



**REPUBLIC OF KENYA**  
**IN THE HIGHCOURT OF KENYA AT NAIROBI**  
**ELECTION PETITION NO 17 OF 2017**  
**IN THE MATTER OF THE ELECTIONS ACT**

**AND**

**IN THE MATTER OF AN ELECTION PETITION FOR**  
**THE MEMBER OF THE NATIONAL ASSEMBLY**  
**OF EMBAKASI CENTRAL**

**BETWEEN**

**HEZBON OMONDI.....PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**FRIDAH CHEBET, THE RETURNING OFFICER**

**EMBAKASI CENTRAL CONSTITUENCY...2<sup>ND</sup> RESPONDENT**

**BENJAMIN GATHIRAU MWANGI.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. This is the final judgment of the Election Court.
2. This case is about a parliamentary election which was conducted and managed by the 1<sup>st</sup> Respondent. The election was won by the 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent was duly declared the winner on 10 August 2017 by the 2<sup>nd</sup> Respondent, who was the Returning Officer for the election. Mr. Hezbon Omondi, a defeated candidate, then launched this Petition on 5 September 2017 under ss.74 and 76 of the Elections Act, No 24 of 2011 (“ the Act”) questioning the 3<sup>rd</sup> Respondent’s election.
3. The Petitioner claims that the Respondents were guilty of corrupt and illegal practices and that the election was marred with irregularities as to remove it from the purview of free, fair and credible elections as anticipated by both the Constitution and the Act.
4. The Respondents oppose the Petition and contend that there were no irregularities and further that the election was conducted pursuant to and in accordance with the Constitution, the Act and the regulations and made there under. The Respondents also insist that the result of the election was unaffected by the alleged irregularities, if at all. Later in this judgment, I return to the finer details of the allegations and contentions by both parties.
5. While the Petitioner asks that the election be nullified, the Respondents urge that the election should not be avoided.
6. The Respondents also contested the form of the Petition as well as the fact that the petition was filed within the prescribed time and the

security deposit for costs dictated by s.78 of the Act was paid within the prescribed time. I exhaustively and definitively dealt with the questions of a defective Petition in a ruling rendered on 24 November 2017.

7. Accordingly, I will deal only with substantive issues raised in this Petition.

### **Background**

8. The election with which this Petition is concerned was an election in Embakasi Central Constituency within Nairobi County. There were nine candidates, including the Petitioner and the 3<sup>rd</sup> Respondent. The election took place on 8 August 2017, the date for the general elections. Multiple elections for the presidency, gubernatorial, parliamentary (senatorial, womens' representatives and national assembly) and county assembly representatives, were held.

9. The 3<sup>rd</sup> Respondent, who contested under the banner of the Jubilee Party, won the Member of Parliament for Embakasi Central Constituency seat with majority 49,854 votes over the Petitioner who came second with 38,630 votes. The numbers recorded for the other candidates read as follows: Wanjiku Joseph Murote – **4,708** votes; Wanjala Newton – **2,026** votes; Onyura Mary Alice – **835** votes; Mwangi Stephen Maina – **363** votes; Musungu Collins Kennedy– **348** votes ; Munyi Beatrice Nyakambi – **314** votes and Mungai Michael Munai – **102** votes.

10. The 1<sup>st</sup> Respondent then proceeded to gazette the 3<sup>rd</sup> Respondent as the winner. Being aggrieved and dissatisfied with the outcome of the elections, the Petitioner launched the Petition challenging the results and conduct of the election. The petition was supported by several affidavits.

### **Allegations in the petition**

11. By way of a précis, the Petitioner contends that the 3<sup>rd</sup> Respondent was not duly elected by reason of acts or omissions on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, their officers or servants or agents which constituted a violation of the Constitution and breaches of election laws. According to the Petitioner, the conduct of the election was so flawed that it was not conducted so as to be substantially in accordance with the Constitution and with the law as to elections. The result, according to the Petitioner, was therefore affected and the returned candidate, being the 3<sup>rd</sup> Respondent, was not validly elected.

12. I have picked the summary from the Petition and in relation to the language of s.83 of the Act.

13. In detail, when it came to the conduct of the elections, the Petitioner alleged, they were so badly conducted due to a systematic and deliberate non-compliance with the governing principles established under the Constitution and the law.

14. In this regard, the Petitioner accused the 1<sup>st</sup> Respondent of delivering preconceived and predetermined leaders, thus not giving effect to the will of the sovereign people. In essence, clamoured the Petitioner, the 1<sup>st</sup> Respondent contravened the principles of free and fair elections, encompassed in Article 81 of the Constitution and s. 39 of the Act.

15. The Petitioner further accused the 1<sup>st</sup> Respondent of failing to electronically collate, tally and transmit results accurately as per the law. It was contended that the 1<sup>st</sup> Respondent failed to ensure accurate, verifiable and accountable results by posting varied contradictory and even altering results in the Forms 35A and Forms 35B. This, the Petitioner contended, contravened Article 35(2) of the Constitution by putting up and publicly maintaining false, inaccurate and misleading information which affected the Petitioner and deliberately misled the general public and the people of Embakasi Central Constituency in particular.

16. On relay of results from the polling stations, the Petitioner contended the same was not simple, accurate, secure, accountable transparent verifiable open and prompt. The process was therefore compromised contrary to Article 81(e)(iv) and (v) of the Constitution. The Petitioner also alleged that the results from the polling stations were not accurately and transparently entered into the Kenya Integrated Election Management System (KIEMS) Kit at the individual polling stations. The Petitioner added that the results were not transmitted in accordance with the law, and that the 1<sup>st</sup> Respondent did not verify the results from all the polling stations.

17. It was also the Petitioner's contention that there was a legitimate expectation that the data entered into the KIEMS Kit should be consistent, comparable and verifiable with the information recorded in the Forms 35A, yet the data that was being displayed by the 1<sup>st</sup> Respondent at the national tallying centre was not consistent with the information and data in the respective Form 35A.

18. Still on Forms 35A, the Petitioner alleged that the data in Forms 35A was not consistent with the information recorded in Form 35B, as was legitimately expected and that the figures did not add up. According to the Petitioner, the inaccuracies and the inconsistencies in the tabulations were deliberate and calculated.

19. To the Petitioner, the 1<sup>st</sup> Respondent, had essentially disregarded the decision of the Court of Appeal rendered in the case of **Independent Electoral and Boundaries Commission vs. Maina Kiai & 5 Others, Civil Appeal No. 105 of 2017 [2017]eKLR** ("the *Maina Kiai case*" ) which stands, inter alia, for the proposition that the results declared at the polling station is the true reflection of the will of the people.

20. As a result of the alleged systematic manipulation and distortion of the results, the Petitioner concluded that it was impossible to determine who actually won the election. The Petitioner also asserted that the results were not based on the ones declared in the polling stations and that, consequently, the 1<sup>st</sup> Respondent's deliberate failure to respect and uphold the law, together with the flawed transmission of

results rendered the election a nullity.

21. The Petitioner then alleged that the votes in a number of polling stations were not counted, tabulated and accurately collated as required under Articles 86(b) and 86(c) of the Constitution.

22. The 1<sup>st</sup> Respondent was also accused of substantive non-compliance and commission of irregularities and improprieties. In this regard it was stated that a number of Forms were not signed as required, neither did they bear authentic IEBC stamps as required under the law and regulations. Further, it was stated that a substantial number of forms did not bear the signatures of the candidates' agents nor the reason for their refusal to sign. Finally, it was alleged that a considerable number of polling stations curiously showed the same person as presiding in those stations.

23. Back to Form 35A, the Petitioner alleged that the number of Forms 35A handed over to the 2<sup>nd</sup> Respondent was never indicated and thus it was therefore not possible to verify the number of forms and returns used in the election. In this regard, the Petitioner concluded that the integrity of the material number of Forms 35A used in the elections was wholly compromised and the results could not be verified.

24. The Petitioner also alleged that the 1<sup>st</sup> Respondent gave its officers instructions which were contrary to the law and laid down regulations. In particular, that there was failure to adhere to the 1<sup>st</sup> Respondent's memo of 27<sup>th</sup> July 2017 with regard to voter identification, transmission; the process of handing over and taking over was not transparent and verifiable.

25. The Petitioner also complained about the failure by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to deliver Form 35A and 35B to the national tallying centre. According to the Petitioner up till Friday 11<sup>th</sup> August 2017 at 12.30 pm, the 1<sup>st</sup> Respondent had not delivered the Forms 35A and 35B to national tallying centre at the Bomas of Kenya yet the constituency is situated in Nairobi.

26. Again on Forms 35A, the Petitioner stated that there were inconsistencies in figures between the Forms 35A; that figures of the presidential and national assembly results differed markedly by more than 6000 votes which was/is statistically impossible.

