



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
ELECTION PETITION NUMBER 12 OF 2017
(CONSOLIDATED WITH ELECTION PETITION NUMBER 10 OF 2017)
IN THE MATTER OF PARLIAMENTARY ELECTIONS FOR
NYARIBARI CHACHE CONSTITUENCY

CHRIS MUNGA N. BICHAGE.....1ST PETITIONER
ZAHEER JHANDA.....2ND PETITIONER
JAMES F. O. KENANI.....3RD PETITIONER

VERSUS

INDEPENDENT ELECTORAL &
BOUNDARIES COMMISSION.....1ST RESPONDENT
JULIUS MEJA OKEYO.....2ND RESPONDENT
RICHARD NYAGAKA TONGLI.....3RD RESPONDENT

JUDGMENT

INTRODUCTION

1. The consolidated petition herein concerns the election for the Member of National Assembly for Nyaribari Chache Constituency that was conducted on 8th August, 2017 by the 1st Respondent through its returning officer the 2nd Respondent. Out of the 77,729 registered voters in this constituency 57,644 voted and from these 57,012 votes were valid and 632 rejected. The results of this election were as follows:-

Candidate Votes garnered

- a) Bichage Chris Munga Nyamaratandi 10,445
- b) Jhanda Zaheer 11,710
- c) Kanani Simeon Sagana 304
- d) Kenani James F. O. 5,974
- e) Mogaka Benson Musa 1,738
- f) Monda Robert Onsare 8,105
- g) Otara Henry Nyachio 199
- h) Otundo Rael 4,397

i) Tongi Richard Nyagaka 14,410

2. After emerging the winner with 14,410 votes, Tongi Richard Nyagaka (3rd Respondent) was declared as the duly elected Member of the National Assembly for Nyaribari Chache Constituency vide Gazette Notice No. 4901 published in special issue of Kenya Gazette Vol. CXIX-No. 121. Bichage Chris Munga Nyamaratandi, Petitioner in Petition No. 12 of 2017 (hereinafter referred to as the 1st Petitioner), Zaheer Jhanda and James F. O. Kenani 1st and 2nd Petitioners in Petition No. 10 of 2017 (hereinafter referred to as the 2nd and 3rd Petitioners respectively) were candidates in the said election. They filed their separate petitions alleging that this election was not conducted in a free, fair and transparent, accountable, accurate and verifiable manner. It was their case that the election was marred with irregularities, mistakes and malpractices contrary to the **Constitution**, the **Elections Act (24 of 2011)** and the **Elections (General) Regulations, 2012**. These irregularities, mistakes and malpractices were substantial and seriously affected the election and the results to the detriment of the Petitioners.

3. The specific prayers sought in each petition, the grounds and evidence adduced in support of each petition is as hereunder.

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4. It was the Petitioners' case that under **Article 38** of the **Constitution**, **Section 10** of the **Elections Act**, every person whose name and biometric data have been entered in the register of voters and who produces requisite identification, must be allowed to vote. However, the 1st and 2nd Respondents contravened these provisions and **Regulation 66(1)** of the **Elections (General) Regulations 2012** by barring eligible voters from voting. In Nyanturago Tea Buying Centre (02), Rikendo Primary School (01), Jogoo Primary School (01), (02) and (04), Monuri Primary School, Riamokwobe Primary School (01), Rikendo Primary School (02), St. Teresa Amasago Primary School and Keboba Tea Buying Centre the polling stations were either closed before the 5.00 pm closing time set by **Regulation 66(1)** of the **Regulations** but while some voters were still in the queue contrary to **Regulation 66(2)**. At Kenya Maritime Fisheries Research 26 voters were turned away because the KIEMS kit broke down.

5. The 2nd and 3rd Petitioners' argued that the 1st and 2nd Respondents and their agents contravened **Section 44A** of the **Elections Act** and **Regulations 61(4)** and **75(6)** of the **Elections (General) Regulations 2012** by failing to provide every polling station with hard copies of the register as a complimentary system of the KIEMS Kit or where such registers were provided and used, failing to keep records of the voters who were identified by the manual register.

Unidentified voters

6. The 1st and 2nd Respondents contravened **Article 38** of the **Constitution** and **Section 10** of the **Elections Act** by allowing persons whose registration status was not verified in the KIEMS Kit or the manual register to vote. In Irondi Primary School voters without a National Identity Card or Passport were allowed to vote. In Chichiro Primary School, Taracha Primary School, Kenyerere Tea Buying Centre and Kegati Primary School (02), voters whose registration status could not be verified from the KIEMS Kit were allowed to vote without being verified by the manual register. In Kiogoro Tea Buying Centre (02), Riangabi Primary School (01), Kenyerere Tea Buying Centre and Taracha Primary School the voters identified by the manual register were not marked in the register.

Unmarked voters

7. Contrary to **Regulations 59(3)**, **61(4)** and **69(1)** of the **Elections (General) Regulations**, voters at Irondi Primary School, Rikendo Primary School and Riondonga Primary School were not marked with indelible ink after voting.

Assisted voters

8. The voters who required assistance during voting were not assisted in accordance with **Regulations 72(2)** and **(6)** of the **Elections (General) Regulations 2012**. In Matunwa, Nyangowa Tea Buying Centre and Boruma Primary School (01) the presiding officers allowed one political party agent to assist voters alone and unsupervised. At Riondonga Secondary School (01), Taracha Primary School (01) and Ibeno Secondary School (02), the presiding or deputy presiding officers assisted these voters without allowing the party agents to witness the process. In all these stations a record of the assisted voters and the reasons for their assistance was not kept.

Not allowing agents entry into the polling station

9. The 2nd and 3rd Petitioners argued that their agents were denied entry into or forcefully removed from the polling stations during the voting process contrary to **Regulation 62** of the **Election (General) Regulations 2012**. In Riangabi Primary School (01) and Gesere Primary School (01) the agents were only allowed into the polling station after intervention of the Party's Chief Agent. In Rikendo Primary School all agents were ejected from the polling station after voting concluded and only allowed back in during the counting and tallying of the votes. They did not witness the sealing of the ballot boxes. In Ritiro Primary School and Riomweri Primary School the 2nd petitioner's agents were not allowed to enter into the polling station during the counting of the votes.

10. In Nyabiuto Primary School (02), Kenya Maritime Fisheries Research, Menyikwa Tea Buying Centre (01) and (02), Irondi Primary School and Nyaura Primary School, the agents were denied entry into the polling station at any point of the election process. In Irungu Primary School, Nyamagwa Primary School, Rianyega Primary School and Kerera Primary School, the presiding officer allowed unknown persons to act as the 2nd Petitioner's agents instead of duly accredited agents. In Mutunwa Primary School (01) and Nyamemiso Primary School (01) the presiding officer allowed more than one 3rd respondent's agent into the polling station.

Inconsistencies of entries in the forms 35A, 35B and polling station diary

11. In the polling stations listed below the number of rejected votes declared by the presiding officer, recorded in the polling station diary, forms 35A and B differed:

- a) Riondonga Secondary School polling station;
- b) Nyamemiso Primary School polling station 1;
- c) Nyanko Primary School polling station;
- d) Jogoo Primary School polling station 2;
- e) Nyanguru Primary School polling station 1;
- f) Nyaura Primary School polling station 1;
- g) Nyaura Primary School polling station 2;
- h) Gusii Stadium polling station 1;
- i) Gusii Stadium polling station 3;
- j) Mobamba polling station 2;
- k) Gusii Municipal Council Hall polling station 3;
- l) St. Teresa Amasago Primary School polling station 2;
- m) St. Teresa Amasago Primary School polling station 3;
- n) Nyamware Primary School polling station;
- o) Gianchere Primary School polling station 2;
- p) Nyanderema Primary School polling station 2;
- q) Irondi Primary School polling station;
- r) Kiogoro Tea Buying Centre polling station;
- s) Taracha Primary School polling station 1;
- t) Taracha Primary School polling station 2;
- u) Nyang'eni Primary School polling station;
- v) Birongo Primary School polling station 1;
- w) Birongo Primary School polling station 2;
- x) Keoke Primary School polling station 1;
- y) Boruma Primary School polling station 1;
- z) Nyabiosi Primary School polling station 1;
- aa) Kabosi Primary School polling station;
- bb) Riamokwobe Primary School polling station 1;
- cc) Riangabi Primary School polling station 1;
- dd) Nyamagwa Primary School polling station 1;
- ee) Rikendo Primary School polling station 1; and

ff) Rianyega Tea Buying Centre polling station.

12. The entries of the results garnered by the candidates, the votes cast and the rejected votes in forms 35A, the polling station diaries and the forms 35B were inconsistent in some polling stations.

- a) Nyanko Primary School Polling Station 1;
- b) Jogoo Primary School Polling Station 2;
- c) Nyanguru Primary School Polling Station 1;
- d) Kenya Maritime Fisheries Research;
- e) Nyanchwa Primary School Polling Station 1;
- f) Nyanchwa Primary School Polling Station 2;
- g) Masongo Primary School Polling Station 1;
- h) Masongo Primary School Polling Station 2;
- i) Gusii Stadium Polling Station 1;
- j) Gusii Stadium Polling Station 3;
- k) Mobamba Sacco Polling Station 2;
- l) Riandong Secondary School;
- m) St Teresa Amadago Primary School Polling Station 2;
- n) Eremo Primary School Polling Station 2;
- o) Chinduani Primary School Polling Station;
- p) Keboba Tea Buying Centre Polling Station 1;
- q) Keboba Tea Buying Centre Polling Station 2;
- r) Boronyi Primary School Polling Station 1;
- s) Amariba Primary School Polling Station 1;
- t) Nyanderema Primary School Polling Station 1;
- u) Irondi Primary School Polling Station;
- v) Taracha Primary School Polling Station 2;
- w) Nyang'eni Primary School Polling Station 1;
- x) Nyansira Primary School Polling Station 1;
- y) Nyansira Primary School Polling Station 2;
- z) Taracha Primary School (02);
- aa) Birongo Primary School Polling Station 2;
- bb) Boruma Primary School Polling Station 1;
- cc) Nyabiosi Primary School Polling Station 1;
- dd) Boronyi Primary School Polling Station 1;

- ee) Riamokowobe Primary School Polling Station 1;
- ff) Rikendo Primary School Polling Station 2;
- gg) Nyakebako Primary School Polling Station;
- hh) Nyankororo Primary School Polling Station;
- ii) Kerere Central Primary School Polling Station; and
- jj) Nyanturago Tea Buying Centre Polling Station.

Unaccountability for electoral materials

13. In the polling stations listed below, there were discrepancies in the records of ballot papers and voter attendance so that the number of people who voted was higher than the ballots issued. The election materials were not properly accounted for after counting and tallying of votes and before they were sealed. They are:

- a) Kegati Primary School Polling Station 1;
- b) Nyamemiso Primary School Polling Station 1;
- c) Nyamemiso Primary School Polling Station 2;
- d) Jogoo Primary School Polling Station 1;
- e) Jogoo Primary School Polling Station 2;
- f) Jogoo Primary School Polling Station 4;
- g) Mobamba Sacco Polling Station 2;
- h) Gusii Municipal Council Hall 1;
- i) Gusii County Hall Polling Station 2;
- j) St Teresa Amasago Primary School Polling Station 2;
- k) St Teresa Amasago Primary School Polling Station 3;
- l) Nyamware Primary School Polling Station 1;
- m) Nyamware Primary School Polling Station 2;
- n) Ritaro Primary School Polling Station;
- o) Irondi Primary School Polling Station;
- p) Nyabiuto Primary School Polling Station;
- q) Mogorora Primary School Polling Station;
- r) Monuri Primary School Polling Station;
- s) Kiogoro Tea Buying Centre Polling Station 1;
- t) Kiogoro Tea Buying Centre Polling Station 3;
- u) Nyang'eni Primary School Polling Station 2;
- v) Nyang'eni Primary School Polling Station 3;
- w) Birongo Primary School Polling Station 1;

- x) Boruna Primary School Polling Station 1;
- y) Boronyi Primary School Polling Station 1;
- z.) Riamokwobe Polling Station 1;
- aa) Irungu Primary School Polling Station 1;
- bb) Nyamecheo Primary School Polling Station 2;
- cc) Riangabi Primary School Polling Station 1;
- cc) Riangabi Primary School Polling Station 2;
- ee) Kerera Primary School Polling Station;
- ff) Ibeno Secondary School Polling Station 2;
- gg) Nyamagwa Primary School Polling Station 1;
- hh) Gesere Primary School Polling Station 2;
- ii) Rikendo Primary School Polling Station 1;
- jj) Nyankororo Primary School Polling Station; and
- kk) Inani Tea Buying Centre.

