



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ELECTION PETITION NO. 7 OF 2017**

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 19, 20, 22, 23, 47 AND 73 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: CHAPTER SEVEN AS READ TOGETHER WITH CHAPTER SIX OF THE CONSTITUTION OF KENYA, 2010 (REPRESENTATION OF THE PEOPLE)**

**AND**

**IN THE MATTER OF: CONTRAVENTION OF ARTICLES 1, 2, 10, 81, 83 AND 86 OF THE CONSTITUTION BY THE RESPONDENTS**

**AND**

**IN THE MATTER OF: THE ELECTIONS ACT CAP 7, ELECTIONS (TECHNOLOGY) REGULATIONS, 2017 AND THE ELECTION OFFENCES ACT NO. 37 OF 2016**

**AND**

**IN THE MATTER OF: THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT, 2012**

**AND**

**IN THE MATTER OF: THE LEADERSHIP AND INTEGRITY ACT, 2012**

**BETWEEN**

**MOHAMED MAHAMUD ALL.....PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL AND  
BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**AISHA ABUBAKAR, CHANGAMWE CONSTITUENCY  
RETURNING OFFICER.....2<sup>ND</sup> RESPONDENT**

**OMAR MWINYI SHIMBWA.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. On 8th August, 2017 the Constituents of Changamwe braved the scorching heat of Mombasa County by turning up in 136 polling stations to elect the leaders of their choice in the second elections post the 2010 Constitution of Kenya. Through results announced by the Constituency Returning Officer, the 3rd respondent, Shimbwa Omar Mwinyi was declared the winner of the seat for the Member of

Parliament for Changamwe Constituency. The overall results are as tabulated below:-

	Candidate	Valid votes cast
1.	Shimbwa Omar Mwinyi	31584
2.	Daib Abdi Mohamed	9769
3.	Muange Daniel	6657
4.	Mittau Peterson	4478
5.	Mpapale Godfrey Imbali	196
6.	Ngugi Patrick	181

2. This petition was filed by Mohamed Mahamoud Ali, a registered voter at St. Lwanga Primary School polling station in Changamwe Constituency to contest the election of Shimbwa Omar Mwinyi as the Member of Parliament for the said Constituency, in Mombasa County. The crux of the petition dated 5<sup>th</sup> September 2017, and filed on 6<sup>th</sup> September, 2017 is that the election held on 8<sup>th</sup> August, 2017, that led to the 1<sup>st</sup> and 2<sup>nd</sup> respondents declaring the 3<sup>rd</sup> respondent as the elected Member of the National Assembly for Changamwe Constituency, was tainted with serious illegalities, substantial irregularities, electoral malpractices and was in violation of certain constitutional principles and statutory provisions.

3. The Petitioner's case is premised on three broad (3) grounds set out in Paragraph 20A of the petition and more specifically, that:

a) The elections for the Member of Parliament for Changamwe Constituency were not conducted in accordance with Articles 81 and 86 of the Constitution of Kenya that sets out the framework for a proper electoral system and voting process;

b) The 1<sup>st</sup> Respondent failed to carry out a transparent, verifiable, accurate and accountable electoral process as required by Articles 81, 83 and 88 of the Constitution of Kenya;

c) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to adhere to the provisions on voting, counting of votes and declaration of results with regard to *inter alia* voting, sealing of ballot boxes, admission of the results and tallying as laid down by the Elections Act, the Election Laws (Amendment) Act No. 1 of 2017 and the Election Offences Act.

4. The Petitioner breaks down the aforementioned grounds to include: issuance of multiple ballot papers, allowing unauthorized election materials and persons at the polling stations, using faulty KIEMS kits, denying valid registered voters their right to vote, relay and transmission of results from polling stations to the constituency tallying center as not being accurate, verifiable, secure, accountable, transparent and open, alteration and/ or incorrect entry of figures in Forms 35A after counting of results, denial of entry and/or removal of Jubilee political party agents and/or Mr. Abdi Daib's agents from polling stations and tallying centers, non-secrecy of the voting exercise, issuance of ballot papers stamped spoilt, lack of accountability in the issuance of Forms 35A and 35B and keeping election materials unsecured.

5. The Petitioner prays for the following reliefs:-

a. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent be ordered to avail forthwith and at any rate not later than twenty four (24) hours from the grant of this order, all the election materials including the KIEMS kits, copies of the registers used in the elections, the copies of Form 35 As; Form 35B and the ballot boxes used to conduct the parliamentary election in Changamwe Constituency, Mombasa County on the 8<sup>th</sup> August, 2017 for preservation and safe custody;

b. An order for scrutiny of all the votes cast, the polling stations diaries made by the presiding officers under the provisions of the Elections Act, 2011, the KIEMS kit, the copies of registers used in the elections, the copies of all Form 35 As and 35 B, the packets of unused Form 35 A booklets, counterfoils of used ballot papers, unused, rejected and spoilt ballot papers to establish the validity of the votes cast and determine the votes cast in favour of each candidate in respect to the election of Member of National Assembly for Changamwe Constituency held on 8<sup>th</sup> August, 2017;

c. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents violated Articles 81 and 86 of the Constitution of Kenya;

d. A declaration that the 3<sup>rd</sup> Respondent was not validly elected as the Member of National Assembly, Changamwe Constituency, Mombasa County;

e. Consequence (sic), to prayer (d) above, an order that fresh elections be conducted in respect of the Member of National Assembly in Changamwe Constituency, Mombasa County;

f. Any other and such further relief as the Honourable Court may deem fit to grant; and

g. Costs of the Petition be awarded to the Petitioner herein.

6. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a joint replying affidavit on 15th September, 2017 to controvert the allegations made by the petitioner. With leave of the court, they filed 4 volumes of supplementary affidavits on 4th October, 2017 and a further supplementary joint affidavit on 9th November, 2017. The 3<sup>rd</sup> Respondent filed a response to the election petition on 19th September, 2017 wherein he denied any fault in the outcome of the election and stated that the said election was free and fair.

7. At the preliminary stages after the filing of the petition, the Petitioner applied to Court for securing of the election materials which orders were granted as per this Court's ruling of 20<sup>th</sup> November, 2017.

### **Issues for Determination**

8. The parties herein filed their statements of issues for consideration, which the Court considered and summarized as follows:

**i. Whether the 1<sup>st</sup> & 2<sup>nd</sup> Respondents or their officers issued multiple ballot papers during the elections for the Member of Parliament for Changamwe Constituency in the elections conducted on 8<sup>th</sup> August 2017;**

**ii. Whether the 1<sup>st</sup> & 2<sup>nd</sup> Respondents or their officers allowed unauthorized election materials and persons at the polling stations during the elections;**

**iii. Whether the 1<sup>st</sup> & 2<sup>nd</sup> Respondents and/or their officers used faulty KIEMS kits during the elections;**

**iv. Were validly registered voters for Changamwe Constituency were denied their right to vote by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents and/or their officers?;**

**v. Did the 1<sup>st</sup> and 2<sup>nd</sup> Respondents or their officers fail to relay and transmit results as required by law?;**

**vi. Did the 1<sup>st</sup> and 2<sup>nd</sup> Respondents or their officers alter and/or make incorrect entries of figures in Form 35As after tallying of results from different polling stations in Changamwe Constituency?;**

**vii. Whether the elections of the Member of Parliament for Changamwe Constituency were conducted by way of a secret ballot;**

**viii. Did the 1<sup>st</sup> and 2<sup>nd</sup> Respondents or their officers issue ballot papers stamped "spoilt" to voters before casting of their votes during the elections for the Member of Parliament for Changamwe Constituency?;**

**ix. Whether Form 35As used by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents during Changamwe Constituency elections for the Member of Parliament contained different serial numbers from the duplicate Form 35As;**

**x. Did the 1<sup>st</sup> and 2<sup>nd</sup> Respondents or their officers secure the safety of election materials after the elections for the Member of Parliament for Changamwe Constituency on 8<sup>th</sup> August 2017;**

**xi. Were party agents in some polling stations denied entry or ejected from polling stations and tallying centers in Changamwe Constituency during the elections for the Member of Parliament?;**

**xii. What was the impact of any irregularities and illegalities to the outcome of the results of the Member of Parliament for Changamwe Constituency in the elections conducted on 8<sup>th</sup> August 2017;**

**xiii. Is the Petitioner entitled to the orders sought in the Petition filed on 6<sup>th</sup> September 2017?**

9. In addressing the above issues as per the evidence tendered in court and the scrutiny report, the Counsel for the Petitioner filed his written submissions on 6th February, 2018 and Counsel for the Respondents file theirs on 9th February, 2018. Submissions were highlighted on 12th February, 2018. The submissions here below contain a summarized form of what was orally submitted and what is contained in their written submissions.

### **Submissions**

10. Mr. Gikandi, Learned Counsel for the Petitioner submitted that the guiding principles of election petitions are encapsulated in Articles 38, 47, 81, 82, 86 and 138(3) of the Constitution which sets them out as integrity, transparency, accountability, impartiality, simplicity, verifiability, security and efficiency as well as those of a free and fair election which is by way of secret ballot, free from violence, intimidation, improper influence or corruption. It includes the conduct of an election by an independent body in a transparent, impartial, neutral, efficient, accurate and accountable manner. He submitted that the heart of the matter is in the majority decision in *Raila Amolo Odinga & Another v. Independent Electoral and Boundaries Commission & Others* [2017] eKLR, where the Supreme Court held that a court

should not merely look at the result in isolation of the process.

11. It was further submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents issued two Forms 35 B, one dated 10<sup>th</sup> August, 2017 and the other dated 13<sup>th</sup> August, 2017. The one dated 10<sup>th</sup> August, 2017 was signed by Twalib Bwajuma, Jared Onyango, Omar Mwinyi and Aisha Abubakar while the Form 35B dated 13<sup>th</sup> August, 2017 was signed by Twalib Bwajuma and Aisha Abubakar. Counsel indicated in his submissions that through the ruling dated 12<sup>th</sup> January, 2018 the court directed the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to avail the two Forms 35B for purposes of scrutinizing the same but they only availed the Form 35B dated 10<sup>th</sup> August, 2017. This, the Petitioner's Counsel contended was a clear indication that there was more than meets the eye. He cited the case of William Cheruiyot Kadie v. Republic, Nakuru Criminal Appeal No. 21 of 1996 for the proposition that whoever fails to produce relevant evidence in his possession is presumed to know that the production of such evidence would be prejudicial to his case.

12. The Petitioner's Counsel argued that the results on the online portal were different from those declared at the polling stations and Forms 35A contrary to the principles in Articles 81 and 86 of the Constitution of Kenya, 2010. He cited the Raila 2017 case (supra), where the Court in determining the issue of votes difference between the online and the declared results, had this to say, *“Our understanding of this process is that the figures keyed into the KIEMS corresponded with those on the scanned image of Form 34A. In the circumstances, we do understand why those figures which learned counsel referred to as mere “statistics” that did not go into the determination of the outcome of the results, differed. In these circumstances, bearing in mind that the IEBC had the custody of the record of elections, the burden of proof shifted to it to prove that it had complied with the law in the conduct of the presidential election especially on the transmission of the presidential election results and it failed to discharge that burden.”*

13. It was argued for the Petitioner that there was a variance of 4,595 votes between the Presidential and the Member of County Assembly election while the variance between the Member of Parliament and the Member of County Assembly was 2,586, thus that was an irregularity. Counsel cited the case of William Kabogo Gitau v. George Thuo & others [2010] eKLR where the court after encountering a similar circumstance where the court said that a difference of over 5,000 votes between the parliamentary vote on the one hand and the presidential and the civic vote on the other was evidence of serious electoral malpractice which could not be wished away in the manner proposed by the respondents therein.

14. On the issue of issuance of multiple ballot papers the Petitioner's Counsel submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents fell short of their constitutional duty of conducting an accurate and transparent election. They relied on the decision in Waititu v. Independent Electoral and Boundaries Commission (IEBC) & others [2014] 2 EA, where the Court of Appeal held thus, *“irregularities in the Form 36 did not imply accident or innocuous mistakes but rather deliberate actions by the perpetrators. The law recognizes that as long as we remain human, mistakes resulting in irregularities will always occur and where they do innocuously, they will be excused and disregarded unless they impact on the final outcome of the voting. Where they impact on the results, whether they are innocent or not, the results must be annulled with a rider that where the error are contumacious, having been perpetuated, those found culpable get penal sanctions.”*

15. On the issue of used-counterfoils and un-used ballot papers exceeding the total number of ballot papers issued to the Presiding Officers, the Petitioner's Counsel admitted that the issue was not pleaded but it came up in evidence and as such the Court ought to make a determination on the same.

16. The Petitioner's Counsel pointed out that the Petitioner's witnesses led evidence on ballot stuffing and that the scrutiny report showed that in Bokole Nursery Polling Station No. 3 the Presiding Officer was issued with 700 ballot papers but after the scrutiny exercise the number rose to 950. That in light of such evidence, the election herein cannot be said to have been free and fair.

