



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**ELECTION PETITION NO. 3 OF 2017**

**MUTISYA ALBANUS PAUL.....PETITIONER**

**VERSUS**

**INDEPENDENT ELECTORAL AND**

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

**THE RETURNING OFFICER (MACHAKOS**

**TOWN CONSTITUENCY).....2<sup>ND</sup> RESPONDENT**

**MUNYAKA VICTOR KIOKO.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

**Introduction:**

1. Following the general election held on 8th August 2017, the 3rd respondent Munyaka Victor Kioko was declared elected as the Member of National Assembly for Machakos Town Constituency by receiving 44,185 votes. The petitioner Mutisya Albanus Paul came second by getting 29, 713 votes. The election was conducted by the Independent Electoral and Boundaries Commission (IEBC) (1st respondent) whose gazetted Returning Officer was Marvin Mungah (2<sup>nd</sup> respondent).

2. The Petitioner was aggrieved by the conduct of the election and the declaration of the results. He filed this petition on 7<sup>th</sup> September 2017 to challenge the same. The petition sought the following reliefs:

- a. Scrutiny and recount of the ballots cast and examination of the tallies in the election both in hard copies and in the 1<sup>st</sup> respondent's servers;
- b. A declaration that the said Munyaka Victor Kioko was not duly and validly elected and his election was null and void;
- c. A declaration that the elections were marred with electoral malpractices of a criminal nature hence null and void;
- d. An order for a fresh election to be held;
- e. Costs of the petition plus interest thereon at court rates till payment in full.

**Summary of the Petitioner's case as pleaded:**

3. The petition was based on the following grounds:

- a. That the Petitioner and/or his agents were denied by the presiding officers and the 1<sup>st</sup> and 2<sup>nd</sup> respondents to confirm and sign declarations forms 35A in respect of the elections as mandatorily required by the law.
- b. That the Petitioner and/or his agents were denied by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to confirm and sign declarations forms 35B in

respect of the election and that one Jackson M. Nyamai who purported to sign form 35B was not a Wiper Democratic Movement-Kenya (WDM-K) appointed agent with the 1<sup>st</sup> Respondent.

c. That the Petitioner and/or his agents were denied copies of the declarations of the results at the polling stations by the Presiding Officers and by the 1<sup>st</sup> and 2<sup>nd</sup> respondents hence there was a total lack of transparency in the elections.

d. That the Presiding Officers working under the 1<sup>st</sup> and 2<sup>nd</sup> Respondent never recorded any fact of refusal to sign form 35As or reasons for the refusal or failure to sign by the petitioner's appointed agents as required by law.

e. That the Presiding Officers working under the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have produced conflicting primary documents for forms 35As with different serial numbers clearly showing that the elections were a sham, a fraud and were not conducted in accordance with the constitution.

f. That the 3<sup>rd</sup> Respondent engaged in activities in gross violation of the electoral laws and was guilty of electoral offences as hereunder:-

i. That the public told the petitioner that the 3<sup>rd</sup> Respondent had offered to buy them school buses and was also giving them money to vote for him;

ii. That on or about the 17<sup>th</sup> July 2017, the 3<sup>rd</sup> respondent campaigned at a government function and gave members of the public Kshs.200,000 and told them to arrange themselves in groups of 20 people and that he had the monies shared out in broad daylight and photographs of the same were taken;

iii. That on or about 16<sup>th</sup> June 2017, the 3<sup>rd</sup> Respondent donated a school bus in the presence of government officials stating that he had personally paid shs.1,000,000 for the same with the school contributing another shs.1,000,000 and there was a balance of shs.4,500,000 which he would pay only if they re-elected him;

iv. That on or about 15<sup>th</sup> July 2017, the 3<sup>rd</sup> respondent at a meeting in Kyambuko Secondary School gave out Kshs.100,000 through the Deputy Principal of the school for dishing out to the members of the public and further donated a school bus stating that he had personally paid Kshs.2,000,000 and that he would clear the balance of shs.4,500,000 if he was re-elected.

g. That from the aforesaid violations, the 3<sup>rd</sup> respondent ought to be barred from holding any public office.

h. That there were major tallying discrepancies and irregularities, whereby the 3<sup>rd</sup> Respondent allegedly got more votes than the total number of registered voters in particular, Kiima Kimwe polling station where total number of registered voters was 258 whereas the 3<sup>rd</sup> respondent garnered 265 votes, and in Kathome Polling stations, the total number of registered voters was 602 whereas the total valid votes cast was 625 votes.

i. That there were major discrepancies as to the number of voters who attended and voted at polling stations because from comparing the election of member of national assembly with the other elections conducted on the same day in the same polling stations, there were unaccounted variances of over 100 votes in certain polling stations.

j. The Petitioner therefore sought for an order that the 3<sup>rd</sup> Respondent was not validly elected and that fresh elections be held.

#### **Summary of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' case as pleaded:**

a. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed responses and denied all the allegations in the petition as follows:- That the Returning Officer properly and legally returned Munyaka Victor Kioko as duly elected member of National Assembly for Machakos Town Constituency;

b. That the election for Member of National Assembly of Machakos Town Constituency was carried out in accordance with the constitution as well as national legislation and rules made thereunder and that the election outcome reflected the will of the majority of the voters of Machakos Town Constituency who voted on the 8<sup>th</sup> August 2017;

c. That the election for the member of National Assembly of Machakos Town Constituency was properly conducted and there were minor or no irregularities and it was clear who the voters of Machakos Town Constituency voted for as their member of National Assembly;

d. That section 83 of the Election Act, 2011 provided that no election should be declared 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 the written law or that the non-compliance did not affect the results of the election;

e. That the elections were carried out in accordance with the principles set out in Article 81 of the Constitution;

f. That all the agents in Machakos Town Constituency were requested to append their signatures upon forms 35As in all the polling stations and the failure by agents to do so could not invalidate the elections;

- g. That the Petitioner and or his agents were allowed to confirm and sign declaration form 35B and all other forms required to be signed by agents within Machakos Town Constituency and only agents who proved to have been duly appointed by various candidates were allowed to sign various forms;
- h. That the election for National Assembly of Machakos Town Constituency was carried out transparently and neither the petitioner, his agents nor any other candidate was denied copies of the declaration of the results at various polling stations by the respective presiding officers;
- i. That failure of an agent to sign the results declaration form or failure to record the reasons for refusal by an agent to sign could not be a ground to nullify an election;
- j. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were not made aware of any conflicting forms 35As having been issued by the Presiding Officers within Machakos Town Constituency;
- k. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were not made aware of any allegations of gross violations of electoral laws raised save that the petitioner ought to have reported any incidents constituting an election offence to the relevant authorities who would have then taken the necessary steps including preferring criminal charges under the Election Offences Act, 2016 against any offending person;
- l. That the 1<sup>st</sup> Respondent was satisfied that the 3<sup>rd</sup> Respondent met the legal, moral and educational requirements to be elected to be a member of National Assembly and no evidence to the contrary was ever furnished;
- m. That according to the results declared by the 2<sup>nd</sup> Respondent, the 3<sup>rd</sup> Respondent garnered 44,185 votes while the Petitioner was a distant second with 29,713 votes;
- n. That there were no tally discrepancies and or irregularities and at no polling stations did the 3<sup>rd</sup> Respondent or any other candidate got more votes than the number of registered voters; and
- o. That there were no discrepancies in the number of voters who voted for the member of National Assembly for Machakos Town Constituency or any other seat.
- p. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents therefore sought for the dismissal of the petition with costs.