27. The Petitioner complained that Forms 35A were signed in the absence of the Petitioner's party agents; some of the names were forged and signatures of the agents used. That after results had been declared in all the polling stations, instead of the presiding officers being cleared by the Returning officer, by forwarding Forms 35A and related materials, the presiding officers were detained and only cleared some 40 hours later.

28. The Petitioner also pleaded that his agents were denied access to the polling stations.

29. Then on the presiding officers' iniquities the Petitioner stated as follows. Some of the presiding officers went away with KIEMS kits and results; they did not post Forms 35A on the doors; they received more than nine seals; which compromised the integrity of the electoral process. The Petitioner further alleged that some of the polling station diaries (PSDs) were given to presiding officers during training only; that the Forms 35A used did not have the mandatory security features that make them distinct and as prescribed by the 1<sup>st</sup> Respondent's regulations.

30. Next, the Petitioner complained about the electronic system.

31. According to the Petitioner, the ICT analysis indicated a suspicious nature of the vote tallying process.

32. Based on the foregoing, the proceeded to lay out the reliefs he was seeking from the Court.

**32.1 A declaration that the non-compliance, irregularities and improprieties in the member of national assembly elections were substantial and significant that they affected the result thereof;**

**32.2 A declaration that all the votes affected by each and all the irregularities are valid and should be struck off from the final tally and the computation of the member of the national assembly election;**

**32.3 A declaration that the Embakasi central constituency member of national assembly elections held on 8<sup>th</sup> August 2017 was not conducted in accordance with the constitution and the applicable law rendering the declared result invalid null and void;**

**32.4 A declaration that the 3<sup>rd</sup> Respondent was not validly declared as the Member of Parliament elect and that the declaration is null and void;**

**32.5 An order directing the 1<sup>st</sup> Respondent to organise and conduct a fresh Embakasi Central Constituency member of National Assembly elections in strict conformity with the Constitution and the Elections Act;**

**32.5 A declaration that each and all of the respondents jointly and severally committed irregularities**

## **Responses**

33. I must first point out that the Petitioner did not make any allegations touching on or concerning the 3<sup>rd</sup> Respondent save for the general

imputation that the irregularities and illegalities were engineered and tailored by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to tilt the election in favour of the 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent's response was thus limited.

34. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a joint response and denied the allegations made by the Petitioner. The response was supported by affidavits. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents stated that the election was conducted in accordance with the Constitution and the principles laid therein. According to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the election was free and fair, carried out by secret ballot; free from violence, intimidation, improper influence or corruption; and administered in an impartial, neutral, efficient, accurate and accountable manner.

35. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents denied the allegations that they were involved in malpractices, irregularities or illegalities while also insisting that the 3<sup>rd</sup> Respondent was declared the duly elected Member of Parliament lawfully and validly.

36. Pointing to the law, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents averred that the design of the of the electoral system and the processes of voting and counting, transmission, tallying and announcement of election results for the seat of Member of Parliament is contemplated and provided for under s.39(1)(a)(i) of the Act. According to the two respondents, the use of the electronic device was an additional instrument to make the electoral process more efficient and transparent, but was not to be a substitution of the legally stipulated manual process. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents further contended that the data in text image of the prescribed Forms 35A from each polling station was fed into the KIEMS Kit and simultaneously transmitted to the results transmission system (RTS). Additionally, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents pointed out that the data entered into the KIEMS Kit was not the final results as they were subject to verification by the returning officers at the tallying centre, in accordance with Regulation 83 of the Elections (General) Regulations 2012. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents then added that the transmission of the results in the form of an image was limited to the presidential elections as anchored in s.39(1)(i) of the Act and Regulation 83(1)(i) of the Elections (General) Regulations.

37. Turning to the KIEMS Kits, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents refuted the allegation that data entered in the KIEMS kit was not consistent with the information contained in Forms 35A. While reiterating that the true and actual results are contained in Forms 35A, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, also insisted that the results tally with those in Form 35B. They reiterated that the results contained in Forms 35A and B are clear verifiable and reflected the will of the electorate.

38. In further response to the allegation that the figures in Forms 35A did not tally with the entries in Form 35B, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents stated that if there was any clerical and human errors or variation in the two Forms, the errors were insignificant and could not affect the outcome of the election. In this regard, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents further explained that the computation and tabulation of the results in Form 35B was not undertaken manually but through an excel spreadsheet which had already been configured with a formula which gave the respective totals of the various elections that had taken place, hence it was therefore not possible to manipulate the same.

39. In a brief response to the allegation that the results in the public portal differed from the ones in the constituency forms, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contended the same were not results, but unverified data which had been fed into the KIEMS Kit at the polling station and that the final results were contained in Forms 35A and B.

40. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents denied the allegation by the Petitioner that the Petitioner had obtained more votes than the 3<sup>rd</sup> Respondent. The 2<sup>nd</sup> Respondent further denied the allegation of collusion between her and the 3<sup>rd</sup> Respondent, stating that the allegation was unfounded speculative, malicious and ill intended.

41. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents then asserted that the process of counting tallying and tabulation was carried out in accordance with the law and that the all parties present signed Forms 35A to confirm they were satisfied with the process. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents averred that all the prescribed forms were in the prescribed format, were signed, and bore all the security features.

42. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents denied that they were supposed to deliver the results to the national tallying centre as alleged by the Petitioner. According to the two respondents, the results were deliverable only to the 2<sup>nd</sup> Respondent and returns then finally made to the 1<sup>st</sup> Respondent.

43. To the accusations that: there were varied results in the different election categories; forgery; agents being denied access; presiding officers not posting forms on doors, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents answered that these were bare allegations with no evidence availed in support.

44. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents then urged the court to dismiss the petition with costs and counter-sought a declaration that;

***44.1 they were not in breach or contravention of the Constitution or electoral laws; and that***

***44.2 the electoral process was valid and a valid declaration of the outcome of the Embakasi Constituency Member of the National Assembly elections be issued;***

45. The 3<sup>rd</sup> Respondent through his response dated 15<sup>th</sup> September 2017 denied the allegations in the petition.

46. According to the 3<sup>rd</sup> Respondent, he was duly elected as the member of National Assembly of Embakasi Central Constituency pursuant to the free and fair election which was duly carried out and conducted in accordance with the law and the laid down principles.

47. Making a more particular response, the 3<sup>rd</sup> Respondent denied the allegation that there was inflation of votes in his favour. The 3<sup>rd</sup> Respondent pointed to the processes that accompany elections and averred that the processes were witnessed by the Petitioner's and other candidates' agents, who authenticated the results by signing Forms 35A and B.

48. To demonstrate that he won the election, the 3<sup>rd</sup> Respondent referred to the fact that out of the 193 polling stations he returned in 130 stations representing over 67% of the polling stations, while the Petitioner's polling station wins represented 33%. Additionally, the 3<sup>rd</sup> Respondent pointed to what he termed "a significant" margin of votes between him and the Petitioner. The margin was 11244 votes. This, the 3<sup>rd</sup> Respondent added, could not be assailed and simply affirmed the will of the people as was further corroborated by the number of wards that he won as against the Petitioner.

49. The 3<sup>rd</sup> Respondent also denied the allegations of over-voting in two polling stations pointing out that the KIEMS Kit only allows 700 voters per polling station and could not fetch or record the over 2000 votes or voters alleged by the Petitioner.

50. It was also the 3<sup>rd</sup> Respondent's contention that all the agents were given an opportunity to sign the prescribed forms at the counting and tallying centres and that it was not true that forms were being signed in the absence of then ODM agents.

51. In closing, the 3<sup>rd</sup> Respondent averred that all the allegations by the Petitioner were unfounded and lacked basis. The 3<sup>rd</sup> Respondent asked the court to dismiss the petition with costs and ;

**51.1 Find that the electoral process was conducted in accordance with the Constitution and the Elections Act and all other relevant statutes;**

**51.2 Make a declaration that the outcome of the member of National Assembly, Embakasi Central Constituency was valid;**

**51.3 Find that the 3<sup>rd</sup> Respondent was duly elected as the member of the National Assembly, Embakasi Central Constituency; the people of Embakasi Central Constituency exercised their sovereign power of vote and their decision ought to be respected; the third respondent did not commit any electoral offence;**

**51.4 Find the petition lacks merit and should be dismissed with costs to be borne by the petitioner**

#### **General principles**

52. It is apposite to first outline the general legal principles which guide the determination of election petitions.

53. Elections are held against the backdrop of complex rules which entitle the electorate to a properly conducted election, the aim being to achieve the right of citizens *qua* electorate to free fair and regular elections based on universal suffrage as enshrined under Article 38(2) of the Constitution.