17. On Results in Forms 35A being more than the used counter-foils, it was submitted that in a properly conducted election, the number of votes indicated in Form 35A must be equal to the number of used ballot papers' counterfoils. In his view, any difference on that account is evidence that the election was marred by irregularities.

18. On the issue of cast ballot papers exceeding the persons who turned out to vote, the Petitioner's Counsel cited the case of Karanja Kabage v. Joseph Kiuna Kariambegu Nganga & 2 others [2013] eKLR where the court stated that an election *is a process whose outcome must be in harmony with the processes done. As such, what the presiding officer records as the voters who turned out must match the number of voters in Form 35A or an explanation in the polling station diary that a certain number of voters did not vote due to certain reasons.* Counsel stated that in the instant case there was no explanation given for the ballots exceeding or being less than the voter turnout.

19. On the issue of un-countersigned alterations on Forms 35A, Counsel submitted that the Returning Officer produced all the Forms 35A in respect to the election that was conducted in Changamwe Constituency as evidence of the results that were declared by the Presiding Officers in the various polling stations. However, in respect of some of the stations, the Forms 35A had a lot of alterations which were not countersigned. Consequently, the said Forms 35A cannot be relied upon because they are invalid. The Court was urged to find the results from the stations with un-countersigned forms to be invalid. Counsel cited the case of Dickson Mwenda Githinji vs Gatirau Peter Munya & 2 others [2014] eKLR where the Court of Appeal stated that- *“The appellant submitted that the trial Judge erred in failing to find that Form 35s that had alterations were invalid and such Forms and the votes entered thereon should have been declared invalid. The cancellations and alterations in statutory electoral Forms beg the issue of veracity and authenticity of the said results. Unless the cancellations and alterations are countersigned, the cancelled and altered forms cannot be said to contain valid results of the polling stations in question. (See William Kabogo Gitau - v- George Thuo & 2 others, {2010} eKLR). In the instant case, we have perused the record and the testimony of DW 10, reveals that there are some Form 35s with alterations which were not countersigned. Guided by the dicta in the William Kabogo case supra, we find that Form 35s with alterations that were not countersigned do not contain valid results of the polling stations involved.”*

20. On the issue of Forms 35A not signed by the Presiding Officer and the Deputy Presiding Officer, the Counsel for the Petitioner submitted that the Returning Officer should not have included the results from the aforesaid polling stations in Form 35B because the Presiding Officers had not signed the same. Counsel for the Petitioner relied on the decision in Abdikhaim Osman Mohammed & another v. IEBC & 2 others [2014] eKLR where the Court of Appeal held, *“the learned judge estimated the affected votes to have been about 1000. This is clearly wrong because the results in respect of twelve Form 35 which had neither the seal of the 2<sup>nd</sup> Respondent nor the presiding officer's*

*signature should have been excluded on the ground that their authenticity could not be vouchsafed.”*

21. As to missing oaths of secrecy for Presiding Officers, the Petitioner's Counsel relied on Regulation 5(5) of the Elections (General) regulations, to submit that the Presiding Officers executed their duties illegally because the law prescribes that a Presiding Officer can only carry out his work after having been administered with a proper oath of secrecy in accordance with the law. On this ground alone, they contended that the election carried out in Changamwe Constituency ought to be nullified so that a proper election which is in accordance with the law can be carried out. The case of *Karanja Kabage v. Joseph Kiuna Kariambegu Nganga & 2 others* (supra) was cited in support of the above submission.

22. On failure of the Presiding Officers to indicate the reasons why some agents did not sign Form 35 A the Petitioner's Counsel submitted that Regulation 79(5) and (6) provides in mandatory terms that the Presiding Officer, the candidate or agents shall sign the declaration forms. Counsel cited the decision in *William Kabogo Gitau v. George Thuo & 2 others* (supra) to support the proposition that a *Presiding Officer* has no discretion in the matter. It was therefore submitted that the results that are not signed by agents should be nullified.

23. On Election materials not secured in a tamper proof envelope, it was submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed in this respect and as such the whole process ought to be brought to question as Regulation 73(3) of the Elections (General) Regulations is couched in mandatory terms.

24. On Assisted voters being misled, it was submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents presiding officers assisted voters in total disregard of Regulation 72 (2) Elections (General) Regulations. Reference was made to the evidence of PW7 who stated that assisted voters were not assisted in the presence of agents and due to that the Presiding Officers misled the voters to vote for candidates not of their choice.

25. As to allowing unauthorized persons in the polling station the Petitioner's Counsel submitted that Regulation 74(2) Elections (General) Regulations is couched in mandatory terms and ought to be adhered to. In this case evidence was led that in Chaani Social Hall Polling Station 13 the Presiding Officer, John King'oo, admitted that one Richard M. Mutuku who had not submitted his letter of authorization, did not indicate the political party he was representing and did not sign anywhere in the polling station diary, was allowed at the polling station during the counting of votes. They submit that the law was flouted in this regard.

26. It was contended that the 1<sup>st</sup> Respondent failed to keep the KIEMS machines as required and proceeded to format the same and thus the integrity of the whole process comes into question. It was argued that it ran counter to the provisions of Regulation 86(2)(b) of the Elections (General) Regulations which provides that the Returning Officer shall, *“keep the sealed ballot boxes and all materials relating to the election in safe custody for such period as may be required under these Regulation and the Act”*.

#### **1st and 2nd Respondents' submissions**

27. On Issuance of multiple ballot papers, Mr. Munyithya Learned Counsel for the 1st and 2nd Respondents submitted that the results for Mikadini Polling Station No. 4 almost tally, with a difference of only one vote in favour of the Petitioner as confirmed in the Scrutiny Report by the Deputy Registrar at Page 42. That this confirms that there is no evidence of any excess ballot papers cast as alleged. Furthermore, the Court did not order any scrutiny for Mikadini Polling Station No. 2 and therefore the results in Form 35A stand unchallenged. They submitted that the same did not affect the credibility of the elections in any way and the Petitioner has not demonstrated or adduced any such evidence showing that the said actions affected the credibility of the elections herein.

28. As to the issue of allowing unauthorized persons and materials into the polling stations, Counsel submitted that the Scrutiny Report for Chaani Primary School Polling Station No. 5 which is referred at Page 88-89 almost tallies with the results in Form 35A as declared on Page 146 of the Joint Response and the report does not raise any evidence of ballot stuffing or votes cast exceeding the number of registered voters. The Scrutiny Report sets the record clear that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Officers managed the results and declared them in accordance with the law and regulations.

29. On the use of faulty KIEMS machines, it was submitted that under Rule 64 the Elections (General) Regulations or as per Regulation 26 of the Elections (Technology) Regulations, 2017 there is provision for alternative methods of identification of voters which the Respondents' witnesses in their evidence stated that they resorted to and recorded the same in the Polling Station Diaries.

30. Counsel submitted that valid registered voters were not denied their right to vote. He stated that the alleged 300 registered voters for whom an allegation was made of being denied of their right to vote did not file any affidavits in line with Rule 12(3) of the Elections (Parliamentary & County) Petition, Rules, 2017 and testify as witnesses to buttress the allegation that they were denied an opportunity to vote. As such, the said allegation was not established. Reference was made to the decision by Kasango J, in *Sammy Ndungu Waity v Independent Electoral and Boundaries Commission & 3 others*, Nanyuki High Court Election Petition No. 2 of 2017 where the Court had the following to say with regard to allegations on the denial of voters of their rights to vote:

*“Bearing in mind the burden and standard of proof discussed above this court finds that Pokot community was not affected by any alleged security operation. And in making that finding I add that had there been such interference with the right to vote of the Pokot community such a matter was an election offence under section 10 of the Election Offences Act. No evidence was led that any complaint was ever filed in regard to that alleged interference. If indeed there was any such interference with people's right to vote IEBC could have, under section 55B of the Election Act, postponed the election in Laikipia North. Strangely however the County Returning officer had no knowledge of such security threats and the only thing she was aware of was that security was given to the election's official and materials.”*

31. It was further submitted that the law was followed with regards to relay and transmission of results and no fault should lie as **Section 39(1A) (i) of the Elections Act confirms that the results relayed online are provisional.**

32. Counsel also cited Regulation 82 of the Elections (General) Regulations 2012 which requires the Presiding Officers to electronically transmit election results to the Returning Officer and that the results so submitted shall be provisional subject Regulation 82 which states that provisional results shall be transmitted electronically. He cited the case of **Jackton Nyanungo Ranguma –Vs. - Independent Electoral And Boundaries Commission & 2 Others** [2018] eKLR where Majanja J affirmed the position that the results at the portal are provisional and that the main results are those contained in the Form “A” series. Thus, the Judge in Paragraph 39 of the petition stated as follows:

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

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

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

33. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their submissions denied the allegation that there were alterations and/or incorrect entry of figures in Forms 35A. Counsel submitted that having not challenged the results as declared in the Forms 35A, the Petitioner cannot rely on any other source of data such as the portal as a basis for comparing figures. Counsel stated that elections are held at the polling stations and the results are declared in the Forms 35A in line with Regulation 79 of the General (General) Regulations, 2012. These results are therefore final as confirmed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission vs Maina Kiai (2017)**. Counsel also cited the case of **Josiah Ole Kores and Another vs Joseph Jama ole Lenku and Others, Kajiado Election Petition No. 2 of 2017**.

34. **On removal of agents from polling stations it was submitted on behalf of the 1st and 2nd Respondents that** Section 30 of the Elections Act, No. 24 of 2011 provides a political party may appoint one agent for its candidates at each polling station.

35. It was argued that the evidence by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ witnesses regarding the presence of agents at the polling stations remains uncontroverted. It is also clear from the record that the Presiding Officers at the Polling Stations acted in accordance with Regulation 62(2) in admitting only agents per political party and per independent candidates respectively, with credentials. He added that their absence does not change the outcome of the election.

36. On non-secrecy of the voting exercise, it was submitted that Regulation 72 of the Elections (General) Regulations provides for assistance of voters. Sub-regulation (2) thereof provides that the Presiding Officer shall assist the voter in the presence of the agents. It was argued that PW 7 was called in to testify on the above said he did not report to the Returning Officer of his observations. He just confronted the Presiding officer who chased him away. Apart from this, no other agent was called yet in the Polling Station Diary for the polling station found at page 84; Volume 3 of the 1st and 2nd Respondents' further affidavit, PW 7 confirmed that there were 6 agents listed in the said diary.

37. On issuance of ballot papers stamped spoilt, it was submitted that the Petitioner lacked specificity in this allegation and as such the 1st and 2nd Respondents could not respond to the same.

38. On lack of accountability on the issuance of Forms 35A and 35B it was the Counsel's position that said Form 35A is a prescribed statutory form found at the Schedule of the Elections (General) Regulations, 2012 which brings into play the provision of Section 72 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya. He argued that a deviation in a statutory form shall not render that particular form void as long as it does not affect the substance of the instrument or it is not calculated to mislead. It was thus submitted that from the annexures at pages 310 and 311 of Form 35A, it is clear that the results of the individual candidates are the same and the total number of valid votes cast is the same. He added that as a result thereof, the Petitioner did not demonstrate that the substance of the election in terms of the results declared was in any way affected save for the issues he is raising in regard to the form. That in the absence of such evidence, it cannot therefore be said that the election is not accountable, verifiable, credible, free and fair.

39. On keeping election materials unsecured, it was submitted that at no particular time were the election materials unsecured or left unattended. It was contended that from the testimony of PW 27, it was clear that he did not take the photos sought to be relied on and the people who took the photos were not called as witnesses to explain on the circumstances at the time the photos were taken. Thus the evidence adduced in support of that contention is unmerited and of no probative value as the authenticity of the same is questionable.

40. On the invitation by the Petitioner for the Court to consider matters that were not pleaded, it was submitted that the requirement to specifically plead is not merely a matter of form that can be diminished by Article 159(2)(d) of the constitution of Kenya, 2010 and cited the case of **Abdikadir Mohammed vs. Sammy Kagiri & Another (2016) eKLR**. He added that it is a rule which serves substantive justice and is a pertinent component of fair hearing, as it prevents a party from taking the other by surprise. It was argued that the present circumstances are not those of the thinking in the case of **Odd Jobs vs. Mubia (1970) EA 476**, would apply. Thus if the said case is applied to the Petition, it will amount to introduction of new evidence after the lapse of the statutory 28 days provided for filing an election petition.

41. In response to the allegation of failure by the Presiding Officers to stamp ballot papers, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that there is no requirement under any electoral law that imposes a duty for stamping of Forms 35A. Counsel for the 1st and 2nd Respondents stated that the Court of Appeal agreed with the submission on behalf of the appellant in **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR** that it is the signatures of the Presiding Officers and the agents that

authenticate the Form 35. If any such forms were stamped, it was a gratuitous and superfluous discretionary or administrative act incapable of creating a statutory obligation, less still the invalidation of the Forms 35 that did not contain the stamp.