14. In several polling stations, the ballot boxes were opened in the absence of the agents. In Rikendo Primary School the agents were asked to leave the polling station for a while. It was reported in a newspaper article that election material for the parliamentary election in question had been discovered at a hotel in Kisii after the elections.

Irregularities in forms 35A

15. The agents were not issued with the forms 35A as required by Regulation 79 of the Elections (General) Regulations. In other polling stations, those that were issued were unstamped, altered or illegible. The presiding officer for Nyanchwa Primary School (01) misplaced the form 35A and as a result these results were not declared at the tallying centre. Nyanchwa Primary School (02) had two form 35As with different results. In Kegati Primary School (03) there were more voters for the Parliamentary election than any of the other 5 elective posts.

Participation of one of the candidates' family member in the electoral process

16. In Rikendo Polling Station, Nancy Maina who is a daughter of a candidate who was vying for the position of member of **County Assembly** was acting as a polling clerk in charge of marking voters who had voted. There was bribery at Esamba Primary School and Riondanga Secondary School.

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17. Bichage Chris Munga Nyamaratandi (hereinafter the 1st Petitioner) came third in the elections. Dissatisfied with the manner of conduct of the elections and the results, he filed his petition on 7/9/2017.

18. The grounds of the petition are found at page 3 of the petition and I summarise them as hereunder.

19. He avers that the election was conducted in a manner substantially inconsistent with the Constitution, the Elections Act and the regulations made thereunder.

20. It is urged that the 3rd Respondent was declared the winner yet he did not receive the greatest number of valid votes cast in his favour. There was alterations manipulation and/or doctoring of the votes and the results posted on forms 35A and 35B did not reflect the actual votes garnered by each candidate. The particulars of adjustments, alterations and/or manipulation are given as;

- i. Arbitrarily reducing the vote count in favour of thePetitioner in over 46 Polling Stations.
- ii. Adopting and adjusting figures in the statutory Forms in various Polling Stations falling within Kiogoro County Assembly Ward.
- iii. Arbitrarily adding and/or adjusting votes cast in favour of the 3rd Respondent at 46 Polling Stations.

- iv. Illegally and unlawfully posting votes belonging to the Petitioner in favour of other candidates.
- v. Adjusting total votes cast and spread out in favour of the candidates.
- vi. Altering and/or erasing votes cast in favour of the Petitioner at various Polling Stations without verification.
- vii. Upgrading votes in favour of the 3rd Respondent at various polling stations, within Kiogoro, Bobaracho, Kisii Central, Keumbu, Birongo and Ibeno, County Assembly Wards.
- viii. Refusing and/or denying the Petitioner's agents to verify and/or authenticate the alterations.

21. The 1st and 2nd Respondents are accused of using or relying on fictitious declaration forms. The contents in the form 35A's were disregarded and form 35B was generated from non-existent and otherwise fictitious form 35As and the results were thus not verifiable nor accurate. It is claimed there are inconsistencies between forms 35A and form 35B.

22. The 2nd Respondent and the presiding officers accepted results where the votes allegedly cast exceeded the number of registered voters. He lists Irondi Polling Station as the one affected.

23. It is claimed that the 1st Petitioner's agents were excluded or chased away by the 2nd Respondent and presiding officers from polling stations thereby preventing them from authenticating the results. This happened at Keboba and Rikendo Primary School. It is urged that the results at Irondi Primary School Polling Station were anchored on unsigned statutory form 37A's whose origin and/or author was unknown.

24. The 1st Petitioner gives the effects of the alterations, manipulation and irregularities on the result(s) of the **Gubernatorial election** as;

- (i) The Respondents badly conducting and mismanaging the election so that the same did not constitute a fair transparent, free, accurate, credible and verifiable election.
- (ii) The breaches, irregularities, illegalities and violations, reliance on invalid declaration forms vitiated the result, validity and integrity of the election.
- (iii) The results declared by the 2nd Respondent cannot be said to reflect the sovereign will of the people of Nyaribari Chache Constituency.

1ST AND 2ND RESPONDENTS RESPONSE TO PETITION 10

25. The 1st and 2nd Respondents' response is dated 14/9/2015 and filed in Court on 15/9/2017.

26. It is averred that the election was conducted in accordance with the Constitution, the Elections Act and Regulations made thereunder.

27. No person who turned up to vote was turned away by the presiding officers as alleged and all voters on the queue at the time of closing the voting were allowed to vote.

28. A complementary system of voting was put in place for purposes of identifying voters being the alphanumeric or the physical copy of the register. Only those who were in the register were allowed to vote and all who voted were marked with indelible ink. Voters requiring assistance were assisted within the stipulated law.

29. None of the agents of the Petitioners were denied entry at polling station as long as they were duly accredited as an agent of a party or a candidate.

30. It is averred that rejected votes were properly declared and recorded in all the statutory forms and the polling station diaries. Forms 35A were not overwritten or erased. Where clerical errors and/or minor mistakes were identified, they were corrected. The transmission of results was done as per the regulations governing the same. All elections materials were held intact, safe and secure.

31. The votes as recorded in the statutory forms 35A and form 35B and in the polling day diaries are consistent and any errors thereto are as a result of human errors occasioned by fatigue on the part of the officials of the 1st Respondent. The forms given to agents tallied with forms retained by the Respondents.

1ST AND 2ND RESPONDENTS RESPONSE TO PETITION NO. 12

32. This response is found in the response dated 16/9/2017. It is the 1st and 2nd Respondents' (hereinafter the Respondents) case that the election herein was conducted in accordance with the **Constitution**, the **Elections Act** and the **Regulations** made thereunder. The process of identifying voters was open and verifiable. The process of counting, tallying and announcement of result, both at the polling stations and at the tallying centre was transparent, accurate and verifiable.

33. All alleged electoral malpractices and/or irregularities are denied and it is stated that if any anomalies or errors occurred during the counting and tallying of votes, this was as a result of human error occasioned by fatigue on the part of the officials of the 1st Respondent.

34. It is denied that there was manipulation of the statutory forms. The results recorded in forms 35A tally with those in form 35B. All the forms used were genuine.

35. All allegations at paragraph 28 of the petition are denied. It is averred that all the returns in forms 35A tally with those in form 35B.

36. The Respondents give specific responses to the allegations listed at page 28 addressing each and every polling station so listed. Starting with Kegati Primary in Bobaracho Ward all the way to Nyakebako Primary School 1 at Ibeno ward. In the explanations given some arithmetic and transposition errors are admitted whereas some allegations are found to be false.

37. As regards Irondi Primary School Polling Station, it is urged that the number of votes cast did not exceed the registered voters. The registered voters are 513 and votes cast were 411. The form 35A at page 161 of the Petition 12 is disowned by the Respondents. The Petitioner is put to strict proof of the legitimacy of and/or authenticity of the form. It is averred that this form is a forgery.

38. It is averred that no agents were chased away or denied entry at polling stations. It is specifically denied that agents were chased away at Keboba and Rikendo Polling Stations. It is urged that transmission or results was done.

39. It is averred that the Respondents shall rely in so far as this petition is concerned, on the Replying Affidavit sworn by the 2nd Respondent in Petition No. 10 of 2017, Zaheer Jhanda & Another vs. IEBC & 2 Others. A copy of the affidavit is annexed. This affidavit was found by Court to not have been served on the 1st Petitioner.

RESPONSE BY THE 3RD RESPONDENT TO PETITION 10

40. This response is contained in the written response filed on the 18/9/2017.

41. The 3rd Respondent denies the allegations of malpractices raised in the petition and denied involvement in any malpractices, irregularities or unlawful acts in the entire election period and he avers that he was legally and lawfully declared the duly elected Member of the National Assembly for Nyaribari Chache Constituency.

42. It is averred that the elections were held in accordance with the Constitution, the Election Act and the Elections (General) Regulations 2012. The 3rd Respondent in his assessment as a stakeholder and participant in the 2017 general elections was satisfied that the 1st Respondent exercised its powers and performed its functions in relation to the general elections in accordance with the Constitution and the national legislation.

43. It is urged that no names or affidavits of voters turned away are provided. The Petitioners are put to strict proof and it is the 3rd Respondents' case that at Nyanturago Tea Buying Centre, the polling day diary shows there were 104 voters on queue by 5.00 p.m. and the agent of the 3rd Petitioner (PDP agent) signed the form 35A.

44. Allegations of voters turned away at Rikendo Primary 1, Jogoo Primary 1, 2 and 4, Kenya Maritime Fisheries Research Institute, Moruri, Ramwokonde Primary 1, Rikendo Primary 2, St. Teresa Amasago Primary 1, 2 and 3 and Keboba Tea Buying Centre polling Stations are all denied.

45. All allegations of voters voting without identity documents, malfunction of KIEMS kit and failure to mark against the register persons who were identified by hard copy register are all denied.

46. It is urged that all voters were marked with indelible ink and no evidence of individuals who were not marked is provided. No evidence of irregular assistance of voters is provided.

47. On allegations of bias on the part of the polling clerk who was a daughter of a jubilee candidate for the elective seat of Member of County Assembly, it is averred that the Petitioners have failed to show how this clerk was out to favour the 3rd Respondent. The elective seat in contention is Member of National Assembly and not Member of County Assembly thus the Petitioner were not prejudiced. In any event, the Petitioner ought to have invoked Regulation 6 of the Elections (General) Regulations 2012 to raise objections at the appropriate time against such an appointment.

48. All the contentions on rejected votes are explained and it is averred that in some instances the Petitioners have peddled falsehoods and in others where the mistake existed, it was rectified and in some instances the Petitioners have misdirected themselves for comparing the number of rejected votes in other elective seats yet rejected or spoiled votes in the different positions cannot be the same. It is averred that if there were errors in form 35B in the entry of rejected votes, the errors were trivial. In any event rejected votes do not belong to any candidate.

49. The anomaly alleged at Nyanchwa Polling Station, if at all, was not beneficial to the 3rd Respondent as the 2nd Petitioner got 60 votes and the 3rd Petitioner got 11 votes while the 3rd Respondent got 0 votes.

50. The allegation that there was widespread discrepancies in the issuing and records of ballot papers, records of voter attendance and accounting for election materials after counting and tallying of votes in and before sealing of election materials is denied. The 3rd Respondent in a table shows non existence of the discrepancies or where found same are minor and trivial.

51. It is denied that there was any discrepancy reflected in forms 35A and 35B. The allegations are false and misleading. Only Masongo Polling Station has some discrepancies and the 3rd Respondent states this was a transpositional error. Again the votes garnered by the candidates are not being challenged. Indeed it is the 3rd Respondent who was prejudiced by the transposition error losing 100 votes.

52. The 3rd Respondent denies any commission of an election offence. No report was made to the police. No statements were recorded to facilitate the arrest and prosecution of the 3rd Respondent or any other person alleged to have committed the offences.

53. The 3rd Respondent avers that all the affidavits in support of the petition are bad in law and ought to be struck out with costs for failing to comply with the mandatory requirements of **Rule 12** of the **Elections (Parliamentary and County Elections) Petition Rules, Rule 19** of the **Civil Procedure Rules 2010** and the **Oaths and Statutory Declaration Act Cap 15 Laws of Kenya**.

3RD RESPONDENT'S RESPONSE TO PETITION NO. 12

54. The 3rd Respondent avers that the election herein was conducted in accordance with the spirit and intention of **Articles 10, 81, 86** and **88** of the **Constitution** and the **Elections Act** and the **Elections (General) Regulations 2012**.

55. It is urged that the accuracy and verifiability of the results was ensured by the 1st and 2nd Respondent complying with the law.