**Summary of the 3<sup>rd</sup> Respondent's case as pleaded:-**

4. The 3<sup>rd</sup> Respondent's case raised the following issues:-

- a. He denied each of the allegations made in the petition;
- b. He stated that failure to sign declaration form 35A by an agent did not by itself invalidate the results announced and the same was not a mandatory requirement;
- c. That Wiper Democratic Movement Party Kenya had only one agent appointed to represent its candidates during the election process, and the 3<sup>rd</sup> Respondent believes the said Jackson M. Nyamai was the agent representing WDM-K and its candidates in the Machakos Town Constituency Tally Centre as he signed results declaration forms for all the WDM-K candidates in the elections for governor, senator, member of National Assembly, County Women representative and member of County Assembly;
- d. That forms 35As were displayed at the door of every polling station;
- e. He denied that the petitioner or his agents were denied to sign the results declaration forms 35A and stated that refusal or failure to sign by the agents did not by itself invalidate results in an election;
- f. That there were no conflicting primary documents for Form 35As in relation to Machakos Town Constituency;
- g. He maintained that he was still a member of National Assembly for Machakos Town Constituency until 7<sup>th</sup> August 2017 at midnight;
- h. That he was entitled to oversee the National Government CDF projects and other National Government projects, which programs were managed by the National Constituency Development Fund Committee in which he had an oversight role as its patron.
- i. That bus projects were funded by the National Government CDF boards following project proposals from the Constituency National Government CDF Committee, that the National Government CDF Board approves the projects and attaches authority to incur expenditure and funds to finance the project and the 3<sup>rd</sup> respondent had no role other than oversight;
- j. That the allegation of bribery lacked evidential efficacy and that no crime of that nature was reported to the police or IEBC or any other enforcement body and no authentic exhibit whatsoever had been availed and that those making those wild claims were desperate sympathizers, supporters or agents of the Petitioner;

k. That there were few cases of mismatch and/or mispostings of results in respect of a few polling stations towards the end of the tallying process due to human error, fatigue, and long hours of lack of sleep but the same was derived from the declaration Forms 35As that were not disputed at all and which mis-post/mismatch did not affect the results;

l. That the allegations of major discrepancies as to the number of voters who attended and voted at the polling stations were speculative and devoid of any specificity and the same ought to be disregarded;

m. That the Petitioner had engaged in forgeries and entry of dates onto pictures for purposes of the petition;

n. That the irregularities if any did not in any way affect the results of the election to warrant nullification; and

o. That the petition herein was incompetent, malicious, vexatious and an abuse of court process and the same ought to be dismissed with costs.

## **THE EVIDENCE**

5. The hearing of the petition commenced on 23<sup>rd</sup> November, 2017 starting with the Petitioner who called nine witnesses, including himself, to testify in support of his petition. The following is the summary of the petitioner's witnesses' evidence:-

### **PW. 1 Albanus Paul Mutisya**

6. In the affidavit in support of his petition, the petitioner stated that despite his numerous requests he was not supplied with all the declaration forms 35A; that he was informed by his chief agent Felix Mutua Musau that his agents were denied access to polling stations, for example, Steve Mutuku Mutwiwa at Mung'ala Primary School Polling Station; that his agents were denied a chance by the presiding officers to confirm and sign declaration forms 35A in respect of the elections; and that he and his agents were also denied by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents a chance to confirm and sign declaration forms 35B in respect of the elections and that one Jackson M. Nyamai who purported to sign form 35B was not a Wiper Democratic Movement-Kenya (WDM-K) appointed agent.

7. He stated that his agents were denied copies of declarations of results at the polling stations by the presiding officers and by the 1<sup>st</sup> and 2<sup>nd</sup> respondents hence there was a lack of transparency in the elections; that the Presiding Officers working under the 1<sup>st</sup> and 2<sup>nd</sup> respondents never recorded any fact of refusal to sign form 35As or reasons for the refusal or failure to sign by his appointed agents as required by law; that the Presiding Officers working under the 1<sup>st</sup> and 2<sup>nd</sup> Respondents produced conflicting primary documents for 35As with different serial numbers clearly indicating that the elections were a sham, a fraud and were not conducted in accordance with the Constitution; that there were major tallying irregularities with the 3<sup>rd</sup> respondent allegedly getting more votes than the registered voters in particular polling stations e.g Kiima Kimwe polling station; that the 3<sup>rd</sup> respondent engaged in activities of gross violation of the election laws and was guilty of electoral offences among them that he offered to partly pay for school buses for Kyambuko Secondary School and Mbembani Secondary School on the condition that he would clear the balance if he was re-elected, voter bribery and campaigning using public resources; that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents refused to hear and entertain complaints by himself or his agents; that the 3<sup>rd</sup> Respondent was an undischarged bankrupt who ought not to have been allowed to vie in the elections or to hold public office; and that the 3<sup>rd</sup> respondent was not validly elected in the elections.

8. On cross-examination, his evidence was that his sponsoring party, Wiper Democratic Party, was the one to issue appointment letters to the agents; that he made several visits to the Returning Officer to request for Forms 35As but did not make any written request but that the Returning Officer was aware of; that Steve Mutuku Mutwiwa was his agent in the four polling stations at Mungala Primary School, and that he could not clearly state the exact polling station Steve Mutuku Mutwiwa was in charge.

9. He testified that he couldn't confirm if all their appointed agents had the requisite credentials; that he was not aware of any issues to do with the credentials of his agent but when asked about the oath of secrecy by Steven Mutuku Mutwiwa (*SMM3*) which was not signed, he stated that it was possible the agent missed to sign. He further testified that there had been an agreement that one agent was to represent the party in all the six elective seats, that Form 35B had been signed by three agents, among them an agent of Wiper Democratic Movement by the name Jackson M. Nyamai; that Jackson M. Nyamai signed all the forms 34B, 35B, 36B, 37B, 38B and 39Bs; that he did not appoint Jackson M. Nyamai; and that he visited the tallying centre from 4 p.m. to 8p.m. but he did not know the said Jackson Nyamai. On the non-signing of the other forms, he stated that several of his agents did not sign the statutory forms as they were turned away; that the stations where his agents were turned away included Mungala primary school; and that he called the Returning officer on the complaints raised by his agents and who promised to take action.

10. On agents, he testified that there were polling station agents, tallying centre agents and the chief agent appointed by the party; that his Chief Agent for Machakos Town Constituency was Felix Mutua Musau; Samson Ngusya Mutua was an agent at the Tallying Centre, also an agent at Kyanda Primary School and also assisted the Chief Agents, while Agnes Mueni Mutuku was a Tallying Agent; that John Mbulu was an agent at Kyanda Primary school; that the agents were expected to report to the polling station before 6.00 a.m. when the exercise was expected to start; that if an agent reported late then he could not know what had transpired earlier at the polling station. On the issue of votes cast, he stated that the number of registered voters in Kiima Kimwe was 258 and valid votes cast was 188 according to form 35A; that his agent signed Form 35A; and that the figures in Form 35B did not tally with those in form 35A.

11. For Kathome Polling Station, he stated that there was an agent for Wiper Party called John Kioko; that the registered number of voters for Kathome trading centre was 602 while valid votes cast was 425; and that the results were confirmed by his agents. He testified that his agents in more than 42 polling stations were denied access, among them was Mungala primary school polling station; that Josephine Mwewa was his agent at Mungala primary school and she signed form 35A stream 2 of 5; that James Paul was his agent at Mungala primary school stream 3 of 5 and he signed Form 35A; and that Elizabeth Ndolo was also his agent at Mungala primary School. He stated that there were

discrepancies in number of voters at polling stations and which information was given to him by his agents; that the 1<sup>st</sup> and 2<sup>nd</sup> respondents denied him and his agents audience regarding their complaints; and that the complaints raised were not documented and he had not availed proof of same.

12. On the difference in votes between him and 3<sup>rd</sup> Respondents, he stated that it was about 14,000 votes; that he did not have the exact figures he was expected to garner but that he was after the process prior to the election of the 3<sup>rd</sup> Respondent as member for Machakos Town Constituency. He also testified that the 3<sup>rd</sup> Respondent used government resources to campaign, such as CDF, but he admitted that he did not complain to the fund manager over 3<sup>rd</sup> Respondents use of CDF funds. He confirmed that the document marked as "MAP 4" in paragraph 6 of his affidavit did not show the results declared but it showed the candidate who had more votes; that he got "MAP 4" from IEBC on 11/08/2017 by the returning officer but he did not state so in his affidavit; that the "MAP4" was not signed or stamped, and that he sought to rely on "MAP 4" as evidence of declaration of results.