54. Article 81 of the Constitution, with a view to ensuring that the Article 38 rights are achieved, further provides the general principles which guide the election system. Article 81 reads as follows:

**"81. The electoral system shall comply with the following principles—**

**(a) freedom of citizens to exercise their political rights under Article 38;**

**(b) not more than two-thirds of the members of elective public bodies shall be of the same gender;**

**(c) fair representation of persons with disabilities;**

**(d) universal suffrage based on the aspiration for fair representation and equality of vote; and**

**(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."**

55. Article 86 of the Constitution seeks to ensure the sanctity of the vote when it demands of the 1<sup>st</sup> Respondent to impose certain standards

at each election. The Article provides thus:

**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.”**

56. The citizen is entitled to an electoral system which not only maintains the secrecy of the ballot but seeks to minimize the risk of improper interference with ballot papers, as well as the counting of the votes and tallying process before a candidate is returned. Ultimately, at the end of the contest the citizen also expect that any dispute is expeditiously and fairly resolved.

57. The electoral system as provided by both the Constitution and the Act is itself open to scrutiny. An election may be questioned in court through a petition where its conduct or the returned result is in doubt. Derivatively and pursuant to Article 87 of the Constitution, Parliament has enacted legislation and together with the 1<sup>st</sup> Respondent approved of regulations guiding electoral disputes petitions.

58. Part VII of the Act permits an election or the returned result to be questioned by way of a petition on grounds which include corrupt practices, illegal practices and allegations of electoral offences: see s.76. Sections 77 through 80 of the Act prescribe the presentation of the petition, its timing, payment of security deposit, as well as powers of an election court, including summoning a non-witness. Subsequent provisions of the Act provide for trial of the petition in open court as well as award of costs on the petition. These statutory provisions are well supplemented by regulations made under the Act.

59. The challenge to an election or returned result is not limited to the provisions of ss.76 through 80 of the Act. Section 83 of the Act is a rather omnibus provisions which provides for challenge to an election or returned result on the basis “ ...of non-compliance with any written law relating to” an election. The section has its own limitations and I, infra, return to it shortly as I consider the question of the burden and standard of proof cast in election petitions.

#### ***Of the burden and standard of proof in election petitions***

60. An election reflects the will of the people. Election, in this context, is essentially a public interest matter. Once an election result is declared, it can only be altered by an order of the Election Court. Any challenge is deemed a challenge to the will of the people and must thus be considered carefully and resolved promptly. There is consequently a presumption that the election was properly and in accordance with the law conducted. Where therefore an election is challenged, the Court having given the parties an opportunity to be heard is required to accept and judge the evidence before it with closer scrutiny while following the norms of the law of evidence.

61. According to the norms contained in the Evidence Act (Cap 80) Laws of Kenya, the burden of proof in a case lies on the claimant, not the respondent: see ss.107-108 of the Evidence Act (Cap 80). The burden here would be on the Petitioner. If he fails to prove his case to the required standard, he loses. The standard of proof for a while sounded to be in the penumbra but a plethora of cases has since settled the required standard as well.

62. I will not revisit the case law but will content myself with quoting in extenso from the case of **Jackton Nyanungo Ranguma v Independent Electoral and Boundaries Commission & 2 Others [2018]eKLR**, where after reviewing various decided cases Majanja J stated as follows:

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

**[196] .... This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies, omnia praesumuntur rite et solemniter esse acta, all acts are presumed to be done rightly and regularly. So the Petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the laws.**

**[16] As regards the standard of proof, the Court went further and held that;**

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

**[17] Related to the burden of proof is that fact that the petitioner is bound to prove the case it has pleaded. A petitioner is not permitted to make a case outside the pleadings and his affidavits and testimony must be consistent with and support the case pleaded. In Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and 2 Others SCK**

*Presidential Petition No. 1 of 2017 [2017]eKLR, the Supreme Court quoted with approval the Supreme Court of India in Arikala Narasa Reddy v Venkata Ram Reddy Reddygari and Another Civil Appeal Nos. 5710 -5711 of 2012[2014] 2 SCR where it stated that;*

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

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

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

63. I am accordingly also guided on the issue of burden and standard of proof, and note that all counsel in the instant Petition also referred to the same decision and were, seemingly, in agreement.

64. The Court's approach to the allegations made in the Petition and sought to be proved by the Petitioner is governed by s.83 of the Act. Prior to its amendment on 2 November 2017, s.83 of the Act read as follows:

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

65. An almost equivalent of this section was considered in the English case of **Morgan v Simpson [1975] QB 151** and it was decided that both conditions in the section had to be satisfied if the election was to be saved, that is to say that the election had to be conducted substantially in accordance with the law, and the result should not be affected. Lord Denning summarized the law in three propositions

"I suggest that the law can be stated in these propositions –

1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated irrespective of whether the result was affected or not. This is shown by Hackney case (1874) 20 M' & H 77, where 2 out of 19 polling stations were closed all day and 5,000 voters were unable to vote.;

2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls – provided that it did not affect the result of the election. That is shown in the Islington case (1901) ITLR 210, where 14 ballot papers were issued after 8.00 p.m.

3. But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the Polls – and did affect the results – then the election is vitiated. That is shown by Gunn vs. Sharpe [1974] 2 ALL E.R. 1058 – where the mistake in not stamping 102 ballot papers did affect the results."

66. The 'result of election', under s.83 of the Act means the success of one candidate over the other, and not the particular number of votes cast for each candidate: see **Kizza Besigye v Electoral Commission & Yoweri Kaguta Museveni (Uganda – Election Petition No. 1 of 2006)** and also **In re Islington West Division; Medhurst v Lough [1901] 17 TLR 210.**

67. In **Raila Odinga and 5 Others v Independent Electoral and Boundaries Commission & 3 Others SCK EP No 5 of 2013 [2013]eKLR** (hereinafter "**Raila 1**"), the Supreme Court of Kenya stated at [196] that

"Where a party alleged non-conformity with electoral law, the petitioner must not only prove that there had been non-compliance with the law but that such failure and non-compliance did affect the validity of an election. It is on that basis that the respondent bears the burden of proving the contrary"

68. Then in a much more recent decision in **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and 2 Others, SCK EP No. 1 of 2017 [2017]eKLR** (hereinafter "**Raila 2**"), the court while reiterating what it had stated in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others SCK E P No 2B of 2014 [2014]eKLR** observed as follows:

[203] Guided by these principles, and given the use of the word "or" in Section 83 of the Elections Act as well as some of our previous decisions, we cannot see how we can conjunctively apply the two limbs of that section and demand that to succeed, a petitioner must not only prove that the conduct of the election violated the principles in our Constitution as well as other

written law on elections but that he must also prove that the irregularities or illegalities complained of affected the result of the election as counsel for the respondents assert. In our view, such an approach would be tantamount to a misreading of the provision.

69. The majority in *Raila 2*, then held as follows concerning s.83 of the Act:

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

70. Accordingly, I have to decide whether it can be stated that any proven violations of the constitutional and legal principles were substantial and or that even though there were no substantial violations, any irregularities and illegalities proven affected the result of the election.

71. As to the standard of proof, the Petitioner must meet in proving the allegations in the Petition, a quick peek at [152] of *Raila 2* reveals that the standard is one higher than that in ordinary civil cases but lower than in criminal cases. So noted the Supreme Court;

**“[152] We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt.”**

See also *Khatib Abdalla Mwashetani v Gideon Mwangangi Wambua & 3 others* [2014]eKLR where the Court of Appeal stated that it was beyond peradventure that the standard of proof, where an election offence or such kind of conduct is alleged, is proof beyond balance of probabilities.

72. In sum, the cases from the High Court to the Supreme Court, demonstrate the standard of proof that governs election petitions is an intermediate standard and that the burden of proof rests upon he who asserts. However, where there are allegations of criminal or quasi criminal nature, the standard is that of beyond reasonable doubt. Thus in the case of *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* [2015]eKLR the Supreme Court observed that:

**“[120] Now on account of this quasi-criminal aspect of bribery in elections, the offence is to be proved beyond any reasonable doubt. The petitioner has to adduce evidence that is cogent, reliable, precise and unequivocal, in proof of the offence alleged.”**

73. Interestingly, the Petitioner variously made reference in his pleadings to the common law principle of “*legitimate expectation*”. Election petitions however have a special jurisdiction, which is *sui generis* in nature and ordinarily that the common law principles do not apply. In the case of *Moses Masika Wetangula v Musikari Nazi Kombo & 2 others* (*supra*) the Supreme Court observed as follows

**“[157] Several other issues emerged from this case, such as: what is the essential character of proceedings in an election Court? What is the nature of the electoral code? How are election offences to be tried, heard and determined? It is now an indelible principle of law that the proceedings before an election Court are *sui generis*. They are neither criminal, nor civil. The parameters of this jurisdiction are set in statute (the Elections Act). As such, while determining an election matter, a Court acts only within the terms of the statute, as guided by the Constitution.”** [emphasis]

74. The Court in the same decision, while quoting from the Indian Supreme Court, further observed as follows:

**“[108] The comparative experience, in the Indian Supreme Court case, *Jyoti Basu & Others v. Debi Ghosal & Others* [1982] AIR 983; [1982] SCR (3) 318, illuminates our perception on the nature of election petitions:**

**“An Election petition is not an action at Common Law, nor in equity. It is a statutory proceeding to which neither the Common Law nor the principles of Equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to Common Law and Equity must remain strangers to Election Law unless statutorily embodied. A Court has no right to resort to them on considerations of alleged policy because policy in such matters, as those, relating to the trial of election disputes, is what the statute lays down. In the trial of election disputes, the Court is put in a straight jacket.”**

75. It is quite clear therefore that election petition proceedings being *sui generis* in nature mean that the common law principles do not apply to them. They are governed by the Constitution, the Act and the regulations that underpin them. The common law principles remain a stranger to them at all material times.