56. The claims of irregularities are denied. The Petitioner is accused of making general allegations without offering any particulars, explanations or supporting facts. The names of presiding officers are not given, the polling stations where the Petitioner's votes were irregularly and unlawfully counted and/or declared to be cast on behalf of other candidates, particularly the 3rd Respondent herein; votes that were altered, manipulated and/or doctored are also not named. This number of votes cast in favour of the Petitioner are not stated. It is urged that the outcome of an election cannot be affected by unknown number of votes.

57. The 3rd Respondents refute the allegations in paragraph 17 of the Petition which relates to particulars of adjustments, alterations and/or manipulations and in particular states that;

- i. An unknown number of votes were reduced in favour of the petitioner in over 46 unnamed polling stations.
- ii. That the figures of votes in the statutory forms were adjusted and adopted in unnamed polling stations within Kiogoro County Assembly Ward.
- iii. That unnamed presiding officers arbitrarily added and/or adjusted unknown number of votes cast in favour of the 3rd Respondent herein at over 46 unnamed polling stations.
- iv. That unnamed presiding officers posted votes belonging to the petitioner in favour of other candidates.
- v. That unnamed presiding officers adjusted total votes cast and spread out in favour of candidates.
- vi. That unnamed presiding officers altered and/or erased votes cast in favour of the petitioner at various unnamed polling stations without verification.
- vii. That unnamed presiding officers upgraded votes in favour of the 3rd Respondent at various unnamed polling stations.
- viii. That unnamed presiding officers denied unnamed petitioner's agents from verifying and/or authenticating the alterations made.

58. Any errors in the entries made in forms 35A and 35B, if at all, do not go to the root of the elections since they are not capable of satisfactorily altering the results. It is averred that the results declared in form 35B upon the tallying of results in forms 35A are the accurate results of the candidates vying for Member of National Assembly for Nyaribari Chache Constituency.

59. Irregularities alleged in paragraph 28 of the Petition in the entries in form 35B from forms 35A are denied. The 3rd Respondent gives explanations on each and every entry in the respective polling station. No variation are noted apart from some small error in addition found at Jogoo Primary Station 3 where the form 35A shows an entry of 359 votes and 35B 361. Indeed all candidates votes are correctly captured in form 35B.

60. The transposition error at Masongo Polling Station is said to inconsequential as the 1st Petitioner's votes would increase by 7 while the 3rd Respondent's votes would increase by 100.

61. It is urged that the 1st Petitioner has perjured himself at paragraph 30 of the Petition as he has stated that the number of votes cast at Irondi Primary exceeded the registered number of voters. No iota of evidence either in forms 35A and 35B shows that the number of people who voted exceeded the number of registered voters in this station.

62. On the chasing of agents, the Petitioner is accused of failing to name the agents chased away at Keboba and Rikendo Polling Station by unnamed presiding officers.

63. It is urged that at Keboba Tea Buying Centre Polling Station 1, the Petitioner's agent one John Momanyi was present as evidenced by his signature on the form 35A (page 109 of the petition) and at Rikendo Polling Station 1, the Petitioner's agent one Cosmas A. Onkiba and in Polling Station 2 one Benard Makori also signed form 35A (page 194 and 195 of the Petition).

64. On reliance on invalid statutory forms, it is urged that the Petitioner avers that in "Iron dini Primary Polling Station" unnamed presiding officer anchored the results on unsigned statutory forms 37A's whose origin and author are unknown. It is stated that no such polling station exists in Nyaribari Chache Constituency nor are forms 37A applicable in this petition. It is therefore impossible to respond to this paragraph

for want of particulars since the 3rd Respondent was a stranger to this polling station.

65. Allegations of commission of electoral offences are denied and the Petitioner is put to strict proof.

66. It is averred that all the affidavits in support of the Petition are bad in law and ought to be struck out with costs for failing to comply with the mandatory requirements of **Rule 12 of the Elections (Parliamentary and County Elections) Petition Rules, Order 19 of the Civil Procedure Rules, 2010** and the **Oaths and Statutory Declarations Act Cap 15 Laws of Kenya**.

THE EVIDENCE

67. Directions were given by the Court on 5/10/2017 to the effect that this petition was to be disposed off by way of oral evidence which would constitute the witnesses adopting their filed affidavits and being cross-examined on them.

68. On their part the 2nd and 3rd Petitioners called 10 witnesses inclusive of their own testimonies. The 1st Petitioner testified but called no witness. The 1st and 2nd Respondents called Julius Meja Okeyo while the 3rd Respondent gave evidence without calling any witnesses.

69. At the close of the evidence all the parties filed written submissions through their respective advocates namely;

- i) Ms Oguttu, Ochwang, Ochwal & Co. Advocates for the 1st Petitioner (Mr. Oguttu and Mr. Ochwang appearing).
- ii) Ms Kilonzo & Co. Advocates for the 2nd and 3rd Petitioners (Ms Makobu appearing)
- iii) Ms Lilan & Koech Associates for the 1st and 2nd Respondents (Mr. Terer appearing)
- iv) Ms Okong'o Omogeni & Co. Advocates for the 3rd Respondent (Mr. Omogeni appearing)

I am greatly indebted to counsel for their industry in this respect and for their very able exposition of the law and facts applicable in this matter which effort has made the work of the Court a lot easier.

ISSUES

70. The parties did not file agreed issues for determination as directed by Court vide its orders of 5/10/2017. The parties have however drawn separate issues in their respective submissions.

71. Having considered the pleadings, the affidavit evidence and the learned submissions on record, I summarise the issues for determination as;

- 1. What are the applicable Constitutional and legal principles in the conduct of an election.**
- 2. Who bears the burden of proof in an election petition and what is the standard of proof.**
- 3. Whether the election of Member of National Assembly for Nyaribari Chache Constituency held on 8/8/2017 was conducted in compliance with the Constitution and the law.**
- 4. Whether there are illegalities, irregularities and improprieties committed by the 1st and 2nd Respondents or any other person during the said election.**
- 5. If the answer to 3 is in the affirmative, whether such irregularities, improprieties or illegalities affected the outcome of the election.**
- 6. Whether the 3rd Respondent was validly elected the Member of National Assembly for Nyaribari Chache Constituency.**
- 7. Who bears the costs of this petition and what is the amount payable?**

THE APPLICABLE CONSTITUTIONAL AND LEGAL PRINCIPLES

72. Kenya is a sovereign and democratic country based on the values of democracy, human rights and the rule of law. **Article 1(1)** of her **Constitution** provides that all sovereign power belongs to the people and shall be exercised only in accordance with the Constitution. **Article 1(2)** provides for the exercise of this power. It states;

“Article 1(2): The people may exercise their sovereign power either directly or through their democratically elected representatives.”

73. Such elections as envisaged under **Article 1(2)** above must conform to the provisions of **Article 38(2)** of the **Constitution** which provides;

“Article 38(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.”

74. **Article 81(e)** of the Constitution provides the principles which the electoral system shall comply with. It provides;

“The electoral system shall comply with the following principles-

(e) free and fair elections, which are-

(i) by secret ballot;

(ii) free from violence, intimidation, improper influence or corruption;

(iii) conducted by an independent body;

(iv) transparent; and

(v) administered in an impartial, neutral, efficient, accurate and accountable manner.”

75. Under **Article 86** of the **Constitution**, the IEBC is mandated to ensure the following;

“Article 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 malpractice are put in place, including the safekeeping of election materials.”

76. The substantive procedural law is to be found in the Elections Act and the Rules and Regulations made thereunder. The other important legislations dealing with elections are the **Election Offences Act**, **The Political Parties Act**, **The Public Office Ethics Act** and the **Independent Electoral and Boundaries Commission Act**.

77. The outcome of an election is not to be taken lightly. The Court must strive to uphold the will of the people. In **Richard Kalembe Ndile & Another vs Patrick Musimba Mweu & 2 Others [2013] eKLR**, the Court observed;

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

78. I cite with approval the decision in **Benard Shinalu Masaka vs. Boni Khalwale & 2 Others** [2011] eKLR where quoting from the case of **John Fitch vs. Tom Stephenson & 3 Others** the Court stated;

“The decided cases including those which Lord Denning considered in Morgan vs. Simpson, established 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 duty and election rules, providing the results of the election were unaffected by those breaches. This is because where possible the Court seek to give effect of the will of the electorate.”

79. Alive to the gravity of overturning an election, our very own parliament in its wisdom enacted **Section 83** of the **Elections Act** which provides;

“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.”

80. Where, however, there exist cogent evidence that there was non compliance with the Constitution and the law and that there were illegalities and irregularities that affect the results of the election, the Court in the same spirit of upholding the will of the people will have no hesitation in annulling such an election.

BURDEN OF PROOF

81. Counsels have very ably submitted on the issue of the burden of proof in election matters. “It is trite law that “whoever alleges must prove.” **Section 107(1)** of the **Evidence Act, Cap 80 Laws of Kenya** provides;

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

A Petitioner in an election petition therefore, has the duty to prove the grounds in support of the petition by showing that the facts on which the petition is based exist. **Section 108** of the **Evidence Act** provides;

“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

82. The burden of proof in an election petition rests with the Petitioner. The **Supreme Court of Kenya in Raila Odinga & Another vs. IEBC and Others [2013] eKLR** laid down the applicable principles. It stated;

“There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an 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 unanswered case has been made.”

83. At **paragraph 203** of the said judgment, the **Supreme Court** held that a Petitioner should be under the obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden. The Court cited with affirmation the **Canadian case Opitz vs Wrzesnewskyj 2012 SCC 55-2012-10-256** where it was stated;

“An applicant who seeks to annul an election bears the legal burden of proof throughout...”

84. This burden once discharged by the Petitioner shifts to the Respondents to disprove the claims made. At **paragraph 196 and 197** in **Raila case (supra)** the Court stated;

“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 irregularities 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.”

85. The gravity of the burden of proof shouldered by a Petitioner is aptly captured by the **Supreme Court of India in Rahim Khan vs Khurshid Ahmed and Others; 197 AIR 290, 1975 SCR(1) 643** where the Court stated;

“We have therefore to insist that corrupt practices, such as are alleged in this case, are examined in the light of the evidence with scrupulous care and merciless severity. However, we have to remember another factor. An election once held is not to be treated in a light-hearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantial grounds and irresponsible evidence, thereby introducing a serious element of uncertainty in the verdict already rendered by the electorate. An election is a politically sacred public act, not of one person or of one official, but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the Court to uphold the corrupt practice alleged against the returned candidate is adduced. Indeed election petitions where corrupt practices are imputed must be regarded as proceedings of a quasi-criminal nature wherein strict proof is necessary. *The burden is therefore heavy on him who assails an election which has been concluded.*”

THE STANDARD OF PROOF

86. The standard of proof in an election petition is above the balance of probability though not as high as beyond reasonable doubt.

87. Where the allegations touch on commission of a criminal offence, the standard of proof is beyond reasonable doubt. The Supreme Court of Kenya made this distinction clearly in its decision in **Raila 2013**, where the Court stated;

“...the threshold of proof should in principle, be above the balance of probability though not as high as beyond reasonable doubt... where there are criminal charges linked to an election, the party bearing the burden of proof must discharge it beyond reasonable doubt.”

88. The reason why a high standard of proof is required in an election petition is further emphasized in **Ramadhan Seif Kajembe vs. The Returning Officer, Jomvu Constituency & 2 Others [2013] eKLR at page 9** thereof where the Honourable Court made the following remarks;

“An Election Petition is a more serious matter and has wider implications than an ordinary Civil suit. What is involved is not merely the right of the Petitioner to a fair election, but the right of the voters to none interference with their already cast votes i.e. their decision without satisfactory reasons. To require the Petitioner to satisfy such standard of proof is not only fair, but reasonable in the circumstances. Petitions, as the Act itself provides, should not be easily allowed by mere production of evidence which might probably prove the allegations and this is why it is not enough merely to prove the allegations, but also necessary to prove that the allegations affected the results of the election. No doubt a person who seeks to avoid an election results has the duty to leading evidence in support of this allegations and without doing so, his petition must fail.”

