



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

(CORAM: KANYI KIMONDO J)

ELECTION PETITION NO. 2 OF 2017

HENRY TIOLE NDIEMA.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

BILHA KIPTUGEN, THE RETURNING OFFICER,

TRANS NZOIA COUNTY.....2ND RESPONDENT

MICHAEL MALING'A MBITO.....3RD RESPONDENT

JUDGMENT

1. The petitioner is Henry Tiole Ndiema. He was a candidate for *Member of the Senate* for Trans Nzoia County in the elections held on 8th August 2017. He was nominated by *Ford Kenya Party*.
2. The election was conducted by the Independent Elections and Boundaries Commission (hereafter *the 1st respondent or the IEBC*). The IEBC is a creature of Article 88 of the Constitution; and, the Independent Electoral and Boundaries Commission Act.
3. On 10th August 2017, the County Returning Officer (hereafter *the 2nd respondent*) announced the final results. The petitioner lost to Michael Maling'a Mbitio (hereafter *the 3rd respondent*) by a *narrow* margin: The petitioner garnered 70,846 votes; the 3rd respondent obtained 71,471 votes. The chasm was 625 votes.
4. The petitioner is aggrieved by the results. He lodged this petition on 6th September 2017. The gravamen of the petition is that the election was marred by widespread and grave *irregularities* which cast a long shadow of doubt on the final outcome. He sought scrutiny of election materials and a recount of votes. Those two prayers are spent.
5. He also craved a *declaration* that the election was *not* free, fair, credible or verifiable. Accordingly, he prayed for a *declaration* that the 3rd respondent was not *validly* elected; and, that the election be *quashed*.
6. In a synopsis, the petitioner contends that the elections were systematically *manipulated* in favour of the 3rd respondent; and, that the IEBC shirked the constitutional duty to conduct an *accurate, transparent and verifiable* election as decreed by Article 86 of the Constitution.
7. The petition is contested by all the respondents. Their case is that the election was conducted strictly in accordance with the Constitution, the Elections Act and the Regulations. The respondents submitted that the errors highlighted by the petitioner were *insignificant*; and, they do not justify the *nullification* of the results.
8. The petitioner relied on the affidavit sworn on 4th September 2017 in support of petition. He testified that he was the Senator for Trans Nzoia County from the year 2013 until 8th August 2017.
9. He testified that there were 639 polling stations in the county. There were 10 candidates for the election. The results were as follows:

- a) Peter Kiptanui Chemuguit.....3,442.
- b) Kipruto Rono.....40,777.
- c) Beatrice Khakali Kitiavi.....13,725.
- d) Stanley Kilimo Kore.....4,582.
- e) Michael Maling’ a Mbiti.....71,471.
- f) Henry Tiolo Ndiema.....70,846.
- g) John Lewis Ndombi.....2,798.
- h) Catherine Mukiite.....22,231.
- i) David Sifuna Kinisu.....9,725.
- j) John Kennedy Wanjala.....6,146.

10. The petitioner was dissatisfied with the process of voting, counting, tallying, transmitting and declaration of results. He contended that the elections were not conducted in compliance with the Constitution, the Elections Act and Regulations. He pleaded that the process was marred with “*massive irregularities*”. In a word, he said that his victory was stolen.

11. Some of the recurring complaints were: the alleged refusal by the 2nd Respondent to allow *his* agents into polling stations; inaccurate results; discrepancies between Forms 38A, 38B and 38C; and, a systematic manipulation of results in favour of the 3rd respondent.

12. In his oral evidence, the petitioner insisted that besides the agents appointed by his *Ford Kenya Party*, he was entitled to appoint *other* agents. The complaints are highlighted at paragraphs 34, 35 and 39 of his affidavit. He said he deployed agents but only a few gained access into the polling stations. Even then, they were not allowed to scrutinize the statutory forms or to sign them. However his chief agents gained ingress into the County Tallying Centre.

13. The petitioner alleged that counting took place in the absence of his agents. He also complained that the bulk of Form 38As were filled out in the absence of his agents; and, that accordingly the ensuing results cannot be verified.

14. At paragraphs 15 (a) to (f) of the affidavit, he particularized his grievancies at a number of polling stations. The stations are spread out in the *five* constituencies of Kwanza, Endebess, Cherangany, Saboti and Kiminini.

15. At Muungano Primary School Station 2, he garnered 164 votes but the Presiding Officer recorded 64 votes in Form 38A. At the hearing of the petition, he complained that the action denied him 100 votes. He said the error was transposed into Forms 38B and 38C. The petitioner had objected about the matter but the Presiding Officer declined to make amends.

16. The petitioner testified that the results for Mutua Primary School stream 1 were duplicated in stream 2. He said that the net effect was a loss of 7 votes whereas the 3rd respondent gained 23 votes. He claimed that the errors were transferred into Forms 38B and 38C. The witness referred to page 34 of the petition. He explained that he garnered 111 votes while the 3rd respondent had 47 votes. However, in Form 38B the 3rd respondent was allocated 70 votes.

17. The witness said that at Kitale Waterworks/ Pombo Primary School Station 1, he garnered 79 votes. Form 38A however indicated that he obtained 99 votes. At Matisi Primary School Station 9, the petitioner said he obtained 214 votes while the 3rd respondent scored 61. The petitioner referred to page 43 of the petition. He alleged that the results in Forms 38B and 38C deprived him of 210 votes; and, irregularly allocated the 3rd respondent 153 votes.

18. The petitioner testified that at Lukosi Primary School the results in stream 2 were duplicated in stream 1. In the process he was wrongly deducted 23 votes while the 3rd respondent gained 8. The petitioner said that at Milimani Primary School Polling Station 1, the 3rd respondent obtained 105 votes as recorded in Form 38A. However in Forms 38B and 38C the score was adjusted to 106.

19. The petitioner said that in the four stations highlighted, the 3rd respondent gained a total of 185 votes; the petitioner lost 260 votes. The petitioner added that at Nai Primary School station 1, the results were presented late; and, did not tally with the total number of valid votes cast. The petitioner’s case was that the results were inaccurate and unverifiable.

20. The petitioner then referred to a number of irregularities in Forms 38A. At St. Josephs Boys Secondary School stream 1, the form was altered and used for elections in Saboti Primary School polling station 4 in Saboti Ward. The alterations were not counter signed. He said the results were suspicious.

21. He testified that at Tuwani Primary School Polling Station 4, there were two forms 38A with different serial numbers. One was signed by one agent and the Deputy Presiding Officer. The other was signed only by the Presiding Officer. It was not executed by agents or candidates.

22. He said that at Luanda Primary School Polling Station 2, there were three different Form 38As with different serial numbers; and, signed by different sets of agents. The Presiding Officer had signed all the forms while his deputy had only executed two.
23. The petitioner cited other examples: At Kitale Vocational Training Centre Polling Station 1, there were two Form 38As with different serial numbers. They contained some alterations. There were no comments on the changes. The results for one candidate were different in the two forms. The same situation obtained at Trans-Nzoia Primary School Polling Station 4: There were three Form 38As with different serial numbers signed by different sets of agents. No comments or remarks were given by the Presiding Officer.
24. The petitioner referred to a number of unstamped forms 38As. They included Kimwondo Primary School and Koronga Primary School. There were then those with “*unexplained alterations*”. They included Milimani Primary School stream 1, Kobos Primary School stream 1, Mukuyuni Primary School polling station 2, Makunga Primary School polling station 2 and Maridadi Primary School stream 3.
25. The petitioner faulted the Returning Officer for Cherangany Constituency for failing to announce results of candidates “*station by station*”. He said that results were only announced for 67 polling stations leaving out 90 polling stations. He said the Returning Officer stopped to announce results immediately the 3rd respondent walked into the tallying hall. He claimed that the 3rd respondent held a meeting with the D.C. and the Returning Officer.
26. The petitioner opined that the process was opaque and meant to mask irregularities. He gave the example of Sitatunga Ward where wrong results were announced for the Member of the County Assembly. When a complaint was made, the Returning Officer made a correction.
27. Despite the protest by the petitioner, the Returning Officer declined to announce the remaining results “*station by station*”. The petitioner lodged a written complaint (exhibit *HTN 15*). The Returning Officer did not acknowledge it. The petitioner testified that his agents were not given sufficient time to verify the results.
28. The petitioner also took up cudgels on the procedures adopted at the County tallying hall. He testified that generally, the procedures for tallying, counting and transmission were defective. He singled out Cherangany, Kiminini and Saboti constituencies.
29. The petitioner said that his chief agent at Kiminini Constituency complained that the results were delayed for 24 hours. The results for the Member of Parliament had long been announced. He said the results for Mabonde polling station were announced long after the Members of the County Assembly had been issued with their certificates.
30. The petitioner testified that on the night of 9th August 2017, a stranger gained access into the tallying hall. He said he personally went there and found a man who claimed to be a C.I.D officer. The “officer” claimed he was left behind by his colleagues. The petitioner left the matter to investigations by the police.
31. The petitioner testified that on 9th August 2017, the results from Saboti Constituency showed he had 16,875 votes while the 3rd respondent had 16,895. However, the Returning Officer declined to issue a printed form 38B ostensibly because his staff was tired. By the following morning, the tally had changed: the 3rd respondent now had 18,236 votes; the petitioner only had 17,743.
32. The petitioner complained about delays of results from Endebess Constituency and in particular from four polling stations: Njoro Primary school station 1; Nai Primary School station 1; Salama Primary School station 1; and, Titimet Primary School station 1. Upon enquiry, the Returning Officer claimed the Presiding Officers could not be traced. The petitioner found the explanation baffling.
33. The next morning, he was informed by Rodgers Ndiema (PW7) that the missing agents had arrived at the constituency tallying centre. However, the Presiding Officer for Salama Polling Station 1 did not have the results in Form 38A. The officers at Njoro Primary station 1 and Nai Primary School station 1 claimed they had stepped out to eat. The petitioner claimed that some results were found in a maize plantation. Eventually three of the officers were charged for theft of a KIEMs kit or mishandling of election materials.
34. The petitioner was aggrieved that the results were accepted despite objections by his agents. The petitioner testified that the Presiding Officer at Titimet Primary School Polling station 1 claimed that he accidentally sealed all the Form 38As in a ballot box. The petitioner found the conduct suspicious because the officer went home without reporting the incident to his superiors. The petitioner said the Returning Officer proceeded to announce results without Form 38A. The petitioner protested in writing. He said that some of the presiding officers were arrested and charged in court.
35. The petitioner then highlighted discrepancies between Form 38C and the IEBC’s public portal. He claimed that at about 22:30 hours on 5th September 2017 the portal showed that the 3rd Respondent had 71,307 votes while the petitioner had 71,147. The rejected votes in Form 38C are 3204; while those in the public portal are 6095. The total votes cast as per the portal is 252,278. But according to Form 38C the total number of votes cast is 248,947.
36. The petitioner disputed the assertion by the respondents that the results in the portal were provisional. Interestingly, when cross examined on the matter, he replied that he does “*not accept the results in the IEBC portal or Form 38C*”.
37. The petitioner attacked the integrity of Form 38As for lack of “*formatting consistency*”. Form 38B for Cherangany Constituency did not have the name of one candidate *Chemuigut Peter Kiptanui*. The petitioner claimed the results for Saboti Constituency appeared to have been meant for declaration of the Member of County Assembly.
38. The petitioner asserted that there were 556 more votes cast for the Senate seat than those of the Governor. He said it was highly suspicious. The witness referred to page 653 of the 1st and 2nd respondent’s bundle. He said one candidate’s name is omitted. He said polling stations with multiple streams were listed under the same code.