13. He maintained that Jackson M. Nyamai was not appointed by Wiper Party but confirmed that he signed form 35 B on behalf of Wiper Party; that he signed all Form 38B, 36B, 39B; that he had not brought wiper Party officials to establish the role of the alleged agent Jackson M. Nyamai. He stated that he did not avail the list of his agents to confirm that he appointed them to the polling stations; that only three of his polling station agents had filed affidavits; that he had availed Form 35A which were not signed to prove that his agents were denied access to the polling station; that he did not indicate the names of the agents in the polling station he alluded to, neither did he bring the agents as his witnesses save for only three of them.

14. On the alleged malpractices, he stated that he was in touch with IEBC during campaigns and he did report to them of the electoral malpractices by the 3<sup>rd</sup> Respondent but that he did not indicate the same in his petition; and that he did not indicate the specific dates that he made the visits and established the malpractices by the 3<sup>rd</sup> Respondent. He stated that the law did not allow an MP to use CDF resources; that the 3<sup>rd</sup> Respondent offered to give buses to schools in the area; that the 3<sup>rd</sup> Respondent launched the CDF projects, that he had right to oversight on the CDF projects; that there were photographs showing 3<sup>rd</sup> Respondent launching the CDF projects; that the photographs were taken by the area residents and his witness David Kasyoki Mutisya but he had not indicated so in his affidavit; that he could state the gadget used to take the photographs; that it was the duty of the area member of Parliament to oversight launch of projects but not during campaign period; that the 3<sup>rd</sup> Respondent made campaign pledges but he did not have the audio cassette of the same; that the photographs did not have certificates to back them up but they were very clear; that the activities of the 3<sup>rd</sup> Respondent disadvantaged them; that the projects had been approved by the CDF Board; that the Board gave the bus grant in November, 2016; and that the bus launch was a campaign tool. He maintained that the 3<sup>rd</sup> Respondent dished out money to the voters; that Nelson Kyalo Makau in his affidavit did not state if he took the photographs; that the photograph showed the image of the 3<sup>rd</sup> Respondent; that he could not tell if the pick up on the photograph belonged to CDF; and that there was a parents meeting at Kyambuko secondary school where a school bus was unveiled.

15. He further testified that the 3<sup>rd</sup> Respondent was an undischarged bankrupt; that he filed a gazette notice indicating the 3<sup>rd</sup> Respondent had been declared bankrupt; that he did not obtain a receiving order from the official receiver over the bankruptcy of the 3<sup>rd</sup> Respondent; and that his petition was silent on the claim of 3<sup>rd</sup> Respondent's bankruptcy. He also alleged that the 3<sup>rd</sup> Respondent campaigned using CDF Motor vehicle registration GK 325S. He indicated that there were discrepancies in Kiima Kimwe and Kathome polling stations regarding total registered voters and valid votes cast; that his results at the polling stations should have been correct; that the mis-postings were not accurate and affected the verifiability of the votes; that there were various discrepancies as per the forms 35A's; that he had shown the discrepancies in forms 35A and 35B; and that form 35A for Kathome Trading centre was correct as regards the registered voters and votes cast but Form 35B had an error; that the errors should not be entertained at all. He indicated that from the response of the Respondents there appeared to have been mis-postings of votes; that the mis-postings benefitted the 3<sup>rd</sup> Respondent and not himself; and that his Petition was not about the total figures but the entire process.

#### **PW.2 Nelson Kyalo Makau**

16. He testified that he did not report about the issue of bus launch and dishing of money to the IEBC; that the Petitioner had sent him to Kyambuko Secondary school and he briefed school principal about the Petitioner's being unable to attend the function; that the petitioner did not tell him if he took any action over the reports; that he heard the 3<sup>rd</sup> Respondent saying that he would leave a sum of 100,000/= for tea for the crowd divided into 40,000/= to teachers and students, 40, 000/= to parents and 20,000/= to the outsiders; that he saw with his very own eyes the 3<sup>rd</sup> Respondent dishing out the money; that the issue of the bus launch took place after the handing over of the money; that the money was handed over to the school principal; that he was one of the outsiders who comprised 133 in number; that each of the outsiders was to get a sum of 150/=; that the outsiders were advised by the Principal to go outside and arrange themselves in groups of seven; that he did not know that by receiving the 150/= he was committing an offence; that he did not think the 3<sup>rd</sup> Respondent was bribing them with the money; that it was normal for politicians including the Petitioner to dish out money to people; and that the 3<sup>rd</sup> Respondent requested that they consider him during the elections.

#### **PW.3 David Kasyoki Mutisya**

17. He testified that he attended the school function at Mbembani secondary school in Kalama area of Machakos Town Constituency on 16/06/2017 as they had been invited as parents for a fund raising; that the 3<sup>rd</sup> Respondent claimed he had paid Kshs.1 million for the school bus and he felt it was wrong; that he did not report the problem to the IEBC or anybody else for that matter; that he later swore his affidavit herein after his aunt advised him to state what had transpired on 16/06/2017; that it was wrong for the 3<sup>rd</sup> Respondent to suggest that another person might not be able to complete the payment for the school bus; and that the 3<sup>rd</sup> Respondent requested them to vote for him as the other person might not be in a position to compete the payment for the school bus.

#### **PW.4 Samson Ngusya Mutua**

18. He testified that he was appointed as a chief agent for Machakos Constituency and was to take charge of Kyanda polling station and then later participate at the Constituency Tallying Centre; that Felix Mutua was to team up with him at the Tallying Centre; that he was the party agent; that he left Kyanda polling station at around 2.00 a.m. and he was in charge of both streams; that he requested for the printout of the results at the tallying centre; that on the early morning of 10/08/2017 the IEBC officials requested to take a break as they were exhausted but exercise resumed after only 15 minutes upon IEBC officials being ordered to continue; that three clerks and one presiding officer continued with the work; that he did not know one Jackson Nyamai; that he did not know the person who submitted the party agents list to the IEBC; and that he was not present when the results were declared and could not tell who signed the declaration form 35B .

#### **PW.5 Felix Mutua Musau**

19. He testified that he was the chief agent; that he was the senior most of the agents appointed on 7/08/2017; that his other assisting agents were under his direct supervision; that he received information from Irene and Jane, who did not swear affidavits, that they had been prevented from accessing the polling station; that an agent by the name of Katua alerted him that he was denied access but he did not swear an affidavit; that he did not indicate the polling stations as per paragraph 5 of his affidavit where agents were denied permission to sign declaration forms 35A; that form 35A for Kisekini S. D Church was signed by four agents; that Wiper agents were not allowed to sign the forms; that Wiper Party was part of NASA coalition; that form 35A for Mbwani primary school polling station 2 of 2 was signed by 11 agents one of whom represented NASA Coalition; that in Kyangala polling stations an ODM agent signed form 35 A; that their agent signed form 35A in respect of Mbusyani primary school code 119 1 of 1; that there was no candidate running on ODM party in the Constituency; that he was assaulted but did not report to the police due to time factor, and did not at any other time report it; that he was not present when the final results were declared; that he did not know Jackson Nyamai; that his letter dated 10/08/2017 sought for recount but returning officer advised them to go to court; that the returning officer refused to accept his complaint letter, hence the decisions to file this petition; that Form 35A for Kiima Kimwe code 090 1 of 1 had the registered voters as 258 while valid votes cast as 188 which was different on form 35B; that the results on the screen for Kiima Kimwe in form 35B was 265; and that form 35A for Kathome trading centre code 030 1 of 2 had registered voters as 602 while valid votes cast as 425 while form 35B had different results.