ANALYSIS AND DETERMINATION

89. Both petitions herein have raised various issues of alleged non-compliance with the Constitution and the law citing illegalities, malpractices or irregularities, most of them cross cutting between the two petitions. I propose to deal with and resolve issues raised in Petition 10 separately and then embark on the issues raised in Petition 12 for clarity in my findings.

PETITION 10 OF 2017

90. I propose to address the various complaints of illegalities, malpractices and irregularities as they flow seriatim from the petition.

Voters denied the right to vote

91. It is the Petitioners' case as pleaded in paragraph 13 of the petition that eligible voters were denied the right to vote. The evidence in support begins with the affidavit of Albert Omambia Ogeto who was the Chief Agent of the 2nd Petitioner. He states that about 100 voters were denied the right to vote at Nyanturago Tea Buying Centre Polling Station despite being at the polling station by 5.00 p.m. Notably the witness does not state he was at this polling station or his source of information.

92. Mercelyne Nyakerario Isaka (PW6), a voter, in her affidavit depones that she went to Nyanturago Polling Station at 4.30p.m. She stayed for 20 minutes. Just before 5.00p.m. she was told by a security officer to go home. A former MCA intervened and PW6 and others were allowed to vote.

93. PW9, the 2nd Petitioner, depones that at St. Teresa Amesago Primary School at around 4.30 p.m. He found voters who had been denied entry into the polling station. He intervened and they voted. The same case applied at Keboba Tea Buying Centre Polling Station.

94. PW11, Richard Kerima Ratemo the Chief Agent PDP (3rd Petitioner's Party) has testified that he received information from Fred Bonuke, PDP agent at Rikendo and Hellen Obongi PDP agent at Nyanturago that some voters had been denied right to vote. He went to Rikendo and found station opened. At Nyanturago some members of the public told him they were denied right to vote.

95. I have applied my mind to this evidence. Mercyline states that intervention so that they could vote was by a known person, indeed a leader in the community. This witness is not called as a witness to confirm indeed that the polling station had been closed before hours. Even assuming that the 3 incidents were as narrated by PW6 and PW9, and whereas this would be a serious derogation from the provisions of **Regulation 66(1) and (2) of the Elections (General) Regulations, 2012**, the fact of the matter is that there is evidence all the voters cast their vote. The evidence of PW11 is hearsay and no evidence is availed of any voter who was denied the right to vote. Again the agent of 1st, 2nd and 3rd Petitioner signed the form 35A at Keboba Tea Centre Polling Station and the agent for the 3rd Petitioner signed the form 35A at St. Teresa Polling Station and Nyanturago Polling Station confirming the results and signifying that the proceedings at the said polling station were conducted within the law.

Identification of voters

96. It is alleged that the 1st and 2nd Respondents allowed voters who were not identified by the KIEMS kit or the hard copy register to vote. It is the evidence of Joseph Onchwati Bogonko (PW2) that he was an agent of the 2nd Petitioner at Ibeno Ward and part of Birongo Ward. Other than his ID card, he annexes nothing else to his affidavit. There is no letter of appointment nor an oath of secrecy. An agent is required by **Regulation 5(5), 57, 62(c) and 74(a)** to make an oath of secrecy and to be duly authorised/appointed by a party or candidate as such agent. His standing as an agent is thus heavily compromised. He says he saw voters who were not identified by the KIEMS kit allowed to vote with their names being recorded in an exercise book. He did not see a manual register. For his part he did nothing. Not even ask a question.

97. PW3, John Obonyo Morekerwa states that he was an agent of the 1st petitioner. He too has no supportive documents. His capacity as such is thus unascertainable. He states that he was an agent at Taracha Polling Station where he saw voters who voted and their names were recorded in an exercise book. Looking at the form 35A, this witness did sign it confirming the results.

98. PW2 and PW3's evidence is unreliable by virtue of their failure to establish that they were agents. Even if their evidence was taken as credible, it is inconceivable how as trained agents they came across such a grave malpractice in the electoral process, kept it to themselves and never took decisive action. No names of any person who voted in the manner complained of is given. Does the Court just take the allegation of the 2 witnesses which are not corroborated as gospel truth and use that as a basis to upset the sacred exercise that is the exercise of the people of Nyaribari Chache's sovereignty through the ballot? Certainly, credible and cogent evidence is necessary and the evidence presented to this Court is nowhere near cogent or credible. Similarly the evidence of PW11, a chief agent, regarding events at Borima and Chirichiro is bare and unreliable.

99. No evidence has been adduced in respect of the pleading on this head at paragraph 159 (a), (b), (d), (e), (f), (g) and (h) and those

allegations remain unproved.

Marking of voters with indelible ink

100. It is pleaded that at Irondi Primary School, Rikendo Primary School and Riondonga Secondary School voters were not marked with indelible ink as required by **Regulation 59(3) (61(4) and 69(1) of the Elections (General) Regulations 2012.**

101. The testimony that was presented was that of PW2, Joseph Onchwati Bogonko who as earlier indicated was an agent to monitor Ibeno Ward and part of Birongo Ward. As noted, his identity as an agent is questioned as no evidence is provided. He states he voted at Irondi Primary Polling Station and he noted that voters were not being marked with indelible ink after casting their votes. He asked the presiding officer but got no response. He gives no identity of any such voters nor is there evidence of a decisive step that he took.

102. PW5, Francis Ogoti Kengara testified that he is a personal assistant to the 3rd Petitioner. He is a voter at Riondonga Polling Station. After voting, he sat outside the polling station to monitor the proceedings. He saw Daniel Nyachio and Robert Mikuro, 2 voters whose fingers were not marked with indelible ink. The 2 confirmed to him that they had not been marked. The story of Francis Ogoti Kengara is an interesting one. Firstly, he comes to Court and brazenly admits to the commission of an offence. He was not an agent. He votes and remains at the polling station contrary to **Section 13(g) of the Election Offences Act.** Yet it is expected that this Court will take and treat his evidence as credible. Secondly, he names 2 persons who were not marked with indelible ink. For reasons unknown to this court, these 2 persons or at least one of them are not called as witnesses.

103. The other available evidence is that of Calvin Ombasa Ogembo (PW7). He describes himself as an observer who was at Irondi Polling Station representing a non-governmental organization known as Election Observer Group (ELOG). He states that he observed at Irondi Polling Station voters who were not marked with indelible ink after voting. Indeed he voted at 4.00 p.m. and he was not marked.

104. He prepared a report on the presidential election and submitted to ELOG. The Court did not have the benefit of a glimpse of the contents of this report probably because it related to the presidential election. It is important to note that the marking of voters with indelible ink is applicable to all the 6 elective posts and it was necessary for PW7 to add weight to his evidence by the production of the report he made. Failure to present the report to confirm his findings renders his evidence weak.

105. The totality of the evidence in respect of this pleading falls far short of the legal test. The burden of proof is not discharged. Were the burden to be equated to, the lifting of a huge stone, that stone would still be sitting pretty on the ground.

Denial of agents to access polling stations

106. As indicated above, agents are the eyes of the political parties, candidates and indeed the public in ensuring that an election is conducted in accordance with the law and devoid of any illegalities and irregularities in order to guarantee that the free will of the people expressed through their choice at the ballot is respected and given full effect.

107. Agents are not busy bodies in the elections. Their position is properly anchored in law **Section 2(a) of the Elections Act** defines an agent as;

“agent” means a person duly appointed by—

(a) a political party or an independent candidate for the purposes of an election under this Act; or

(b) a referendum committee for the purposes of a referendum under this Act,

and includes a counting agent and a tallying agent. ”

Section 30 of the Elections Act provides;

“(1) A political party may appoint one agent for its candidates at each polling station.

(2) Where a political party does not nominate an agent under subsection (1), a candidate nominated by a political party may appoint an agent of the candidate’s choice.

(3) An independent candidate may appoint his own agent.”

108. Once the agent is duly appointed and has the necessary documentation, entry at the polling station is a matter of right as provided under **Regulation 62(2) of the Elections (General) Regulations 2012.**

109. It is pleaded at paragraph 19 of the petition that the 1st and 2nd Respondents denied the agents of the 2nd and 3rd Petitioner entry to several polling stations contrary to Regulation 62 of the Elections (General) Regulations 2012.

110. During the hearing, PW2 Joseph Onchwati Bogonko who as seen herebefore describes himself as an agent monitoring Ibeno and Birongo Wards (No documents in support) states that in his patrols, he found that Wiper agents had been denied entry at Irondi, Irungu,

Nyamagwa, Rianyega and Kerera. The presiding officer told him that he had already admitted other Wiper agents. A similar problem was encountered at Riomeri and Ritiro Polling Stations.

111. The agents at Irungu, Rianyega, Kerera and Nyamagwa are not named. How does the Court establish who they were and that they were actually denied entry? The agents at Riomeri and Ritiro are named as Nathan Rogito and Micah Momanyi. These two(2) are not called to testify.

112. PW9 (the 2nd Petitioner) told the Court that Nixon Sikini an agent was locked out at Menyinkwa Tea Buying Centre. The presiding officer said the room was crowded. Nixon has not been called to testify and corroborate this fact.

113. PW8, Gilbert Omambia Ogeto's testimony appears on evaluation to be the one holding the key to this riddle. He states that on the 7/8/2017, he went to the tallying centre to present a list of agents to IEBC and to collect his badge. He was told to ensure that each agent had an appointment letter and oath of secrecy.

114. He discovered that one Nicholas Muimbi Nyamaro and Patricia Kwamboka, agents of the Wiper candidate for Governor seat had presented another list. Infact, Gilbert was unable to secure his badge because of this confusion. He only secured it on 8/8/2017.

115. And therein lies the answer to the riddle! It is manifestly clear from the evidence that there was a mix up over the appointment of agents within the Wiper party. That is confirmed by none other than the chief agent of the 2nd Petitioner.

116. How then can this internal disorganisation and confusion be blamed on the 1st and 2nd Respondents? I am satisfied that arising from the 2 lists admitted as existing, the presiding officers in the field were likely to be confronted with the arrival of more than one set of agents and they would be justified in denying entry.

117. In any event, the agents said to be locked out have not been called to testify.

118. PW11 has testified that agents for PDP party were denied entry atRiangabi Primary School - 2 and Gesere. He went there andresolved the issue. It was also reported to him that Derrick Kaunda,the agent at Nyabiuto Polling Station has been ejected from thepolling station. The said witness is not called to testify. Without theevidence of the agents herein, PW11's evidence remains hearsay.

119. No evidence is led that the persons said to have been denied entry had the requisite documents. In my considered view only the evidence of these agents confirming that they were actually appointed and they took oath of secrecy and that they presented themselves at the respective polling stations and were denied entry would suffice.

120. Consequently, prove that the said agents were locked out as claimed is lacking and that ground must fail.

Bias

121. It is pleaded that at Rikendo Polling Station, one of the polling clerks was a daughter of one of the candidate for the seat of Member of County Assembly, one Charles Chacha Maina who was vying on a Kenya Social Congress Party. The clerk was incharge of marking voters with indelible ink. A complaint raised elicited no action from the presiding officer who pleaded lack of power to relieve the clerk of the duties.

122. The evidence to confirm the said relationship is sketchy. Even assuming that it is shown that Nancy Maina was a daughter of a candidate, mere allegation of bias will not suffice.

123. The appointment of election officials must of necessity be tempered with a high degree of neutrality of the persons picked. Where the existence of a semblance of bias can be established then such a person should not be considered for duty as an election official.

124. To achieve this **Regulation 5(2)** of the **Elections (General) Regulations 2012** provides;

“Regulation 5(2): Prior to appointment under subregulation (1), the Commission shall provide the list of persons proposed for appointment to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them make any representations.”

125. The obligation by the 1st Respondent is to furnish political parties with the list 14 days before elections. In our instant case, it was incumbent upon the Petitioners to show that the 1st Respondent had not supplied the list to their political parties.

126. I rely on the decision of this Court in **Zebedeo John Opore vs. IEBC & 2 Others, Election Petition 2 of 2017** where the Court citing with approval the decision of **Mokwaledi Bagwasi vs. Seabe Morueng & Another, Misc. Application No. F228 of 2004 The High Court at Botswana** held;

“Where a Petitioner asserts that an election official is biased against him, he should adduce evidence to show the manner in which the election official was biased. In the present case the Petitioners made what amounted to bald allegations and did not adduce evidence to prove those allegations.”