42. On the effect of the allegations made by the Petitioner it was submitted that they do not meet the standard set out in Section 83 of the Elections Act. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Counsel therefore urged this Court to find that the Petitioner did not prove his case to the required standard and that the 3<sup>rd</sup> Respondent was duly elected as the Member of Parliament for Changamwe Constituency. He stated that the election was valid and the Petition should be dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

43. In addressing the court on the costs that are applicable, Counsel cited Section 84 of the Elections Act and Rule 30 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 which provide that the Election Court shall award the costs of and incidental to the Petition, which shall follow the cause. Counsel prayed for costs in the sum of Kshs. 10,000,000/- to be awarded to the 1st and 2nd Respondents.

### 3<sup>rd</sup> Respondent's submissions

44. On the issues of faulty KIEMS machines and turning away of valid voters, Mr. Mohamed, Learned Counsel for the 3rd respondent stated that from the evidence, 2 categories of voters emerge, those that eventually voted despite the delay and those that went home after being told their names did not appear in the KIEMS kits but who voted on 26<sup>th</sup> October 2017. It was submitted that the testimonies of the 2<sup>nd</sup> category of witnesses who testified that they were denied their right to vote on 8<sup>th</sup> August 2017 but voted on 26<sup>th</sup> October 2017 is thus questionable. The witnesses testified that they confirmed their voter registration status via Short Message Service (SMS) number 70000 but failed to adduce a screenshot of the said SMS' to confirm to the court that they were indeed registered voters at that particular polling station. It can thus be concluded that the 2<sup>nd</sup> category of voters grew impatient and just left the polling station.

45. It was further submitted that PW17 annexed a letter of authority from voters totaling 54 who were denied the right to vote. These voters were never brought in as witnesses thus their allegations of being denied the right to vote remain mere allegations since their testimony remains untested. That the purported authority giving PW17 authority to testify on behalf of the 54 voters offends Rule 12 (3) of the Elections (Parliamentary & County Elections) Petition Rules 2017, which provides that each witness to be relied upon by the Petitioner must swear an affidavit. The purported authority does not amount to swearing of an affidavit.

46. On faulty transmission of results the 3<sup>rd</sup> Respondent submits that Section 44 of the Elections Act provides for an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. With regard to the provisions of Regulation 82 of the Elections (General) Regulations 2012, he stated that it requires the Presiding Officers to electronically transmit the election results to the Returning Officer and that the results so submitted shall be provisional subject to confirmation after the procedure described in Regulation 76. He therefore submitted that the Petitioner's reliance on the case of **William Kabogo Gitau –vs.- George Thuo & Others** (2010) eKLR was **totally misplaced**. Counsel also cited the case of **Jackton Nyanungo Ranguma vs The Independent Electoral and Boundaries Commission** (supra) and his determination of the issue was as follows:

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

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

47. It was also submitted on behalf of the 3<sup>rd</sup> Respondent that the allegation of the variance between the 6 elective posts remains unproven as per Sections 107-109 of the Evidence Act. Counsel added that the electronic results are provisional in nature and thus do not connote the will of the people but the actual Forms which carry the voters will, in this case, the Forms 35 A which are as a result of the physical counting of the votes in the ballot boxes as per Regulation 76 of the Elections (General) Regulations 2012. It was further submitted that by virtue of the electronic transmission (online portal results) being provisional in nature, the 1<sup>st</sup> & 2<sup>nd</sup> Respondents and their Officers did not fail to transmit the results as required by law but performed their mandate as required under Regulation 82.

48. In making reference to the Petitioner's submissions at Paragraphs 71-73, where the Petitioner's Counsel relied on the Court of Appeal case of **Dickson Mwenda Githinji –vs.- Gatirau Peter Munya & 2 others** [2014] eKLR (Civil Appeal 38/2013) for the proposition that if a Form is altered and not countersigned, the said Form does not contain valid results of the polling station. In response, the 3<sup>rd</sup> Respondent relied on the Supreme Court case of **Gatirau Peter Munya –vs.- Dickson Mwenda Kithinji & 2 Others** [2014] eKLR (Supreme Court Petition No. 2B./2014) where the Court of Appeal decision was overturned by the Supreme Court. It made its analysis and findings found at paragraphs 212-225 in the following words:-

*“The Court observed that the practical realities of election administration are such that imperfections in the electoral process are inevitable; and on this account, elections should not be lightly overturned, especially where neither a candidate nor the voters have engaged in any wrongdoing.” The Supreme Court held the conviction, with due respect, that the appellate Court Judges had misdirected themselves, regarding the test to be applied in determining the effect of irregularities on an election. Such a test cannot be a speculative one, as flows limited-scale irregularity to the broad expanse of Meru County.”*

49. Counsel admitted that the said alterations did happen but not with the purpose of inserting incorrect figures but rather due to clerical errors as evidenced by the scrutiny report.

50. On whether the elections of the Member of Parliament for Changamwe Constituency were conducted by way of a secret ballot, the 3<sup>rd</sup> Respondent's Counsel submitted in similar fashion to Counsel for the 1st and 2nd Respondents. He added that the 3<sup>rd</sup> Respondent's position was that the Petitioner failed to prove that the elections of the Member of Parliament for Changamwe Constituency were not conducted by way of a secret ballot.

51. On whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents or their officers issued ballot papers stamped "spoilt" to voters before casting of their votes during the elections for the Member of Parliament for Changamwe Constituency as alleged by PW 27, it was submitted that no voter was called in as a witness to testify that he/she was issued with a ballot paper stamped "spoilt" and as a result the vote he/she cast was not counted.

52. As to whether Forms 35A used by the 1<sup>st</sup> & 2<sup>nd</sup> Respondents during Changamwe Constituency elections for the Member of Parliament contained different serial numbers from the duplicate Forms 35As the 3<sup>rd</sup> Respondent submitted in similar manner to the 1st and 2nd Respondents' submissions.

53. As regards the issuance of two Forms 35 B, Mr. Mohamed submitted that the 2<sup>nd</sup> Respondent testified that the Form 35B at pages 3 and 280 are test/draft copies and gave an explanation as to why the stamp indicated the date of 13<sup>th</sup> August 2017. She further testified that the Form 35B at pages 2 and 283 are the final copies after being put in the official format. Counsel further argued that the two Forms 35 B show that one is a copy of the other, word for word. For instance, in the total voter turnout, the votes garnered by each of the 6 candidate and the results from each polling station are the same from both copies with the only difference being the date of the stamp.

54. On whether the 1<sup>st</sup> and 2<sup>nd</sup> Respondents or their Officers secured the safety of election materials after the elections for the Member of Parliament for Changamwe Constituency on 8<sup>th</sup> August 2017, it was submitted that PW27 testified to the above allegations and relied on photographs at pages 312-315 of the Petition. According to PW27, the photographs at pages 312 and 313 were taken at the Constituency Tallying Center by his agent. The said agent was however not brought in as a witness. PW27 thus concluded that the boxes were abandoned. It was submitted that this allegation was not proved.

55. On party agents being ejected or denied entry into polling stations and tallying centers in Changamwe Constituency during the elections for the Member of Parliament, Counsel stated that Section 2 of the Elections Act defines an "Agent" as a person duly appointed by a political party or an independent candidate and includes a counting agent and a tallying agent. He cited Regulation 62(1) of the Elections (General) Regulations 2012 which gives discretion to Presiding Officers to regulate the admission of voters to the polling station. Counsel further stated that Sub-regulation 2 provides that the Presiding Officer shall admit to the polling station not more than one agent for each candidate or political party while Sub-regulation 3 is to the effect that the absence of agents shall not invalidate the proceedings at a polling station.

56. The 3<sup>rd</sup> Respondent's Counsel cited the case of **Philip Munge Ndolo** (supra), where Odero J., relied on Regulation 62 and made the following observation:

*"Regulation 62(1)(c) of the Election Regulations provides that the presiding officer shall admit into the polling station 'authorized agents'. Regulation 62(1) however allows the presiding officer to regulate the number of persons to be admitted into a polling station at any one time. Regulation 62(2) provides:*

***"(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."***

*Therefore as stated by the 2<sup>nd</sup> respondent the denial of access to a second WIPER agent where there was already one inside the polling station was quite lawful in order to avoid overcrowding."*

57. Counsel for the 3<sup>rd</sup> Respondent submitted that the polling station diaries for the polling stations provided had a page for agents to sign and all political parties were represented. The allegation of denial of access of agents to polling stations was thus not proved.

58. On the issue of the impact of any irregularities and illegalities to the outcome of the results of the Member of Parliament for Changamwe Constituency in the elections conducted on 8<sup>th</sup> August 2017, it was submitted for the 3<sup>rd</sup> Respondent that the margin between the 3<sup>rd</sup> Respondent who was returned as the duly elected Member of National Assembly for Changamwe Constituency and the candidate who came in second was 21,815 votes. Counsel stated that the provisions of Section 83 of the Elections Act comes into play and it is clear that the said irregularities are not so substantial as to change the outcome of the election.

59. Counsel submitted that the Petitioner is not entitled to any of the prayers sought and the Petition should fail. He sought costs in the sum of Kshs. 15,000,000/= being awarded to the 3<sup>rd</sup> Respondent.

#### **APPLICABLE CONSTITUTIONAL PRINCIPLES**

60. The Constitutional principles applicable to the election petition before me are espoused in the provisions of Articles 81 and 86 of the Constitution of Kenya. Article 81 of the Constitution provides for an electoral system that shall comply with, *inter alia*, principles of:-

*"(e) free and fair elections, which are -*

(i) by way of 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."

61. Article 86 of the Constitution provides that at every election the Independent Electoral and Boundaries Commission shall ensure that -

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

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

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

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

## ANALYSIS AND DETERMINATION

62. In support of the issues framed by the court, the Petitioner called twenty eight (28) witnesses, whereas the Respondents called forty eight (48) witnesses in total. I will delve into resolving the issues as I deliberate the evidence adduced in support thereof. The analysis will also take into account the submissions made by all Counsel on record. This court in making a determination must however be guided by the burden and standard of proof as required in an election petition.

### The burden of proof

63. The burden of proof was reiterated by the Supreme Court of Kenya in the Raila 2017 case (supra) to be as held in **Raila Odinga & 5 Others vs Independent Electoral and Boundaries Commission & 3 Others** [2013] eKLR. The Court stated as follows:-

*"[130]The law places the common law principle of onus probandi on the person who asserts a fact to prove it. Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya, legislates this principle in the words: "Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." In election disputes, as was stated by the Canadian Supreme Court in the case of Opitz v. Wrzesnewsky (2012) SCC 55, an applicant who seeks to annul an election bears the legal burden of proof throughout. This Court reiterated that position in the 2013 Raila Odinga case, thus:*

*[195] There is, apparently, a common thread in...comparative jurisprudence on burden of proof in election cases...that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner..."*

### The standard of proof

64. As to the standard of proof, the Supreme Court held as follows in the **Raila 2017** election petition:-

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

*[149] This is the standard of proof that has been applied in literally all election petitions in this country. For instance, in the case of M'nkiria Petkay Shem Miriti v. Ragwa Samuel Mbae & 2 Others, [2014] eKLR the Court of Appeal observed that "[F]rom the practice and history of this country, the standard of proof required in Election Petitions is higher than a balance of probabilities but not beyond reasonable doubt save where offences of a criminal nature are in question."*

*[150] The rationale for this higher standard of proof is based on the notion that an election petition is not an ordinary suit concerning the two or more parties to it but involves the entire electorate in a ward, constituency, county or, in the case of a presidential petition, the entire nation. As the Tanzanian High Court stated in the old case of Madundo v. Mweshemi & A-G Mwanza, HMC No. 10 of 1970:*

*"An election petition is a more serious matter and has wider implications than an ordinary civil suit. What is involved is not merely the right of the petitioner to a fair election but the right of the voters to non-interference with their already cast votes i.e. their decision without satisfactory reasons."*

***[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 petitioners' submissions that the Court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities.***

***[153] We recognize that some have criticized this higher standard of proof as unreasonable, however, as we have stated, electoral disputes are not ordinary civil proceedings hence reference to them as sui generis. It must be ascertainable, based on the evidence on record, that the allegations made are more probable to have occurred than not.*** (emphasis added).

### **Issuance of Multiple ballot papers**

65. PW1, Loreen Mbare Handa, was a Wiper Democratic Party agent at Bokole Nursery School polling station No. 3. It was her evidence that she confronted a voter who was given multiple ballot papers and that she had previously reported 4 incidents of voters being given multiple ballot papers to the Presiding Officer who did nothing. She however did not report the incident in writing. She indicated that she took down the serial numbers of the ballot boxes where the multiple ballot papers were cast but she did not attach documents to her affidavit to support her allegation. She stated that when she reported another incident to the Presiding Officer who took the multiple ballot papers and put them in an envelope.