#### **PW.6 Moses Muema Maweu**

20. He testified that he operates a Motor Cycle Taxi Business (Boda Boda) within Kithini area of Machakos; that on 17/07/2017 he picked up a customer at Kithini and rode for five kilometers to Vota market where he found a meeting taking place where the County Commissioner was launching a new Division; that the Petitioner was not present in the said meeting; that several political aspirants such as Oliver Seki and 3<sup>rd</sup> Respondent were given an opportunity to address the public; that the 3<sup>rd</sup> Respondent herein dished out 200,000/= to be shared by those present; that he did not take any action against the 3<sup>rd</sup> Respondent; that he was among the crowd that received money which he thought was a bribe so as to elect the 3<sup>rd</sup> Respondent; that he knew that giving bribes and taking bribes was an offence; that he needed money at the time as he was hungry; that he was not the only one who received the money; and that he did not see the Petitioner dishing out money to the public.

#### **PW.7 Peter Kithuka Matolo**

21. He stated that he was a lorry driver from Katelembo area of Machakos Town in Mua ward; that on 17/07/2017 he was fetching sand from land belonging to one Ngunga when he heard that there was to be a function at Vota Market; that he knew Moses Muema Maweu who hailed from his village; that during the meeting of 17/07/2017 the area Member of County Assembly Oliver Nzeki welcomed the 3<sup>rd</sup> Respondent; that the Petitioner was not present during the meeting and he did not know if he sent a representative; that the 3<sup>rd</sup> Respondent gave out money and there was nothing wrong with that; that they were divided into groups and received the money; that the people had problems and needed money; that he also later on received some goodies from another aspirant called Kawaya; that he later came to learn that receiving the money was not appropriate; that he was photographed by Moses Muema receiving the money; that he did not lodge any report over the receipt of the money; that they were given 2000/ and he took 2000/= to share among the 20 people each getting 100/=; that the money was first given before the people took the meals; that they went to "kwa kawembe" area and picked up T-shirts and lessos extolling jubilee party as he was then heading home; that "mpango mpangoni," meant money was to be given; that people were to be in a group of 20 and it was Mutinda Makau who organized the people.

#### **PW. 8 Stephen Mutuku Mutwiwa**

22. He testified that he was a polling agent and was given the wiper party badge, letter of appointment and oath of secrecy; that the oath of secrecy had a problem on the correct number of his ID card; that the oath of secrecy (SMM3') did not have his signature and was not valid; that he woke up at 5:30 am and proceeded to Kyumba Primary School to vote and saw polling Station agents; that from there he proceeded to Mungala Primary School polling station where he was to work as an agent; that there were four streams at Mungala Primary School polling station; that he arrived at Mungala at 7.00am and found voting going on and therefore did not witness the initial opening up of the ballot boxes; that he was turned away by the presiding officer who did not want to hear anything about wiper party; he was told to wait for the Constituency Returning Officer who did not eventually show up and he left for his home; that he reported to his seniors about the incident; that his appointment letter did not specify the exact polling stream where he was to work; and that he was not given reasons for not being allowed into the polling station.

#### **PW.9 Agnes Mueni Mutuku**

23. She testified that she was a teacher at Mikome Primary School; that she was the Constituency Chief Agent while Felix Mutua was the overall Chief Agent and she was under him; that the letter of appointment by wiper Party had the umbrella as its logo and indicated that she was the County Chief Agent; that she was issued with the letter on 7/8/17; that the presiding officer claimed her appointment letter was a photocopy; that she did not specify to the agents on whether they should present original documents; that she later cast her vote and went away and did not recall if there were any irregularities; that she was directed by Felix Mutua to get to Machakos University to oversee the tallying process; that she was at the Tallying Centre till the following day and left; that the 3<sup>rd</sup> Respondent's supporters harassed them forcing police to intervene.

24. The 1<sup>st</sup> and 2<sup>nd</sup> respondents called three witnesses in support of their case. The following is the summary of the witnesses' evidence:

#### **DW.1 - Marvin Mungah Karanja**

25. He testified that he was the Returning officer for Machakos Town Constituency having been appointed vide gazette Notice of 5/5/2017 and the 2<sup>nd</sup> Respondent; that he was aware that IEBC was to serve notice of his appointment to the political parties; that he was trained prior to the elections and hence competent; that IEBC was under a duty to conduct credible and verifiable elections with minimal errors; that IEBC conducted intense training; that all statutory forms had to be carefully filled and cancellation was to be avoided as much as possible; and that any cancellations had to be neatly crossed and countersigned and overwriting was to be avoided; that stamps were provided for purposes of authenticity.

26. On the issue of stamping, he stated on cross – examination that ballot papers were supposed to be stamped and likewise declaration forms; **that he had seen some of the forms 35A which were not stamped and they were several**; that form 35A on page 107 of the documents supplied by IEBC on 21/11/2017 for St. Marys primary school code 067 1 of 2 was blank; that Forms 35A on page 135 had some overwriting but there was no countersign; that they had a Deputy Returning Officer one Kaloki who would check the documents but that the said Kaloki was not a witness in this case; **that the issue of overwriting was not explained in his affidavit**; that there was no stamp for the form 35A in respect of Kasinga primary school code 078 5 of 5; that a lot of pressure had to be applied so as to ensure the information was replicated in the six forms; and that the overwriting was done at the polling station by the presiding officers.

27. He stated that all the original forms were forwarded to Nairobi; that copies of forms 35A were scanned from the originals in Nairobi; that he could not open the ballot boxes to get the original copies since the carbon copies were available; that instances of original copies being placed in the ballot boxes were few; that he kept a record but not before this court; that all forms handed to him were thereafter forwarded to Nairobi; that the original copies were to be brought to the tallying centre by the presiding officers; that some presiding officers claimed they had handed over the originals to agents while others were placed in the ballot boxes but he did not have the exact number; that all election materials were ordered to be secured.

28. On **stamping of forms**, he confirmed that forms 35A for Muthini primary school code 086 5 of 5 did not have a stamp; and that several forms 35As were not stamped. On **Form 35As**, he stated that they were supposed to be six copies of form 35A; that forms 35A were to be signed by the presiding officer and deputy; that the copy form 35A for Kyambuko primary school code 066 1 of 2 was from a different booklet from the duplicate copy that he had but that they relate to the same results; that the copy of the form 35A for Kyambuko primary school did not have dates as compared to his duplicate copy; that all the agents were to be given copies of form 35A; that some forms 35A appeared not signed by the presiding officer or their deputy presiding officers but his had all of them; and that the name of deputy presiding officer on page 73 was not indicated and likewise page 95. **He confirmed that they were not supposed to make any comments on the polling day diaries.**

29. He stated that the presiding officers were trained in Machakos; that he was aware of polling station diaries which were to be filled by Presiding Officers and to take them to the returning officer at the tallying centre. He stated that it was not mandatory for tallying agents to sign the poll diaries; that the returning officer was to acknowledge receipt of the poll diaries by signing them and indicating any comments thereon; that the presiding officers were to indicate if any challenges were faced on the poll diary; that they did not have incidences of failure of the KIEMS Kits; and that the officers were to indicate on the diary if the kits failed to operate for more than one hour.

30. He further stated that the presiding officers were supposed to keep a record of seals used and also ballots used; that the ballot papers were to be accounted for and records of number used or cast; that there was a record showing the number of votes cast at a polling station; that the poll diaries also captured record of voters turning up to vote at certain intervals; that the poll diaries had some data on number of voters captured as at 5 p.m, for instance, Katheka Kai primary school had 384 on form 35A while diary had 382. **He testified that Form 35A was the statutory form filled at the end of the exercise and it was the primary source of information used to declare the results**; that periodic intervals of voters were captured and given percentage; that it was not a must for agents to sign the polling diaries, but that the agents were at liberty to sign the polling diaries; that he marked "ok" on the diaries after ensuring that everything had been properly done; that it was not true that he was casual in the management of the elections.

31. He further acknowledged that there were anomalies and errors but stated that the issue was whether the same was significant to overturn the eventual result. He stated that the complaint letter was not brought to his attention and that violence and intimidation could affect voter turnout. He confirmed that the OCS Machakos was at the tallying centre. He confirmed that they had been ordered to supply documents to the court but they did not supply the register of voters as it was not used. He stated that the polling day diaries were supplied. He also confirmed that there were errors such as missing form 35A for Kaseve polling station; that there were irregularities in Kiima Kimwe and Kathome polling stations as on form 35B; and that he signed form 35B.