127. No acts or omissions of the said Nancy Maina are shown to have any effect on results at Rikendo Polling Station and no party was

prejudiced.

Assisted voters

128. A Court of law relies on evidence not on intuition, feelings or general perceptions of a litigant. When a party alleges a set of facts, proof of the same must be provided. Oral evidence is good evidence. But when such evidence comes from a single witness and is not corroborated then it becomes the word of the accuser against the accused which leads to an obvious stalemate.

129. The **Evidence Act** at **Section 3(4)** provides;

“Section 3(4): A fact is not proved if it is neither proved nor disproved”

130. The need therefore for parties in an electoral process to gather and document evidence throughout the process cannot be gainsaid. An agent who acts for a candidate at a polling station shoulders a heavy responsibility to safeguard the integrity of the electoral process not only for the benefit of the candidate but in the interests of the public. It is not enough for a witness(agent) to allege; proof above the balance of probability is required.

Assisted voters

131. It is pleaded at paragraph 18 of the petition that assisted voters were given voter assistance in contravention to **Regulation 72(2) and (6)** of the **Elections (General) Regulations 2012**.

132. The presented evidence is that of PW3, Job Obonyo Morekerwa, PW4, Saphania Otundo Monyenye, PW7 Calvin Ombasa Ogembo, PW10 (3rd Petitioner) and PW11 (Richard Kerima Ratemo).

133. PW3 saw the presiding and deputy presiding officers at Taracha Primary School Polling Station assist voters without agents witnessing. He saw at least 4 voters assisted that way. PW4 stated that he saw 10 – 15 voters assisted irregularly. He was an agent at Ibeno Secondary School. PW7, an observer with ELOG, stated he saw more than 20 voters assisted by agents. PW10 stated he voted at Riondonga on priority being a candidate. He observed a Ford Kenya Party Agent assist a voter without an official of the IEBC. The agents name is Ombui Onchuru. He asked the presiding officer and he was told that that was within the rules as an illiterate voter was not to be crowded.

134. PW10 further testifies that at Boruma Secondary School Polling Station, he saw a lady assisted by one agent only. PW11 testifies that he was called by a member of the public who informed him of irregular voter assistance at Nyangowa Polling Station.

135. I have carefully analysed the evidence of these witnesses. The act of irregular assistance of a voter is tantamount to disenfranchising a voter as the possibility of a voter being misled by a biased party is real resulting in a choice by the person assisting and not the voter. **Regulation 72(2) and (6)** of the **Elections (General) Regulations 2012** is couched in very clear terms to protect a free choice of a voter. It provides;

“Regulation 72(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.

(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.”

136. PW10 was a candidate in this election. He saw a grave irregularity being carried out. Other than a meek questioning of the presiding officer (and this he witnessed at 2 polling stations), no other decisive action is taken including but not limited to making necessary report to higher echelons of the electoral body or even the police.

137. Similarly, the agents herein also slept on their laurels and now expect the Court to take their word to the bank. I would love to do that, but the law of evidence and the degree of proof provided in a matter like the one before me makes their uncorroborated word of mouth unbankable.

138. I reiterate what the Court stated in **Zebedeo John Opore vs. IEBC & 2 Others Election Petition 2 of 2017**;

“Noting that it is trite law that whoever alleges proves and further alive to the heavy burden of proof on a petitioner in an election petition, I am of the very considered view that it is not enough for an agent who is in law the eyes of the political party, candidate and indeed the public to casually state there were irregularities and illegalities in an election without backing that with tangible evidence that the Court can rely on.

Where the agent, like in our instant case is/are guilty of inaction, the credibility of the complaint and its sustainability becomes rather dicey. The presiding officers and returning officers managing the election process are not the agents' bosses. It is the responsibility of the agents to keep those officers in check to ensure that they operate within the law. It is not in vain that the agents are trained before the elections. Where there is non-compliance with the law or any form of irregularities then the duty of the agents to collect, preserve and present cogent evidence before court cannot be gainsaid. The burden of proof must be born in mind throughout.”

139. On the material before me on assisted voters and denial of entry of agents into polling stations, I am persuaded that the same falls short of proof above the balance of probability as necessary and make a finding that the ground is not proved. I hasten to observe that a more proactive approach by agents is needed if elections have to attain credibility. More tools and proper training and proper reporting lines need to be established if reliable evidence is to be secured. I opine that the need to document evidence as the election progresses is a sure guarantee of an effective challenge to the outcome of the an election should the need arise.

Admission of more than one agent allied to Jubilee Party

140. It is alleged by PW11 that the presiding officer was intimidated into allowing more than one agent for Jubilee at Nyangowa Polling Station. PW11 was a chief agent. He made no formal complaint. His word is not corroborated.

141. Though pleaded, my perusal of the record shows no evidence adduced in support of this ground. It is not sustainable.

Rejected ballot papers

142. It is pleaded at paragraph 22 of the petition that at several polling stations rejected ballot papers were incorrectly declared so, and handled and recorded in the polling stations diary, form 35A and form 35B. A list of polling stations with this anomaly is given.

143. It is now settled that the results at the polling station are final. The **Court of Appeal in IEBC vs Maina Kiai & 5 Others [2017] eKLR** while confirming the finality of results at the polling station stated;

“It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters' will. The counting of 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.”

144. Consequently, if there be a dispute over the number of valid votes cast or the rejected votes, the true locus where this anomaly can be resolved will be at the polling station through a thorough examination of the form 35A and where found necessary a look at the contents in the ballot box (vote recount).

145. Any transposition to derivative forms, in our case to form 35B is for the purposes of tallying only and the returning officer at this stage cannot change the votes as declared at the polling station.

146. I saw and heard witnesses in this matter. None of the witnesses has offered evidence of the incorrect declaration of rejected ballot papers at the various polling stations named in paragraph 22 (a) to (ff) of the petition.

147. No agent has contested the votes assigned to any of the candidates in the forms 35A. Without the evidence of an agent confirming that rejected ballots were incorrectly declared at a particular polling station and recorded in the polling station diary and form 35A, this claim remains hollow.

Erasing/Overwriting and Correction of form 35As

148. From the 10 witnesses who testified on behalf of the 2nd and 3rd Petitioners, evidence in support of overwriting, erasing or correction of form 35As is not forthcoming.

149. Such evidence can only be credibly given by agents present and witnessing the count and recording of the results in the declaration forms as a result of which they would be at a vantage position to confirm or deny the correctness of the contents. Without such evidence from agents, the allegation herein sits on quick sand.

150. It is to be noted too, that, elections are conducted by human beings who in the natural order of things are prone to error.

151. The Court (*Majanja J*) in **Wavinya Ndeti vs. IEBC and 4 Others** captured this succinctly when it stated;

“An election is a human endeavour and is not carried out by programmed machines. Perfection is an inspiration but allowance must be made for human error. Indeed the evidence is clear that the counting and tallying was being done at night and in less than ideal conditions, hence errors, which were admitted were bound to occur particularly in the tallying of results. What is paramount is that even in the face of such errors whether advertent or otherwise, is that the will of the electorate is ascertained and upheld at all costs.”

152. Again, in an elaborate exercise like a general election, errors will occur and same may find correction in overwriting, erasing or otherwise. What is important is for a party to show if there is an intention to defraud. In the case of **Peter Gitenyi Mochorwa vs. Timothy Moseti E. Bosire & 2 Others [2013] eKLR**, it was held;

“There is no requirement that the entries of Form 35 or any other form be without alteration. The constitutional requirement for accuracy in election system cannot be construed to mean that the statutory forms for the recording of the results of an election must never have errors, corrections or alterations. Accuracy does not mean free from error which has

been corrected, an impossibility in all human endeavour; accuracy will be served, if there exists a means of verification of the entries to test for their accuracy and it necessarily imports corrections by alterations, whether countersigned or not.”

153. On the evidence before me I come to the conclusion that none of the 10 witnesses called has shown the existence of the erasings, overwritings or corrections complained of and even where existent, such errors are a normal occurrence in human activity and the same do not affect the result. No evidence is laid of how if at all the errors would affect the result.

Results transmission

154. It is pleaded that the presiding officers failed to transmit results electronically to the constituency tallying centre contrary to **Regulation 82** of the **Elections (General) Regulations, 2012**. The 2nd Respondent has denied this and indicated that the results were transmitted electronically.

155. Be thus as it may, a reading of **Section 39(1) (c)** of the **Elections Act** shows that electronic transmission of results is only a statutory requirement for presidential election. Except for voter registration and voter identification, voting, counting, tallying and transmission of results for the election of other elective posts including that of Member of National Assembly are mainly manual. (see **Seth Ambusiro Panyako vs. IEBC & 2 Others [2017] eKLR**).

156. In **Election Petition No. 3 of 2017 Jackton Ranguma vs. IEBC and 2 Others**, the Court states at **paragraph 39**;

“Even accepting the errors, omissions and inconsistencies highlighted by PW4 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.”

157. It follows then that this complaint even if it had been proved valid would not affect the election and the results herein.

Discrepancies in issuing and records of ballot papers, records of voter attendance and accounting for election materials

158. It is alleged that there was widespread discrepancies in the issuing and records of ballot papers, records of voter attendance and accounting for election materials in 37 polling stations listed under paragraph 25(a) to (kk) of the petition.

159. I have painstakingly gone through the evidence of the 10 witnesses called to testify. I have not come across any evidence from any of the witnesses giving specific evidence of the occurrence of these discrepancies in the specific polling stations. PW11 had attached copies of polling station diaries in his affidavit which could have spoken to this but for reasons expounded in the Court's ruling dated 5/12/2017 the said documents were expunged from record.

160. The persons who could have testified authoritatively on the goings on at the polling stations mentioned would have been the agents assigned duty in those stations. In the absence of such evidence this ground is a limping one and its journey shortlived. It certainly falls.

Inconsistency in the records of results of candidates total votes cast and rejected votes as reflected in forms 35A, polling station diaries and form 35B

161. Under this head, 36 polling stations are listed at paragraph 26 of the petition. The agents called as witnesses are Job Obonyo Morekerwa (PW3) who was an agent at Taracha Primary Polling Station. I note the form 35A is signed by 2 Wiper agents at that polling station. The other agent called is Zaphania Otundo Monyenye (PW4), an agent at Ibeno Secondary School. The form 35A is signed by both agents of Wiper and PDP parties. The other witnesses are the 2 candidates, a voter, an observer, a personal assistant to 3rd Petitioner, an agent for 2 wards and 2 chief agents. None of all the other agents in the polling stations listed under paragraph 26 of the petition are called to confirm the total votes cast and the rejected votes in the polling stations. Without this crucial evidence of the final results at the polling station (Maina Kiai case) for comparison with the form 35B, the inconsistency alleged is not established. The Petitioners had sought to rely on documents in the petition running from pages 197 – 719 which documents were expunged by Court.

Irregular counting and tallying and mishandling of ballot books and statutory forms

162. This complaint relates to 2 polling stations, Nyanchwa Primary Polling Station 1 and Kegati Primary Polling Station 3. At Nyanchwa it is alleged that there was no result transmitted or declared for Nyanchwa Primary School Polling Station 1 and in polling station 2, this had 2 forms 35A with different results. At Kegati Polling Station 3, it is said there were more ballot papers issued to voters for the election of Member of Parliament than for the 5 elective posts.

163. To begin with, the allegation at Kegati Polling Station 3 was not supported by any of the 10 witnesses called by the Petitioners. In any event the results thereof were confirmed by the signing of form 35A in respect to this station by both agents of Wiper Democratic Party and PDP Party.

164. As regards the allegation about Nyanchwa, the 2nd Respondent when cross-examined by Mr. Ochwangi confirms that there were 2 forms for Nyanchwa 2 of 2. One is signed by Phelgona Ombachi who was presiding officer at Nyanchwa 1 of 2. He is cross examined further by Mr. Omogeni and he confirms that;

“At page 40 of the Petition is the form 35A for Nyanchwa 2 of 2 signed by Phelgona Ombachi. The 3rd Respondent was given 0 votes in this station. At form 35B the 3rd Respondent has 0... even if the votes for Nyanchwa were taken away i.e. 458 the 3rd Respondent would still be the winner. “(See page 156, 2nd paragraph).”