39. Lastly, he said that the Cabinet Secretary for Water and Irrigation openly campaigned for the 3rd Respondent “*and was sighted in various polling stations on the voting day*”. In his view, this was unlawful use of public resources.

40. Under cross examination, he confirmed that he was a member of *Ford Kenya* party. He conceded that the party had agents but he did not know them. He said he had trained his agents and deployed them to all the stations. The witness was referred to section 30 of the Act on appointment of agents. He asserted that he had a right to appoint agents. He however conceded that he did not annex to the petition the letters appointing his agents.

41. He said there was a scheme or trend to deny him votes. He said that a recount or scrutiny would show he won the election. Regarding Muungano polling station, he said that his agents were present when the results were announced. They informed him that he garnered 164 votes. He clarified that at Mutua Primary School (code 040 – 1 of 2) the duplication is actually in Form 38B.

42. At Kitale Waterworks Polling Station (056) he said he could not comment on how the number “7” is written. From the copy of Form 38A in his possession, he got 199 votes. The witness admitted that the form for Tuwaini displayed in his petition was copy. But he said there were two forms with separate serial numbers. He said he was alerted by an agent that the Returning Officer at Cherangany Constituency tallying centre had stopped to announce the results “station by station”.

43. He conceded that the forms for Endebess were signed by agents. However, the forms contained errors and were not properly handed over. When cross examined further by counsel for the 3rd respondent, he confirmed that most of the forms were signed by *Ford Kenya* agents. He said that his agents did not sign the forms because they contained anomalies.

44. He conceded that Form 38B has no provision for signature by individual party agents. The witness insisted that the refusal to admit his agents was contrary to the law. He was of the view that party agents did not necessarily represent the interests of the individual candidates.

45. Regarding the errors at Mutua Primary School (Code 040), he said he did not blame the 3rd respondent. But he could not comprehend why he was losing and the 3rd respondent was gaining all the time. He said the errors at Matisi Primary School were deliberate and cost him 210 votes. But he admitted that the 3rd respondent also lost votes at Salama Primary school. He agreed that the duplication of centres in Form 38B affected all candidates but he said was the most prejudiced.

46. The witness said that one *Mercy Chebet* was his agent at Muungano Primary School. She did not sign the forms. The same was the case with another agent, *Moses Wabwire*. He said the agents disagreed with the results. They were instructed by another agent, Kigai (PW4), not to accept the results. He said that Form 38B for Cherangany reflects results for nine candidates only. He contended that the form did not capture the true results in Form 38A. He said that 90 polling station results were not announced one by one.

47. Under further cross examination, he said that the 3rd respondent campaigned with CS Eugene Wamalwa on 1st July 2017. The petitioner however did not file a formal complaint with the police. Lastly, he denied that the petition was speculative or based on conjecture. He said the entire process of elections was not transparent.

48. Upon re-examination he said the forms for Muungano Primary School are not copies of each other. He said the serial numbers are different and fall far apart. He said the figures in the form at page 538 of the 3rd respondent’s response do not add up; and, that the form annexed to the petition was more accurate.

49. He answered further that his agents were only admitted in 23 out of 639 polling stations. The witness was emphatic that *Ford Kenya* agents were not synonymous with *his* agents.

50. Lastly, he said the petition challenges both the numbers and the entire process of the election. He said that the polling, counting and tallying were irregular; and, that the final results could not be verified.

51. The petitioner lined up six other witnesses. The first was Tom Ndiwa (PW2). He was the petitioner’s County Chief Agent. He was based at Kitale Museum. The witness relied on an affidavit sworn on 4th September 2017.

52. He testified that the Deputy County Returning Officer gave a directive on 30th July 2017 that candidates sponsored by political parties would not be allowed to appoint their own agents. Instead, the political parties were to appoint one party agent per polling station to serve all the party candidates. He protested. The protest was not in writing. The directive was re-affirmed on 4th August 2017. That notwithstanding, he dispatched agents to the polling stations. He said that many were denied access.

53. The witness claimed that very few agents witnessed the actual voting. He said that all the Form 38As were never witnessed by any of their agents; and, no comments were made on the forms. The witness then regurgitated the evidence of the petitioner regarding Endebess Constituency. He said that the results did not tally with the numbers communicated by their agent.

54. On cross examination, he conceded that he did not annex his letter of appointment as an agent. He however claimed that he was accredited by IEBC. He said he was given Form 38C but he declined to sign it. He confirmed that *Ford Kenya* had agents at most polling stations. For example, the form at page 646 is signed by *Mark Baraza* of *Ford Kenya*. The witness did not know him. At Kwanza, a Mr. *Jonesmus Ngundo* signed for the party.

55. PW3 was Charles Samoei Chemwajar. The witness relied on an affidavit sworn on 4th September 2017. He was the Chief Agent for the Petitioner for Kiminini Constituency. The tallying centre was located at Kiminini Catholic Church. He said that the agents of the petitioner were denied access to polling stations. He gave the example of Masaba Primary School.

56. The witness testified that at about 9:00 p.m. on 9th August, 2017 a stranger walked into the tallying Centre and had a conversation with the Returning Officer. He said he later came to learn that the stranger was Mr. Ousa, a former head teacher at Keringa Primary School. The Returning Officer summoned his staff. There was a flurry of activities leading to inspection of six ballot boxes. The Returning Officer informed the agents that a Presiding Officer accidentally sealed a statutory form inside a ballot box. He said the boxes would be taken to the police for safekeeping.

57. The witness said that at about midnight, the Returning Officer claimed his officers were tired and needed a break. However, there was an *attempt* by another stranger to gain access into the locked tallying centre. The stranger was apprehended and handed over to the police. Later in re-examination, the witness said he saw the intruder *inside* the tallying hall.

58. PW3 claimed that at 11:30 a.m. on 10th August 2017 yet another stranger walked into the tallying centre with “*a bag full of marked ballot papers and the BVR Kit*”. He said that at 4:00 p.m., “*Mabonde Poling station [results] were introduced and announced*” when most agents had already left.

59. He claimed that at about that time, the petitioner was ahead with “*approximately 17,000 and the 3rd respondent was at approximately 11,000*”. When the final declaration was made, he claimed that the gap had reduced dramatically to the detriment of the petitioner: the petitioner now had 17,384 votes while 3rd respondent had 12,100.

60. Upon cross examination, the witness stated that he visited all the 137 stations. He did not produce his letter of accreditation. He said he saw the ballots “when they were poured out” from an envelope the stranger was carrying. The witness did not sign Form 38B because he disagreed with the results.

61. He said the Returning Officer said that a rogue officer had delayed the Mabonde station results. When cross examined further, he said the late delivery of results from Mabonde was suspicious. He also queried why *Chris Wamalwa*, the local Member of the National Assembly, was given his certificate the previous night only for the IEBC officials to then claim they were tired; and, that they could not process the senatorial results.