32. He stated that there were only 213 ballot boxes for Machakos Town Constituency Member of Parliament and he disputed the report by the Deputy Registrar indicating an extra ballot box; that the errors on the serial numbers on seals and ballots might be attributed to presiding officers; that seals could break due to the large number of ballot boxes being ferried from polling station to the warehouse; that the warehouse had all the ballot boxes for the Constituency and the extra one mentioned belonged to another election. **On the issue of agents not signing forms, he stated that in most cases agents did not sign the forms and they could not be forced; and that it was the responsibility of the candidates to police their agents to do their work.**

**On errors**, he testified that Form 35A for Kathome Trading Centre code 030 1 of 2 showed an error of 344 votes instead of 144; that on form 35B there was duplication of results for Machakos university streams, Kakinduni primary school and Kaseve primary schools; that results for Machakos university polling station stream one results were posted to stream three and the same error was replicated down to Kaseve primary school stream one; **that the errors affected all the candidates in the election; that results for Kaseve polling stream one were not posted where 3<sup>rd</sup> Respondent got 248 votes while Petitioner got 93 votes; and that the Petitioner would not have won the election even if the results for Kaseve Primary school stream one were correctly captured.**

33. He further indicated that he reported at the tallying centre on 7/08/2017 and remained there for 96 hours; that there were 215 presiding officers based in the field who were subjected to a close to 72 hours of work. He testified that he had no power to alter the results after they had been declared and neither his employer had power to interfere. He denied any commotion at the tallying centre as alleged by petitioners witnesses and stated that at no time was the OCS Machakos called to restore order at the Tallying Centre. When shown some forms presented in court, he confirmed that form 35A for Ivutini Primary School code 009 1 of 1 was signed by ten agents; that form 35A for Kiatuni primary school code 010 1 of 1 was signed by party agents who included Wiper party; that form 35A on page 33 of documents filed by 1<sup>st</sup> Respondent was signed by the presiding officer and two agents; that form 35A on page 41 was signed by the presiding officers and 11 agents who included four wiper Party agents; that form 35A for Kasaini primary school was duly signed by the IEBC officials and two agents each for Wiper and Jubilee parties; that form 35A on page 80 was signed by the presiding officers and three agents; that he did not have a copy for St. Marys Girl primary school on page 107 but he had never received complaint over non capture of results on form 35A as the results were duly captured on form 35B; that he had the duplicate copy for Machakos Level 5 hospital polling station but did not receive any complaint about forms 35A for Machakos Level 5 hospital; that the faint copy of form 35A for Machakos Level 5 hospital was signed, carbonated copies were six in number; that the presiding officer had to get extra copies of form 35A in another booklet to give to agents if there was shortage but they were to contain same information; that he did not receive any complaint from agents over different serial numbers; that he was not aware of any instance that any candidate got an advantage over difference of serial numbers as it did not affect the results in any way.

34. He further stated that he did not receive complaints of lack of original forms 35A's and the Petitioner had not raised it in his petition; that he did not receive any complaint over overwriting on the statutory forms; that a returning officer could not change what the presiding officer had indicated but only to receive and announce. He confirmed that Jackson Nyamai introduced himself as the chief agent for Wiper party and had all the requisite credentials; that form 35B forms were duly signed by the agents and there were no complaints; that the petitioner was absent during the signing of form 35B. On the issue of complaints, it was his testimony that **any complaints of election malpractices were to be forwarded to them and he did not receive any such complaint with regard to 3<sup>rd</sup> Respondent.**

#### **DW.2 John Mutunga Musembi:**

35. He testified that he was a teacher and resided at Salama Town along Mombasa road; that he was not a member of any political party; that he was to record the polling diary and form 35A; that he did not allow anybody to interfere with the statutory documents but also did not bar any agent from signing the forms. He stated that he filled form 35A for Kiima Kimwe polling station which contained the results of 130 votes for 3<sup>rd</sup> Respondent and 48 for Petitioner; that form 35B indicated there was a mispostings of results; that the 3<sup>rd</sup> Respondent garnered 130 votes at Kiima Kimwe polling station where he was in charge; that he was aware that in form 35B 3<sup>rd</sup> Respondent garnered 265 votes instead of 130. He also stated that one of the polling clerks failed to turn up for work and he was forced to get somebody from around whom he trained; that the polling diary indicated that he indicated failure of a voting clerk to report for work and that there was no complaint over the replacement. He also stated that results in form 35A for his station was correct and was not disputed.

#### **DW.3 - Rachael Kasiva Simon**

36. She testified that she was a teacher by profession and resided at Kithayoni but worked at Manza primary School; that she never saw Steve Mutuku Mutwiwa who was said to be a polling agent; that the agents came to the polling station and she checked their credentials and noted their details on the polling diary; that Sylvester Kyalo was the Wiper agent; that the agents were supposed to witness the sealing of the ballot boxes but the diary did not indicate them; that 11 agents signed the polling diary and included Sylvester Kyalo representing Wiper Party and his ID. Number. 9224695 and Telephone No. 0701 227247 were captured as having been present and reported at 5.20 a.m; that there was no complaint about Sylvester Kyalo being a Wiper Party agent; that four agents confirmed the seals and were from Muungano party, CCU, CCM and KANU parties; and that she did not stop the alleged Steve Mutuku Mutwiwa from entering the polling station as there was even a Wiper agent present at the polling station.

#### **3<sup>rd</sup> Respondent's evidence**

37. The 3<sup>rd</sup> Respondent herein Munyaka Victor testified in support of his case and opposed the petition. He did not call any other witness besides himself. He testified that he was the duly elected Member of Parliament for Machakos Town Constituency and the 3<sup>rd</sup> Respondent; that he established from form 35B that Jackson M. Nyamai was the Wiper Party agent. He confirmed that he was still a Member of Parliament until midnight of 7/08/2017 and therefore entitled to attend meetings even if during campaigns period; that he did not know the exact cost of a new bus; that the photographs were all forgeries and photoshops; and that he could not tell from where the photographs were lifted from .

38. It was his testimony that "*Muvango Muvangoni*" was his political slogan on development; that "*Muvango*" was a development plan while "*Muvangoni*" was a strategic planning concept given to him by elders in 2002.

He agreed that there were errors in the statutory forms attributed to human fatigue, for instance, in the results for Kathome trading Centre polling station there was an error of an extra 200 votes instead of 144; that the Petitioner gained from the mispostings such as for Kaseve primary school; and that in Machakos University polling station he was the one leading; that there was mis-postings for Kiima Kimwe polling station where registered voters were indicated as 265 instead of 258; that the mis-postings in the seven polling stations disadvantaged him; that in Kathome polling station he garnered 144 votes instead of 344 as per Form 35B; that the error in form 35B was not of his own making; and that even if the 200 votes were deducted, it would not affect the margin.

39. On the allegation about him being bankrupt, he stated that he had not been declared bankrupt since there was a consent entered before court after he cleared the debt; that he had not brought the receiving order from the official receiver but there was a consent; that the case in Nairobi had since been settled; and that the Petitioner did not raise the issue with the IEBC over any alleged bankruptcy. He stated that he was present during the function where a bus was bought by CDF Board; that it was a lie to label him as having paid Kshs.1 million for the bus; that the photograph of the bus had his image; that the witnesses who claimed that he dished out money were liars. He confirmed that he was never summoned by IEBC or police over alleged malpractices.

40. On non-signing of forms by agents, he confirmed that several forms 35A were not signed by their Jubilee party agents and nobody prevented them from signing, and that failure by agents to sign forms was a common practice; that CDF Act gave him an oversight role over the Constituency activities; that he did not tell the public that he had bought the bus; that the public schools needed the CDF to buy for them buses; and that there was nothing barring him from initiating bus projects: that Form 35B for 7 polling stations were misposted and he lost 100 votes while Petitioner garnered 50 votes; that the results in form 35A for Kaseve primary school code 092 1 of 2 were not factored to his detriment; and that the returning officer confirmed the duplication of the results. He stated that there was nothing wrong with his sister being a presiding officer for Kakinduni primary school and that in any event no one had complained about it nor did the petitioner raise the issue in the petition.