66. The 1st and 2nd Respondents' witness No.11, Isaac Kara Wafula was the Presiding Officer at Bokole Nursery school polling station No. 3. He stated that a voter was given more than 1 ballot paper for the Governor's position. He saw it before the voter could cast the ballot paper and took away the additional ballot paper and stamped it spoilt in the presence of the agents. He indicated that he put it in a tamper proof envelope. Another incident happened where a voter was issued with two presidential ballot papers and none for the Governor's position. He stated that he averted the situation and corrected it. He reprimanded the Polling Clerk by the name Mariam Rajab and changed her duties to that of marking of voters' fingers with indelible ink after voting.

67. PW5, Salma Omar stated that she was an agent for Mr. Abdi Daib, the Jubilee party candidate. She was assigned duties at Chaani Social Hall polling station No. 5. She gave evidence that she witnessed a voter being confronted by the Police as he wanted to talk to her. The said voter by the name Fuad Mohamed told her that he had spotted two clerks issuing multiple ballot papers. It was her evidence that she also witnessed Polling Clerks giving multiple ballot papers but when she informed the Presiding Officer about it, she was told that was not her business. She stated that she was kicked out of the polling station some minutes to noon, after she witnessed issuance of multiple ballot papers. She did not sign Form 35A.

68. PW23 one Fuad Abdalla Mohammed was a registered voter at Chaani Social Hall polling station No. 4, which was inside a classroom. He indicated that polling station No. 5 was also inside a classroom. He alleged he could see what was going on, in polling station No. 5 from polling station No. 4. He stated that after voting, he saw a Polling Clerk at polling station No. 5 issuing multiple ballot papers to a voter. He testified that he told the Presiding Officer about it but he was told that was not his business. He further testified that he called a Police Officer whom he asked to call a Jubilee agent, one Salma Omar (PW5). She was called and a report was made to her. She entered into polling station No. 5 and got into an argument with the Presiding Officer. She was thrown out of the polling station. PW23 could not tell if the extra ballot papers issued were for the presidential or parliamentary seat.

69. The 1st and 2nd Respondents did not call the Presiding Officer of Chaani Social Hall polling station No. 5 to controvert the above evidence. It therefore remains firm.

70. PW26, Esther Masika an Uwiano observer stated that she saw a Polling Clerk issue multiple ballot papers at Mikadini Primary School Polling Station No. 2 but the Presiding Officer reported the said Clerk to the Police and he was charged.

71. Joseph Wafula Mutochi, the 1st and 2nd Respondents' witness No. 2 was the Presiding Officer at Mikadini Primary School Polling Station No. 2. He testified that at 9:20 a.m, Polling Clerk No. 2, Naomi Musenya James alerted him about a voter who had been issued with 2 green ballot papers for Member of Parliament and 2 yellow ballot papers for the Senatorial position. It was his evidence that he allowed the voter to cast the usual 6 ballots papers. He informed the Returning Officer who instructed him to call the Police. He stated that he did not get to know the name of the voter as he disappeared as he was talking to the Polling Clerk. He suspended the Polling Clerk immediately as per regulations and handed him to security personnel at the polling station as he awaited the arrival of Police Officers.

72. Another witness, Regina Adhiambo, PW10 a Jubilee party agent at Al-Irshad Nursery polling station No. 6 testified that on 8th August, 2017 at noon she saw a Polling Clerk by the name Musyoki issuing multiple ballot papers. PW10 reported the incident to the Presiding Officer (PO) but he only warned him. The PO took the multiple ballot papers and put them in an envelope. PW10 signed Form 35A.

73. The 1st and 2nd Respondents did not call the Presiding Officer of Al-Irshad Nursery polling station No. 6 to controvert the evidence of PW10. PW10's evidence therefore remains firm.

74. The 1st and 2nd Respondents' witness No. 13, Wilson Mwendwa Mutokaa the Presiding Officer at Mikadini Primary School polling station No. 4 witnessed an incident where a voter was issued with 2 ballot papers for an Member of the County Assembly. He reported the matter to the Police and the clerk, Bernard Mutuku was arrested and charged. He stated that the agents signed Form 35A to indicate their satisfaction with the process.

75. PW13, Ayub Abdullahi Hassan was Mr. Abdi Daib's agent at Kipevu Primary School polling station No. 1. He stated that he was chased away from the polling station at 3:00 p.m. after he confronted the Presiding Officer when he saw a clerk issuing multiple ballot papers to a voter. He was however not able to ascertain if the multiple ballot papers were for the presidential or parliamentary candidates.

76. In response to PW13's allegation, the 1st and 2nd Respondents' witness No. 4, Thomas Ngumbao who was the Prsiding Officer at Kipevu

Primary School polling station No. 1 swore an affidavit on 2nd October, 2017 which he adopted in court. He denied the allegations by PW13 that a Polling Clerk at the said polling station issued multiple ballot papers to a voter.

77. The Petitioner attached to his affidavit copies of a charge sheet in respect of Kennedy Mulwa Kitheka to show that he was charged with 4 electoral offences. A copy of a charge sheet in respect to Benard Malanga Matuku was also attached to the Petitioner's affidavit to show that the said Polling Clerk was charged with an electoral offence. A copy of a charge sheet for a voter by the name Leonard Odonda Kinyaga was also attached to the Petitioner's affidavit to illustrate that the said voter was charged with the offence of voting more than once after allegedly being issued with an extra ballot paper by Benard Malanga Matuku. As at the time this petition came up for highlighting of submissions, the charges of issuance of multiple ballot papers by the 2 polling clerks were unproved and the case against the voter was unproved as the hearing of the cases was still ongoing in the subordinate courts.

#### **Allowing unauthorized election materials and persons at the polling stations**

78. PW 8, Shukria Muktar Sambur was an agent for Mr. Abdi Daib at Chaani Primary School polling station 5. It was her evidence that while at the polling station she saw a man with a black bag enter the polling station. She asked the Presiding Officer why the man carrying the bag was allowed into polling station. Shortly afterwards another man entered therein carrying a green paper bag and stood next to the ballot boxes. She stated that the man with a bag removed ballot papers and stuffed them into ballot boxes and so did the one with a green paper bag. She started shouting that ballot thieves had gone to the polling station but the Police removed her from therein. She testified that she took photographs of the two men who had the bags at the polling station, which were annexed to her affidavit at pages 254, 255 and 256. She showed the court the said photographs that she still had in her phone. She stated that she did not report to the Police Station as the Police chased her out of the polling station after she raised the alarm. She indicated that her phone fell and broke in the process. She informed the court that the men stuffed the ballot papers in the ballot box for the Member of Parliament for Changamwe Constituency. She indicated that the Presiding Officer in the said polling station was Musa Mzee.

79. PW14, Muslima Ali stated that she went to vote at Chaani Primary School polling station No. 7 at 9:00 a.m. She voted and left for home. Shukria Muktar Sambur (PW8) called her and told her to take food to her at Chaani Primary School polling station No. 5. She went there and waited outside when the Police forbid her from entering the polling station. She then saw two men arrive at the polling station aboard a motor bike. One was carrying a black bag and the other one was carrying a green paper bag. They entered the polling station which prompted her to ask the Policeman why he let in the two men with bags yet he forbid her from taking food to her friend. They entered into the polling station. She heard Shukria shouting "vote thieves are here". It was her evidence that when Shukria made noise, she went into the polling station and saw the man who was carrying the green paper bag removing ballot papers and stuffing them into ballot boxes. She stated that Shukria was thrown out and they stayed outside. She indicated that at that time there were a few people queuing to vote.

80. The 1st and 2nd Respondents' witness No. 9 was Musa Mzee Musa was the Presiding Officer at Chaani Primary School polling station No. 5. He denied that there was any ballot paper stuffing that took place at his polling station as alleged by PW8 and PW14. He stated that he would not have allowed someone to go inside the polling station carrying a paper bag if there were voting materials inside the said bag. However, if the security personnel ascertained that the paper bag contained personal items he would allow them to vote. He denied that the photograph on page 254 was taken at his polling station and stated that the law does not allow photography at polling stations. As far as he was aware, no photograph was taken of someone carrying a paper bag with ballot papers at the said polling station. He admitted that PW8 was a party agent at his polling station as per the polling station diary. He denied that he ejected PW8 from the polling station.

81. To establish the veracity of the allegation of allowing unauthorized material into the polling station thus leading to ballot paper stuffing, this court has perused Form 35A of Chaani Primary School polling station No. 5 which reveals that the number of valid votes cast was 396 and the number of rejected ballot papers were 2. In volume 3 page 389 of the 1st and 2nd Respondents' documents, the polling station diary (PSD) of the said polling station shows that as at 5.00 p.m., 394 voters had voted. There were 3 voters on the queue after 5.00p.m. The PSD at page 392 shows that 399 ballot papers were issued to voters. There was no spoilt ballot paper and that the ballot papers cast less the spoilt ballot papers were 396. On page 393, the Presiding Officer recorded that he marked the register of voters once, he made a statement of rejected ballot papers.

82. In the Petitioner's submissions, they highlighted Chaani Primary School polling station No. 5 as one of the polling stations where the ballot papers cast were less than the persons who turned out to vote. It therefore follows logically that if there were incidents of ballot stuffing as alleged by PW8 and PW14 at the said polling station, then the number of ballot papers in the ballot box for the Member of the National Assembly would have been much more than the 396 valid votes that were cast therein. I therefore find that the allegation of ballot paper stuffing is unfounded and has been counteracted by documentary evidence from the said polling station.

83. The Petitioner submitted that an unauthorized person by the name of Richard M. Mutuku having been allowed into Chaani Social Hall polling station No. 13 during the counting of votes by the Presiding Officer, John King'oo and that the said person did not indicate the political party he was representing and did not sign anywhere in the polling station diary. On re-examination, the said witness indicated that

84. The 1st and 2nd Respondents' witness No.13, who was John Kingo'o was the Presiding Officer of the said polling station. On being cross-examined by Mr. Gikandi about Richard M. Mutuku responded by saying that the said person was an agent but he did not write the political party he was representing and he did not sign the said page against his name. The Presiding Officer denied that Richard M. Mutuku was an unauthorized person. On being cross-examined by Mr. Mohammed, the witness said that he allowed political party agents who had IEBC accreditation, appointment letters from political parties and identity documents into the polling station he was in charge of.

85. The Court notes that the foregoing issue raised by the Petitioner is a non-issue as the Presiding Officer of Chaani Social Hall polling station No. 13 explained that the political party agents that he allowed into the said polling station had all the requisite documentation.

#### **Influence of voters by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' officials**

86. PW22, Khadija Abdi Osman led evidence to the effect that on 8th August, 2017, she went to Chaani Primary School polling station 6 to

vote. She found a long queue and since she was not feeling well, she asked for permission of an Independent Electoral and Boundaries Commission official to jump the queue. The KIEMS kit identified her, after which she was given ballot papers. She asked for someone to assist her. She testified that the IEBC Official called 4 others and they asked her whom she wanted to vote for. She told them she wanted to vote for Abdi Daib. They then asked her whether she did not want to vote for Omar Mwinyi, and she said that she did not like him. They proceeded to put the symbol of an "X" against his name. They asked her the candidate she wanted to vote for as President, she told them Uhuru Kenyatta and they asked her, "so you do not want to vote for Raila?". They proceeded to put the symbol of an "X" against Raila's name.

87. She asked them why they put the symbol of an "X" against Omar Mwinyi's name and yet she knows Abdi Daib's picture and they told her that they had done what she wanted. They put the ballot papers in the ballot boxes. On leaving the polling station she met her sister, Shankor Abdi Ibrahim whom she explained to what had happened. Shankor told her that she had been cheated. She went back to the polling station and told the Policeman who was keeping security therein what the polling officials had done, but he forbid her from entering the polling station. She stated that she did not report to the Police Station as the person who chased her away was a Policeman.

88. Michael Kalume Ponda testified as the 1st and 2nd Respondents' witness No. 17. He was the Presiding Officer at Chaani Primary School polling station No. 6. He recalled having assisted some voters to vote at the said polling station. He testified that the voters that needed assistance would go to him and identify the candidate they wanted to vote for and he would put a mark against the names of the said candidates in the space provided. He denied having put a mark in favour of the 3<sup>rd</sup> respondent after PW22 told her that she wanted to vote for another candidate. He indicated that he assisted about 5 voters and that he assisted them in the presence of party agents.

89. Although the Presiding Officer for Chaani Primary School polling station No. 6 stated that he assisted 5 voters to vote, the Polling Station Diary shows that he did not record the number of Forms 32 he filled as prove of the fact that the correct procedure was followed with regard to assisted voters.

90. Regulation 72 of the Elections (General) Regulations 2012 provides for the assistance of voters. Sub regulation 2 thereof provides that the Presiding Officer shall assist the voter in the presence of the agents. This Court finds that PW22 was a truthful witness notwithstanding the fact that she did not call her sister to corroborate the fact that she told her that she had been influenced in voting for the candidates she did not want to vote for. Although the Presiding Officer denied the said allegation I believe the evidence of PW22 that there was improper influence by undisclosed IEBC officials to have her vote in favour of the 3<sup>rd</sup> Respondent.