165. On the material before me, I am persuaded there was a mishandling of the forms 35A at Nyanchwa Polling Station. No satisfactory response is coming from the 1st and 2nd Respondent and this complaint is founded, I hasten to note, however, that as per the record the 3rd Respondent garnered 0 votes as indicated in the form. The effect of the total 458 votes in this station on the overall result is negligible.

Campaign posters and holding of campaigns

166. PW7, Calvin Ombasa, an observer at Irondi Polling Station states that he saw campaign posters for the 3rd Respondent and an MCA candidate. He saw some agents campaigning. This evidence is bare and uncorroborated. The pleading states that there were campaign posters for **various candidates** displayed outside the polling station and at the gate/entrance of polling station (sic) on the day of the election and that some agents were allowed to campaign for the candidates as the voters waited in the queue.

167. The said agents who were campaigning are not named. The candidates whose posters are mentioned are not named, action taken if any is not stated. The evidence adduced is insufficient.

Mishandling of election materials

168. At paragraph 31 of the petition it is averred that ballot boxes at several polling stations were opened in the absence of the Petitioners' agents. Further that agents at Rikendo Primary Polling Station were given a compulsory break by the presiding officer before being allowed to go back to the voting room. It is also alleged that ballot boxes and electoral materials were discovered after the elections at a hotel.

169. I have had a review of the evidence on record. I have not encountered a shred of evidence from any agent that ballot boxes were opened in absence of agents. The complaint herein was couched in general terms. It is alleged this happened in several unnamed polling stations. Confronted with this generalised pleading lacking in particulars, how were the Respondents to effectively counter the allegations?

170. The allegations of a compulsory break at Rikendo is watered down by the fact that the agents of both wiper and PDP signed the form 35A at Rikendo 2 of 2 and the agent for wiper signed the form 35A at Rikendo 1 of 2. In both instances, there is no whimper of a complaint from the agent.

171. As regards the issue of election material found at a hotel, the 1st and 2nd Respondents have explained that these were dummy election materials used during training. The Petitioners did not initiate any investigations to counter this or to create a nexus between these materials to the impugned election. In any event, the Petitioners' evidence is based solely on newspaper cutting which is not reliable as a piece of evidence.

172. The **Court of Appeal** in **IEBC vs. National Super Alliance (NASA) Kenya & 6 Others** [2017] eKLR held;

“On our part, having considered the evidence on record and the law relating to admissibility and probative value of newspaper cutting, we find that a report in a newspaper is hearsay evidence. We are conscious of Section 86(1) (b) of the Evidence Act which provides that newspapers are one of the documents whose genuineness is presumed by the Court. This section prima facie makes newspapers admissible in evidence. However, a statement of fact contained in a newspaper is merely hearsay and therefore inadmissible in evidence in the absence of the maker of the statement appearing in court and deposing to have perceived the fact reported. Even if newspapers are admissible in evidence without formal proof, the paper itself is not proof of its contents. It would merely amount to an anonymous statement and cannot be treated as proof of the facts stated in the newspaper.”

The allegation herein falls flat on the face.

Failure to give forms 35A to agents

173. It is pleaded at paragraph 32 of the petition that the Petitioners' agents were not given forms 35A by presiding officers as required under **Regulation 79 of the Elections (General) Regulations 2012**. Again, the issued forms were unstamped, had alterations and had contents illegible and the contents in some were different with those retained by IEBC.

174. I note from the evidence that no agents have testified to prove this fact. Again, on the issue of alterations, unless an agent was able to show that alterations were after the declaration and signing of the form, alterations or corrections alone cannot vitiate a form. (See **Peter Gitenyi Mochorwa vs. Timothy Mosei E. Bosire & 2 Others**).

175. On the issue of the stamping of the forms, this is not a mandatory legal requirement. The **Court of Appeal** in **Stephen Mutinda Mule & 3 Others vs. IEBC & Another** C. A. 219 of 2013 [2014] eKLR held;

“There is no stamping requirement in the case of the Form 35. All that is required with regard to Form 35 as provided for in regulation 79 is the signature of the presiding officer and the agents of the candidates. We agree with submission on behalf of the appellants that it is the signatures of the presiding officers and agents that authenticate the Form 35. If any such forms were stamped, it was a gratuitous and superfluous discretionary or administrative act incapable of creating a

statutory obligation, less still the invalidation of the Form 35 that did not contain the stamp. On this score too the appeal succeeds.”

Violence at tallying centre

176. It is alleged that there was violence at the tallying centre and the 3rd Respondent was allowed to access the tallying centre with about 100 supporters, who, led by him, intimidated the 2nd Respondent and his officials.

177. PW8, PW9 and PW10 have testified that the 3rd Respondent harassed the 2nd Respondent demanding to be declared the winner of the election. PW9 states there was commotion and disorder. 3rd Respondent argued with the 2nd Respondent. PW8 and PW10 state they saw the 3rd Respondent go to the ICT area at the tallying centre.

178. These allegations are denied by the 3rd Respondent. The 2nd Respondent when cross-examined by Omogeni stated that he had over 20 police officers plus the OCPD and AP Commandant and in those circumstances, it was not possible for the 3rd Respondent to snatch his laptop.

179. These allegations are criminal in nature. The degree of proof required is beyond reasonable doubt. No report was made to police against any person in relation to the activities at the tallying centre. The alleged victim, the 2nd Respondent categorically states that the situation at the tallying centre was secure and he had over 20 police officers. Indeed the OCPD and AP Commandant were present. Is it possible that a crime would have happened before their eyes without inviting their action. That is highly doubtful.

180. When cross-examined by Ms Makobu, DW2 (3rd Respondent) stated;

“I was not violent to any officers. I never intimidated the returning officer. My supporters never intimidated the returning officer or his officers.”

181. As held by the **Supreme Court** in **Dickson Mwenda Kithinji vs Gatirau Peter Munya & 2 Others**, **High Court Election Petition No. 1 of 2013**;

“The allegations made by the Petitioner were of criminal nature and required to be proved beyond reasonable doubt. The allegations by the Petitioner were not proved nor was there an attempt to prove the same. They remain just mere allegations which this court cannot rely on as they have not been proved to the required standards.”

This ground fails.

Bribery

182. Incidences of bribery are pleaded at paragraph 34 as having taken place at Esamba Primary School Polling Station and Riondonga Secondary School Polling Station. PW5, a personal assistant to the 3rd Respondent testifies that he saw one Florence give money to voters at Riondonga Polling Station. He witnessed this with Job Onganchwa, Martin Mikuro, Rumeo Moindi, Denis Gekanana, Mosoti Osongo and Ongaki. Notably, none of these are called as witnesses. The witness states he reported to the security officers present but Florence ran away.

183. PW9 states that he was informed of bribery at Esamba. He went there and reported to security officers who brushed him off. He mentions a man (unnamed) who told him that he had been given Kshs. 500/= to vote for 3rd Respondent. He confronted 2 people a man and woman who ran away.

184. PW11 states that one Denis Oseko was found bribing voters at Kabasi Primary School Polling Station. He was accosted by a chief and a police officer. The said Oseko was led away by a police officer. The said Chief and police officer are not called as witnesses. There is no record of a formal report of this alleged crime.

185. Bribery is a criminal offence. The degree of proof required is beyond reasonable doubt. The evidence of the 2 witnesses does not identify the person(s) giving the bribes and those who received. It is a generalised allegation. The Florence named, is not properly identified. No formal reports were made to police.

186. I rely on the decision in **Razik Ram vs. J. S. Chauhan** AIR 1975 SC 667, where the **Supreme Court of India** held;

“A charge of corrupt practice is substantially taken to be a criminal charge, the trial of an election petition being in the nature of an accusation, bearing the indelible stamp of quasi-criminal action, the standard of proof is the same as in a criminal trial. Just as in a criminal case so in an election petition the Respondent against whom the the charge of corrupt practice is leveled, is presumed to be innocent unless proved guilty. A grave and heavy onus, therefore, rests on the accuser to establish each and every ingredient of the charge by clear, unequivocal and unimpeachable evidence beyond reasonable doubt. A charge of corrupt practice cannot be established by a mere balance of probabilities and, if after giving due consideration and effect to the totality of the evidence and circumstances of the case, the mind of the court is left rocking with reasonable doubt, it must hold the same as not proved.”

187. Closer home the in decision in **Wavinya Ndeti vs. IEBC and 4 Others** [2013] eKLR the Judge citing with approval the decision in **Mohamed Ali Mursal vs Saadia Mohamed & 2 Others** [2013] eKLR stated;

“Bribery is an electoral offence. It is also a criminal offence in ordinary life. Being such, proof of the same must be by credible evidence and in my view, nothing short of proving this offence beyond reasonable doubt will suffice. There is no distinction as far as I am concerned, and rightly so, between bribery in a criminal case and one in an election petition. Bribery involves offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of the person receiving. Under the Act, bribery is an election offence under Section 64 and both the giver and the taker of a bribe in order to influence voting are guilty of this offence upon proof. The penalty found under Part VIII – General Provisions of the Act, specifically Section 106(1) of the Act is a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years or to both.”

188. The evidence before me is insufficient to show that money changed hands with the intention of influencing voters, it was given by a particular person and was received by voters. The degree of proof required is not achieved.

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189. On the part of the 1st Petitioner, the evidence on record is his affidavit evidence which he adopted in his evidence in chief on the 17/11/2017 and the answers in cross-examination and re-examination. Though 2 other witnesses Jefferson Mambo Ogero and Douglas Nyaberi Bosire filed affidavits; they were not called to testify. Suffice it to note that under sub-heading 'B' titled Grounds of the Petition, the Petitioner cites generally the breaches of the **Constitution**, the **Elections Act**, the **Elections (General) Regulations, 2012** and the **Elections (Technology) Regulations, 2017**. I propose to analyse the various breaches complained of as they flow seriatim.

Declaration of the 3rd Respondent as winner despite not receiving greatest number of valid votes.

190. This pleading is found at paragraph 15 of the petition. The relevant evidence is at paragraph 14 of the Petitioner's affidavit (the affidavit). Indeed paragraph 14 of the affidavit is a copy and paste of paragraph 15 of the petition. There is no attempt to give evidence of what the greatest number of voters was. When cross-examined by Mr. Omogeni, the 1st Petitioner at page 42 of the proceedings states;

“In (sic) page 16 paragraph 14 of my affidavit, I state that the 3rd Respondent was not the winner. Under paragraph 14, I have not annexed a schedule of how the vote tally was in the affidavit....”

191. There is no evidence showing alternative votes that the 3rd Respondent and the 1st Petitioner got respectively other than the declared 14,140. It was incumbent upon the 1st Petitioner to prove the fact that the vote tally was different from what was announced. Certainly, this could have been achieved by the 1st Petitioner presenting his tallying from results received from his agents. This is a serious allegation which is not supported by evidence.

Irregular and unlawful count of votes by presiding officers

192. It is the 1st Petitioner's case that the presiding officers undertook irregular and unlawful count of votes. At paragraph 15 of the affidavit, he avers that presiding officers irregularly and unlawfully undertook the count of the votes and in the process denied and/or deprived him of valid votes cast in his favour. He adds at paragraph 16, 17, 18 and 19 that there was alteration, manipulation and doctoring of votes and as such the votes reflected in the forms 35A did not reflect the count of votes in his favour. This led to an illegal increase in the votes of the 3rd Respondent to 14,140 and reduction of his votes to 10,445. He avers that the tally returned by the 2nd Respondent grossly differed with the votes actually counted.

193. In a democratic system, the people express their will through the casting of their vote indicating the specific choice(s) of their leaders. The correct and accountable counting of the votes so cast is the bedrock of the election process since the vote count is what determines who the elected leader(s) is. Therefore any form of manipulation of the vote during the count is enough to vitiate an election when proved.