76. With the foregoing principles in mind, I will now proceed to determine the specific questions settled by the parties for determination by the Court.

## Issues

77. The parties at the pre-trial conference were able to agree on the following issues for determination. All corollary issues which arose during the trial were resolved save a specific issue which arose during the oral submissions by counsel. I specifically address this issue later in [159] to [173] of this judgment. The issues isolated during the pre-trial conference were:

**77.1 Whether the election of the member of the national assembly of Embakasi Central Constituency was conducted in accordance with the Constitution of Kenya 2010, the constitutional principles governing the conduct of elections and the Elections Act 2011 and the regulations there under.**

**77.2 Whether in the conduct of the election of the said Member of Parliament for Embakasi Central constituency there was substantial and material non-compliance with the provisions of the Elections Act and the regulations made there under and whether such non-compliance substantially and materially affected the results of the elections.**

**77.3 Whether any electoral malpractices may have occurred during the conduct of the said election.**

**77.4 Whether the said malpractices as envisaged under the Electoral Offences Act No. 37 of 2016 may have occurred during the conduct of the said election.**

**77.5 Whether the third respondent was validly elected as member of the National Assembly of Embakasi Central Constituency.**

**77.6 Who bears the cost of the petition?**

78. I will consider the issues seriatim.

### *Four days of candour*

79. The evidentiary hearing was conducted over a period of four different days in November and December 2017, with the final oral submissions being presented on 19 February 2018. A scrutiny exercise was also undertaken in the month of December pursuant to this Court's orders of 11 December 2017. The scrutiny report was availed to all the parties and to the Court on 22 December 2017.

80. The evidence comprised of (i) 9 witnesses led by counsel for the Petitioner; (ii) 3 witnesses being led by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and (iii) 3 witnesses being led by counsel for the 3<sup>rd</sup> Respondent. Both the Petitioner and the Respondents dropped a number of witnesses who had sworn affidavits in proof of evidence.

81. I advert to the testimony of the witnesses as I consider the issues. The affidavit evidence of the dropped witnesses has however not been considered or referred to in this judgment.

82. Suffice however to point out that I had no concerns about the credibility and reliability of the witnesses, with one exception being PW2. The witnesses, who all appeared pensive, freely and in an unguarded manner answered questions. I had no doubt that I could safely take into account their testimony in so far as was relevant in determining the issues in dispute.

83. With regard to PW2, he was unnecessarily guarded and had a rather disingenuous approach to responding to questions giving the impression that the witness had failed to understand that the political overtones of the election were best kept out of the adjudicative stage of the emergent dispute. Ultimately, after a caution by the court, PW2 calmed down and was able to also freely and smoothly give evidence.

84. I turn to the issues.

## Discussion and determination

85. The first and second issues correlate. They both deal with whether or not the election was conducted in accordance with the Constitution and the law governing elections in Kenya. They are silhouetted questions fetched on s.83 of the Act. I intend to consider the two issues simultaneously. At the risk of a little awkwardness, context dictates that I repeat the two issues infra.

#1Whether the election of the member of the national assembly of Embakasi Central Constituency was conducted in accordance with the Constitution of Kenya 2010, the constitutional principles governing the conduct of elections and the Elections Act 2011 and the regulations there under

#2Whether in the conduct of the election of the said member of parliament for Embakasi Central Constituency there was substantial and material non-compliance with the provisions of the Elections Act and the regulations made there under and whether such non-compliance substantially and materially affected the results of the elections

86. These two issues, in my understanding, are largely concerned with the general conduct of the election in dispute and whether the laws and regulations were adhered to. The Petitioner in this regard as earlier outlined made several allegations.

### *Of agents and access*

87. The petitioner has alleged that most of his agents were denied access to the polling stations. In his oral testimony the Petitioner stated that he relied on the evidence of his witnesses who apparently had informed him of the denial as the Petitioner was himself not present in all the polling stations. The witnesses were allegedly his agents.

88. **PW 2, PW3, PW5, PW6 and PW7** all testified, in one way or the other that they had been denied access in their respective polling stations. **PW2 (Solomon Olonde)** testified when he got to the polling station no 12 at Komarock School Polling Centre at 5.30 am he was denied access having been told that there was already someone inside. Later, he was allowed to ingress the polling station but found no other agent for the Petitioner.

89. **PW3 (Daniel Owino)** did not complain about access in the morning or in the course of the day but complained of being denied access to the polling Centre after voting had closed. His testimony was that as chief agent at Mwangaza Primary School Polling Centre at the end of voting the Presiding Officer asked the agents to take a 30 minute break before counting could begin. Like all the other agents he obliged but as he was ill disposed he decided to leave the centre's precincts to buy medication. He returned 30 minutes later but was not allowed access into the centre by police officers who were manning the entrance. He was unable to communicate with the presiding officer as his phone was not working.

90. **PW5 (Stephen Mukuli)** testified that he was denied access from 5.40am when he got to the polling station which was Kayole 1 Centre Polling Station No 34. He was however later allowed ingress after he talked with his boss PW4, who was the chief agent for the ODM political party. PW5 confirmed in cross-examination that he then stayed in the centre/station until the votes had been counted and tallied.

91. Cometh **PW6 (Martin Mutisya)**. He was chief agent at Komarock Primary School Polling Centre. He got to the centre at 3.00am on the morning of the election but was told to await the official opening time. Cometh the hour, he was granted free access but later as he tried to access other polling stations within the centre he was denied access to the stations.

92. Finally, was **PW7 (Anthony Muthama)**. He also testified that he was stationed at Kayole 1 Primary School Polling Station No 1. He confirmed that he was inside the station during the voting exercise but when the voting ended and the agents , at the request of the Presiding Officer , took a 30 minute break he was not allowed back in by the officers who manned the entrance.

93. The Respondents' evidence was curt. **DW2 (Frida Chebet )** denied that any agent was denied access to the polling centres or stations for want of space once it was shown that the agent had the necessary accreditation. She testified during cross examination that the number of agents was limited to one for each party or candidate because of space, as this was a multiple election. Further, she confirmed that the candidates were not restricted with regard to their agents as long as there was space. She further testified that she never received any complaint with regard to the voting process. She also testified that she had instructed Presiding Officers to take a fifteen minute break after voting but that such break was not mandatory.

94. **DW3 (Tabitha Wanjiru Mwangi)** who was stationed at Kayole 1 Primary School Polling Centre was even more assertive. She was a Presiding Officer. She denied that agents were not allowed access. She was specific that PW7 was never an agent and pointed to one Antonio Situma as the agent at the centre. To support her testimony she availed an abstract of the polling station diary which was signed by Antonio Situma. She insisted that she was familiar with Mr Situma as he was once her pupil. DW3 is a teacher at Kayole 1 Primary School.

95. Then there was also **R3W1(John Kagucia)** who testified on cross-examination that only one agent in every polling station was allowed by the 1<sup>st</sup> Respondent and the parties could substitute such agent as they were always two. He further testified that as the Chief agent for the Jubilee Party he never received any complaint that his agents had been locked out.

96. **R3W2 (Annah Kavuti Mutua)** also testified that no agent was blocked.

97. The Petitioner complained that his agents were denied access either in the morning before the polls commenced or in the evening after the polls closed. The respondents denied the accusation.

98. Who is right?

99. I am inclined to take the line of the respondents' case that none of the Petitioner's agent who identified himself or herself as having been properly appointed as an agent was denied access to the polling stations or centres during the appropriate hours of the election. There is, in my view, no evidence from which it may be reasonably inferred that access by the agents was denied.

100. First, it is to be observed that none of the Petitioner's witnesses who testified in this regard was able to positively identify himself or herself as an appointed agent with all the accreditations. Regulations 62,74 and 82 of the Regulations permits only authorised agents to access polling, counting and tallying centres respectively. It was thus important for the Petitioner's witnesses to show that they had the requisite documentation showing that they were indeed agents. Not a single one of the witnesses pointed to any document of accreditation or availed a document to the court.