### **THE APPLICABLE PRINCIPLES**

41. This court is now called upon to determine the petition lodged by the Petitioner. The said petition has raised certain irregularities on the part of the Respondents. There is need to first delve into the applicable principles which are found in Articles 38, 81 and 86 of the Constitution as well as Section 83 of the Elections Act No.24 of 2011.

42. Under **Article 38(2)** the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors is fundamental and has been conferred to every citizen.

43. **Article 81(e)** stipulates the ingredients of free and fair elections. They are election by secret ballot; election free from violence, intimidation, improper influence or corruption; election conducted by an independent body; transparent election; and election administered in an impartial, neutral, efficient and accountable manner. The independent body that is established under **Article 88** is the Independent Electoral and Boundaries Commission. Its functions are enumerated, the details of which are to be found in the **Independent Electoral and Boundaries Commission Act (No. 9 of 2011)**. In **Article 86** the Constitution sets out the principles that relate to the actual voting. It commands the Commission to ensure that:

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

**a. the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;**

**b. the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and**

**c. appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”**

44. **Article 87** entrenches the principle of timely resolution of electoral disputes.

The substantive and procedural election law is to be found in the **Elections Act**. The other important legislations dealing with elections are the **Election Offences Act**, the **Political Parties Act**, the **Public Office Ethics Act** and, of course, the **Independent Electoral and Boundaries Commission Act**. **Article 10** enjoins all State organs (including courts), State officers, public officers, and all persons to comply with national values and principles of governance whenever they apply or interpret the Constitution or any law, or when they are implementing any public policy. The values and principles include:-(c) **good governance, integrity, transparency and accountability.”**

### **Irregularities and Illegalities**

45. **Section 83** of the **Elections Act** recognizes the sanctity of the right of the people to choose their political leaders, and forbids the court from trivialising that right by nullifying an election merely because errors and irregularities have been shown to have been committed, or that a provision of the law relating to elections has not been complied with. The errors and irregularities, or the non-compliance with election law, must be of such gravity that the integrity of the election is materially compromised. This is what the section states:

**“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.”**

46. The Supreme Court in **Gatirau Peter Munya –v- Dickson Mwenda Kithinji & 2 Others [2014] eKLR** acknowledged the practical reality that imperfections in the electoral process are expected; that elections are conducted by human beings under stressful circumstances, and therefore mistakes do sometimes occur. It follows that an election court should not lightly overturn the election; especially where the results substantially reflect the will of the voters, and where neither a candidate nor voters have engaged in any wrongdoing. The court laid down the following principles; in its interpretation of **section 83**:-

**“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 Elections 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 results, 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.”**

### **Burden of Proof and Standard of Proof**

47. The burden of establishing the allegations of non-compliance with the Constitution and the election laws, irregularities, and electoral malpractice and misconduct, which would result in the election being declared invalid, rests with the petitioner (**Raila Odinga –v- IEBC & 2 Others, Supreme Court Presidential Petition No. 1 of 2017**). On the standard of proof, while in ordinary civil cases the standard of proof is that of a balance of probability, in an election petition, the standard of proof is beyond the balance of probability but lower than beyond reasonable doubt that is applicable in criminal cases (**Raila Odinga** (above)). However once the court is satisfied that the Petitioner has adduced sufficient evidence to warrant impugning an election, if not uncontroverted, then the evidentiary burden shifts to the Respondent. In most cases the electoral body to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or if the ground is one of irregularities that they did not affect the results of the election. The rationale for the need for a higher standard of proof stems from the fact that election petitions are not ordinary suits involving one or two parties as is often the case with ordinary suits but involves the entire electorate.

48. Where there is alleged commission of an election offence, the standard is beyond reasonable doubt. It was held in the case of **Fredrick Otieno Outa –v- Jared Odoyo Okello & 4 Others [2014]eKLR**, that where an election offence is proved this will not only lead to the election being set aside, but also to the disqualification of the proved culprit from standing as a candidate. In the case of **Moses Masika Wetangula –v- Musikari Kombo & 2 Others [2014]eKLR** it was held that, where one engages in bribery, treating or commits any other election offence, his election violates the electoral law principle of “free and fair election” contained in the Constitution, the **Elections Act** and the **Election Regulations**.

### **SUMMARY OF SUBMISSIONS**

#### **Summary of Petitioner’s Submissions**

49. On the issue of anomaly in the entries in both Forms 35As *vis a vis* those in Form 35B which were not tallying, the petitioner submitted that **the forms showed very different figures to an extent that some entries in Form 35B exceeded the number of the registered voters in the concerned polling stations. He submitted that this included for instance the entry made in Form 35B for Kathome trading centre polling station which had 344 votes as the inflated votes in favour of the 3<sup>rd</sup> respondent instead of 144 votes appearing in its respective Form 35A, and that the Respondents pledged two defences: one of “human error and fatigue” and another that “the anomaly did not affect the results”.**

50. The Petitioner urged the court to find that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had a statutory duty to correctly make entries in the statutory forms, because the reason for the existence of the two forms was not for cosmetic purposes but to help in verification of the results as demanded by the Constitution. He submitted that the forms are statutory documents whose contents must be accurate and true, and as such, failure by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to correctly enter the correct figures in Forms 35B is an issue so serious that it cannot be justified on the new mantra in town: human error and fatigue.

51. The Petitioner submitted that the election for Member of National Assembly for Machakos Town Constituency conducted on 8<sup>th</sup> August 2017 was not **verifiable as required by the constitution and by the election laws**. This was based on the reason that several declaration forms used by the Respondents not only lacked the Agents and Presiding Officers signatures but also **were not stamped**. These included form 35A for Kasinga Primary school code 078 5 of 5. He submitted that RW1 confirmed during cross examination that he had seen some of the forms 35As which were not stamped and that they were several; that RW1 also confirmed that they were provided by the 1<sup>st</sup> Respondent with the stamps for the purposes of authenticity and that the declaration forms were supposed to be stamped.

52. It was the petitioner’s submission that lack of verifiability of the election results arose when it emerged that some of the forms also used had over writing’s with no counter signing. These included **Machakos Level 5 2 of 3, Machakos recreational 2 of 9, Kisueni S.A primary 1 of 1, Kyandili primary 1of 1, Kalama primary 1 of 1, Kiteini primary 1 of 2, Machakos Teachers collage 3 of 3, Misakwani 2of 2, Machakos primary 3 of 4, Mumbuni primary 1 of 3, Machakos university 3 of 3, Muumandu primary 2 of 3, Ianzoni primary 2 of 2 and Iiyuni primary 1 of 1**. He also submitted that RW1 had confirmed that overwriting and any kind of cancellation should be neatly done and countersigned, and that he had no explanation as far as lacking of countersigning against the overwriting meaning that he was clueless. The Petitioner’s conclusion was that the declaration of the 3<sup>rd</sup> respondent did not reflect the will of the electorate of Machakos Town Constituency.

53. On the issue of Incidences of Violence and Intimidation, the petitioner submitted that the same had been pleaded in the petition and established. It was his submission that **Article 81 of the Constitution of Kenya, 2010** obliges the 1st and 2nd Respondents to administer an electoral system which should comply with the principle of a free and fair elections, inter alia- by secret ballot; free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner. He argued that the incidences of violence at Machakos Town Constituency Tallying Centre and acts of intimidation proved that the 1st Respondent neglected its mandate under **Section 64A (1) of Elections (General) Regulations** by failing to act upon the said actions of intimidation against the Petitioner.

54. The Petitioner also submitted that the irregularities and illegalities committed during the election were substantial enough to affect the validity of the election.