62. PW4 was Kigai Job. He was the petitioner’s Chief Agent for Kwanza Constituency. The tallying centre was at St. Monica Girls High School. His material evidence related to Muungano Polling Station 2. According to the public portal; and, information from *Mercy Chebet*, the petitioner garnered 164 votes. However, Form 38B gave him only 64. The error was transposed into Form 38C. He said the Returning Officer declined to rectify the error; and, advised them to file an election petition.

63. He also testified about duplication of results for Mutua polling station which gave the 3rd respondent an advantage of 23 votes. At paragraphs 11 and 12 of his deposition, he enumerated similar errors at Liyavo and Misanga Primary School. In the end, he said that it remained uncertain the number of votes the petitioner or the 3rd respondent received in Kwanza Constituency.

64. Under cross examination, he admitted that his name does not appear as an agent in Form 38B for Kwanza constituency. There are two agents listed there: *Ngundo* and *Juma* for Ford Kenya and Jubilee parties respectively. Pressed further, he clarified he could not sign the form because he was not a party agent.

65. When re-examined, the witness stated that only 23 of their agents gained admission into polling centres. He clarified that the information in paragraph 5 of his affidavit was obtained from the Presiding Officer. At paragraph 8 of his deposition, he relied on information from their agent, *Mercy Chebet*. The witness was uncertain when Form 38A for Muungano Primary School was filled out.

66. PW5 was Patrick Wamalwa Masanja. He was the chief agent for the petitioner in Cherangany Constituency. He was stationed at the Constituency Tallying Centre at Kipkeikei Secondary School. In his affidavit, he deposed that the petitioner’s agents were not admitted into Makutano Polling Centre, Sibanga Primary School, Nyakinyua Primary School and Karara Primary School.

67. He said that on 9th August 2017, the Returning Officer stopped announcing the results for each polling station. He protested and notified the petitioner. The petitioner arrived at the tallying Centre at around 4:00 a.m. and demanded that the results be announced “station by station”. In his affidavit he deposed that by 2:00 a.m. on 10th August 2017 only 81 stations had been tallied. In his oral testimony however, he said that only 67 stations were read by station. The Deputy Returning Officer declined to proceed with the exercise because most agents had fallen asleep.

68. The witness testified that failure to announce the results per station was a “cover up [for] some anomalies”. He gave the example of the wrong declaration of results of the Member of County Assembly for Sitatunga Ward. The petitioner had testified about the matter earlier.

69. Under cross examination, he stated that the petitioner’s agents were denied access at four polling stations. He said the break the Returning Officer took at 7:00 a.m. on 9th August 2017 was undeserved. He conceded that he only visited Makutano, Nyakinyua Primary, Sibanga Primary and Kalala Primary School; and, that his evidence was limited to the four areas. He however clarified that Makutano encompassed four polling stations. He said that he requested to sign Form 38B but the Returning Officer declined. He said the form was not signed by a *Ford Kenya* agent.

70. PW6 was Mike Peu. He was the petitioner’s chief agent for Saboti Constituency. He was stationed at Kitale Technical Training Institute. At paragraph 6 of his affidavit, he had deposed that “*in the course of tallying and declaration of results I noted that a few new ballot boxes whose authenticity we could not ascertain were sneaked in the tallying centre*”. In his oral evidence, he claimed that some ballot boxes had no seals. Under cross examination he conceded that he did not know the origin of the boxes; or, the elective office that they related to.

71. The witness had also deposed that on 10th August 2017, he was “shocked” when the Returning Officer began to read fresh constituency tallies. He said they were at variance with those announced the previous night. The new tally affected Matisi Primary School Polling Station. The petitioner garnered 214 votes but Form 38B recorded only 4 votes. He said that the petitioner’s agent, Monica, did not sign off the results. He also cited the case for Lukosi Primary School. The petitioner had testified at length about those matters.

72. Under further cross examination, he said that only one out of six disputed ballot boxes related to the senatorial election. He stated that his key complaint was with the tallying process. He refused to sign Form 38B because he disagreed with the results. He said the agents were told that the announcement made on the previous night was final. That is why he was shocked by the new tally the following morning.

73. The last witness for the petitioner was Rodgers Ndiema (PW7). The relevant part of his evidence was as follows. That there was suspicious delay in delivering the results for four polling stations at Nai, Njoro, Salama and Titimet. He protested. The Presiding Officers could not be found. They had switched off their mobile phones. The Returning Officer sought the assistance of the District Commissioner to trace them. PW7 testified that the officers were found after three hours and escorted to the tallying centre by police.

74. He said that the Presiding Officer for Salama stream 1 had lost the results and the Kiems kit. The results were recovered in a farm. The officer was charged as per the charge sheet at page 89 of the bundle. Njoro’s Presiding Officer, Juma Martim, claimed he got tired and went home. He was charged with breaching official duties. Titimet’s Presiding Officer cited network problems; and, that he had accidentally sealed Form 38A inside a ballot box. PW7 said the officer did not present the results.

75. The witness testified that the Presiding Officer at Nai claimed that he felt hungry and left. He was also charged for failing to properly hand over. The witness said the totals in Form 38A did not add up. The ballot form pasted on the ballot box was different from the one presented by the Presiding Officer. The witness said that he and the petitioner protested. He blamed the Returning Officer for relying on the form pasted on the ballot box.

76. Under cross-examination, he confirmed that the charge sheet referred to “*Nai Farm Primary School...Form 37 for senatorial seat*”. He also said that he never visited the four polling stations or the farm where the materials were found. He said he declined to sign Form 38B because he did not agree with the results. Under further cross examination, he said that the loss of documents affected all candidates.

77. When re-examined, the witness said Form 38B for Endebess was not signed by the Returning Officer. He denied that they tried to force the Returning Officer to announce the results without those from the four polling stations. That marked the close of petitioner’s case.

78. The next witness was Bilha Kiptugen (DW1). She was the County Elections Manager for Trans Nzoia County. In the disputed election, she was the County Elections Returning Officer. She largely relied on her affidavit sworn on 19th September 2017. She explained in great detail the entire *process* of elections: from delivery of strategic and non-strategic materials to the stations; voter identification, polling, counting, data entry or filling of statutory forms; and, announcement of results.

79. Her view was that the election was conducted strictly in accordance with the law; and, that the declaration of the 3rd respondent as the winner was accurate and verifiable. She implored the court to dismiss the petition.

80. I will however concentrate on her responses to each of the accusations by the petitioner. Regarding agents, she testified that candidates nominated by political parties were to rely on agents of the party. The agents were required to obtain an appointment letter from the political party; and, a copy of the Oath of Secrecy. The agent would then be given a badge by the IEBC.

81. However, at paragraph 9 of her affidavit the witness had deposed that that “*political parties were to appoint agents for all their candidates but subsequently, candidates were allowed lee way by the IEBC to appoint their own agents*”. On further examination, she clarified that candidates were allowed to appoint agents through their party.

82. The witness stated that Form 38As have a provision for “reasons for refusal to sign” but none of the agents made such remarks. She said that failure of agents to sign the forms does not invalidate result. She testified that there was no discrepancy in the actual votes garnered by the candidates at the polling stations.

83. She said that the only elections that end at the constituency level are those of the Member of National Assembly and Member of the County Assembly. She denied there were delays in announcing the results. She said the commission was allowed up to 7 days to make the announcement. She was unaware of any complaint by any candidate over the results for Mabonde polling station. She denied that any unauthorized persons gained access into the tallying centre.

84. On 30th September 2017, the court had directed the IEBC to file certified copies of all Forms 38A, 38B and 38C used in the elections. The materials were filed on 7th December 2017. In cross examination, DW1 conceded that the forms at pages 103, 104, 105, 106, 107, 108, 109, 110, 111, 112 of her bundle are *not* certified copies. She also confirmed that Form 38A for Maliki Primary School stream 2 (code 902) and Endebess Primary School stream 1 (code 101) were not filed in court. She however denied that the results for Endebess Constituency were compromised in any material respect.

85. Regarding the criminal charges against some Presiding Officers, she said that Michael Wekesa was accused of theft of a KIEMS kit. She said it had nothing to do with the results. The charge against Benson Senda, the presiding officer of Nai Primary School Station 1, related to Form 37A. She deposed that the form “relates to gubernatorial election”.

86. The witness clarified that she had no power to alter Form 38B; and, any errors in the form would be transposed into Form 38C. She conceded that Form 38B for Cherangany has a missing candidate in the first column. However, the name of the missing candidate was included in Form 38C.