101. Secondly, PW5 testified that he lodged a complaint about the entry denial with PW4. PW4 however did not seem to be aware of such a complaint and did not, either in his affidavit evidence or oral testimony, mention anything about agents being denied access to corroborate PW5's testimony.

102. Thirdly, there is the evidence of PW2 and PW6 who both arrived at the polling stations earlier than usual, were told to wait for the opening hour and were then granted access without any hiccups.

103. Finally, is the evidence of DW3 which positively identified the agent who was stationed at the polling station that PW7 insists he was in

charge of as an agent for the Petitioner. I observed DW3 testify and I am convinced she was telling the truth. PW7 was not, in my view, even an agent.

104. In the end, I am not satisfied that the Petitioner has shown that his agents properly so identified were locked out of the polling centres or stations.

***A question of more agents than one and non-agents***

105. Closely related to the issue of access by the Petitioner's agents to polling stations, is the question of alleged violation of s.30 of the Act. The Petitioner complained that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents allowed the 3<sup>rd</sup> Respondent to have more than one agent contrary to the provisions of s.30 of the Act. The Petitioner pointed to Forms 35A which were signed by multiple agents of the 3<sup>rd</sup> Respondent or the agents of the 3<sup>rd</sup> Respondent's party. The Petitioner's counsel, during her closing submissions also pointed to Forms 35A which were signed by multiple agents of the Petitioner's political party, the ODM.

106. The Petitioner then pointed to instances where the Forms were signed by alleged non-participants. In this regard, the Petitioner pointed to such allegedly non-existent characters like "Bulldozer" who signed Form 35A at a polling station within Kayole 1 Primary School Polling Centre; Elog Observer at Imara Polling Station No 22; PK & George at Mwangaza Primary School Polling Station No 11 and at Imara Primary School Polling Station No 9 where Miguna Miguna, NASA, PNU, et al signed the Form 35A.

107. It is common cause that some of the Forms 35A were signed by multiple agents of either the Petitioner or the Petitioner's political party- ODM. It is also common cause that some of the Forms 35A were also signed by multiple agents of the 3<sup>rd</sup> Respondent or the 3<sup>rd</sup> Respondent's political party- the Jubilee Party. Finally, it is not in controversy that some of the Forms 35A were not signed at all or were signed by persons who were not participating in the particular election. The signatures were not effected in the Returning Officer's or Presiding Officers' stead but rather in addition to or where ordinarily the political party's agent or the candidate's agent ought to have been signed.

108. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' response was that no strangers participated in the process. DW2 explained in cross-examination that "*the POs [presiding officers] only allowed agents for [sic] parties participating in the elections*" to sign the Forms 35A. She was emphatic that no strangers signed the forms. When confronted with the Forms with multiple political party agents' signatures, DW2 expounded the same way she was to latter do with the Forms signed by persons who were not participants in the election. DW2 explained that the general election were multiple elections and each candidate for each position had its own agent and this occasionally led to the Forms being signed by more than one agent for a political party. DW2 insisted that all the signatories, including "Bulldozer" were not strangers at all. Additionally, DW2 explained that with a view to attaining a high level of transparency, where space allowed, agents could sign in a multiple manner- that is to say, both the political parties' agents as well as the individual candidates' agents.

109. The Petitioner complains that that this was a transgression of s.30 of the Act and that the results of the election were affected. The Respondents say the results were not affected at all.

110. Again, who is right?

111. Section 30 of the Act provides as follows:

**(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.**

**(3A) A registered referendum committee may appoint one agent at each polling station.**

112. From the foregoing it is quite clear that the political party is the one which may appoint agents for the candidate nominated to participate in the elections. One is only allowed to appoint his own agents if he was an independent candidate or where the political party on whose platform he is running for political office fails to appoint one. The section, read in whole, anticipates that only one agent will be appointed in each polling station per candidate. It does not, in my view, anticipate candidates having more than one agent at each polling station.

113. The Petitioner submitted with regard to this section that as the same envisages one agent per polling station, two or more agents could not lawfully sign Forms 35A. He proceeded to list 62 polling stations stating that this was systemic, widespread and repetitive and this affected the results.

114. The Respondents on the other hand attacked this aspect of the Petitioner's submission stating that it was either new evidence and had not been canvassed in court and neither were the material particulars provided. They therefore urged the court to treat it as such.

115. From the testimonies given in court the Petitioner has admitted that he relied on the party's agent for purposes of the elections. Most of his agents were not static and kept moving around in the polling stations in which they were situated.

116. Regulation 62 of **Elections (General) Regulations, 2012** ( "**the Regulations**") provides as follows

**(1) The presiding officer shall regulate the number of voters to be admitted to the polling station at the same time, and may exclude all other persons except—**

- (a) a candidate;**
- (b) a person nominated as a deputy to the candidate, where applicable;**
- (c) authorised agents;**
- (d) members of the Commission and election officers on duty;**
- (e) police officers on duty;**
- (f) persons necessarily assisting or supporting voters with special needs or assisted voter; and**
- (g) observers and representatives of the print and electronic media accredited by the Commission.**

**(2) Notwithstanding sub-regulation (1), the presiding officer shall admit to the polling station not more than one agent for each candidate or political party.**

**(3) The absence of agents shall not invalidate the proceedings at a polling station.**

**(4) Every agent appointed by an independent candidate or political party for the purposes of these Regulations shall at all times during the performance of the duties authorized by the independent candidate or political party display the official badge supplied by the Commission.**

**(5) No person shall be admitted to vote at any polling station other than that allotted to that person under regulation 59(4).**

**(6) No person shall be admitted into a polling station if that person is wearing a badge or has any dressing, signifying symbols or other indication of support for any political party, a candidate in the election or a referendum committee.**

117. A reading of the above clearly shows that it is the presiding officer who has the command of a polling station and reserves the right to choose who enters and stays in the polling station subject to the law. Sub regulation 2 requires the presiding officer to admit no more than one agent for each political candidate, regardless of whether they are independent or backed by the party. Regulation 63 on the other hand gives the presiding officer power to keep order at the polling station.

118. The further explanation by the **DW2**, the returning officer, that she had urged the presiding officers to and that she also only allowed one agent per candidate for each position in the polling station due to the lack of space is plausible, considering that elections need to be conducted in a neat and orderly environment.

119. There was a further explanation by the **DW2** that this was a multiple election. There was therefore the fact of the party appointing more than one agent or indeed each candidate ending up with more than one agent where the party had appointed none. R3W1 confirmed as a fact that the 3<sup>rd</sup> Respondent's party had more than one agent. It is little wonder that the multiple signing cut across the candidates and their parties. Consequently the possibility of extra candidates' agents signing the forms cannot be said to have been unforeseeable.

120. What certainly could not be foreseeable was any signing of the forms by strangers. No evidence was availed to the court to show that the Forms were signed by any strangers in the place of the political parties or the candidates. What has been revealed is that individual who were not candidates signed the forms I must also hasten to point out that the Forms which were signed by some of these individuals were subjected to scrutiny at the instance of the court and I will revert to the scrutiny report later in this judgment.

121. On the evidence before the court, I am not satisfied that a stranger or strangers executed any duty or obligation which was expected of any poll officer that is to say a Returning Officer, a Presiding officer or a Deputy Presiding Officer in so far as the signing of the Forms 35A were concerned. What is clear is that the parties had multiple agents and so did the candidates. The 1<sup>st</sup> Respondent's agents needed to be vigilant to avoid the multiple signatures or signatures by non-participants. Where this happened there was an irregularity and I so find there was.

#### ***Whether collation and transmission was accurately done***

122. The Petitioner put forth the allegation that the collation and transmission of results was not done in accordance with the law. When it came to the tallying and transmission of the results, the Petitioner contended that the same was not accurately done.

123. PW1 (the Petitioner) testified that he was not satisfied when he looked at form 35B upon getting results from the 1<sup>st</sup> Respondent and noticed that between 63 and 65 polling stations were not captured. He testified that his chief agent was later however given the missing forms in hard copy which still did not impress him.

124. When it came to the **transmission** of results he contended that what was declared was different from the public portal. He testified during cross-examination that the data was not entered into the KIEMS kit.