## **Summary of Submissions By The 1<sup>st</sup> And 2<sup>nd</sup> Respondents**

55. On the issue of whether statutory forms 35A and 35B used in Machakos Town Constituency were valid, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the Petitioner did not challenge the validity of the great majority of the statutory forms 35A used in Machakos Town Constituency; that in paragraph 5 of the Petition, the Petitioner cited Kiima Kimwe and Kathome polling stations as having had major tallying discrepancies; that results declaration Forms 35A for **Kathome Trading Centre** and **Kiima Kimwe Primary School** were properly filled as per the regulations; that all the other Forms 35A were filled in accordance with the regulations; that the results declarations Form 35A was signed by Wiper Party agents on whose ticket the Petitioner was vying; and that even if the court were to find that any of the results declaration forms were not signed, the same had not been pleaded by the Petitioner in his Election Petition nor was it raised in the affidavits in support thereof.

56. On the issue of whether the votes from disputed polling stations were valid, it was their submission that the Petitioner provided no evidence to show why the votes from the contested polling stations should be excluded from the final tally.

57. On the issue of whether the election for Machakos Town Constituency was conducted in a free, fair and transparent manner, it was their submission that there was no allegation raised that the election for Member of Parliament for Machakos Town Constituency was held in any manner other than through the secret ballot; that the Petitioner did not make any intimation of there having been acts of violence or intimidation which may have prevented certain groups of people from voting or forcing people to vote in a certain way; that there were numerous allegations that the 3<sup>rd</sup> Respondent may have been involved in improper conduct or corruption, among them that the 3<sup>rd</sup> Respondent was alleged to have donated school buses especially for Mbembani and Kyambuko Secondary Schools, yet the same was not established.

58. On whether the outcome of the election reflected the will of the voters, it was their submission that the will of voters from Machakos Town Constituency was clearly reflected by the election outcome; that all the candidates who took part in the election garnered various numbers of votes; that it was the will of the majority of the voters that carried the day and the winner happened to be the 3<sup>rd</sup> Respondent; and that the gap of about 14,000 votes between the 3<sup>rd</sup> Respondent and the Petitioner cannot possibly be wished away by the minor discrepancies noted in only a small minority of the results declaration forms.

59. On whether the 3<sup>rd</sup> Respondent was validly elected, the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that it was evident that the election for Machakos Town Constituency was carried out in strict compliance with the provisions of the Constitutions as well as the laws made thereunder; that at the end of the electoral exercises, the candidate who garnered the highest number of valid votes was the 3<sup>rd</sup> Respondent; and that the Court ought to find that the 3<sup>rd</sup> Respondent was validly elected as the Member of Parliament for Machakos Town Constituency.

## **Summary of the 3<sup>rd</sup> Respondent's Submissions**

60. On the issue of the electoral Irregularities and Discrepancies and whether they affected outcome, the 3<sup>rd</sup> respondent submitted that electoral irregularities referred to administrative or logistical lapses and breaches of the electoral laws that did not amount to an election offence or a malpractice of a criminal nature; that these were procedural and administrative failures on the part of election officials, attributable to poor training, incompetence or fatigue; that the irregularities identified by the Petitioner were mainly, with regard to Kathome polling station and Kiima Kimwe polling stations; that these irregularities were alleged especially with regard to the posting of results in form 35B which clearly were not to be in accordance with the form 35As; that these irregularities in 9 out of 213 polling stations were minor in nature and their insignificance because of the margin of victory of 14,472 votes; that even if for argument sake the Petitioners were awarded all of the 5,868 votes, that would still not affect the outcome of the said elections; and that the margin of victory by the 3<sup>rd</sup> Respondent, was by far too wide and would not be narrowed by such evidence.

61. On the issue of the agents' alleged denial of entry into polling stations and denied to sign the statutory forms, he submitted that other Agents of other candidates were also denied access if they didn't have the requisite documentation; that the idea was not to single out the Petitioners Agents for exclusion; and that the irregularities were not so significant or of such a weighty nature as to affect the result or the integrity of the election.

62. The 3<sup>rd</sup> Respondent submitted that the Petitioner failed to discharge the burden of proof to the required standard; that the Petitioner only made allegations against the Respondents and did not prove any commission of the alleged crimes to the required standard; that it was incumbent upon the Petitioner to adduce adequate evidence to prove that indeed the election held at Machakos Town Constituency on 8/8/2017 was not in accordance with the Law; and that it is not enough for a party to simply throw mud at a process that was largely conducted in accordance with the law and the Constitution of Kenya.

## **THE DETERMINATION**

63. I have considered the evidence of the Petitioner, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as well as the 3<sup>rd</sup> Respondents together with their witnesses. I have also considered the submissions of the respective learned counsels as well as the authorities cited. The parties herein through their Advocates had filed a raft of some proposed issues for determination during the conclusion of the pre-trial conference and which were as follows:-

- i. Whether the election of 8/8/2017 Member of National Assembly for Machakos Town Constituency was conducted in accordance with the principles laid down in the Constitution and the electoral laws.
- ii. Whether the election of National Assembly for Machakos Town Constituency was marred by malpractices, irregularities and discrepancies.

- iii. Whether the alleged malpractices, irregularities and discrepancies affected the result of the election.
- iv. Whether a sufficient legal basis for an order of scrutiny and or recount of votes had been made by the Petitioner to the election of Member of National Assembly for Machakos Town Constituency.
- v. Whether the 3<sup>rd</sup> Respondent was validly elected as Member of National Assembly for Machakos Town Constituency.
- vi. Who is to bear the costs of the Petition and in what proportion.

64. The hearing of this petition started in earnest on the 23/11/2017 and concluded on the 15/12/2017. Thereafter an Application for an order of scrutiny and recount was made by the Petitioner and that this court delivered a ruling thereon on the 25/01/2018 and as such a determination on scrutiny and recount of votes now remains spent. After analyzing the evidence herein and the submissions tendered as well as the initial issues proposed for determination, I find the following issues now call for determination namely:-

- i. Whether the election of Member of Parliament for Machakos Town was marred by irregularities and whether the same substantially affected the results of the election.
- ii. Whether the Petitioner has established the said irregularities and discrepancies to the required standard of proof.
- iii. Whether the election was conducted substantially in accordance with the Constitution and the electoral laws.
- iv. Whether the 3<sup>rd</sup> Respondent was validly elected as the Member of Parliament Machakos Town Constituency on the 8/8/2017.
- v. Whether election offences or malpractice have been proved against the Respondents.
- vi. *Who bears the costs of the petition?*

65. Before embarking on the above issues, there is need to enumerate the various allegations levelled against the Respondents by the Petitioner in the petition and in his evidence and to find out whether or not the above issues slated for determination (i) to (v) shall have been established. They are as follows:-

- a. Discrepancies in results on forms 35A and 35B for various polling stations specifically Kathome and Kiima Kimwe.
- b. Mispostings of results in 7 other polling stations in which results for Kaseve primary school was left hanging.
- c. Denial of Petitioner's agents to access polling stations and to sign forms 35A by presiding and Deputy Presiding officers.
- d. Lack of signing and stamping of forms 35A by presiding and deputy presiding officers.
- e. Violence and intimidation metted out upon the Petitioner's agents and supporters by the 3<sup>rd</sup> Respondent and his supporters.
- f. Bribery of voters by the 3<sup>rd</sup> Respondent.
- g. Use of public resources by the 3<sup>rd</sup> Respondent prior to the elections and more specifically the launch of school buses at Kyambuko and Mbembani secondary schools as well as campaigning using a motor vehicle belonging to the area Constituency Development Fund and finally being present during the launch of a new Division at Vota Market.
- h. Bankruptcy allegation raised against the 3<sup>rd</sup> Respondent which should have disqualified him from being cleared by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to contest in the election.
- i. Discrepancies noted during re-sealing of ballot boxes.