87. DW1 conceded that a number of stations with multiple streams were listed under the same code in the form. They included St Christopher where two stations were given the same code. The same error was found at Kipsaina, Sitatunga, Milimani, Makutano, Biribireit, Baraka and Mwanga. She corrected the codes but did not interfere with the results.
88. The witness had difficulties explaining the discrepancy in Form 38A for St. Joseph's Secondary School. The pre-printed form for the station had been crossed over by hand; and, a new station, Saboti Primary School, was added. It was not countersigned. No agents signed either.
89. She was unaware where the original printed form for Saboti Primary School stream 4 went. She hypothesized that St. Joseph's Secondary School code 1 of 3 must have used another form. The serial number of the form was 004901 for stream 3. However, the form at page 278 of her bundle had serial number 004909. Three agents from Jubilee Party signed the form.
90. In re-examination, she said that Form 38B bore the correct results for both streams at St. Joseph's; and, that there were no complaints. She said she could not speak on behalf of the printer of the forms. However Form 38A is a booklet containing 6 leaves. The forms are carbonated and have anti-copying features. She opined that the last digit in the serial number changed from 1 to 6.
91. When cross examined on the matter, she said the form at page 101 has the word *copy* at the top. The one at page 102 looks different and illegible. She testified that every Presiding Officer was given a *Canon* printer. Sequential numbers would only change when copied in the system. When copies were made out of the IEBC system, the number would not change.
92. At paragraph 4 (a) of the response to the petition, the 1st and 2nd respondents had stated that "*all forms 38As were filled "accurately" and that [sic] it was recorded in form 38 B...*" But the witness conceded in cross examination that Form 38C in her bundle was not signed. Form 38B for Saboti is also not signed by agents; the one for Endebess is not signed by the Returning Officer.
93. The witness stated that the original forms are in the custody of the chairman of the commission. She explained that Form 38C has both a soft and hard copy. The soft copy has no signature. She said the hard copy was made at the County tallying centre; and, was signed.
94. She said that at Muungano (code 49) the total votes cast in stream 2 were 284. In Form 38C the number is shown as 184. The score for the petitioner in Muungano stream 1 is 169; the score in Muungano stream 2 is 64.
95. When pressed further, the witness agreed that the results in the IEBC portal and those in Form 38C are different. But she said that the portal is administrative; and, that the results are not "*official results*".
96. DW2 was Agness Wanjala. She was the Returning Officer for Endebess Constituency. She refuted the claims that the KIEMS kits failed to function at any of the polling stations in the constituency. She was unaware of any complaints by agents or candidates regarding the "authenticity of the results as entered in Forms 38A".
97. She denied that there were delays in submitting results from four polling stations: Njoro Primary school station 1; Nai Primary School station 1; Salama Primary School station 1; and, Titimet Primary School station 1. When those results were received, there was no allegation whatsoever that they had been manipulated or tampered with.
98. The witness testified that tallying commenced on 8th August 2017 at about 3:00 a.m. On 9th August 2017 at about midnight, she took a break; and, started tracing the four Presiding Officers. She clarified that the four ballot boxes were already at the centre. The results were finally announced on 10th August 2017.
99. She conceded that the results announced for Nai Primary School stream 1 were extracted from the copy displayed on the ballot box. She said the form was signed by the Presiding Officer and agents. The form at page 102 of the IEBC bundle is a photographic image of the copy on the ballot box. She testified that the Presiding Officer had brought "*a carbon copy but had overwritten [sic] on it and figures were not adding up*". Under cross examination she conceded that the form she rejected was Form 38A and not 37A.
100. She denied that the Presiding Officer at Titimet Primary School stream 1 did not have results for the senate race. She said results for Salama Primary School stream 1 were transmitted from the polling station. She said the criminal charges against the officers at Salama and Nai stations had no impact on the final results. She said the final results for Endebess were as follows: 3rd respondent 12,720 votes; petitioner 7,769 votes. She said Form 38B was signed by agents. She admitted that the form before the court had no signature. But she insisted that she executed the original form.
101. On cross examination, the witness admitted that she received a *written* complaint from the petitioner marked RN06. His complaint went into forms 38A. The witness clarified that she had no power to change the results in forms 38A. She said she received the complaint after tallying and declaration of results.
102. When the witness was shown the form for Titimet (code 030 1 of 2), she agreed that it had some *faint numbers* in the middle reading 384. She said that those figures related to a different election. She agreed that the total number of 443 *valid votes* is altered; and, that there is a faint figure behind it. At Salama (code 028) there were no results for the 3rd respondent and Kilimo. The form has no IEBC stamp. She said the Presiding Officer was arrested; and, that she wrote a statement and testified in the case.
103. The witness was shown the form at page 150 of the bundle for Tester Borne station. She agreed it was not stamped; and, that it is signed by an agent of NASA. She was unaware of a political party known as NASA. She said the form is signed by the Presiding Officer, Deputy Presiding Officer and 10 agents.

104. The witness agreed that the senatorial election was close; and, that every vote was crucial. She clarified that the results declared by IEBC were in Form 38B and not the public portal. That marked the close of the 1st and 2nd respondent's case.

105. The 3rd respondent testified as DW3. He is the Senator for Trans Nzoia County. He relied on the response to the petition; and, the affidavit sworn on 22nd September 2017. He testified that the petitioner was represented by agents across all polling stations; and, who had executed forms 38A at the polling stations.

106. He said that the petitioner only obtained 64 votes at Muungano Primary School Polling Station 2; and, that the total number of votes was erroneously stated as 284. The 3rd respondent conceded that the results for stations with multiple streams were duplicated in Form 38B. However, the anomaly was accounted for in the overall totals.

107. The 3rd respondent insisted that the petitioner only garnered 79 votes at Kitale Waterworks/ Pombo primary School Station 1. He added that he got 103 votes, and not 105, at Milimani Primary School Station 1. He opined that the few anomalies cited in the petition were minor; and, had no impact on the final results.

108. He emphasized that even when the errors are taken into account, he still remains the winner. He gave the example of Saboti Constituency: the final announcement gave the petitioner 17,743 votes; the 3rd respondent 18,236 votes. However after correction, it is clear that the petitioner had 18,101 and the 3rd Respondent had 18,075.

109. The 3rd respondent denied that the Cabinet Secretary for Water campaigned for him. He denied ever attending the launch of the NYS Programme with the Cabinet Secretary; or, attending the meetings referred to at paragraphs 16 (b) and (c) of the petitioner's affidavit.

110. The witness disputed that he was favoured in the election; or, that the counting or tallies were manipulated. He said that to the contrary, he was the victim. He said he was denied 150 votes at Eugene Wamalwa Primary School. The votes were allocated to another candidate, *Stanley Kilimo Kore*. The 3rd respondent was only allocated 3 votes. At Salama Primary School, he was not allocated any votes.

111. He referred to the results at Lukosi Primary School Station 1. There, the 3rd respondent obtained 14 votes while the petitioner got 131. In station 2, the 3rd respondent garnered 22 votes against the petitioner's 108. He said the information was well captured in Forms 38A of both stations but there is a clerical error in Form 38B.

112. On cross examination, he conceded that some Form 38As had discrepancies. For example, the form at page 685 of his replying affidavit is signed by 3 agents whereas the one by IEBC (page 647) has 4 agents. The one by IEBC at page 649 contained no signatures by agents. At page 705 the name of one candidate, Stanley Kiplimo Kore, is *handwritten*. On the IEBC form the name is *printed*.

113. The witness conceded that the form at page 376 of the IEBC bundle was not signed. There were alterations in the forms at pages 29, 108 and 467 of the bundle. The form for Kahuho (page 658) is not stamped while that for Cheptentan (page 41) was not signed.

114. The witness said he was unaware that IEBC did not file certified copies of 89 forms. He admitted there was an error in the form for Matisi Primary School where the petitioner was given only 4 votes. He said that at Muungano Primary School (code 049 2 of 2) the total *valid votes* of 284 votes had an alteration. It is counter-signed by the Presiding Officer.

115. The 3rd respondent's next witness was Sisimo Sile (DW4). He was the Chief County Agent at Saboti Constituency for the Jubilee Party. He said that at Lukosi Primary School (code 051) there were some posting problems when transferring the results into Form 38B. In the process both the petitioner and 3rd respondent lost some votes.

116. He admitted that at Matisi Primary School Polling Station 9, the results for the petitioner and the 3rd respondent were interchanged in Form 38B. At Eugene Wamalwa Primary School stream 3, the 3rd respondent's votes were erroneously given to *Stanley Kilimo Kore*.

117. The witness said he signed Form 38B for Kiminini Constituency. Two other agents, *Dorothy Alyumba* and *Mark Baraza*, also signed. Under cross examination, he said the error in the form for Matisi Primary School was "*accidental*". He said he was stationed at the tallying centre; and, he did not visit all polling stations.

118. He said he signed Form 38B for Saboti Constituency. He referred to the form in the 3rd respondent's bundle. He however conceded that the certified copy presented to the court did not have his name. The form in the IEBC bundle is typed; the one in the 3rd respondent's bundle is handwritten.

119. The witness agreed that the results for Saboti had clerical errors. The form for Kiminini was signed. However, the form annexed to the 3rd respondent's affidavit has three signatures; the one in the IEBC bundle is signed by four agents. Lastly, he said he did not have evidence that *Mark Baraza* was campaigning for the petitioner.

120. The last witness was Sabila Cherry (DW5). He was the 3rd respondent's County Agent. He explained that he was not accredited by the IEBC; and, that he was meant to assist DW4.

121. He was of the view that the clerical errors were minor; and, had no impact on the outcome of the election. He said that the errors could not be blamed on the 3rd respondent. At paragraph 10 of his affidavit, he had deposed that the "*voting, tallying, counting, and announcement of results was fair...and transparent*".