91. PW24 one Zeinab Abdow Gubey voted at Chaani Social Hall polling station No. 13. She stated that she needed assistance in voting because she had not taken anyone along with her to assist her in voting. That at the said polling station she found IEBC clerks who asked for her identity card, the KIEMS Kit did not identify her but after another trial it worked. She was given 6 ballot papers whereupon she asked a man wearing a reflector jacket to assist her. It was her evidence that she knew the photographs of the people she wanted to vote for. The person assisting her put an "X" against the name of the person she did not want.

92. John Kioko King'oo, the 1st and 2nd Respondents' witness No. 23 who was the Presiding Officer at Chaani Social Hall polling station No. 13 did not respond to the above allegation either in his affidavit or in court.

93. The court however notes that PW24's evidence in court is a departure from the deposition in her affidavit which she swore on 5th September, 2017 where she deposed that she asked the Presiding Officer to assist her to vote and he referred her to a Clerk who tried to lure her to mark the box with Omar Mwinyi's picture. She refused to mark because despite the fact that she is illiterate, she knew Abdi Daib's picture. She stated that the incident left her frustrated and she tried to confront the said Clerk. This court therefore cannot rely on the evidence of PW24 to prove the allegation of voter influence.

94. PW7, Yusuf Adan Isaak, an agent of Abdi Daib at Cape Town polling station No 6 stated that as he was queuing to vote, he saw an illiterate voter being asked if he knew how to read and write and being told that he would be assisted to vote by the Presiding Officer. He stated that after voting, he confronted the Presiding Officer about assisting Somali voters who were illiterate but he was chased away. He testified that some Somali voters who were illiterate would say "Uhuru Daib" as the persons they wanted to vote for. The Presiding Officer would then ask them if they did not want Raila and he would put the symbol of an "X" against Raila's name.

95. This court notes that no voter who was registered at Cape Town polling station No 6 was called to give evidence that he/she was influenced to vote in a particular manner. The allegation by PW7 remains unsubstantiated.

96. PW2, Asha Shaban was an agent for Jubilee party at Baraka village polling station No. 1. At the said station the Presiding Officer gave her a document to sign but other Jubilee agents were denied entry. She testified that she was not assisting those who needed assistance as all of them were being assisted by the NASA agent. She recounted that a voter went to the polling station saying he did not want Raila but the ODM agent put an "X" against Raila's name after being told that he should sign "X" against the name of the candidate he did not want.

97. Although PW2 gave evidence of illiterate voters being influenced to vote in a certain way, her affidavit does not contain a deposition about illiterate voters being influenced to vote in favour of the 3<sup>rd</sup> Respondent. Moreover, the court found PW2 to be an untruthful witness for the fact that although she denied having signed Form 35A because of the way the counting of votes was being done, this court made reference to Form 35A of Baraka village polling station No. 1 and noted a striking similarity in the signature appended by the Jubilee party representative, and the signatures signed by PW2 on several pages polling station diary. It was clear to this court from the demeanour of the said witness as she testified that she lied about not having signed Form 35A and the court recorded that observation in the proceedings of this case.

#### **Whether the elections for Member of Parliament Changamwe Constituency was by way of secret ballot.**

98. PW27, Abdi Mohamed Daib in his evidence stated that the essence of a secret ballot is to give a voter a chance to decide the person they

would like to vote for. Relying on a photograph attached to his affidavit and marked as AMD 11, he testified that the voting booths were next to each other and were not separated in the middle to give voters privacy. He further stated that some of the people behind the voters were talking to them and the others were standing aside. He gave an instance of where a voter in the said photograph who was standing behind the one in the voting booth was looking at what the one in the voting booth was doing. He stated that the crowding of the polling booths diminished any privacy in the elections.

99. The Returning Officer in her evidence conversely stated that the election was by way of secret ballot because if it was not, the agents would have objected to the same and to her knowledge, there was no such objection.

100. Regulations 69(2) and 70 of the Elections (General) Regulations, 2012 provides:

***“69(2) A voter shall, in a multiple election, be issued with the ballot papers for all elections therein at the same time and shall after receiving the ballot papers-***

***(a) Cast his or her votes in accordance with regulation 70 without undue delay.”***

On the other hand, Regulation 70 provides:-

***“(1) A voter shall, upon receiving a ballot paper under Regulation 69(2)-***

***(a) Go immediately into one of the compartments of the polling station and secretly mark his or her ballot paper by putting a cross, a tick, thumbprint or any other mark in the box and column provided for that purpose against the name and the symbol of the candidate for whom that voter wishes to vote; and***

***(b) Fold it up so as to conceal his or her vote, and shall then put the ballot paper into the ballot box in the presence of the presiding officer and in full view of the candidates or agents.***

***(2) The voter shall after following the procedure specified in sub regulation (1) put each ballot paper into the ballot box provided for the election concerned.”***

101. The Court finds that the allegation of overcrowding at voting booths was non-specific as PW27 failed to lay a proper foundation on the polling station where the photograph was taken which would have given the Presiding Officer an opportunity to respond to the contention fully. The Returning Officer gave a general response as the best placed person to answer to the above would have been the Presiding Officer of the undisclosed polling station who would have explained the situation at the polling station.

102. This court finds the allegation of lack of privacy during the election process on 8th August, 2017 to be unfounded as no witness came forward to adduce evidence to the fact that they felt that their privacy was compromised in Changamwe Constituency due to crowding at the voting booths.

#### **Faulty KIEMS Machines**

103. PW26, Esther Masika an Observer working for UWIANO led evidence that at Chaani Primary School polling station No. 4, the IEBC allowed a faulty KIEMS kit to be used despite objections from observers and party agents. The KIEMS kit would at times take time to respond which necessitated it to be switched on and off. At Cape Town Ground polling station No. 5, the complementary register was absent. She testified that the KIEMS kit at Mikadini polling station had a problem with the date and was one hour behind time but the 1st Respondent's Information Communication Technology (ICT) Manager authorized it to be used through the Presiding Officer.

104. PW27, Abdi Mohamed Daib made reference to page 277 of the annexures to his affidavit, which contains a photograph of a KIEMS kit that reads Kenya General Elections 2009. The voting period was given as 12<sup>th</sup> January, 2009. He stated that it was for Mikadini Primary School polling station No. 2. He was of the view that the KIEMS kit was not configured correctly with the number of voters registered and votes cast. In paragraph 9 of his affidavit, he deposed that he confronted the 1st Respondent's officials to remove the said faulty KIEMS kit but they turned a blind eye. He stated that KIEMS kits were first used in the year 2013.

105. The Returning Officer indicated that the KIEMS kit for Bomu Primary School polling station No. 2 had a problem when searching for network at 5:00 a.m, at Cape Town Ground polling station No. 3, the KIEMS Kit could not admit some voters including an MCA aspirant Ibrahim Kondo for Kipevu ward. She sent the supervisory password to the Presiding Officer and the said kit worked successfully. At Mwidani Social Hall polling station No. 3, the KIEMS kit shut down but the problem was resolved. At Chaani Primary School polling station No. 5, the KIEMS kit failed to scan finger prints of voters and it was replaced. At Bomu Primary School the KIEMS kit was on training mode, the IEBC ICT personnel fixed the problem. At Mikadini Primary School polling station No. 6, the KIEMS Kit could not identify voters for 20 minutes but the issue was resolved. She stated that machines have issues at times and the KIEMS kits are no exception. The Returning Officer stated that any time lost because of such hitches was recovered by extension of voting time.

106. When giving a demonstration on how the KIEMS kits work, the Returning Officer stated that the dates reflected on the KIEMS kits automatically synchronize with the network. It was her view that the KIEMS kit bearing the year 2009 could be a photoshop as the Mikadini Primary School polling Station No. 2 did not record that it had a problem with the configuration of the KIEMS kit.

107. The 1st and 2nd Respondents witness No. 15 who was the Presiding Officer at Bomu primary school polling station No. 2 admitted that the Kiems kit at the said polling station did not work properly from 6:00 a.m. to 7:00 a.m. but the problem was resolved.

108. In response to the photograph referred to by PW27 that shows a KIEMS kit that was configured for elections for the year 2009, the 1st and 2nd Respondents' witness No. 2, Joseph Wafula Mutochi denied that it was taken at Mikadini Primary School polling station No. 2. On the configuration of the KIEMS kit for the year 2009 general elections, he said that it could not have affected the results as data had been input in all KIEMS kits.

109. This court notes the photograph of the KIEMS kit on page 277 of the petitioner's documents shows that it was taken on 8th August, 2017 at 03.49 p.m. It is reflected thereon that the election period was for the year 2009, the voting period opening date was January 12, 2009 at the time on the KIEMS kit was 16:39:50, the polling centre was Mikadini Primary School, the polling centre is reflected thereon as 001-001-0005-023/02. The total number of registered voters is given as 647, the total number of authenticated voters was 405, the number of voters authorized by the Supervisor were 18, the voter turnout at that time was 62.6%, the voting round was No. 1.

110. In making reference to the PSD for the said polling station, it shows that the number of registered voters as at 8th August, 2017 was 647. The number of voters who had been identified using the KIEMS kit as at 1700 hours were 425 which was equivalent to 65.7% of the registered voters.

111. In **Thomas Matwetwe Nyamache v Independent Electoral and Boundaries Commission & Others**, [2017] eKLR, Omondi J, had the following to state with regard to KIEMS kits:-

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

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

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

112. I have considered the disparity of the voting period as reflected on the KIEMS kit and the actual voting date being 8th August, 2017 as well as the argument that some voters were disenfranchised as the KIEMS kit with a voting period of the year 2009 could not have had an up to date register of voters. I believe that the above photograph was taken at Mikadini Polling Station No. 2 on the 8th of August, 2017. I however do not believe that it did not contain an updated register of voters. PW27 in his own words informed the court that the KIEMS kit were first used in the year 2013.

113. The fact that the KIEMS kit was not properly configured with the correct date and time does not of necessity mean that the data therein was not up to date. I believe the evidence of the 1st and 2nd Respondents' witness No. 2 that data had been input in all KIEMS kits. The allegation by the Petitioner therefore remains unproved.

114. The other issues raised about KIEMS kits not working properly dealt with delays in picking of network in the morning before the beginning of polling and battery charging problems thus a few KIEMS kits would go on and off. The 1st Respondent's (ICT) staff resolved the said issues successfully.

115. The Returning Officer in her evidence testified that KIEMS kits were formatted countrywide to pave way for the 26th October, 2017 repeat Presidential elections. The SD cards were however safely stored and were available. It is however worth noting that the Petitioner resolved to forgo the scrutiny of the information contained in the SD cards through his submissions for scrutiny and recount of votes.

### **Turning away of Jubilee Political Party Agents**

116. PW1, Loreen Mbare Handa a Wiper Democratic Movement agent at Bokole Nursery school polling station No. 3 stated that some agents were turned away as their documents did not have stamps of the political parties that nominated them and that no other agents were chased away from the said station.

117. PW2, Asha Shaban an agent for Jubilee Party at Baraka village polling station No. 1 testified that she was allowed into the polling station but other Jubilee agents were denied entry. The court has in this Judgment already indicated that PW2 was not a truthful witness.

118. PW3, Joyce Wamaita Githua testified that she was an agent for Abdi Daib on 8th August, 2017. She went to Baraka Village polling station No. 4. She stated that at 6:30 a.m., Jubilee party agents were not allowed into the polling station and she therefore observed the election process from outside the polling station. She indicated that she was allowed entry into the polling station at noon. She signed Form 35A. The Presiding Officer of the said polling station did not swear an affidavit to respond to the above allegation.

119. PW4, Lilian Nyambura Wanderi, who was a Jubilee party agent for Abdi Daib at Baptist Church polling station No. 3 stated that although she was at the said polling station at 4:00 a.m., she was not allowed entry until 2:00 p.m., after intervention by the Chief Jubilee agent for Mr. Daib by the name Sofia. She was told that there was another Jubilee agent in the polling station. She however did not see any agent for the said party, after gaining entry into the polling station.

120. In response to the allegation by PW4, Susan Akoth Nyangajo testified as the 1st and 2nd respondents' witness No. 7 and stated in her affidavit that only agents who had the requisite documents were allowed and only one political party agent was allowed into the polling station because of the space in the classroom.

121. A perusal of volume 2 of the 1st and Respondents' documents which contains the PSD for Baptist Church polling station No. 3. At page 287 it shows that PW4 signed it at 1.14 p.m., and she also signed Form 35A. It also shows that another Jubilee representative by the name Ruth Mbula had reported to the polling station at 7.26 a.m. It is thus evident that Jubilee party was represented by an agent at the polling station as from the morning of the election date.