125. The Petitioner, in support of his case in this regard, also called a Dr Noah Akala as a witness.

126. Originally dubbed an expert witness, Dr Akala turned out to be a witness of fact. He was PW9 (inadvertently recorded as PW8). Dr Akala testified that he was the deputy director of campaigns for the ODM party; he stated that he supervised the ICT audit which had been directed or ordered by the Supreme Court in Raila 2. He stated that he undertook the process together with the court appointed experts. He insisted that he was thus able to obtain information. He gave an explanation of how the KIEMS kit had been set up and the way it works. He stated that upon reviewing the results of the election, the subject of the dispute, he noticed errors. He pointed to several omissions in which there were no results, errors, and stated that he did not know where the 1<sup>st</sup> Respondent got the results from. He further testified that there was a miss-match of the votes casts between the six elections and that therefore this was contrary to s. 44 of the Act. He concluded that the process of transmission was either manipulated or ignored leading to gross anomalies or irregularities.

127. On the other hand the 1<sup>st</sup> and 2<sup>nd</sup> Respondents stated that what was contained in the portal was unverified data. That relay of results as far as the election was concerned was always through a manual process and this had not changed. The Respondents, in their submissions, pointed to s.39 of the Act.

128. With regard to the KIEMS Kit, the 1<sup>st</sup> Respondent called DW1 (**Martin Wachira Nyaga**).

129. DW1 described and demonstrated how the KIEMS Kit works. He explained how the Kit identifies a voter and when a voter is not biometrically identified or identifiable, the Kit makes a “ping’ sound. The Kit, DW1 explained and demonstrated, is also used to transmit the final result from the polling station.

130. DW1 then went to great lengths to counter PW9’s testimony, including an explanation and demonstration that it was not possible for the KIEMS Kit to simply transmit a return of more than 700 votes from a polling station. He concluded by stating that the results transmission only occurs after the results’ declaration form which would already have been signed by the agents is scanned.

131. PW9 testified that he formed his analysis from the web portal. He did not however bother to look at the Forms 35A which are the true locus of results from the polling stations as was held by the Court of Appeal decision in the *Maina Kiai* case which the Petitioner has sought to rely on for purposes of transmission. **PW9** however on cross-examination conceded that the counting and vote process was manual.

132. Regulation 5 of the Regulations reads as follows:

**(1) The Commission shall transparently and competitively appoint a presiding officer for every polling station and may similarly appoint such number of deputy presiding officers as may be necessary.**

**(1A) The functions of a presiding officer shall be—**

**(a) presiding over elections at an assigned polling station;**

**(b) tallying, counting and announcement of results at the Polling station;**

**(c) submitting polling station results to the Constituency returning officer; and**

**(d) electronically transmitting presidential results to the constituency, counties and national tallying centers.**

**(2) Prior to appointment under sub-regulation (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.**

**(3) A returning officer may preside at a polling station and in that case the returning officer shall, for the purposes of these Regulations, be deemed to be the presiding officer of that station.**

**(4) A deputy presiding officer may perform any act, including the asking of any question, which a presiding officer is required or authorized to perform by these Regulations.**

**(5) .....**

**(6) The declaration under sub regulation (4) shall be in Form 1 set out in the Schedule.**

133. It is clear what the work of the presiding officer is at the polling station. Primarily, he is the one who is required to tally the results and then forward them to the returning officer. PW9’s contention that the results of the Embakasi Central Constituency, to be more precise 23 polling stations, were missing and the allegation that the returning officer did not deliver the results to the Bomas of Kenya national tallying centre in the required time does not hold in light of the fact that sub-regulation **5(1A) (d)** only envisages that presidential elections results are the ones to be transmitted electronically and the rest to be delivered to the returning officer as per regulation **5(1A)(c)**.

134. The explanation therefore by the DW2, the returning officer, that she was not required to transmit the particular election results is in line with the law. Whether or not there was a difference of 6000 votes between the different elections which were held on the same day which DW2 denied does not matter as the other elections results were also not be transmitted electronically, save for the presidential one. Support for this proposition may easily be found in the substantive provisions of the law and in particular s.39 of the Act.

135. This section provides expressly that

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

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

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

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

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

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

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

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

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

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

136. Evidently, the duty of the 1<sup>st</sup> Respondent's appointed presiding officers, under s.39 (1C) of the Act, is to electronically transmit the presidential election result from the polling station to the constituency tallying centre and to the national tallying centre. There is no provision for the electronic transmission of the results for the election of a member of the National Assembly to the national tallying centre rather there is only provision, under s.39 (1A)(ii) of the Act, for the returning officer to tally, announce and declare in the prescribed form the final results from each polling station in a constituency for the election of a member of the National Assembly. The returning officer in the latter case receives the forms from the presiding officer: see Regulation 82, and the prescribed form is Form 35A. Any errors, mismatches or inconsistencies appearing on the public portal may not of themselves vitiate the results recorded in Form 35A.

137. In the result, I am not convinced that PW9's testimony was of much help to the Petitioner and, in my view, PW9's testimony that the results of the election were manipulated was purely speculative.

138. Before moving on to Form 35A and the issue generated by the tallying and tabulation of results from Forms 35A to Form 35B, there is need for me to deal with the testimonies of PW4 (**Albanus Muthiani Kioko**) and PW8 (**Elizabeth Mueni**). The evidence of these two witnesses related largely to the KIEMS Kits.

139. The Petitioner testified that the results as obtained through the KIEMS Kits were not accurate, verifiable, transparent and accountable as they had not been properly entered in the KIEMS Kits. The Petitioner also recorded doubt on the data in the KIEMS Kits. It was the Petitioner's testimony that his "*agents had problems with how the KIEMS Kits were working*". In support the Petitioner called PW4 and PW8.

140. Both PW4 and PW8 were the Petitioner's agents. They were stationed at Kayole 1 Primary School polling centre and Mwangaza Primary School polling Centre respectively. Both testified that the KIEMS Kits did not make the "ping" sound as the identification of voters and voting was in progress. Like PW4, PW8 stated that she was concerned and orally lodged her concerns with the Presiding Officer. Both also confirmed, in cross examination, that they had been trained by the Petitioner as well as by the 1<sup>st</sup> Respondent and that they were familiar with the KIEMS Kits.

141. I have already indicated that DW1 testified at length on how the KIEMS Kit works. He explained how it is set to biometrically identify voters and how when a voter is not identified an alert is given by the Kit. The alert is by way of a "ping" sound. The court had the benefit of DW1's demonstration with a sample KIEMS Kit.

142. The mode of registration of voters and identification of voters through an apparatus or machine is sanctioned by the law. The electronic registration of voters and identification of voters on polling day was put in effect through the general elections of 2013 and 2017. The KIEMS Kits were however put to application in the latter year.

143. So far as the allegations contained in the petition are concerned, they are merely allegations in the nature of apprehension expressed by the Petitioner. In the entire body of the Petition, the Petitioner has pleaded nothing except to raise suspicion in respect of possible tampering and mischief of the KIEMS Kits. I must however appreciate that suspicion of possible mischief in the process of likely errors in counting, tallying and transmission of votes always lingers in the mind of the defeated candidate when shocked by an unexpected result.

144. Actual malfunctioning or tampering with the KIEMS Kit is a question of fact to be decided based upon an appreciation of the facts and the technology involved itself. There is thus need in the petition to contain proper pleadings with material particulars in respect of malfunctioning or intentional tampering with the KIEMS Kit. The court should not be quick to draw conclusions only on the expert opinion or conjectures as regards tampering or corruptibility of the KIEMS Kits.

145. In my view, a petitioner with questions on the KIEMS Kit ought to plead, with reasonable particularity, that the returned candidate or the officers of the 1<sup>st</sup> Respondent commission have done acts of rigging or manipulation with KIEMS Kit(s) and that the results have been materially affected as far as the returned candidate is concerned. The petitioner also ought to plead that due to fault or interference with the KIEMS Kit(s), the result of the election has been materially affected as far as the returned candidate is concerned.

146. In the instant Petition, both the pleadings and the evidence are scarce in so far as manipulation, interference and problems with the KIEMS Kit(s) are concerned.

147. It was also clear to the court that though PW4 and PW8 were duly trained on the workings of the KIEMS Kits they still did not understand how they operated. The demonstration by DW1 was conclusive enough that the Kit churns out the “ping” sound only where the voter has not been biometrically identified and not otherwise. I do not find that any Kit malfunctioned or was tampered with to affect the returned results.

148. I now turn again to Forms 35A. They contain the polling station results.

149. The results in Forms 35A reflect the will of the people. This is the epitome of the *Maina Kiai case*. It is thus understandable that the Petitioner through his pleading as well as through the trial and the final submissions laid focus and emphasis on the Forms 35A. I must observe however that the Petitioner largely complained about Form 35B as opposed to A. The former contains the tallied results from Forms 35A.

150. DW2, in the course of her testimony, described the process of how she went about the tallying and tabulation of results and the generated use of the spread sheet, which had pre-inserted formula to automatically give the total results once the polling station figures were entered. She explained that the process was undertaken in the presence of the agents and any errors corrected. According to DW2, it was not possible to manipulate the results. She conceded that it was true that the figures in words and numbers differed and explained that the same occurred during the pre-printing exercise done in the presence of agents. DW2 explained that this was done to confirm that the Form 35B would print out in the correct format. She further contended that the final copy delivered to the 1<sup>st</sup> Respondent had the correct figures in both numbers and words as per the attached copy of the final result.