122. Under cross examination he clarified that he was appointed by the 3rd respondent on behalf of Jubilee Party. He said that the IEBC allowed only one agent per candidate. He conceded that he was given a badge by IEBC. He denied that exceptions were made for Jubilee Party. Lastly, he admitted that the forms contained errors. He gave the example of the results for Eugene Wamalwa Primary School and Salama Primary School.

123. That marked the close of the 3rd respondent's case.

124. At the close of the trial, the court was satisfied that a case for *partial scrutiny* had been made out. I ordered for *partial scrutiny of votes* limited to a *recount*; and, ascertainment of the number of *votes* each candidate obtained in the following *eleven* polling stations and streams:

- (i) Njoro Primary School Polling Station 001 – 1 of 2.
- (ii) Nai Primary School Polling Station 003 – 1 of 2.
- (iii) Matisi Primary School Polling Station 018 – 9 of 9.
- (iv) Salama Primary School Polling Station 028 – 1 of 2.
- (v) Eugene Wamalwa Polling Station 029 – 1 of 6.
- (vi) Eugene Wamalwa Polling Station 029 – 3 of 6.
- (vii) Titimet Primary School Polling Station 030 – 1 of 2.
- (viii) Mutua Primary School Polling Station 040 – 2 of 2.
- (ix) Muungano Primary School Polling Station 049 – 2 of 2.
- (x) Lukosi Primary School Polling Station 051 – 1 of 2.
- (ix) Kitale Water Works/Pombo Primary School Polling Station 056 - 1 of 2.

125. The exercise was carried out in the presence of *nine* agents representing all the parties to this petition. The detailed *Report on Scrutiny* by the Deputy Registrar of the Court was filed on 12th January 2018. Under the Elections (Parliamentary and County Elections) Petition Rules 2017 the report forms part of the *proceedings* in this petition. I will comment on its findings in the course of this judgment.

126. Before I leave the matter of that Report, my attention was drawn by learned counsel to *ten* handwritten letters by agents of the petitioner. They questioned the procedures of re-tallying of forms; re-count of votes; security of seals, ballot boxes, diaries and forms; and, the manner in which the entire exercise was conducted.

127. Those letters were addressed to the Deputy Registrar *well after* close of the oral evidence. Learned counsel for the petitioner at paragraphs 55 to 61 of the written submissions has repeated and expounded the narrative by the petitioner's agents.

128. My take is simple: The *Orders and Directions* of the Court on *partial scrutiny* were very detailed and clear. I got the distinct impression that the petitioner's agents; and, the learned counsel for the petitioner were trying to permeate the *borders* of the order; and, to *extend* the exercise to a *full scrutiny*.

129. All the parties have filed written submissions. Those by the petitioner were filed on 23rd January 2018. The petitioner also filed a list of authorities on even date. The 1st and 2nd respondents' submissions were also filed on 23rd January 2018 together with a list of precedents. The 3rd respondent filed submissions on 24th January 2018 with a list of authorities.

130. On 30th January 2018, all learned counsel for the parties addressed the court on those submissions. I am greatly indebted to all the learned counsel for their comprehensive submissions; diligence; and, courtesy to the Court. If I do not make direct reference to all the cited cases and materials, it is not for their lack of relevance.

131. I have now considered the pleadings, depositions, witness statements, materials, and the evidence. I have also paid heed to the written and oral submissions by learned counsel.

132. At the pre-trial conference, the following *five* broad issues were framed for determination by the Court:

- (i) *Whether the election was conducted in accordance with the Constitution, the Elections Act and Regulations;*
- (ii) *Whether the election was tainted by irregularities, illegalities or malpractices;*

(iii) Whether the 3rd respondent was validly elected as the Senator Trans Nzoia County;

(iv) Whether the petitioner is entitled to the reliefs sought in the petition; and,

(v) Who will bear the costs of the petition?

133. The framed issues are largely *subsumed* under the *third* one: This court is *simply* being asked to determine whether the 3rd respondent was *validly* returned as the Member of the Senate for Trans Nzoia County.

134. I will commence with a synopsis of the *relevant* legal regime. Article 1 of our Constitution vociferously proclaims the *sovereignty of the people*. See generally *Raila Odinga & another v IEBC & 2 others* Nairobi, Supreme Court, Presidential Election Petition 5 of 2013 [2013] eKLR, *Kakuta Maimai Hamisi v Peris Pesi Tobiko and others* Nairobi High Court, E.P. 5 of 2013 [2013] eKLR, *Gideon Mwangangi Wambua vs Independent Electoral and Boundaries Commission and others* Mombasa, High Court E.P. 4 of 2013 [2013] eKLR.

135. The *political rights* enshrined under Article 38 of the Constitution are partly exercised through *regular elections*. Articles 81 and 82 on the other hand demand for free, fair, transparent and credible polls.

136. These principles were explained well by Majanja J in *Richard Kalembe Ndile and another Vs Patrick Musimba Musau et al*, Machakos, High Court E.P. 1 of 2013 (consolidated with E.P. 7 of 2013) [2013] eKLR-

“The golden thread running through the Constitution is one of the sovereignty of the people of Kenya articulated in Article 1 of the constitution. The exercise of this sovereignty of the people is anchored by other rights and fundamental freedoms such as the freedom of expression, association and freedom of access to information which are to be found in Articles 33, 36, and 35 respectively of our constitution. In addition, Article 38 articulates political rights which are given effect through the electoral system set out in chapter seven titled ‘Representation of the people’.

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

137. Article 81(e) of the Constitution decrees as follows:

“The electoral system shall comply with the following principles-

(e) free and fair elections, which are-

(i) by secret ballot;

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

(iii) conducted by an independent body;

(iv) transparent;

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

138. The Elections Act 2011 (as amended from time to time); and, the Regulations thereunder are the legislation contemplated by Article 82. The recent amendments to the Act have introduced other relevant regulations and rules. Sections 39, 40 and 40A for example now anchor the use of technology in elections. See *National Super Alliance v IEBC & 2 others*, Nairobi High Court, Constitutional petition 328 of 2017 [2017] eKLR.

139. There are also new Regulations in the Elections Act. An example is the Election (Technology) Regulations 2017. Rule 17 mandates the IEBC to *retain* electronic data in safe custody for *three years* after the elections. The KIEMS kits were deployed in the last election for *electronic* registration and identification of voters; and, transmission of results. See my earlier ruling in this matter dated 30th November 2017 reported as *Henry Tiole Ndiema v IEBC & others*, Kitale High Court, E.P. 2 of 2017 [2017] eKLR.

140. Prior to its amendment, section 83 of the Elections Act provided as follows-

“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.”

141. I am alive that the Act was amended after the conduct of the impugned election. The amendment is thus *irrelevant* to the present dispute. I concur with Majanja J in *Jackton Ranguma v IEBC & 2 others*, Kisumu High Court E.P. 3 of 2017 [2018] eKLR, that the amendments had no *retroactive* effect.

142. I will thus apply the law as it existed on the date of the election. Section 83 is couched in *negative* language to emphasize the *caveat* placed on the election court. There is in it a *rebuttable presumption* in favour of the respondents that the election was conducted *properly* and in accordance with the law. It is also implied by that provision that elections are not always perfect. See Steven Kariuki v George Mike Wanjohi and others Nairobi, High Court Petition No 2 of 2013 [2013] e KLR.

143. Consequently, *not* all malpractices will lead to nullification of the result. See the dissenting opinion of Njoki SCJ in Raila Odinga & another v IEBC & 2 others, Supreme Court of Kenya, Presidential Petition 1 of 2017 [2017] eKLR, Morgan and others v Simpson and another [1974] 3 ALL ER 722.

144. The parties to the petition are *bound* by their pleadings. See Mahamud Sirat Ali Hassan Abdurahman & 2 others, Nairobi High Court, E.P. 15 of 2008, Steven Kariuki v George Mike Wanjohi and others Nairobi, High Court Petition No 2 of 2013 [2013] e KLR Jackton Ranguma v IEBC & 2 others, Kisumu High Court E.P. 3 of 2017 [2018] eKLR.

145. The formal responses to the petition by the 1st to 3rd respondents *join issues* on all the allegations in the petition. The respondents have thus put the petitioner to strict proof. The *legal burden of proof* remains firmly on the shoulders of the petitioner: the petitioner must lead cogent evidence to impeach the poll. The cardinal precept of the law of evidence is that he who alleges must prove; and to the required standard of proof. See section 107 of the Evidence Act. See generally Onalo v Ludeki and another [2008] 3 KLR (E.P) 614.

146. The burden of proof was explained well by our Supreme Court in Raila Odinga and others Vs Independent Electoral and Boundaries Commission et al (supra):

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta: all acts are presumed to 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 law”.

147. The Supreme Court’s propositions were not entirely novel. The Court was merely restating a view long held by the High Court in election dispute settlement. See Munyao vs Munuve et al (2008) KLR (E.P) 20. In Ole Lempaka Vs Komen and others (2008) 2 KLR (E.P.) 83, the learned judges stated that each paragraph of the petition alleging breach of law, rule or regulation or which complains of any malpractice must be proved by evidence. See also *Halsbury’s Laws of England* 4thedvol 15 para 670, Hawkins vs Powell [1911] 1 KB 988. An election petition must succeed or fail on its pleadings and evidence. All that is meant by that *onus probandi* is that first, the petitioner must proffer adequate or sufficient evidence. Secondly, the evidence must be of a persuasive quality. It is then that the respondents are called to rebut it. In the end, the petitioner must show that the preponderance of evidence inures in his favour. If he fails to rise to that standard, the petition must be dismissed.

