reaching the cap, I have taken into account the time spent on research, preparation of pleadings, applications and submissions, preparation of witnesses and in court during the actual hearing of the case and the parties' proposals.

60. I have also considered several decisions of the High Court in Gubernatorial elections where costs were capped and factored in the element of inflation. In ***Mable Muruli v Wycliffe Ambetsa Oparanya & 3 others Kakamega HC EP No. 5 of 2013 [2013] eKLR***, the court ordered the 4th respondent to pay costs which were capped at 5 million to be shared equally between the petitioner and the 1st and 2nd respondents. In ***Edward Akong'o Oyugi v Independent Electoral and Boundaries Commission & 2 others Kisii HC EP Petition No. 3 Of 2013 [2013] eKLR*** costs payable by the 1st respondent to the petitioner and the 3rd respondent were capped at Kshs. 1 million for each party. Costs payable by the 1st and 3rd respondents equally to the petitioner were capped at Kshs. 3 million in ***William Odhiambo Oduol v Independent Electoral and Boundaries Commission & 2 others Kisumu HC EP No. 2 of 2013 [2013] eKLR***. In ***Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 others Meru HC EP No. 1 of 2013 [2013] eKLR*** the costs awarded to the respondents and those for the 1st respondent were capped at Kshs. 2.8 million while the 2nd and 3rd respondents capped at Kshs. 2.2 million. The costs in ***Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission & 8 others Nairobi EP No. 1 of 2013 [2013] eKLR*** the total costs were capped at Kshs. 5 million and with those of the 1st to 3rd respondents jointly capped at Kshs. 2.5 million and those 4th and 5th respondents jointly capped at Kshs. 2.5 million.

61. Taking all the factors I have outlined above, the instructions fees for each party shall be capped as follows; **Kshs. 2,500,000/00** for the 1st and 2nd respondents and **Kshs. 2,500,000/00** for the 3rd respondent.

Disposition

62. The final orders are therefore as follows;

- (a) The petition be and is hereby dismissed.
- (b) The respondents are awarded costs on the following terms:
 - (i) Instruction fees for 1st and 2nd respondent are capped at **Kshs. 2,500,000/00**.
 - (ii) Instruction fees for the 3rd respondent are capped at **Kshs. 2,500,000/00**.
 - (iii) The costs shall be taxed and the total costs certified by the Deputy Registrar of this court.
 - (iv) The certified costs awarded shall be paid out of the security deposit on a pro-rata basis.
 - (v) A certificate of this determination in accordance with **section 86(1)** of the ***Elections Act, 2011*** shall issue to the Independent Boundaries and Electoral Commission and the Speaker of the Senate.

DATED and DELIVERED at KISUMU this 3rd day of January 2018.

D.S. MAJANJA

JUDGE

Mr Onsongo instructed by Onsongo & Company Advocates for the petitioner.

Mr Mukele with him Mr Kubebea and Mr Juma instructed by Mukele Moni & Company Advocates for the 1st and 2nd respondents.

Hon. Orengo with him Hon. Oluoch, Ms Aulo and Mr Obondi instructed by Rasheed, Rage & Nassir Advocates for the 3rd respondent.