194. The counting of votes is such a serious affair that a candidate or his agent is given room to counter-check the counting twice. **Regulation 80** of the **Elections (General) Regulations 2012** provides;

“80(1) A candidate or agent, if present when the counting is completed, may require the presiding officer to have the votes rechecked and recounted or the presiding officer may on his or her own initiative, have the votes recounted:

Provided that the recount of votes shall not take place more than twice.

(2) No steps shall be taken on the completion of a count or recount of votes until the candidates and agents present at the completion of the counting have been given a reasonable opportunity to exercise the right given by this regulation.”

195. The importance of confirming the correct count cannot be gainsaid. The law is now settled; the results from the polling station are final! The **Court of Appeal** in **IEBC vs Maina Kiai & 5 Others** succinctly put it this way;

“It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters' will. The counting of 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 appellants mouth.”

196. From the foregoing, any challenge mounted against the counting of votes must be ring-fenced with evidence from the counting room to expose any irregularities if at all. Naturally such evidence would be in the hands of agents representing the interests of political parties or candidates at the various polling stations.

197. The 1st Petitioner has not called any such agent. For this Court to determine if there was irregular and unlawful count of the votes at the polling station, the evidence of the agents present would have been not only necessary but crucial. The burden of proof lay on the 1st Petitioner to prove that there was irregular or illegal count of votes. To quote from the case of **Dickson Mwenda Kithinji vs. Gatirau Peter Munya & 2 Others** [2013] eKLR;

“The court on perusal of the Petitioner's evidence, that of his witnesses affidavits, it notes that there was no single agent who was called to testify who alleged to have been present at Kaguru Tallying Centre, Nchuui Primary School, Karurune Polling Station, St. Mary's Immaculate, Mikinduri Polling Station, Mikinduri Factory and Murembu Primary School. The allegations in respect of the above polling stations were not even backed by Witnesses Affidavits.

Simply it is clear that in election petitions, the legal burden rests with the Petitioner to succinctly demonstrate that there was non-conformity with the law on the part of the Respondents in engaging in or permitting the commission of electoral malpractices, and in the declaration of results and that the alleged non-compliance affected the validity of the elections. The Petitioner must therefore adduce, before the Honourable court, firm and credible evidence of departure on the part of the Respondents from the prescribed law.”

198. In the civil case **Kirugi & Another vs. Kabiya & 3 Others**, the Court held that the burden was always on the plaintiff to prove his case on a balance of probabilities even if the case was based on formal proof. In our case the degree of prove is higher than on a balance of probability and it lies on the Petitioner throughout until discharged for it to shift to the Respondents.

Scheme altering, manipulating and/or doctoring record of vote count

199. At paragraph 17 in the petition it is pleaded that there was arbitrary reducing of the vote count in favour of the 1st Petitioner in 46 polling stations. There was also adopting (sic) and adjusting figures in the statutory forms in various polling stations at Kiogoro Ward. There was arbitrary addition of 3rd Repondent's votes in 46 polling stations and the 1st Petitioner's votes were unlawfully posted in favour of other candidates and there was altering and erasing of votes cast in favour of the petitioner at various polling stations. There was also upgrading of votes in favour of the 3rd Respondent at various polling stations within Kiogoro, Bobaracho, Kisii Central, Keumbu, Birongo and Ibeno County Assembly Wards. The 1st Petitioner's agents were denied the chance to verify or authenticate the alterations.

200. This pleading is too generalized and confronted with it, I am at a loss as to whether a Respondent would be in a position to respond to it.

201. I have painstakingly gone through the affidavit and I am hard pressed to see any evidence specifically supporting this pleading. The questions that readily spring to mind are;

- (i) What is the number of the votes in favour of the 1st Petitioner that were reduced in 46 polling stations?
- (ii) In which polling stations was this done?
- (iii) In what polling stations in Kiogoro ward were figures in statutory forms adjusted?
- (iv) In which 46 polling stations were the votes of the 3rd Respondent added and in what numbers?
- (v) How many of the 1st Petitioner's votes were posted in favour of other candidates and to which particular candidates?
- (vi) How many votes of the 1st Petitioner were altered and in which polling stations?
- (vii) Which agents were denied the chance to verify or authenticate alterations made?

On the material before me, I find no answers to these pertinent questions and the allegations remain hollow. It would be expected that clear, cogent and credible evidence is laid before Court answering all the questions posed above. That is not done and without specifics especially from agents of what the actual votes were at the polling stations, the claim remains unsubstantiated.

202. I have carefully considered the table produced at paragraph 28 of the petition which is titled 'particulars of polling stations requiring scrutiny.' I have had due regard to the forms 35A and form 35B exhibited. I have put into account the evidence of the 1st Petitioner in his answers in cross-examination. A few excerpts would be useful; when questioned on Nyamemiso Polling Station he states;

“According to form 35A it shows I had 54 votes. At page 22 the form 35B shows it had 54 votes. The information does not show the lost votes.”

203. When questioned about Nyosia Primary School (02) where he alleged the rejected votes varied in form 35A and 35B he stated (page 39 of the proceedings);

“At page 60 we have form 35 for Nyosia. Rejected votes are 5. At form 35B at page 22 Nyosia (at No. 5) the rejected votes are 5. The votes rejected are thus the same.”

204. Questioned about Nyaguta Primary Polling Station 1 of 1 were he made a similar allegation, he states;

“At page 8 of the petition at Nyaguta 1 of 1, the corresponding form at page 143 of the petition, shows 5 rejected votes. What is in the petition is not true. The petition is unfounded.

205. This admission was repeated in regard to the complaints in Jogoo Primary School (01) and (05), Bobaracho Primary School (01), Kegati Primary School (01) and (02) and Irondi Primary School (01). Besides, for those polling stations where irregularities in the posting of votes was admitted by the respondents, the errors were minor, inadvertent and not tailored to favour any candidate. I examined the forms and noted that most of the claims had no basis and were disproved by the 1st Petitioner's own evidence.

206. As held in Joho vs. Nyange 2008 3 KLR such errors are expected in an election and it is important to consider how they affect the results. The Court stated;

“In my view, the errors made and irregularities committed in this petition fall in two categories. The first one is the errors or mistakes that I would call innocent even though negligent. The second category is those deliberate irregularities or forgeries that were committed. In respect of the first category I would like to say this: error is to human. Some errors in an election like this, conducted under a frenetic schedule, are nothing more than what is always likely in the conduct of any human activity. If they are not fundamental they should always be excused and ignored. But where deliberate irregularities or forgeries are committed different considerations come into play. In either case, however, serious consideration should be given as to what effect, if any, those errors whether innocent or deliberate, have on an election before the same is vitiated.”

207. I am satisfied that there exists no premeditated and persistent errors which reveal a pattern to prejudice any candidate. The errors at Masongo Primary School Polling Station are illustrative of this. At paragraph 28 of the petition, the 1st Petitioner complains that the forms 35A and 35B varied in terms of the candidates' votes and valid votes cast. It was also this polling station that he cited as proof that his votes were reduced by (7) while the 3rd Respondent's were increased by 10.

208. I have examined the forms 35A and 35B for this polling station and Masongo Primary School Polling Station (02). The latter station was cited by the Respondents to rebut the allegations of deliberate manipulations of results to favour the 3rd Respondent.

209. The form 35A for Masongo (01) as filed has no errors and it has in fact been signed by the 1st Petitioner's agents. The results of this stream were not transposed into form 35B. The returning officer instead entered the results of the stream (2). As a result, in form 35B, the results for Masongo (01) and (02) are the same. It was clearly an inadvertent error. It is worth pointing out that in form 35B, Masongo Primary School (02) the 3rd Respondent has 11 instead of 111 votes. Therefore in Masongo Primary School (01) and (02) both the Petitioner and 3rd Respondent lost votes.

210. The Petitioner failed to prove that votes were manipulated to favour the 3rd Respondent or any other candidate.

211. It should be appreciated that mere alteration or correction of forms by itself without evidence of fraud or illegal intent will not suffice to challenge results in a declaration form. As held by this Court (Muriithi J) in Paul Gitenyi Mochorwa vs. Timothy Moseti E. Bosire & 2 Others [2013] eKLR;

“There is no requirement that the entries on form 35 or any other form be without alteration. The constitutional requirement for accuracy in an election system cannot be construed to mean that the statutory forms for the recording of the results of an election must never have errors, corrections or alterations. Accuracy does not mean free from error which has been corrected, an impossibility in all human endeavour; accuracy will be served, if there exists a means of verification of the entries to test for their accuracy and it necessarily imports corrections by alterations, whether countersigned or not.”

212. There was need to tender evidence to show that any alterations complained of were done after the declaration of results and with intent to interfere with the outcome. The court in Dickson Mwenda Kithinji case (supra) had this to say on this;

“The only apparent rectification is valid votes in Nkubu Stream 1 to read 629 from a figure which had been indicated earlier. Valid votes cast are arrived at from totaling the respective candidates' votes. Any other figure would have been incorrect. Pursuant to the 3rd Respondent's overall Constitutional obligation under Article 86(c) of the Constitution to ensure that the tallies of votes submitted from the polling stations are accurately collated, nothing stops the presiding officers from making corrections on the Form 35. Further, the said corrections were made before the five(5) agents signed the form. No evidence was adduced by the Petitioner to show that the alterations were made after those agents signed the Form 35. In view of the foregoing, the Petitioner has not demonstrated that there was manipulation of the results as suggested.”

Generation, usage and/or reliance on fictitious declaration forms

213. It is the Petitioner's case at paragraph 22 of the petition that the 2nd Respondent was obliged to fill form 35B relying on forms 35A submitted by the presiding officers from the 149 polling stations in Nyaribari Chache Constituency. To the contrary, the 2nd Respondent used self generated, non-existent and fictitious forms 35A not supplied by the presiding officers. The evidence available in support of the contention is found at paragraph 23 and 24 of the affidavit where the above averment is restated verbatim. It is added at paragraph 25 that

consequently, the 2nd Respondent purportedly declared the 3rd Respondent the winner of the election without verifying and completing form 35B in the presence of the agent(s) of the 1st Petitioner who were present.

214. This is a very serious allegation. It is actually a criminal offence under **Section 13(e)** of the **Election Offences Act**. Thus the allegation invites the high degree of proof “beyond reasonable doubt.” The averments at paragraphs 23 and 24 are bald and are mere restatements of the pleading.

215. The 1st Petitioner avers that his agents were present when the illegality happened. These agent(s) (and it is curious that the 1st Petitioner seems not to know whether only one agent was present or more by use of the word agents(s)) are not named and neither are they called as witnesses. I would presume that these would be agent(s) at the tallying centre. Did they see or view the self generated forms? Did they confirm that the results thereon contradicted the returns from their agents at the polling stations? What action was taken to formally report this heinous crime and atrocity committed against the entire population of Nyaribari Chache Constituency if at all? Without them giving testimony, this Court will never know.

216. Under cross-examination (page 12 last paragraph of proceedings), the 1st Petitioner states;

“At paragraph 24, I state form 35B was filled from fictitious forms 35As. I have not listed the fictitious forms at page 1 to 13. The polling stations where they emanated from are not listed in the petition.”

217. The said fictitious forms are not annexed to the petitioner's affidavit. No agents are called to confirm that the results as posted from the alleged fictitious forms were contrary to results at the polling stations.

218. As stated earlier the alleged act by the 2nd Respondent constitutes a recognizable criminal act. In the circumstances the burden of proof is beyond reasonable doubt. The **Court of Appeal** in **Moses Masika Wetangula v Musikari Nazi Kombo & 2 others [2014] eKLR**;

“However, if there are allegations of commission of election offences in an election, the law requires that those allegations be proved beyond reasonable doubt. In other words, the standard of proof required in allegations of commission of election offences made in election petitions is beyond reasonable doubt. Once again see Raila Odinga Vs IEBC & Others and Joho v Nyange (supra).

There is good reason for this requirement. Election offences are criminal offences. For anyone to be held criminally liable, Article 50(2)(a) of the Constitution requires that the case against such person should be proved beyond reasonable doubt. In election petitions, the law requires the election court to report such person to the IEBC, which may bar such person from contesting in that or future elections. This is besides the sentence that may be meted out to such person if criminal charges are brought against him. It is on account of these dire consequences that the law demands proof beyond reasonable doubt of allegations of commission of election offences.”