148. I remain alive that the *evidential burden* keeps shifting in the course of the trial. This was succinctly captured by the Supreme Court in Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others, Nairobi, Supreme Court, election petition 5 of 2013 [2013] e KLR:

“The petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden”.

149. The *standard of proof* in election petitions is *higher* than a balance of probabilities in ordinary civil cases but *not* beyond reasonable doubt as required in criminal cases. See Mbowe v Eliufoo [1967] E. A. 240, Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others, Nairobi, Supreme Court, election petition 5 of 2013 [2013] e KLR, Muliro v Musonye (2008) 2 KLR (E.P.) 52, Rishad Amana v Independent Electoral and Boundaries Commission and 2 others, Malindi, High Court election petition 6 of 2013 [2013] eKLR.

151. In Kakuta Maimai Hamisi v Peris Pesi Tobiko and others Nairobi High Court E.P. 5 of 2013 [2013] eKLR I had the following to say on the subject-

“The crux of the matter is whether all the grounds raised by the petitioner sufficiently challenge the integrity of the poll. The court has to weigh the impact of the alleged irregularities on the outcome of the election. See James Omingo Magara v Manson Nyamweya and others Kisumu, Court of Appeal, Civil Appeal 8 of 2010 [2010] eKLR. In the context of a general election for six electoral offices, it would be impractical to demand or expect mathematical precision”

152. I will now return to the matter at hand. A good starting point is the *right* of candidates to have *agents* at polling stations. Section 2 of the Elections Act defines *agent* in the following terms:

“agent means a person duly appointed by-

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

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

and includes a counting agent and a tallying agent;”

153. The Elections (General) Regulations 2012 on the other hand define agent “as a person appointed under section 30 of the Act”. I have then studied section 30 of the Elections Act. It provides that party candidates *shall* only be entitled to *one* agent per polling station *appointed* by the party.

154. DW1 at paragraph 9 of her affidavit had deposed that that “*political parties were to appoint agents for all their candidates but subsequently, candidates were allowed lee way by the IEBC to appoint their own agents*”. On cross examination, she clarified that candidates were allowed to appoint agents *through* their party.

155. The directives given by the IEBC Deputy County Returning Officer on 30th July 2017 and 4th August 2017 that candidates sponsored by political parties would *not* be allowed to appoint their agents was thus *fully* backed by the law.

156. My considered opinion is that the offer to *party candidates* to appoint their *own* agents or *additional* agents *breached* section 30 of the Act. The offer was at best *gratuitous*. Fundamentally, the petitioner was a *Ford Kenya Party* candidate. He was *not* an independent candidate. He freely conceded that his party had agents across *all* polling stations. In *addition*, his own agents were given access into 23 polling stations. True, the petitioner was denied his *personal* preferences. But I find there was *no* transgression of the law.

157. I agree that a number of Form 38As did *not* have the official IEBC stamp. I hold the opinion that the lack of an IEBC stamp on Form 38A is *not* fatal. For starters, there is no *formal space* set out in the form to place the impression. Secondly, the IEBC stamp constitutes what the Regulations refer to as *non-strategic materials*. Thirdly, there is no express requirement in the Act or Regulations that the Presiding Officer *must* stamp Form 38A. This is *unlike* the case of a *ballot paper*. See Sammy Kemboi Kipkeu v IEBC & 2 others, Eldoret High Court E.P. 2 of 2017 (unreported). See also IEBC & another v Stephen Mutinda Mule & 3 others, Nairobi, Court of Appeal, Civil Appeal 219 of 2013 [2013] eKLR.

158. There is then the matter of missing signatures by agents. The *signatures* by agents are *not* mandatory. Regulation 79 (6) and (7) provide that the absence of an agent or candidate at the time of announcing results does not invalidate it. Form 38A provides for signatures by agents or candidates *if present*. Aggrieved agents or candidates have the right to protest or refuse to sign the form. Doubt is removed completely because at the foot of the form, there is a space intitled: *Refusal to Sign (if any)*. See Sammy Kemboi Kipkeu v IEBC & 2 others, Eldoret High Court E.P. 2 of 2017 (unreported).

159. The petitioner alleged that the Cabinet Secretary for Water carried out unlawful campaigns for the 3rd respondent at Mt Elgon Lodge; Endeless Centre; and, at Trans Nzoia Primary School. The dates were 1st July 2017 to 8th August 2017. That claim was *not* borne out by tangible evidence. All that the petitioner stated was that the Cabinet Secretary “*was sighted in various polling stations on the voting day*”. He did not say who saw him and at which polling station.

160. The petitioner did *not* file a formal complaint with the Commission or the police. From a legal and evidential standpoint, I am *unable* to hold that the 3rd respondent exploited *public resources* in his campaign; or, that Eugene Wamalwa, the Cabinet Secretary for Water and Irrigation, and the 3rd respondent held joint *campaign* meetings. It was also not lost on me that the allegations were classic hearsay.

161. Furthermore, the allegations were of a *criminal nature*. The standard of proof required was *beyond reasonable doubt*. See Wilson Mbithi Munguti Kabuti and others v Patrick Makau King'ola and others Machakos, High Court election petition 9 of 2013 (unreported), Halsbury's Laws of England 4th Ed. Vol. 15 para 695, Simon Nyaundi Ogari and another v Onyancha and others [2008] KLR, Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others, Nairobi, Supreme Court, election petition 5 of 2013 [2013] e KLR.

162. There was a *variance* between the results posted in the IEBC *public portal* and the final results in Form 38C. DW1 conceded the matter. She elucidated that the portal is “*administrative; and, that the results are not official results.*”

163. I am persuaded by that argument. The KIEMS kits were deployed in the last election for *electronic* registration and identification of voters; and, *transmission* of results. I have closely studied section 39 of the Elections Act 2011. Unlike the presidential election, there is no express requirement to transmit *electronically* the results of the election of Governors, Senators or County Women Representative.

164. Furthermore, under Regulation 82 of the Elections (General) Regulations 2012 *electronic transmission* of results is deemed *provisional*; and, subject to *confirmation* after the procedures in Regulation 76.

165. I will now interrogate the petitioner’s claims of inaccurate results; discrepancies between Forms 38A, 38B and 38C; or, that there was *systematic* manipulation of the results.

166. There is a false claim in paragraph 4 (a) of the response to the petition by the 1st and 2nd respondents that “*all forms 38A were filled accurately and recorded in form 38 B...*” Nothing could be further from the truth.

167. I will pick just *five* examples to demonstrate the point: Firstly, at Muungano Primary School Station 2, Form 38A denied the petitioner 100 votes and added the 3rd respondent 1 vote. Secondly, at Salama (code 028) there were no results for the 3rd respondent and another candidate, *Kilimo*. Thirdly, at Eugene Wamalwa Primary School stream 3, the 3rd respondent was denied 150 votes which were recorded in favour of *Kilimo*. Fourthly, at Nai Primary School (code 003 1 of 2), the Form 38A pasted on the *ballot box* was markedly *different* from the one presented to the Constituency Returning Officer. Fifthly, at St. Josephs Boys Secondary School stream 1, the form was *altered* and used for elections in Saboti Primary School polling station 4. The alterations were not counter signed.

168. The next logical or pertinent question is whether the anomalies or irregularities in the records of the election were so grave as to affect the outcome of the poll. Paraphrased, did they defeat the will of the people? I will revisit the matter shortly.

169. The petitioner had alleged that on the night of 9th August 2017, the results from Saboti Constituency showed he had 16,875 votes while the 3rd respondent had 16,895. I find there is *scantiness* of evidence to back up that claim. Fundamentally, no *final results* were announced that night. The following morning the final tally was as follows: The petitioner 17,743 votes; the 3rd respondent 18,236 votes.

170. Those numbers were *erroneous*. The court established that the petitioner obtained 17,975 while the 3rd respondent garnered 18,243 votes. This is from the *re-tally* by the Deputy Registrar of Form 38B for Saboti; and, after taking into account the *recount* of votes at Matisi Primary School Polling Station 9 of 9, Eugene Wamalwa Primary School Polling Station 1 of 6, Eugene Wamalwa Primary School Polling Station 3 of 6 and Lukosi Primary School Polling Station 1 of 2.

171. I said earlier that parties to the petition are *bound* by their pleadings. I will now focus on material complaints in *eleven* polling stations *specified* in the petition. I will commence with claims surrounding Form 38As. I will juxtapose those claims against the *Report on Scrutiny*.

172. At Muungano Primary School Station 2, the petitioner garnered 164 votes but the Presiding Officer recorded 64 votes in Form 38A. This was confirmed by the *recount* conducted by the court. The petitioner got 164 votes; the 3rd respondent 59 votes. It denied the petitioner 100 votes and added the 3rd respondent 1 vote. Obviously, the error was transposed into Forms 38B and 38C.