151. On this issue of collation and tabulation of results, **R3W1** testified that he was the chief agent of the 3<sup>rd</sup> Respondent’s political party and, as far as he was concerned, the tallying and counting went on well. R3W1 stated as much as he had never received any complaint from his agents in this regard.

152. In the case of **Khatib Abdalla Mwashetani vGideon Mwangangi Wambua & 3 others [2014]eKLR** the Court of Appeal observed as follows

**“[52] Accuracy is one of the principles that the electoral system must comply with. The obligation to tally involves confirmation of the figures without recounting the ballots. It is anticipated that during the tallying exercise, the Returning Officer shall confirm the validity of the votes. Indeed Article 86 (c) of the Constitution places an obligation on the 3<sup>rd</sup> and 4<sup>th</sup> respondents to ensure that the results from the polling stations are “openly and accurately collated and promptly announced”**

153. It is the duty of the returning officer to collate and tally the results as received from the polling stations without making any changes. The returning officer is expected to openly confirm the figures as well as the totals enter them as appropriate and accurately in Form 35B and then declare the results.

154. The Petitioner complained and alleged that the “ *data and information recorded in Forms 35A at the individual polling stations were not accurately and transparently entered into the KIEMS kits at the individual polling stations;*” and that “ *the information in Forms 35A is not consistent with the information in Forms 35B as required and legitimately expected*”. The resultant effect, according to the Petitioner, was that Form 35B used by the 2<sup>nd</sup> Respondent to declare the result was not accurate and verifiable and was thus invalid.

155. The retort by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents was that the result as announced was verifiable and any human errors of omission or transposition. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents insisted that the errors were not deliberate or intentional at all and that the errors if any did not affect the result. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents also complained that with regard to the alleged errors the Petition lacked the requisite particulars.

156. There is a cantena of court decisions, and I need not cite any which advance the acceptable proposition that an election petition ought to disclose all material facts on which a petitioner relies to establish the existence of a cause of action.

157. Material facts essentially refer to all the relevant facts on which the petitioner relies for purposes of drawing inferences in his favour during the trial and which the respondent may have opportunity before hand to counter through plausible evidence or explanations. The petitioner is expected to plead specifically and clearly with all the requisite minute particulars. While material facts mention generally a basic or essential or cardinal statement of fact while alleging its truth or falsity, particulars seek to give full complete and true pictures. With such further information in detail, the respondent is made to understand the case he is to meet, given that there is no room for an order for further and better particulars in the Regulations.

158. Alleged breaches of electoral laws and regulations or irregularities must thus be pleaded and established by way of affidavits or evidence during trial so that an adverse party is not disenfranchised or ambushed: see **Mark Nkonana Supeyo v Independent Electoral and Boundaries Commission & 2 Others [2017]eKLR**. See also **Raila 2** where the court held the view that even an application for scrutiny must not be made with a view to adding to particulars of the claim by the petitioner.

159. I have had to revisit the issue of pleadings in election petitions due to a corollary but difficult issue which arose during the final oral submissions by counsel.

160. In her filed submissions, Ms Othieno for the Petitioner annexed a list of 40 polling stations where the relevant Forms 35A was not signed by the Petitioner's agent or an agent from the Petitioner's political party. Then in the course of the final arguments, counsel nitpicked five polling stations to demonstrate that the collation of the votes by DW2 was not proper or up to the expected standards of a verifiable, transparent or accountable. The express comparison by the Petitioner's counsel of the Forms 35A and 35B prompted objections from counsel for the Respondents who argued that they were prejudiced and their clients had been ambushed.

161. The starting point is the Petitioner's own pleadings and the question is whether the Petitioner adequately pleaded his case in this respect.

162. The pleading was relatively clear that the information in Forms 35A did not tally with that entered in Form 35B. A closer perusal of both forms will reveal that the information in Form 35A which is to be fetched by the returning officer to Form 35B consist of : name of polling station, number of polling station, constituency, county, ward, candidates' name, number of registered voters in each polling station, number of votes obtained by candidate in each polling station, number of rejected ballots, number of rejection objected to ballot papers, number of disputed votes and the total valid votes cast :see Regulation 83(e).

163. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent in their joint response denied that there were any inconsistencies whilst stating that all the results were contained in Forms 35A and 35B. Additionally, the respondents pleaded that the results contained in both Forms 35A and 35B were clear and verifiable before concluding that if there were any errors they were not deliberate and did not affect the result of the election. The two respondents however complained that the Petitioner had failed to give particulars of the polling stations where the results captured in Form 35B were different.

164. I must first point out that Forms 35A and Form 35B were filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent as the results of the election. Form 35B was attached to the affidavit of the 2<sup>nd</sup> Respondent but clearer copies of the Forms 35A were re-filed by the Respondents with the Court's permission.

165. During the evidentiary hearing the Petitioner focused on the public portal comparison with the results in Forms 35A and also the fact that the agents did not sign the forms. In answer to a question during cross examination, DW2 stated that the errors detected during tallying involving one polling station were corrected. The Petitioner did not pick on any polling station leaving DW2 to insist that Form 35B was reflective of the results in Form 35A and that is why she gave all the agents the opportunity to vet the same and sign the form before she declared the final results. The agents who were present signed Form 35B.

166. In the **Maina Kiai case**, the Court of appeal was clear and emphasised the finality of results declared at the polling station stage.

The court stated as follows:

**“It is clear beyond peradventure that the polling station is the true locus for the exercise of the voter's will. The counting of the votes as elaborately set out in the Act and 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”.**

**Accuracy of the count is fundamental in any election. Voter turnout determines the outcome of any electoral contest. Numbers are therefore not only unimpeachable, but they are everything in an election. The lowest voting unit and the first level of declaration of ...results is the polling station. The declaration form containing those results is a primary document and all other forms subsequent to it are only tallies of the original and final results recorded at the polling station.”**

167. The case in my view stands for the proposition that the validity of the count declared at the polling station is final and may not be challenged or altered except in an election petition. This position had earlier been confirmed by the Supreme Court in the case of **Hassan Ali Joho & Another v Suleiman said Shabhal & 2 Others [2014] eKLR** where the court stated as follows

**[84] ...However, we note with appreciation that Justice Fred Ochieng, in Suleiman Said Shabhal v The Independent Electoral and Boundaries Commission & 3 Others , Election Petition No.8 of 2013, rightly held as follows;**

**“if a declaration must be in a formal instrument, I find that the forms containing the results of the elections at every level constitute such formal instruments. When the forms 34,35,36,37 or 38 have been duly signed by the authorized returning officer,[they become] instruments which cannot be challenged through election petition”[emphasis in the original]**

168. The duty of the returning officer is limited under regulation 83. He is only to tally, collate and publicly announce the results already, under regulations 74 and 79, announced and declared by the presiding officers from each polling station. The returning officer can however disregard results of a polling station where the total valid votes exceeds the number of registered voters in that polling station or where the total votes exceeds the total number of voters who turned out to vote in that polling station. In other words, the instances where the returning officer interferes with, varies, alters, modifies or adjusts the results of the polling station are limited to the two. It is only the election court empowered to interfere and vary, alter, modify or adjust the results of a polling station once sufficient cause is shown.

169. Where therefore a petitioner alleges that the returning officer has altered, varied, modified or adjusted the results of a polling station it is important that the allegation is not just left as a material fact to be contested but that the pleadings contain sufficiently clear and precise particulars giving a true picture of the allegations. This enables the respondent to appropriately respond or gives the court an opportunity to determine, on merit, whether to intervene or not through an order of scrutiny or otherwise.

170. In the instant case, there was a general material pleading but no particulars as to which polling stations were being brought to doubt and question. The Petitioner also did not raise the issue or question either in his evidence in chief or through the cross examination of any witness. Counsel only brought it up during the final submissions. This denied the court the opportunity to reflect on the same and perhaps order a scrutiny of the results allegedly altered. This also denied the respondents, in my view, the chance to also consider the same and put forth any explanation.

171. I would not deem it appropriate to accede to the Petitioner's argument that the approach at this stage merely constitutes an analysis of evidence. The issues touching on specific polling stations ought to have come out in the pleadings in the first place or at the very worst during the evidentiary hearing. As it were, it would not be untoward to infer that the petition in this regard was filed with the hope that some gaps would somehow be filled by the respondents.

172. In my judgment, petitions should and must never be filed *ex abundanti cautela* and then await documents and evidence to be lodged by a respondent.