122. PW5 was Salma Omar an agent for Abdi Daib at Chaani Social Hall polling station No. 5. She stated that she reported to the polling station at 5:00 a.m., but was not allowed in as she did not have her oath of secrecy. She got it at 9:00 a.m., and she was allowed in. It was her evidence that she was kicked out of the polling station some minutes to noon, after she witnessed issuance of multiple ballot papers. She did not sign Form 35A. The Presiding Officer of the said polling station did not testify.

123. PW7 was Yusuf Adan Isaak. He was a Jubilee party agent at Cape Town polling station No 6. He was also Abdi Daib's agent. He stated that he reached the polling station at 5:00 a.m., but he was told by the Presiding Officer that they were allowing only one agent for each political party. He was not allowed in.

124. The Presiding Officer of the said polling station, Florence Damaris Chai who testified as the 1st and 2nd respondents' witness No. 10 denied chasing PW7 out of the polling station. She stated that Yusuf Adan was one of the political party agents who signed Form 35A.

125. The court on perusal confirmed from the polling station diary of the above polling station shows that PW7 signed it at 5.50a.m. In the course of the day another Jubilee agent by the name Salim Athman was at the polling station in issue. Form 35A confirms that PW7 signed the said document. The foregoing facts illustrate that PW7 was not an honest witness.

126. PW8, Shukria Muktar Sambur testified that on 8th August, 2017, she was a party agent for Mr. Abdi Daib at Chaani Primary School polling station No. 5. She arrived at the said station at 5:00 a.m. On presentation of her papers to the Presiding Officer, she was told to step aside and was allowed entry into the polling station at 7:00 a.m. She indicated that she did not find any other Jubilee party agent in the said polling station. She stated that she was thrown out of the polling station after she raised an alarm on the stuffing of ballot boxes at the said polling station.

127. The 1st and 2nd Respondents' witness No.9, Musa Mzee Musa denied throwing out PW8 from Chaani Primary School polling station No. 5.

128. PW9 was Fatuma Said Abdalla. She was Mr. Abdi's agent at Bomu polling center. She was also the Deputy Chief Agent for Jubilee party in Changamwe Constituency. She stated that she went to Mwijabu polling center at 6:40 a.m., and found Jubilee party agents had been denied entry. She further stated that Jubilee party agents called her from Bomu polling station and informed her that they had been denied entry. The witness was however shown through cross-examination by Counsel for the 1st and 2nd Respondents that one Robert Njoroge was allowed entry as per the polling station diary of the said polling station. On being referred to the polling station diary for Lilongwe polling station No. 3, the witness stated that it showed that 3 Jubilee party agents were present. PW9 further testified that Joseph was denied entry into Mwijabu Primary School polling station No. 4 and Modester was also denied entry into the said polling station. She stated that Jubilee party agents were allowed into polling stations after 1:00p.m.

129. The 1st and 2nd Respondents' witness No. 16, Otieno Dishon Aran who was the Presiding Officer at Lilongwe Garden Center polling station No. 5 denied that any agent was prevented from witnessing or carrying out their duties.

130. This Court has perused the PSD of Lilongwe Garden Center polling station No. 5 to ascertain the veracity of the allegation and has established that Humphrey Wanjohi, a Jubilee party agent was present and signed page 248 of the polling station diary at 6.00 a.m. Caleb Mwangi also of Jubilee party signed several pages of the said diary which signifies that Jubilee party was represented at the said polling station. The said Caleb Mwangi signed Form 35A for said polling station.

131. The Presiding Officer of the Bomu Primary School polling station No. 3, LucyCaster Muoti Mutua testified as the 1st and 2nd Respondents' witness No. 36. It was her evidence that Jubilee party was represented by an agent by the name Robert Njoroge.

132. A perusal of the polling station diary does confirm the assertion and that Robert Njoroge signed the said document at 6.03 a.m., after reporting to Bomu Primary School polling station No. 3.

133. The Presiding Officer of Mwijabu Primary School polling station No. 4 did not testify. A perusal of Form 35A for Mwijabu Primary School polling station No.4 however reveals that it was signed by Thomas Ngulu, a Jubilee party agent. The said party was therefore represented.

134. PW11 was Josphat Maina Macharia, who was agent for Abdi Daib at Al-Irshad Nursery station No. 4. He stated that although he reached the said station at 5:15 a.m., the Presiding Officer told him that there was a Jubilee party agent in the polling station. He was allowed into the polling station at 11:00 a.m. by that time people had started voting. He indicated that he did not find any Jubilee party agents in the polling station. On being referred to the polling station diary for the said polling station, he indicated that it showed that there were 7 Jubilee agents therein at different times. He admitted that he had signed the polling station diary for Al-Irshad Nursery polling station No. 7 but on going to Al-Irshad polling station No. 4, he did not sign the polling station diary. He stated that he did not sign Form 35A but 2 Jubilee agents signed it.

135. Athuman Mohamed Fahamun testified as the 1st and 2nd Respondents' witness No. 29. He was the Presiding Officer at Al-Irshad

Nursery school polling station No. 4. He stated that the reporting times for agents were written by themselves, Josphat Maina wrote that he reported to the polling station at 4:30 a.m., but he could not change that entry. He did not fill the incident report that the agent made an erroneous entry as his reporting time. He further stated that due to the workload of the duties he was involved in, it was not possible to immediately notice that Josphat Maina had recorded in the polling station diary that he reported to the polling station at 4:30 a.m. He indicated that he did not deny the said Jubilee party agent entry into Al-Irshad Nursery school polling station No. 4.

136. A perusal of the polling station diary for Al-Irshad Nursery station No. 4 shows that Josphat Maina (PW11) of Jubilee party signed the said document at 4.30 a.m. He was thus not a truthful witness as he said he did not sign the said polling diary yet the record shows that he did. He also stated that he was denied entry into the polling station yet the polling station indicates that he signed it thus signifying his presence therein.

137. PW12, Cecilia Wakesho was an agent for Mr. Abdi Mohamed Daib at Bokole Nursery school polling station No. 2. She testified that she went to the said polling station at 6:00 a.m. but was denied entry. She was told that there was a Jubilee agent in the polling station. She insisted on getting in and was allowed entry at 9:00 a.m., but was ejected out after some time. The Presiding Officer of the said did not testify to controvert the above allegation. PW12 was however shown the polling station diary for Bokole Nursery school polling station No. 2 which contained names of 3 Jubilee agents.

138. PW13 was Ayub Abdullahi Hassan. He was Abdi Daib's agent at Kipevu Primary School polling station No. 1. He stated that the Presiding Officer took photocopies of the documents he had when he went to the polling station at 5: 00 a.m. He was told to wait. After 15 minutes he called PW27 who told him to wait for him. The latter went to the said polling station at 9:30 a.m., and spoke with the Presiding Officer who allowed PW13 into the polling station. He stated that although the polling station diary has 2 names of persons shown to be Jubilee party agents, he stated that he did not see any agent from the said party. He further testified that he was ejected from the said polling station at 3.00pm after having witnessed a clerk issuing multiple ballots to a voter.

139. The court notes that the PSD for Kipevu Primary School polling station No.1 shows that Jubilee party was represented at the said polling station by Abdia Hassan Amin and Beth Mutambuki who reported at 7.25a.m and 6.00 a.m. respectively.

140. PW26 an UWIANO observer stated that at Baptist church polling center, she noticed some agents outside the gate and she asked them what they were doing outside and they told her that they had not been allowed to enter the polling station. She stated that she did not sign the register of observers. Although the witness said that there was no Jubilee party agent at Changamwe Secondary School polling station No. 1, she was in cross-examination shown the polling station diary which showed that Leah Njoki Njenga a Jubilee party agent reported to the polling station at 5:40 a.m.

141. It was the evidence of PW27 that in not less than 25 polling stations, his agents were kicked out by the IEBC officials thus the number of votes cast amounting to 10,045 were brought into disrepute and the correctness of accuracy could not be verified.

142. The Petitioner, PW28 stated that PW27's agents were not allowed to enter into some polling stations and there was therefore oppression of voters.

Twalib Bwajuma Mwinyifaki, the Chief Agent for the 3rd Respondent testified as his witness No. 11, and his Chief Agent stated that political party agents were being denied entry into polling stations if they did not have all the documents required by the IEBC.

143. The Returning Officer asserted that she did not receive any report of political party agents who were chased away from polling stations. If an agent did not have all the documents, she would tell the Presiding Officers to refer them to her. The Presiding Officers that were called to respond to the foregoing allegation denied that they prevented Jubilee party or PW27's agents from entering polling stations and clarified that they were allowing one agent per political party or for an independent candidate. They all stated that such agents had to have all accreditation documents so as to be allowed into polling stations. Any other person who demanded access to polling stations as an agent was denied entry on the ground that there was already an agent of the particular party already in the station. More than one agent per party was allowed only when space could hold more agents.

144. Regulation 62 of the Election (General) Regulations provides that:-

***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.*** (emphasis added).

145. The above provisions are clear that even in the absence of political party agents at polling stations, the election results would be valid if the elections have been conducted properly. It therefore follows that the election results for the Member of the National Assembly for Changamwe Constituency cannot be invalidated solely due to the absence of political party agents in some polling stations.

**Denying valid voters their right to vote**

146. PW13, PW14 and PW15 all testified that they saw voters of Somali origin being turned away as they could not be identified by the KIEMS kits. PW16 led evidence to the effect that on 8th August, 2017, she went to Cape Town polling center (sic) No. 2 at 5:45 a.m., where she found a few people ahead of her. When it reached her turn, she was told that the KIEMS kit could not identify her by way of fingerprint. She told them that she had confirmed that her name was registered in June 2017. After a long struggle, the Presiding Officer allowed her to vote. About 5 other Somalis were not allowed to vote.

147. The Presiding Officer of Cape Town polling station No. 2 testified as the 1st and 2nd Respondents' witness No. 12. She stated that some voters were not identified by the KIEMS kit.

148. PW17, Ali Hussein Gure a voter at Mikadini Primary School polling station No. 1 stated that he had seen his name pinned on a list on the wall of the said polling station. On presenting his identity card and placing his thumb on the KIEMS Kit, he was told that his name was not showing thereon. He did not vote. He alleged that he counted 54 other persons of Somali origin who were not captured by the KIEMS kit who were turned away at the polling station. He made reference to an affidavit on page 227 of the Petitioner's documents sworn by 54 voters of Somali origin who were not allowed to vote on 8th August, 2017, which gave him authority to swear an affidavit on their behalf.

149. PW25 Halima Abdullahi Ibrahim who is the mother of PW27 stated that she put her thumb on the KIEMS kit but was told to go home. She indicated that when she insisted on her right to vote, she was told to wait by the IEBC officials which she did until 3:00 p.m., when she eventually voted.

150. PW18 Abshir Salan stated that he did not vote at Mikadini polling station No.1 on 8th August, 2017 as the KIEMS kit did not identify him.

151. The Presiding Officer of Mikadini Primary School polling station No.1, Kombo Hussein testified as the 1st and 2nd Respondents' witness No. 8. He stated that there were voters who were not identified through their thumbprints. The KIEMS kit prompted the particulars of the voters using their identity card numbers. They would assist the ones who were identified as registered voters in his polling station to vote using an alternative means. He testified that they referred those registered elsewhere to their respective polling stations. It was his evidence that all 429 voters were identified by the KIEMS kit, including those for whom they used the alpha – numeric means of voting. He could not record the number of voters that voted through the alpha - numeric means as they eventually voted. He indicated that 2 people who went to the polling station did not vote as they were not registered as voters in his polling station. One was an old man who a registered voter at Chaani and a young lady who was a registered voter in Kisumu.

152. Other witnesses who said they did not vote on 8th August, 2017 as they were not identified by the KIEMS kits at different polling stations were PW19, Ibrahim Ismail at Chaani Primary School polling station No. 4, PW20 Noor Bilow Mohamed at Magongo Primary School polling station No.4 and PW21 at Mikadini Primary School polling station No. 3. The Presiding officers of the foregoing polling stations did not testify.

153. PW27 confirmed the information given by witnesses who were his agents and voters that were supporting him with regard to some voters not being allowed to vote. He stated in his evidence that over 300 Somali voters did not have their names entered in the KIEMS Kits but he did not have the names of them. He indicated that he knew about 65 of them who went to complain about being denied their right to vote.

154. The Petitioner, PW28 testified that at St. Lwanga Primary School polling station at 5:45 a.m. He saw about 3 or 4 voters who were not allowed to vote. He stated that some voters of Somali origin told him that they had been denied their right to vote. He testified that it hurt him a great deal to know that people of the same ethnic origin had been denied their right to vote.

155. The 1st and 2nd Respondents' witness No. 3, John Mang'ethwa Nguthu the Presiding Officer at St. Lwanga Primary School polling station No. 3 stated that no voter was turned away after the KIEMS kit identified them. The 1st and 2nd Respondents' witness No. 4, the Presiding Officer at Kipevu Primary School polling station No. 1 stated that no voter was turned away from the said station. If a voter was not registered in his station he/she was referred to the polling stations they were supposed to vote in.