173. However, the 3rd respondent was also a victim of similar gaffes. At Eugene Wamalwa Polling Station (code 029) stream 3, the 3rd respondent led with 152 votes against the petitioner's 122. The correct votes for candidate *Kilimo* were only 3 votes and *not* 153 as indicated in form 38A. However, the 3rd respondent was *irregularly* deducted *150 votes* in Form 38A.

174. The court further scrutinized the original form 38A for Muungano Primary School Station 2. It had serial number 001603. It contained an I.E.B.C stamp; and it was executed by both the Presiding Officer and the Deputy Presiding Officer. There were no remarks by the Presiding Officer but four agents appended their signatures.

175. The results for Mutua Primary School stream 1 were irregularly duplicated in Mutua Primary School Stream 2. The error was not unique to the petitioner: it affected *all* the candidates. The scrutiny of the original form 38B for Kwanza Constituency showed that the petitioner was given 104 votes in stream 1 and 104 votes in stream 2. The 3rd respondent was given 70 votes in stream 1 and 70 votes in stream 2. When the court *recounted* the votes for stream 2, the petitioner had 111 votes while the 3rd respondent garnered 47 votes. A quick arithmetic confirms the petitioner's claim that he incurred a *loss* of 7 votes whereas the 3rd respondent *gained* 23 votes.

176. I have studied the *written* complaint by the petitioner marked *RN06* annexed to the deposition of Rodgers Ndiema (PW7). His complaint went into Form 38As. The petitioner was trying to persuade the Returning Officer to revisit a number of Form 38As. No power reposed in the Returning Officer under the Act or Regulations to *adjust* the results in forms 38A. See *IEBC v Maina Kiai & Others*, Court of Appeal, Nairobi, Civil Appeal 105 of 2017 [2017] eKLR.

177. There were complaints of *delay* of submission of results for Njoro Primary school station 1; Nai Primary School station 1; Salama Primary School station 1; and, Titimet Primary School station 1. I have taken into consideration the rebuttal tendered by IEBC. DW1 testified that tallying commenced on 8th August 2017 at 3:00 a.m. On 9th August 2017 at about midnight, she took a break; and, started tracing the four Presiding Officers. Considering that span of time, I *cannot* say that the break was *undeserved*.

178. The four ballot boxes for those centres had already reached the centre by the time DW1 took a rest. But the Presiding Officers were curiously absent. The results were finally announced on 10th August 2017. IEBC had an allowance of *seven days* to announce the final results. The petitioner had alleged that at Kiminini Constituency, the results for the senate seat were delayed for 24 hours. True, there was tardiness; but the delay did *not* breach the official timelines for declaration of final results.

176. The petitioner questioned why *Chris Wamalwa*, the local Member of the National Assembly; and, the Member of County Assembly received their certificates ahead of him. He was at a loss why the IEBC failed to announce the senatorial results the same night.

180. First, I have stated that I cannot begrudge the IEBC officials for taking a break after so many hours. Secondly, the answer to the petitioner is in Regulation 75. It is titled: *Commencement and sequence of the count*. The order of counting of votes should be as follows:

a) *President;*

b) *Member of the National Assembly;*

c) *Member of the County Assembly;*

d) *Senator;*

e) *County Woman Representative in the National Assembly; and*

f) *County Governor.*

181. There was paucity of evidence that the KIEMS kits failed to function at any of the polling stations in the constituency. Furthermore, the petitioner failed to prove that the results as entered in Form 38As were *unauthentic*. From the rebuttal by Agness Wanjala (DW2), I have reached the conclusion that it was a red herring.

182. This was a heated election that went to the wire. Such a close contest forments unnecessary suspicions. For example, the petitioner alleged that on the night of 9th August 2017, a stranger gained access into the tallying hall. He said he personally went there and found a man who claimed to be a C.I.D officer left behind by his colleagues. Charles Samoei Chemwajar (PW3) claimed that a stranger walked into the tallying Centre and had a conversation with the Returning Officer. It turned out to be a *Mr. Ousa*, a former head teacher at Keringa Primary School. Tom Ndiwa (PW2) also claimed that a stranger tried to break into the tallying centre at night. He was apprehended and handed over to the police. Later in re-examination, the witness said he saw the intruder *inside* the tallying hall.

183. All those allegations did not establish that any of the strangers *tampered* with the election materials. Perhaps more serious was the allegation by PW3 that a stranger entered the tallying hall with an *“envelope containing marked ballots”*. I have studied paragraph 13 of his affidavit. He deposes that the stranger had a *“bag full of marked ballot papers and the BVR kit”*.

184. The discrepancy aside, this was at the county tallying centre. Ballot boxes are not re-opened at the tallying centre and no counting takes place. The witness did not explain the marked ballot papers were for which election. Furthermore, as explained by DW1, the *BVR kits* were not used in the 2017 elections. The technology deployed was the *KIEMs kits*.

185. Mike Peu (PW6) sensationally claimed that ballot boxes were *“sneaked into the tallying centre”*. He also claimed that some ballot boxes were unsealed. But under cross examination he conceded that he did not know the origin of boxes; or, to which elective office they related. It was just a bare allegation with no evidential foundation.

186. Election officials are prone to human error. I take judicial notice that these officers had worked for many hours between the 7th and 10th of August 2017. Fatigue sets in. It may explain arithmetic errors in some statutory forms. It is thus not surprising that at Kiminini, a Presiding Officer accidentally sealed a statutory form inside a ballot box.

187. However, owing to the numerous anomalies that emerged in the course of the trial, I ordered a *partial scrutiny, re-count and re-tally* in a number of stations.

188. There was disquiet particularly with the results for Nai Primary School (code 003 1 of 2) and Njoro Primary School Polling Station 001 -1 of 2. Form 38A pasted on the *ballot box* for stream 1 at Nai was *different* from the one presented to the Constituency Returning Officer. Two issues arise. First, it was highly suspicious for the Presiding Officer to belatedly present *“a carbon copy”* of Form 38A that had *“overwriting or figures [that did] not [add] up”*. The less I comment about the matter the better because there is a *pending* criminal case.

189. But as explained by the IEBC, a number of copies of Form 38A are produced. The forms are printed in *six sheets*. One copy is supposed to be placed inside the ballot box, another to be pasted on the box, one to be pasted on the door, a copy for the agent(s) and so forth. See *Kakuta Maimai Hamisi v Peris Pesi Tobiko and others* Nairobi High Court E.P. 5 of 2013 [2013] eKLR.

190. There was no allegation that the copy pasted on the box was *foreign*. I am also fortified because the scrutiny by the Deputy Registrar found within the ballot box a copy of Form 38A serial No. S/No02293. The recount of votes revealed that the petitioner received 94 votes; the 3rd respondent 86 votes. The Deputy Registrar observed that there were *four* ballot papers that had been *double marked* but assigned to candidates. They should obviously have been counted as *rejected votes*.

191. The petitioner alleged that some results were found in a maize farm. Neither the petitioner nor Rodgers Ndiema (PW7) visited the farm where the materials were recovered. I find there is a paucity of evidence to support that allegation. In any case, the loss of results would affect all other candidates.

192. There is then the matter of the three Presiding Officers charged for various offences. The one at Njoro Primary School was charged for breach of official duties for failing to properly hand over election materials. The presiding Officer at Nai Primary School faced a similar charge. The charge sheet however referred to Form 37A used for gubernatorial elections. The complainant in both cases was Agness Wanjala (DW2). The third officer was charged for theft of a KIEMs kit at Salama Primary School. All these issues informed the decision of the court to carry out a partial scrutiny.

193. The scrutiny revealed that the following *original* Form 38As were signed by either the Presiding Officer or the Deputy Presiding Officer or both of them. They also bore an *IEBC stamp*; and, were signed by *three* or more agents: Matisi Primary School Polling Station 018 – 9 of 9; Eugene Wamalwa Polling Station 029 – 1 of 6; Eugene Wamalwa Polling Station 029 – 3 of 6; Mutua Primary School Polling Station 040 – 2 of 2; Muungano Primary School Polling Station 049 – 2 of 2; Lukosi Primary School Polling Station 051 – 1 of 2; and, Kitale Water Works/ Pombo Primary School Polling Station 056 – 1 of 2.

194. I also noted that in four impugned polling stations (Njoro, Nai, Titimet and Salama) the original Form 38As were *not* made available to the Deputy Registrar. However, the copies for Njoro and Salama were stamped; signed by both the Presiding Officer and the Deputy Presiding Officer; and, signed by some agents. Form 38A for Nai was *not* signed by any agent. However, the one pasted on the ballot box (page 102 of IEBC’s bundle) *seems* to be signed by four agents. The photographic image is too faint and illegible.

195. The petitioner must shoulder blame for *not* seeking a recount at the polling station. Regulation 80 of the Elections (General) Regulations 2012 provides as follows:-

“80. (1) A candidate or agent, if present when the counting is completed, may require the presiding officer to have the votes

rechecked and recounted or the presiding officer may on his or her own initiative, have the votes recounted: provided that the recount of votes shall not take place more than twice.