173. As was stated by Odunga J in **Gideon Mwangangi Wambua & another v Independent Electoral and Boundaries Commission & 2 Others [2013]eKLR**

***“where a party does not sufficiently plead his facts with the necessary particulars but hinges his case merely on documents filed pursuant to Rule 21 of the Rules [ballot boxes, results & other election material], the court would be justified in forming the view that the petitioner is engaging in a fishing expedition or seeking to expand his petition outside the four corners of the petition.***

174. I would say the same of the Petitioner in so far as the submissions merely hinged on the documents filed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents without more in the form of particular pleadings and evidence by the Petitioner. I must consequently reject the submissions made by the Petitioner touching and concerning Forms 35A for the five polling stations namely Komarock Primary School polling station No 2 of 24, Mwangaza Secondary School Polling Station No 5 of 15, Imara Primary School Polling Station No 10 of 25, Thawabu Primary School Polling Station No 8 of 26 and Thawabu Primary School Polling Station No 26 of 26 in relation to the resultant Form 35B.

#### ***The Scrutiny report***

175. I directed that a scrutiny be undertaken with regard to eleven polling stations. The scrutiny was undertaken by the court's deputy registrar Hon Elizabeth Tanui. A report was prepared and availed to all the parties. It was to assist the court come to a just and fair determination.

176. The scrutiny report revealed that the ballot boxes were secured and that the original Form 35As had all been signed by the presiding officers or their deputies. The scrutiny also revealed some discrepancies in the vote counts. No marked irregularities were revealed or reported.

177. The discrepancies or irregularities if any were minor. They could not have any effect on the result of the election. They were in my view not substantial or significant enough as to lead me to change my overall view of the election.

#### ***On the other allegations of improper procedure, et al***

178. On this front the Petitioner alleged that the presiding officers were issued with more polling station diaries than necessary. The Petitioner also contended that when the presiding officers delivered results it took more than the usual time to clear them and some carried the KIEMS Kits home. All these, the Petitioner contended, was part of the wider scheme of manipulating the election.

179. I must first observe that none of the Petitioner's witnesses led testimony on these allegations. The Respondents however found it fit to address it and DW2 testified accordingly. She explained that the polling station diaries issued to the presiding officers were for purposes of training only, and the ones used in the actual day of the election are available and contain the accurate and the sequential account of the events of the day. She further denied that the presiding officers carried away any KIEMS Kit. DW2 also explained how the clearing process works and how long it took to clear one presiding officer after surrendering all election material.

180. It would suffice to simply state that the Petitioner did not avail evidence in proof of these allegations of the KIEMS Kits being carried away by the presiding officers and the same presiding officers having been issued with multiple polling station diaries (PDS).

181. The Petitioner also made various allegations, to wit; that votes in a number of polling stations were not counted or tabulated, that various Forms 35A were not stamped by the 1<sup>st</sup> Respondent's official stamp, that the 1<sup>st</sup> Respondent gave various instructions its officers which instructions were contrary to the law, and that the names and signatures of the Petitioner's agents were forged. I observe that none of the Petitioner's witnesses testified on these allegations.

182. The burden as I had earlier pointed out in this judgment lay on the Petitioner to avail evidence in proof of these allegations. He did not do so. The allegations which the Petitioner deemed to constitute irregularities and illegalities must thus fail for want of proof.

183. With regards to the allegation that various Forms 35A were not stamped by the 1<sup>st</sup> Respondent's official stamp, I hasten to add that the Petitioner did not prove this particular requirement and in any event, even though most of the Forms 35A availed to the court bore the stamp of the 1<sup>st</sup> Respondent Commission, I am not aware of any mandatory rule or regulation which demands the stamping of the forms and neither did the Petitioner draw my attention to any.

### ***Electoral malpractices***

184. The 3<sup>rd</sup> and 4<sup>th</sup> issues concerned the question as to whether there were any incidents of electoral malpractices or offences.

185. I did not hear the Petitioner to canvass these issues in evidence or submissions. In short, on the 3<sup>rd</sup> and 4<sup>th</sup> issues no evidence was led or canvassed before the Court and as a result the court has nothing to say on them.

186. They also fall on the wayside.

### **Conclusion**

187. For the reasons presented in the foregoing discussion, I conclude that the Petitioner has not discharged his burden. The Petitioner has not shown and proven substantive infringements of the constitutional and legal provisions or principles aimed at protecting the electoral system and preventing manipulation. Any proven irregularity did not in any event affect the result. In my judgment, the election was conducted substantially in accordance with the principles laid down in the Constitution and other written law on elections.

188. I refuse the prayers in the Petition and return the verdict that the 3<sup>rd</sup> Respondent was duly elected in the election. His election was not void.

### **Costs**

189. It is not alleged that the Petitioner has behaved unreasonably in the conduct of this litigation but I do not conclude that there should be no adverse costs consequences. I am however satisfied that the court has the power and duty to ensure that costs are proportionate in all circumstances and do not unduly deter access to the Courts in appropriate cases of dispute. Section 84 of the Act stipulates that

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

190. The Court is however further guided by rule 30 of the Elections( Parliamentary and County Election) Petitions Rules, 2017 which states that ;

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

**a) the total amount of costs payable; and**

**b) the person by and to whom the costs shall be paid.**

191. Where the court is not able to make an order on the total amount payable for whatever reason then the taxing master of the court will assess the costs: see Rule 31.

192. Ideally, when considering the amount of costs payable one ought to be concerned not to make any order on costs which has disproportionate consequences on any unsuccessful petitioner. The costs if awarded should not be punitive. In my view, an analogy ought to be made with the courts' concerns to limit the costs consequences in public law claims and public interest litigation. Public law principles on award of costs are an appropriate guideline in the case of a legitimate and serious challenge to an election. It would appear irrational, if not oxymoronic, for the election court during trial to insist that an election dispute has a full public aspect in that it is concerned more with the right of a constituency to be represented by a particular candidate, yet turn around at the conclusion of the trial and then hold that the *lis* was only between the parties to the petition and almost punitively award costs. The highway of access to justice may be blocked to ordinary voters who are also allowed to file petitions and at times even to take over the prosecution of the petition in the original petitioner's stead. An award of costs should thus not be intended to deter but rather to indemnify and encourage genuine and bona fide challenges to this exercise of elections.

193. I have reviewed the instant petition. The trial took a full four days of nearly twelve hours each. The witnesses were relatively to the point and the pre-trial guidelines helped to shorten the length of the trial as some witnesses who were likely to duplicate evidence were dropped. The issues generated by the petition were also in my view relatively straight forward. I appreciate the witnesses had to be prepared and keen drafting ventured into. The volume of pleadings and evidence was however not staggering.

194. The Respondents made suggestions on costs. The 3<sup>rd</sup> Respondent suggested a global Kshs. 8,000,000/= whilst the 2<sup>nd</sup> Respondent recommended 5,000,000/=. There is unfortunately no clear cantena of decisions on the appropriate award. The loose discretion of an election court seems to have led to what I may, with due respect term skewed awards on costs.

195. I will in this case retrieve my guide on costs from both the prescribed minimum fees and the security deposit on costs. It is an equivalent Kshs. 500,000/=. Taking the totality of the case, the issue, the trial period and the ultimate submissions, I am constrained to use and triple the minimum instructions fees. The costs awarded shall not **Disposal**

196. Before parting with this petition, I must acknowledge the assistance and cooperation of the Counsel- Ms J. Othieno assisted by Mr Oigara for the Petitioner, Mrs Mageto for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and Mr. D Okatch for the 3<sup>rd</sup> Respondent. Despite the political overtones which keep most election petitions company, the instant petition was prosecuted and urged forcefully but without generating unnecessary heat. An atmosphere of calmness ran through the court sessions and with the political overtones absent, the field was strictly judicial. I am grateful to counsel and non-reference to case law cited was not out of any feigned disrespect.

197. I make the following orders in final disposal

**193.1 The Petition be and is hereby dismissed.**

**193.2 I hereby declare that Mr Benjamin Gathiru Mwangi was validly elected as the Member of National Assembly Embakasi Central Constituency**

**193.3 The certificate under and in accordance with Section 86(1) of the Elections Act 2011 shall issue to the Independent Electoral and Boundaries Commission**

**193.4 The Petitioner shall bear the costs of the petition to be capped as follows:**

**193.4.1 As against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, Kshs.1,500,000/=**

**193.4.2 As against the 3<sup>rd</sup> Respondent, Kshs. 1,500,000/=**

**193.4.3 The costs shall be taxed and certified by the Deputy Registrar and the security deposit utilized to pay the 1<sup>st</sup> & 2<sup>nd</sup> Respondents on the one hand and the 3<sup>rd</sup> Respondent *on the other hand, on a pro rata basis.***

**Dated, signed and delivered at Nairobi this 28<sup>th</sup> day February, 2018**

**J.L.ONGUTO**

**JUDGE**