156. The Returning Officer in evidence stated that in Changamwe Constituency, she was not aware of any voter who was turned away after failing to be identified by the KIEMS Kit. That when a voter was not identified by the KIEMS kit they would fall back to the printed register and upon identification the voter would proceed to exercise his/her right to vote. On the voters who were not allowed to vote she stated that they included those who had no identity cards or passports, those not identified by KIEMS kits for respective polling stations or by the supervisor's mode or not registered on the manual register.

157. Section 44 (1) of the Elections Act provides as follows:

***“(1) Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.”***

158. It is clear from the above provisions that for a voter to be identified using the KIEMS kit, he/she must have gone through biometric voter registration in a particular polling station. Thereafter once such a voter visits the polling station he/she was registered in, electronic voter identification is deployed. Having analyzed the evidence tendered by the Petitioner, it is geared toward showing that there was ethnic profiling to single out Somali voters and to deny them the right to vote so as to give undue advantage to the 3rd Respondent. I am not persuaded that the 1st and 2nd Respondents engineered a means of identifying which voters were of Somali origin and which ones were not. The Petitioner failed to give the means deployed to make such identities known. On that score, I agree with Counsel for the Respondents that there was no ethnic profiling during the elections held on 8th August, 2017 at Changamwe Constituency. I am satisfied by the explanation given by the Returning Officer and the Presiding Officers that none of the voters who were identified by the KIEMS kits, alpha-numeric mode or manual register were denied a right to vote.

159. Although PW27 stated that about 300 Somali voters were not allowed to vote, they did not give evidence, save for 65 whom he said that he knew, he did not know the others. PW17 talked of 54 voters of Somali origin who authorized him to give evidence on their behalf. The Election (County & Parliamentary rules, 2017 in Section 12(1)(3) provides that each person who the petitioner intends to call as a witness at the hearing, shall swear an affidavit.

#### **Issuance of ballot papers stamped spoilt to voters before casting of their votes**

160. PW27 referred to page 305 of his annexures, which contains a photograph of voters who were issued with ballot papers stamped "IEBC spoilt". It was his evidence that the Polling Clerks selectively stamped ballot papers "IEBC spoilt", to influence the outcome of the election. He alleged that the incident happened at Cape Town polling station No. 5. In his view, if the polling clerks selectively stamp ballot papers "IEBC spoilt", such a vote will be counted as a spoilt vote. He stated that the ballot papers in issue were issued at 12:39 p.m. and 12:42 p.m. respectively, as per the photographs on the said page.

161. The Presiding Officer of the said polling station did not testify but the Returning Officer denied the said allegation and stated that ballot papers are stamped as "IEBC spoilt" on their face and not at the back, as is the case with the ballot papers produced in support of the Petitioner's case.

162. PW27 failed to call the person who was issued with the said ballot papers as witnesses to support his allegation. The contention therefore remains unsubstantiated and unproved.

#### **Forms 35A contained different serial numbers from the duplicate Form 35A**

163. PW27 referred to pages 310 and 311 of his annexures. He led evidence to the effect that the serial number of the original page was supposed to be reflected in the duplicates. He indicated that on 8th August, 2017, the IEBC used Forms 35A in Changamwe Constituency which were purported to be in duplicate of 6. Further that each of the Forms at Chaani Social Hall polling station 13 had its own serial number. He stated that the one which is purported to be the original bore serial number NA0011387 and the 2<sup>nd</sup> duplicate had serial No. NA0011382. He however admitted the Forms appeared to be the duplicates of Forms 35A which can also be termed as originals.

164. Several Presiding Officers and the Returning Officer testified that Forms 35A are carbonated and are issued in a set of six. They further testified that each page contains a different page number and that the details of the polling stations are printed thereon.

165. I find that the above complaint to be without merit as it was fully responded to by the 1st and 2nd respondents to the satisfaction of this court.

#### **Alterations and incorrect entries of figures on Forms 35A**

166. In his affidavit in paragraph 22, PW27 singled out Forms 35A which he alleged were filed after the vote tallying. These were Form Nos. NA000511, NA001261 and NA000973 for Cape Town polling station No. 3, Chaani Social Hall polling station No. 3 and Changamwe Social Hall polling station No. 8, respectively. He attached a bundle of Forms 35A marked as annexure AMD5 to his affidavit. Cancellation of Forms 35A in his view was indicative of manipulation. The Petitioner in his submissions included additional polling stations where he alleged that alterations were made without counter-signatures.

167. The 1st and 2nd Respondents' witness No 20, Tima Said Ali Hussein, the Presiding Officer at Cape Town Ground polling station No. 3 admitted to having made several alterations to Form 35A. She however denied incompetence in failing to counter sign.

168. The election results on Form 35A of Cape Town Ground polling station No.3 are a replica of what contained on Form 35B. The Presiding Officer countersigned the corrections she made on the said form as to the number of votes garnered by Daib Abdi Mohamed and Mittau Peterson which are reflected as 117 and 23 votes, respectively. She made an amendment to the number of rejected ballot papers to read 8. That is the only part the PO did not countersign. The said Form 35A was signed by a Jubilee agent by the name Abdirizack Yussuf. Form 35A for Chaani Social Hall polling station No.1 has the alteration made with regard to the 3rd respondent's votes countersigned, Form 35A for Chaani Social Hall polling station No. 3 and Changamwe Social Hall polling station No. 8 has no alterations that were made. The Court noted that although the Petitioner had deposed in his affidavit that they had attached the two Forms 35A, they were not but the Court made reference to the Forms 35A attached to the 1st and 2nd Respondents' affidavit.

#### **Failure to secure election materials after the elections for the Member of Parliament Changamwe Constituency**

169. PW27 made reference to page 312 of the petitioner's documents which contains a photograph marked as ADM10. He testified that it depicted an IEBC official who had collected ballot boxes, put them aside and slept. He stated that only 3 ballot boxes were visible and it was not known where 3 ballot boxes had gone to as they are supposed to be 6. He also referred to the photograph at page 313 attached to his affidavit which shows 4 ballot boxes abandoned outside with 2 ballot boxes nowhere to be seen. On the photograph on page 315 of his

annexures, he indicated that it shows a seal that had been dropped and picked by a member of the public. He stated that an IEBC seal is a strategic material and anything could have gone wrong with security of the ballots.

170. The Returning Officer in response to the above explained that the photographs in issue were taken at a tallying centre located at Kenya Medical Training College which was a waiting bay for the Presiding Officers. She stated that the Presiding Officers would sit next to their ballot boxes with their security officials. She further stated that after the elections of 8th August, 2017, 136 ballot boxes were kept safely at a warehouse in Changamwe. On the seal that was recovered at a polling station by a member of the public, she stated that the seals were accounted for.

171. The court's finding on the above allegation is that it is not supported by any evidence that any ballot box went missing. At the time of the scrutiny and recount of votes, all the 136 ballot boxes for the Member of Parliament for Changamwe Constituency for the elections held on 8th August, 2017 were accounted for. There is therefore no evidence of any ballot box that went missing.

#### **Form 35 B**

172. This Court was referred to two copies of Form 35B. One bore the date of 10th August, 2017 and the other one 13th August, 2017. The Petitioner therefore alleged ill motive on the part of the Returning Officer for issuing two Forms 35B on different dates.

173. In my considered view, the issue of the existence of two Forms 35B is a red herring and this Court failed to understand why so much time was spent in trying to show impartiality on the part of the Returning Officer because of the said Forms. She explained to the satisfaction of this court that she at first printed a test page of Form 35B and signed it and stamped it. The IEBC rubber stamp however bore the wrong date of 13th August, 2017. She placed the test page of Form 35B on the table and the 3rd Respondent's Chief Agent took it and signed it. She then pulled it away so that other agents and/or candidates would not sign it. She then printed the actual Form 35B which was signed by the 3rd Respondent's Chief Agent, Twalib Bwajuma of ODM, Jared Onyango of VDP and the 3rd Respondent. The Returning Officer also signed the Form and stamped it the 10th August, 2017. She indicated that the Jubilee Party Chief Agent declined to sign the said Form and walked out of the Constituency Tallying Centre. The 3rd Respondent testified that after the declaration of results at the Constituency tallying centre, PW27 and his team stormed out of the said centre.

174. This Court fails to see the benefit that was conferred on the 3rd Respondent by the Returning Officer when the results collated on the actual Form 35B are a complete replica of the test page of Form 35B. I therefore find the above complaint unjustified.

#### **Failure to relay and transmit results as required by law**

175. No evidence was tendered by the Petitioner that there was failure to relay and transmit results. The Returning officer led evidence to the effect that transmission of election results was both through the KIEMs kits and Forms 35A. She testified that the online portal results for the Member of the National Assembly showed that the total votes cast were 53,985, the valid votes cast were 52,865 and rejected ballot papers were 1,120. On Form 35B the total votes cast were 53,250. She admitted that from the text message results which were displayed on the online portal there was a difference of 2,511 votes.

176. She further testified that they received instructions from the IEBC Chairman to disregard the online portal results as some Presiding Officers were sending text messages twice. They therefore relied on the results as per the paper work and that from the said paperwork the difference was 170 votes, which she said could be explained by the stray ballots. It was her evidence that the Presiding Officers posted online results that were at variance with the declared results originating from Forms 35A. The 3rd Respondent testified that the online portal results were provisional and that the final results were captured on Form 35B.

177. With regard to online portal results, Regulation 82 of the *Elections (General) Regulations, 2012* provide as follows:-

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

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

178. In the **Raila 2017** (supra), the Supreme Court cited with approval the **Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others** [2017] eKLR. at paragraph), the Court of Appeal underscored results recorded at the polling station as follows:

***"[264] 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."***

179. Under the Elections Act, the issue of transmission of results is addressed in the provisions of **Section 39** which provides as follows:-

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

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

***(i) tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency***

*for the election of a member of the National Assembly and members of the county assembly;*

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

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

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

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

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

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

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

180. Section 39(1C) of the *Elections Act* is clear that electronic transmission and publication of poll results in a public portal is only a statutory requirement for the Presidential election. Further, except for voter registration and voter identification; voting, counting, tallying and transmission of results for the election of the other elective posts including that of the Governor are mainly manual.

181. Section 39(1E) of the *Elections Act* provides as follows:-

***"Where there is a discrepancy between the electronically transmitted and the physically delivered results, the Commission shall verify the result and the result which is an accurate record of the results tallied, verified and declared at the respective polling station and constituency tallying centre shall prevail".***

182. It is clear from the above provisions that online portal results are not the declared results and cannot be regarded as final. There is also no ambiguity that the declared results, in this case captured on Forms 35A carry the day over the online portal results.

183. On the issue of the difference in the number of votes cast for the President, the Governor, Member of the National Assembly, Senator, Woman Representative and the Member of the County Assembly at Changamwe Constituency, this court notes that valid votes cast for all positions need not necessarily be uniform. There could be various reasons which would account for any difference that may be realized. Therefore, unless cogent evidence is adduced, a difference of numbers in the votes cast in various positions is not from the face of it evidence of electoral malpractice. However, where the variance is huge and no tangible explanation is proffered, that would call for the court to make a decision in one way or the other on the same.

### **Scrutiny exercise**

184. The Court granted an order on 16<sup>th</sup> January, 2018, for scrutiny and recount of votes in 57 polling stations. A summary of the report filed by the Hon. J. Kasam SRM/DR confirmed the following:-

- i. The number of votes declared for each candidate at each polling station;
- ii. Inspection of Forms 35A & Form 35 B, Voter Registers, spoilt, stray, disputed & rejected ballot papers;
- iii. The total number of valid votes cast for each candidate after recount & scrutiny;
- iv. Voters' mark appeared on either Party/Candidates Symbol or Candidate Photo and Name or multiple markings for one particular Candidate, extension of a mark outside the box, both Parties objected but all such ballots were included in the final tally;
- v. Unused Form 35 A Booklet was missing, only originals and copies were produced by the IEBC for each ballot Box;
- vi. Some Counterfoils of used ballot papers attached to the Booklets were not marked;
- vii. Almost all Voters Registers were not marked;
- viii. The comments/remarks of the Presiding Officers were missing in most of Form 35A;
- ix. Most rejected or spoilt ballot papers were not accompanied by the declaratory statements;

- x. All results noted in Form 35A corresponded with the results in Form 35B;
- xi. No alterations were noted in Form 35B; and
- xii. Form 35B was duly signed and stamped by IEBC.