In this particular case, the 1st Petitioner's burden of proof has not been moved an inch let alone being shifted to the respondents.

Votes exceeding registered voters

219. This is pleaded at paragraph 29 of the petition and the affected polling station is Irondi Polling Station. Notably there are 2 forms 35A annexed to the petition, one found at page 55 and the other at page 161. The form at page 55 is signed by the presiding officer and deputy presiding officer. It is also signed by 2 ODM agents (The Petitioner's sponsoring party). The form at page 161 is not signed by anyone. Other than the positioning of the assigned votes on the left near the names, the votes assigned to each candidate are the same in both forms i.e. 25, 231, 3, 82, 20, 11, 00, 16, 23.

220. When cross examined on this complaint, the 1st Petitioner states at page 36, 3rd paragraph of the proceedings;

“At page 55 of the petition is form 35A for Irondi Primary School This is polling station 1 of 1. The form at page 55 was given to me by the IEBC. It is properly filled. It is signed by agents. The form at page 161 is form 35A for Irondi 1 of 1. There are no signatures from anyone.”

221. The source of the form 35A at page 161 is not explained. The form 35A at page 55 is signed by Jeremiah Ontara and George Maguto, agents of the 1st Petitioner. Only these 2 can successfully disown the form at page 55 and I find and hold that it is a genuine form from the 1st Respondent and there is no iota of evidence that the votes cast at Irondi Polling Station exceeded the registered voters.

222. The Court had the opportunity to pronounce itself on a similar issue in **Jeremiah Nyangwara Matoke vs. Alfah Miruka Ondieki & 2 Others, Petition No. 1 of 2017** where the Court stated;

“... this case presents a scenario in which there are two sets of forms in respect of the same election, one set being the forms in the Applicant's possession and the other set in the custody of the 1st Respondent. The legal position however is that the 1st Respondent is the maker and the custodian of all the election materials used in any election and therefore it would be a misdirection for anyone purporting to have forms that are not authenticated as having been issued to him by the 1st Respondent to claim that such forms should be taken into account in determining a sensitive case such as an election petition. I further note that the applicant did not, upon observing that the forms in his possession lacked certain specifications or differed from the forms filed in court by the Respondents, as he alleged take the initiative to exercise his right to access information by requesting the 1st Respondent to supply him with the certified copies of the forms that were

in its custody. One can therefore safely say that the forms in the possession are not the official form 35A from IEBC, but forms whose exact source is unknown and I therefore find that it is not open for the Applicant to secure forms from unofficial sources only to turn up in court to ask the court to order for scrutiny to enable him confirm if the forms in his possession are the same as the ones held by the 1st Respondent in the ballot boxes. I find that, under the above circumstances, allowing scrutiny on the basis that forms held by the 1st Respondent can set a dangerous precedent in which parties will take the liberty to obtain forms from all manner of sources only to turn up in court and seek scrutiny to enable them confirm if the forms from their unofficial sources matched the forms in the 1st Respondent's custody.”

Exclusion/Ejection of agents from polling stations

223. It is averred at paragraph 32 of the petition that the 2nd Respondent and presiding officers excluded and/or chased away the 1st Petitioner's agents from polling stations. This is said to have happened at Keboba Tea Buying Centre and Rikendo Primary School. This allegation is not sustainable for 2 reasons;

1. The agents assigned to these polling stations are not called to confirm the allegation.

2. The statutory form 35A declaring results in these polling station show;

(i) The 1st Petitioner's agent at Keboba Tea Buying Centre one John Momanyi signed the form 35A (page 109 of the petition).

(ii) The Petitioner's agent one Cosmas A. Onkiba at Rikendo Primary School Polling Station I signed the form 35A (page 194 of the petition).

(iii) The 1st Petitioner's agent at Rikendo Primary School Polling Station 2, one Benard Makori signed form 35A (page 195 of the petition).

This is confirmed by the 1st Petitioner in his answers in cross-examination found at page 41 of the proceedings.

224. The decision in **Seif Ramadhan Kajembe vs. The Returning Officer & Others [2013] eKLR** sums up what was required of the Petitioner and I need not say more. The Court stated;

“It was incumbent upon the Petitioner to adduce evidence to show that in those polling stations it was his agents who were locked out therefrom with documentary evidence showing that they were accredited agents for the Petitioner. This was evidence which was peculiarly within the knowledge and possession of the petitioner and by not adducing the same the petitioner has deprived the Court of the crucial evidence on the basis of which the Court can make a finding in favour of the Petitioner with respect to the scrutiny sought. Whereas the Petitioner has submitted that he has identified 27 polling stations in which his agents were absent, that submission is not supported by the evidence on record so far as I have held elsewhere in this ruling it was incumbent upon the Petitioner to peruse the record to see whether based on the documents filed pursuant to Rule 21 of the Rules there was a need to seek the Court's leave to adduce further affidavit evidence.”

Reliance of invalid statutory forms

225. It is pleaded at paragraph 33 of the petition that the election results for Member of National Assembly, Nyaribari Chache Constituency were anchored on unsigned statutory form 37A's from ***Iron dini*** Primary School Polling Station whose origin or author was unknown and hence the contents thereon were not authenticated, invalid and void. Notably, from the record there was no polling station known as Iron dini in the whole of Nyaribari Chache Constituency. That averment is rehashed at paragraph 32 of the affidavit but indicating the form 37 A's related to Iron di Primary School. The pleading herein is not supported by the necessary evidence. The form 37A is not exhibited. It was necessary to exhibit the same given that it would have amounted to a serious irregularity as the form applicable in the impugned election is form 35A. In any event the correct form for Iron di Polling Station at page 55 is seen to have been duly signed by agents. It has been proved as a genuine statutory form for the declaration of results and which is signed by the 1st Petitioner's agents.

Violation of Elections (Technology) Regulations 2017

226. It is averred that the 1st and 2nd Respondent failed to electronically transmit results to the constituency tallying centre. I have dealt with this issue comprehensively at Petition No. 10 of 2017 at paragraphs 154 to 157 above. Suffice it to note that no agent is called to confirm non-transmission. The 3rd Respondent in his evidence confirms seeing the transmission of results at the tallying centre.

Effects of alterations, manipulation and irregularities on the result(s) of the Gubernatorial Election

227. At sub-heading marked 'F' the 1st Petitioner captures the effects of alterations, manipulation and irregularities on the result of the gubernatorial election. When cross-examined at page 43 of the proceedings he confirms that he has made reference to the gubernatorial elections not the MP results. This is a misleading pleading and which invites a plethora of confusion into the 1st Petitioner's case noting that parties are bound by their pleadings. Meticulous drawing of pleadings is a must if a party's case is to be understood by the Court and if the Respondents are to ascertain what they are confronted with in order to give effective responses thereto.

228. I cite with approval the decision by ***Kimondo J*** in **Kakuta Hamisi vs. Peris Tobiko [2013] eKLR**;

“The motion by the Petitioner is fraught with serious procedural difficulties. A petition is a pleading. There are elementary rules of pleadings. For example, a party cannot expand the boundaries of pleadings to seek reliefs not prayed

for; a party shall not lead evidence *inconsistent* with the pleading; and fundamentally, a Court shall not grant a relief not prayed for.....”

229. From the foregoing, it is clear that the evidence adduced by the lone petitioner and the documents relied on are insufficient. In their response, the 1st and 2nd Respondent deny each and every averment in the petition. The 3rd respondent denies the averments too. This placed on the 1st Petitioner the duty of proving his case. The case of Nana Addo Dankwa vs. Akufu Addo & 2 Others vs. John Dramani Mahama & 2 Others [2013] SGL aptly captures the nature of such duty. The Court held;

“I note that the respondents denied each and every averment of the petitioners in the petition. This imposed on the petitioners the duty of proving every single allegation they made in order to obtain a favourable finding thereof by this court.”

230. Such prove would be achieved by cogent and credible evidence. The Court in the *Nigerian Case* of Buhari vs. Obasanjo [2003] CLR 11 had this to say on the evidential requirements where a petitioner challenges an election. It was held;

“A petitioner who contests the legality and lawfulness of votes cast in an election and the subsequent result must tender in evidence all the necessary documents by way of forms and other documents used at the election. He should not stop there. He must call witnesses to testify to the illegality and unlawfulness of the votes cast and prove that the illegality or unlawfulness substantially affected the result of the election. The documents are amongst those in which the results of the votes are recorded. The witnesses are those who saw it all on the day of the election; not those who picked the evidence from an eye witness. No. they must be eye witnesses too. Both forms and witnesses are vital for contesting the legality and lawfulness of the votes cast and the subsequent result of the election. One cannot be a substitute for the other. It is not enough for the petitioner to tender only the documents. It is incumbent on him to lead evidence in respect of the wrong doings or irregularities both in the conduct of the election and the recording of the votes; wrong doings and irregularities which affected substantially the result of the election. Proving an election petition or proof of an election petition is not as easy as the Englishman finding coffee in his breakfast table and seeping it with pleasure;”

231. And for the meaning of 'affect the results' the ready answer is found in the Tanzanian case of Mbowe vs Eliufoo [1967] EA240 where *Georges CJ* interpreted this to mean;

“In my view in the phrase “affected the result”, the word 'result' means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules.”

CONCLUSION

232. Having considered these 2 consolidated petitions, being petitions No. 10 of 2017 and No. 12 of 2017; the pleadings, the evidence and learned submissions by Counsel, I am of the considered view that the 3 petitioners have not adduced sufficient evidence to overturn the declared results in the election for Member of National Assembly Nyaribari Chache Constituency made pursuant to the general elections held on 8/8/2017.

233. I find great appeal in the words of the Judge in John Okello Nagafwa vs. IEBC and 2 Others [2013] eKLR where addressing a similar scenario like the one before this Court he stated;

“In my humble view, this Petition was a tale of many allegations with little proof. It does not require alchemy to turn allegations into fact. What is required is the quality of evidence set by the Law. The Petitioner, I am afraid has failed to discharge the onus placed on him by the Law. This court must at all times keep in view the provisions of Section 83 of the Act which are significant enough to deserve recalling.... 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.”

234. I can't agree more.

COSTS

235. Costs follow the event. Section **Section 84** of the **Elections Act** provides that;

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

Rule 30(1) of the **Election Petition Rules** provides as follows;

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

(a) The total amount of costs payable.

(b) The person by and to whom the costs shall be paid.”

236. I have considered submissions on costs made by counsel. I take note that the 3rd Respondent was represented by senior counsel whose place of business is Nairobi. I further put into account the fact that the defence by the 1st and 2nd Respondent was mounted jointly.

237. Counsel for the 3rd Respondent has sought costs at Kshs. 10 million. I think in the circumstances of this case that figure is inordinately high. Taking into account the input, level of research and time spent and work done by the parties in the course of preparations, drawing pleadings and the hearing of this case, I cap total costs in the consolidated petition as follows;

1. Total costs not exceed 5.4 million for the 3rd Respondent shared out equally among the 3 Petitioners.
2. Total costs of 3 million for the 1st and 2nd Respondent shared out equally among the 3 Petitioners.

ORDERS

238. The final orders of Court are as follows;

- (a) Both petitions herein are hereby dismissed with costs.
- (b) The 3rd Respondent was validly elected as the Member of National Assembly for Nyaribari Chache Constituency.
- (c) The Respondents are awarded costs as indicated above.
- (d) The costs shall be taxed and total costs certified by the Deputy Registrar of this Court.
- (e) A certificate of this determination in accordance with **Section 86(1)** of the **Elections Act 2011**, shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly.

JUDGMENT SIGNED, DATED AND DELIVERED AT KISII THIS 28TH DAY OF FEBRUARY, 2018.

A. K. NDUNG'U

JUDGE

In the presence of:

Ms. Makobu for 2nd and 3rd Petitioners

Omwega for Terer for the 1st and 2nd Respondents

Omogeni for the 3rd Respondent

Oguttu for 1st Petitioner absent

N. Limo Court Assistant

A. K. NDUNG'U

JUDGE