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

196. It is also important to keep in mind that this was a senate election spread out in 639 polling stations. The focal point of an election is the *polling station*. The Court of Appeal had this to say in IEBC v Maina Kiai & Others, Court of Appeal, Nairobi, Civil Appeal 105 of 2017 [2017] eKLR-

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

197. I have then looked at the Form 38Bs. In Kwanza Constituency (code 136) the original form dated 10th August 2017 was stamped; and, signed by the Returning Officer and *two agents*. The form for Endebess Constituency (Code 137) was also stamped and signed by the Returning officer and *six agents*.

198. The original Form 38B for Saboti Constituency (code 138) was in two sheets. Although the last sheet was stamped and signed by the Returning Officer, no agents executed the form. In Kiminini Constituency (code 139) the original form contained three leaves. The last page was stamped and signed by the Constituency Returning Officer and one agent.

199. The original form for Cherangany Constituency (code 140) was *not* presented to the Deputy Registrar. The last page of the copy was stamped and signed by the Constituency Returning Officer and two agents.

200. There is another matter at Cherangany: I fault the Cherangany Constituency Returning Officer for failing to announce all the results of candidates station by station. There was evidence that he announced the results for about 67 polling stations out of 90. Such procedure sparked mistrust; and, defeated transparency. But in the end I am *not* satisfied that it was *cover up* for irregularities.

201. In their oral evidence, the petitioner and Patrick Wamalwa Masanja (PW5) pointed to Sitatunga Ward where wrong results were declared for the Member of the County Assembly. That was not very helpful as this court is dealing with the *senatorial results*. The same goes for the claim by the petitioner that there were 556 more votes cast for the senate seat than those of the Governor. He said it was highly suspicious. It remained just that; a mere suspicion.

202. Finally, I scrutinized the original Form 38C. It ran into seven sheets. It bore the official IEBC stamp; and, was signed by the County Returning Officer and five agents. As discussed elsewhere in this judgment, the errors in Form 38As were transposed into Form 38Bs and partially into Form 38C.

203. As I stated earlier *not* all malpractices will lead to *nullification* of the result. The court must weigh the impact of the irregularity against the overall results. I dealt with the subject in Kakuta Maimai Hamisi v Peris Pesi Tobiko and others Nairobi High Court E.P. 5 of 2013 [2013] eKLR where I stated-

“The crux of the matter is whether all the grounds raised by the petitioner sufficiently challenge the integrity of the poll. The court has to weigh the impact of the alleged irregularities on the outcome of the election. See James Omingo Magara v Manson Nyamweya and others Kisumu, Court of Appeal, Civil Appeal 8 of 2010 [2010] eKLR. In the context of a general election for six electoral offices, it would be impractical to demand or expect mathematical precision”

204. This question was partially answered by the recount of votes in the *eleven* disputed polling stations. At Njoro Primary School Polling Station 001 – 1 of 2, the petitioner got 66 votes against the 3rd respondent’s 88. At Nai Primary School Polling Station 003 – 1 of 2, the petitioner garnered 94 votes against the 3rd respondent’s 86. At Matisi Primary School Polling Station 018 – 9 of 9, the petitioner led with 214 votes against the 3rd respondent’s 81. At Salama Primary School Polling Station 028 – 1 of 2, the petitioner obtained 50 votes against the 3rd respondent’s 17.

205. The recount of votes further revealed the following: At Eugene Wamalwa polling station 029- 1 of 6, the petitioner was ahead with 142 votes against the 3rd respondent’s 109. In stream 3 of the same polling centre, the 3rd respondent led with 152 votes against the petitioner’s 122. The correct votes for candidate Kilimo were only 3 votes and *not* 153 as indicated in form 38A. Like I discussed earlier, the 3rd respondent was *irregularly* deducted 150 votes in Form 38A. At Titimet Primary School Polling Station 030 – 1 of 2, the 3rd respondent led with 351 votes against the petitioner’s 72.

206. At Mutua Primary School (code 2 of 2) the scrutiny disclosed that the petitioner was ahead with 111 votes against the 3rd respondent’s 47. I dealt earlier with the duplication of results in streams 1 and 2 at Mutua and the impact on the final tally. At Muungano, the valid votes for the petitioner were 164. Those of the 3rd respondent were 59. Like I stated earlier, it confirmed that the petitioner was unfairly denied 100 votes; and, the 3rd respondent added 1. At Lukosi Primary School Polling Station No. 051 – 1 of 2, the petitioner led with 131 votes against the 3rd respondent’s 14. Finally, at Kitale Water Works/Pombo Primary School Polling Station 056 - 1 of 2, the petitioner garnered 78 votes against the 3rd respondent’s 16.

207. But when the votes were re-counted; and, *re-tallied* in Form 38Bs and 38C for all the *five* constituencies, it still leaves the 3rd respondent in the lead. The arithmetic for the two candidates is as per the following table:

Constituency	Henry Ndiema	Michael Mbito
Kwanza	16,392	11,746
Endebess	7,767	12,723
Saboti	17,975	18,243
Kiminini	17,384	12,100
Cherangany	11,664	16,645
TOTALS	71,182	71,457

208. I am fortified in those findings by the petitioner's own pleading at paragraph 18 of the petition. The petitioner stated as follows: "*From the foregoing and from the few forms analyzed...the petitioner had irregularly lost 360 votes while the 3rd respondent irregularly gained 185 votes*". So much so that the irregularities and anomalies do *not* substantially affect the *final* result.

209. I concur with my learned brother, Majanja J in *Jackton Ranguma v IEBC & 2 others*, Kisumu High Court E.P. 3 of 2017 [2018] eKLR.

"An election petition is not a do-over of the just concluded election. It is not an opportunity to conduct another election through the court as every election conducted in accordance with the law is presumed valid unless it is set aside by the court."

210. In the final analysis, there were flaws and irregularities in the *records* of the election. I stated at the beginning that section 83 of the Act has a *rebuttable presumption* in favour of the respondents: that the election was conducted *properly* and in accordance with the law. It also implied by that provision that elections are not always perfect. See *Steven Kariuki v George Mike Wanjohi and others* Nairobi, High Court Petition No 2 of 2013 [2013] e KLR.

211. This was a *senatorial election* covering *five* constituencies. It was taking place in the backdrop of a general election for *six* electoral offices. Like I observed in *Kakuta Maimai Hamisi vs Peris Pesi Tobiko and others* Nairobi High Court election petition 5 of 2013 [2013] eKLR, *it would be impractical to demand or expect mathematical precision*.

212. My answer to issue number ii) framed earlier is thus *partially* in the *affirmative*. I readily find that the records of the poll in some Form 38As and 38Bs were *tainted* by irregularities and malpractices. However, the anomalies do *not* substantially affect the *numbers* or *outcome* of the poll.

213. From the recount of votes in the disputed polling stations, the 3rd respondent's lead shriveled from 625 votes to about 275 votes. I disagree with the hypothesis by the petitioner that *if* the scrutiny had extended to *all* the polling stations, the lead would be wiped out. That is no more than a selfish *guess*. To accept such a submission would be to turn the law of evidence on its head.

214. The court was dealing with *specific* complaints *pleaded* in the petition. However narrow the gap is, it still suffices for our *first-past-the-post* electoral system. I *cannot* then say that the overall result did not reflect the *will* of the people of Trans Nzoia.

215. It follows that my answer to issue number i) is in the *affirmative*. The election was *substantially* conducted in accordance with the Constitution, the Elections Act and Regulations.

216. On a preponderance of the evidence and my analysis so far, the 3rd respondent was *validly* elected as the Senator for Trans Nzoia County. That answers issue number iii) in the *affirmative*.

217. It must then follow as a corollary that the answer to issue number iv) is in the *negative*. The petitioner has *not* marshaled sufficient evidence to the required *standard of proof* that inures in his favour. Accordingly, the petitioner is *not* entitled to *overturn* the results as prayed in the petition. The petition is hereby *dismissed*.

218. That leaves issue number v) on costs. Costs ordinarily follow the event. They are also at the discretion of the Court. Section 84 of the Act provides that an *election court shall award the costs of and incidental to a petition and such costs shall follow the cause*. Rule 30 (1) (b) of the Elections (Parliamentary and County Elections) Petition Rules 2017 empowers the court to set *the maximum of costs payable*.

219. If the Court does not determine the costs, then the Registrar of the Court is required by Rule 31 to tax such costs. I grant the *respondents* costs of the petition. Those costs shall be paid by the *petitioner*. Although *twelve* witnesses were called to the stand; and, a tome of materials presented to the court, the petition did *not* raise complex questions of law. The evidence was taken in *four* days.

220. The maximum costs shall thus be Kshs. 3,000,000. The Deputy Registrar of this Court shall tax the *Bill of Costs* under Rule 31. Under Rule 31 (3), I direct that the whole or any part of those costs shall be paid to the respondents from the money deposited in court by the petitioner.

221. A certificate of determination of this petition required under section 86 of the Elections Act shall issue forthwith.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 28th day of February 2018.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Mr. Nyaosi with him Mr. Oibo for the Petitioner instructed by McKay & Company Advocates.

Mr. Lang'at holding brief for Mr. Munene for the 1st and 2nd Respondents instructed by Akide & Company Advocates.

Mr. S. Gitonga for the 3rd Respondent instructed by Gitonga Mureithi & Company Advocates.

Mr. J. Kemboi, Court Clerk.