185. The Petitioner's Counsel in his written submission has in great detail addressed the irregularities observed during the scrutiny and recount exercise. Such as used-counterfoils and un-used ballot papers exceeding the total number of ballot papers issued to the Presiding Officers, results in Forms 35A being more than the used counterfoils, cast ballot papers exceeding the persons who turned out to vote, the number of ballot papers cast being less than the persons who turned out to vote, ballot papers in the ballot box being less than what was issued to the Presiding Officers as indicated in polling station diaries, missing used and un-used counterfoils in the ballot boxes as captured in the Deputy Registrar's report dated 30th January, 2018. Failure to mark registers, serial numbers of ballot boxes and seals as captured by the Deputy Registrar in her report of 17th November, 2017 being different compared to the entries in the polling station diaries, un-countersigned alterations on Forms 35A, Forms 35A not signed by Presiding Officers and Deputy Presiding Officers, lack of duly executed Presiding Officers' oaths of secrecy, failure by the Presiding Officers to indicate reasons why some agents did not sign Form 35A, election material not being secured in tamper proof envelopes, counting of rejected ballot papers as valid.

186. The issue of Presiding Officers failing to avail signed oaths of secrecy in my view is a non-issue. The Presiding Officers who testified stated that they took the oath of secrecy in an ceremony officiated by Hon. Makori, Chief Magistrate, Mombasa. As at the time the 1st and 2nd Respondents supplied the Petitioner with copies of the oaths of secrecy the Presiding Officers took, the originals had been submitted to the said Hon. Chief Magistrate for execution. The Constituency Returning Officer did her work in ensuring that the oaths of secrecy were administered and the Presiding Officers took the oaths of secrecy accordingly.

187. The matter that is of great concern is the Forms 35A that are said not to have been signed by the Presiding Officers and Deputy Presiding Officers. A perusal of the same reveals that Forms 35A for Baptist Church Primary School polling station No. 4 was signed by the Presiding Officer, but not the Deputy Presiding Officer, Form 35A for Baraka Village polling station No.1 was signed by both the Presiding Officer and the Deputy Presiding Officer, Form 35A for Baraka village No. 2 was signed by the Deputy Presiding Officer, Form 35A for Baraka village polling station No. 6 was signed by the Presiding Officer, Form 35A for Bokole Nursery School polling station No. 3 was signed by the Presiding Officer, Form 35A for Changamwe Social Hall polling station No. 5 was signed by the Presiding Officer, Form 35A for Gome Primary School polling station No. 1 was not signed by either the Presiding Officer or the Deputy Presiding Officer, Form 35A for Gome Primary School polling station No. 3 was signed by the Presiding Officer and Form 35A for Lilongwe Garden polling station No. 5 was signed by the Presiding Officer.

188. This court's finding is that any Form 35A that was signed by either the Presiding Officer or the Deputy Presiding Officer was valid as signing of the said Forms signifies ownership of the results declared in a respective polling station. The validity of the results on Forms 35A that only bear the signature of the Deputy Presiding Officer is well captured under the provisions of Regulation 5(4) of the Elections (General) Regulations which provides that:-

**"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."** (emphasis added).

189. With regard to Gome Polling station No.1, the 391 valid votes cast should have been disregarded by the Returning Officer as Form 35A from the said polling station was neither signed by the Presiding Officer or the Deputy Presiding Officer. The Petitioner in his submissions indicated that in 12 polling stations, the valid votes declared surpassed the number of voters that voted. The said votes amount to 287. In coming up with the said foregoing, the Petitioner took into account the number of voters that turned out to vote on 8th August, 2017 recorded in the polling station diaries and those recorded on Forms 35A. Any votes that surpassed the number of voters that voted using the KIEMS kit or manual register should have been disregarded in line with the provisions of Regulation 83(1)(c) of the Elections (General) Regulations.. provides as follows:-

***"1. Immediately after the results of the poll from all polling stations in a constituency have been received by the Returning Officer, the Returning Officer shall, in the presence of the candidates or agents or observers, if present- (c) disregard the results of the count of a polling station where the total valid votes exceeds the total number of voters who turned out to vote in the polling station"***

190. On the issue of Forms 35A which contained alterations that were not countersigned, I had already addressed that issue with regard to the Forms 35A that were deposed to in PW27's affidavit. Form 35A for Bokole Nursery school polling station No. 3 shows that the only alteration that was not countersigned contains the figure 01 but the figures on Form 35A including the figure 01 are captured in the polling station diary, Form 35A for Magongo Primary School polling station No. 3 has alterations that were not countersigned, the said figures are however with regard to the total number of registered voters in the polling station and the number of rejected ballot papers. Form 35A for Kipevu Primary School polling station No. 1 contains an alteration on the number of valid votes cast to read as 323, this figure is similar to that captured in the polling station diary and the Scrutiny Report. Form 35A for Chaani Primary School polling Station No. 8, contains an alteration with regard to the votes garnered by the 3rd Respondent to read 272, which I note is the same figure that is reflected on page 60 of the Scrutiny Report. It is therefore clear that the alterations of the figures on Forms 35A were not done with an ulterior motive but due to clerical errors in transferring figures from the polling station diaries to Forms 35A. Any unbiased discerning eye can however notice that all the other Forms 35A which are said by the Petitioner to contain alterations that were not countersigned, were indeed countersigned.

191. On the counterfoils that were not found in ballot boxes during the scrutiny exercise, **Regulation 73(3) and (4)**, of the Elections (General) Regulation 2012 stipulates as follows:

***3. Immediately after the completion of the statement under sub-regulation (2), the presiding officer, in the presence of the candidates or agents shall seal in separate tamper proof envelopes-***

(a) *the spoilt ballot papers, if any;*

(b) *the marked copy register, where necessary;*

(c) *the counterfoils of the used ballot papers; and*

(d) *the statement specified in sub regulations, and shall seal each of the envelopes with his or her own seal and the seal of the Commission and shall allow any candidate or agent who may wish to do so, to affix his seal to the envelope and any statement recorded under these regulations.*

**4. After complying with the provisions of this regulation, the presiding officer shall, as soon as practicable, deliver the ballot boxes, and the tamper proof sealed envelopes to the returning officer who shall take charge thereof.**” (emphasis added).

192. The Court of Appeal when addressing the issue of counterfoils in the election petition appeal of **Timamy Issa Abdalla v Swaleh Salim Swaleh Imu & 3 others** [2014] eKLR held as follows:-

**“That although the counterfoils were not included in the ballot boxes, this was not an irregularity as the law did not require the counterfoils to be in the ballot boxes and therefore there was no proof of non conformity of the law.”**

193. Following the above Court of appeal decision, it is apparent that there is no mandatory provision for ballot paper counterfoils to be stored in ballot boxes.

194. Although the Petitioner submitted that Forms 35A that were not signed by the political party agents were not valid, courts have held that failure by a political party agent or agents to sign Form 35A would not invalidate election results. In the case of **Odalo Makojwando Abuur v Dalmas Otieno Anyango & 2 others** [2013] eKLR, the court reiterated the provisions of **Regulation 79(6)** of the Elections (General) Regulations which provides as follows:-

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

#### **Impact of regularities and illegalities, if any, to the outcome of the results**

195. All the other issues raised by the Petitioner flowing from the scrutiny and recount report, which I reiterate was for 57 polling stations, revolve around irregularities in the election process. Section 83 of the Elections Act provides that:

**“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.**

196. Mr. Gikandi in seeking a nullification of the declaration of the 3rd Respondent as the duly elected Member of Parliament for Changamwe Constituency relied on the case of **William Kabogo Gitau vs George Thuo & Others** [2010] eKLR. This Court notes that the decision therein was rendered in the year 2010 by a court of concurrent jurisdiction. Since then the Supreme Court has had occasion to address the issue of irregularities in election petitions. I am in agreement with Counsel for the Respondents that the precedent they have cited of **Raila 2017** (supra) is the applicable precedent.

197. The Supreme Court in **Raila 2017** addressed the implication of **Section 83** of the *Elections Act*. It stated that the provision comprised two limbs; the first regarding compliance with the Constitution and the law on elections and the second, concerning irregularities that may affect the result of the election. The court held thus:-

**“[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.”**

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

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

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

**[218] Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human**

*imperfection, are not enough, by and of themselves, to vitiate an election .....*

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

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

199. Having carefully considered the complaints arising out of the petition, the evidence tendered and the scrutiny report, I am of the considered view, that the irregularities occasioned by the 1st and 2nd Respondents are not of such a magnitude that would justify the annulment of the election results for Changamwe constituency for the elections held on 8th August, 2017. Even if the disputed votes were to be collated and added onto those garnered by the Mr. Abdi Daib, the would the margin of votes would still be wide. I therefore find that the Petitioner has failed to prove his petition to the required standard.

### **Election Offences**

200. Section 86 of the Elections Act makes the following provisions:-

- "(1) An election court may, at the conclusion of the hearing of a petition, in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature may have occurred.***
- (2) Where the election court determines that an electoral malpractice of a criminal nature may have occurred, the court shall direct that the order be transmitted to the Director of Public Prosecutions.***
- (3) Upon receipt of the order under subsection (2), the Director of Public Prosecutions shall —***
- (a) direct an investigation to be carried out by such State agency as it considers appropriate; and***
- (b) based on the outcome of the investigations, commence prosecution or close the matter."***

201. In light of the above provisions, this Court was invited by Counsel for the Petitioner to make recommendations for the investigation of the Returning Officer for making amendments on Form 37B for the Mombasa gubernatorial position and the 3 IEBC polling clerks who were attached to Chaani Primary School polling station No. 3 on 8th August, 2017 who signed Form 35 A purporting to be political party agents. I decline to make any recommendations for Mrs. Aisha Abubabakar, the Changamwe Constituency Returning Officer to be investigated for an election offence that was alleged to have been committed touching on Form 37B which relates to the Mombasa County Governor's election. Form 37B was not one of the documents that was filed in this court as part of the Petitioner's or the Respondents' evidence. The issue of Form 37B came up when the Returning Officer was being cross-examined by Mr. Gikandi, Counsel for the Petitioner. It is then that she said that she made a correction on Form 37B because the election results for Mr. Shabhal who was vying for the Governor's position had not been collated in the said Form. She said that she made the correction in the presence of and with the approval of Mrs. Nancy Kariuki who was the Mombasa County Returning Officer. Any issues of concern regarding Form 37B should have been brought to the attention of the Advocates who had conduct of the Mombasa Governor's election petition for the court which was hearing the said petition to deal with. I have no full facts and better particulars upon which I can make a recommendation for the Returning Officer to be investigated for an electoral offence.

202. It was clear in the course of the proceedings that 3 Polling Clerks attached to Chaani Primary School polling station No. 3, namely, Faith Kinyua, Zipporah Ndunge and Agnes Makena Mugambi signed Form 35A of the said polling station purporting to be ODM and Jubilee party agents. Zipporah Ndunge testified as PW34 and admitted having signed the said Form due to fatigue. IEBC polling clerks had no business in the signing of Form 35A in the guise of being political party agents. I therefore make a recommendation to the DPP to institute investigations and make a determination on whether or not the said Polling Clerks should be charged with an electoral offence.

### **Costs**

203. Section 84 of the Elections Act provides that the court shall award the costs of and incidental to a petition and such costs shall follow the cause. Rule 36 of the Election (Parliamentary & County) petition Rules provide further the court's power in regard to costs. It provides as follows;

- " (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 persons by and to whom the costs shall be paid.***
- (2) When making an order under subrule (1), the court may —***
- (a) disallow any costs which may, in the opinion of the court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the Petitioner or the Respondent; and***

***(b) impose the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not, in order to discourage any such expense."***

204. *In the case of Kalembe Ndile and Another v Patrick Musimba and Others Machakos [2013] eKLR* the court stated as follows:-

***'...Costs awarded should be fairly adequate to compensate for work done but at the same time should not be exorbitant as to unjustly enrich the parties or cause unwarranted dent on the public purse or injure the body politic by undermining the principle of access to justice enshrined in Article 48 of the Constitution."***

205. This court in awarding costs will therefore take into consideration the number of witnesses who testified and the length of time taken to hear this petition. I thank the Counsel for their industry, the hard work and long hours they put in, at the hearing of the petition herein, and for their elaborate submissions.

#### **Final orders**

**(i) The petition be and is hereby dismissed;**

**(ii) The 3rd respondent Shimbwa Omar Mwinyi was validly elected and gazette as the Member of Parliament for Changamwe Constituency;**

**(iii) The said election was constitutionally and validly held;**

**(iv) I hereby award costs in favour of the respondents capped in the sum of Kshs.8,000,000/-. The 1st and 2nd Respondents will get a share of 4 Million and the 3rd Respondent 4 Million;**

**(v) The Deputy Registrar will extract and submit an order to the Director of Public Prosecutions pertaining to this court's recommendation for 3 IEBC polling clerks to be investigated for electoral offences; and**

**(vii) A certificate of the determination in accordance with section 86(1) of the Elections Act 2011, shall issue to the IEBC and the Speaker of the National Assembly.**

**DELIVERED, DATED and SIGNED at MOMBASA on this 28th day of February, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Gikandi for the Petitioner

Mr. Munyiya for the 1st and 2nd Respondents

Mr. Mohamed for the 3rd Respondent

Mr. Oliver Musundi - Court Assistant