#### **Discrepancies in results on forms 35A and 35B**

66. The Petitioner in his petition pleaded irregularities on forms 35A and 35B and identified Kathome and Kiima Kimwe polling stations. The Petitioner pointed out that Kathome trading centre polling station code 030 1 of 2 had votes cast for the 3<sup>rd</sup> Respondent in form 35A, as 144 which was indicated in form 35B 344 thereby getting an erroneous extra 200 votes. Again the 3<sup>rd</sup> Respondent's votes in form 35B for Kiima Kimwe polling station was recorded as 265 instead of 130. The Petitioner in his petition alleged that several other polling stations results were altered in a skewed manner so as to unlawfully benefit the 3<sup>rd</sup> Respondent and which according to him was a clear violation of Article 86 of the constitution which demanded for accurate, simple, verifiable, secure and transparent election processes and results. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent called John Mutunga Musembi who was the presiding officer at Kiima Kimwe polling station and who confirmed that the 3<sup>rd</sup> Respondent garnered 130 votes but which were recorded in form 35B as 265 in error. The Returning officer for the constituency Marvin Mungah Karanja confirmed the error of 344 votes instead of 144 for Kathome trading centre. The said witness was taken through the relevant form 35 A and it turned out that the first number on form 35A for this particular polling station ought to appear as 1 but it looked like letter 3 and hence form 35B captured the 3<sup>rd</sup> Respondent votes as 344 instead of 144 thereby causing an excess 200 votes. The rest of

the polling stations except the two above were not pleaded by the Petitioner in his petition even though most of the witnesses were cross-examined on some of the forms 35A and 35 B. It is noted that the Petitioner was expected to confine his evidence to the averments as pleaded in the petition. It is only the two polling stations out of 213 within the constituency which the Petitioner singled out as having some errors. Hence he shall not be seen to pleading evidence inconsistent with his pleadings. In the Supreme court case of **RAILA ODINGA =VS= IEBC & 3 OTHERS SC. PETITION 1 OF 2017** the court held that a Petitioner must not be on an evidence fishing expedition and must not expand the scope of his pleadings and that a party is bound by his pleadings. The Returning Officer in his evidence in chief and cross-examination admitted to the discrepancy in the two polling stations and stated that they were genuine errors committed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents officers as a result of fatigue.

The Petitioner has sought for the nullification of the election on the ground of the above irregularities and discrepancies. Indeed the irregularities herein have occurred in two out of about 213 polling stations within the constituency. I find this to be a small fraction which ought to be excused in the circumstances. Section 83 of the Elections Act recognizes the sanctity of the right of the voters to choose their political leaders and the court should take that into account and find that though errors and irregularities have been shown to have been committed, it should not nullify the election if the errors or irregularities are not of such gravity as to materially compromise the elections. In this case the error has occasioned a difference of about 335 votes only as compared to the total votes garnered and the margin difference of over 14000 votes. As was held in the Supreme Court case of **GATIRAU PETER MUNYA =VS= DICKSON MWENDA ITHINJI & 2 OTHERS [2014] eKLR** Procedural or administrative irregularities and other errors occasioned by human imperfections are not enough by and of themselves to vitiate an election. Hence I find the errors from the two out of 213 polling stations did not substantially affect the eventual results of the elections.

#### **Mispostings of results in 7 others polling stations**

67. The Respondents admitted the existence of some mispostings of votes in form 35 B for 7 polling stations as a result of which one of the polling station by the name of Kaseve Primary school polling station 1 was left out and its results not captured. The explanation offered went as follows:- that Kiima Kimwe polling station results in form 35A were entered into form 35B in the space provided for Machakos Girls Rescue Centre polling station 1 of 2 whose results in turn were misposted in the space provided in Form 35B for Machakos Girls Rescue Centre 2 of 2 whose results were erroneously posted under Kaseve Primary School 1 of 2. Again the results for Machakos University polling station 1 of 3 were entered in the space provided for station 2 of 3 whose results were pushed onto the same polling station 3 of 3 which in turn pushed its results to Kakinduni Primary School polling station which again led to its results being posted onto Kiima Kimwe polling station. As a result of these errors, the results for Kaseve primary school were not captured. All these errors were freely admitted by the returning officer Marvin Mungah Karanja who sought to explain the problem as having been caused by human error which was not intentional at all. A perusal of the forms 35A for the 7 polling stations excluding Kiima Kimwe and Kathome polling stations, revealed that the votes as captured and entered at the polling stations were correct and the only hitch was the eventual data on forms 35B to the slots in the excell sheet for each polling station. The data on the forms 35B was correct save that they had been posted to the wrong slot and therefore if the data was to be re-arranged it would only leave out Kaseve Primary school polling station whose data was not captured. The form 35A for Kaseve primary school which was not captured contained 248 votes for the 3<sup>rd</sup> Respondent while the Petitioner garnered 93 votes. The total votes from the other 7 polling stations which had mispostings was 5868. As noted that the error on the mispostings was not deliberate as it affected all the candidates in the election, if this number of votes were to be discounted from the total votes garnered by both Petitioner and 3<sup>rd</sup> Respondent, the same would not have significantly affected the outcome between the two since the margin of victory by the 3<sup>rd</sup> Respondent would still be wide. Hence the mispostings aforesaid did not significantly affect the results of the election.

#### **Denial of Petitioner's agents to access polling stations and to sign forms 35A:**

68. The Petitioner maintained that his agents were denied access into the polling stations and even to sign forms 35A. Indeed several of the forms 35A referred to in court did not have the names of the Petitioner's agents. However, there was a common name of one Jackson M. Nyamai who signed almost all the forms 35A and 35B on behalf of Wiper Democratic Movement Party. Even though the Petitioner sought to dismiss the said agent as an imposter, there was no evidence presented by the Wiper Democratic Movement Party to the contrary. The Petitioner's Counsel in his submissions sought to shift the burden of establishing whether or not that agent belonged to Wiper party upon the Respondent. This was improper since the burden lay with the Petitioner to prove the claim that the alleged agent had not been mandated by Wiper Party to represent its interest during the election. Again the witnesses who came forward to testify for the Petitioner in this regard left a lot to be desired. For instance Steve Mutuku Mutwiwa (PW.8) claimed that he was the Petitioner's agent at Mungala primary school and was denied access thereto but he confirmed on cross-examination that his accreditation documents had discrepancies in that the identity card number was incorrect as indicated on the oath of secrecy and further the oath of secrecy was not signed by him. Another agent was Agnes Mueni Mutuku (PW.9) who confirmed that she had presented a photocopy of the letter of appointment but was rejected by the presiding officer. The Petitioner's chief agent Felix Mutua Musau (PW.5) stated that the agents had been denied the chance to sign the declaration forms. However, some of the forms 35A had signatures by the Petitioner's agents while some were signed by the said Jackson Nyamai representing Wiper Party on whose ticket the Petitioner had vied.

Even though some of the agents did not sign the declaration forms, I find the failure was not fatal since by dint of Regulation 79(6) of the Elections (General) Regulations 2012, the refusal or failure of a candidate or an agent to sign a declaration form or to record the reasons for their refusal to sign as required shall not by itself invalidate the results announced. Again it emerged from the evidence of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents witnesses that all polling agents had been required to present proper accreditation documents which included an appointment letter duly signed, an oath of secrecy duly executed and commissioned and national identity card in addition to having a badge. If the agents had been turned away for want of proper accreditation documents the presiding officers could not be faulted for that. In any case several other agents were allowed access to the polling station and participated in signing the declaration forms and some of them included those from the Wiper Party under whose ticket the Petitioners had vied and therefore it is unlikely that his agents had been turned away as claimed.

#### **Lack of signing and stamping of forms 35A by presiding and deputy presiding officers**

69. It was the evidence of the Petitioner that the statutory forms were neither signed nor stamped by the Presiding officers. However the petition did not state the specific polling stations and the complaint was a generalized one. The returning officer stated in his evidence that there were a few errors with regard to the filling of various forms some of which lacked stamps but that the contents of the declaration forms

were not challenged or indicated to have been fraudulent by the Petitioner and that the few errors did not result to an advantage or disadvantage to any given candidate including the Petitioner and further upon receipt at the tallying centre his role was only to collate and announce the results as presented from the various polling stations. This court had the opportunity to peruse some of the statutory forms 35A and 35B and it was clear that even though a few had no stamps or signatures, all of them had the IEBC serial numbers. There was no evidence advanced to the effect that the forms had been fraudulently manufactured and I therefore find that the integrity of the contents therein had not been compromised. It is also noted that the issue of stamping of the documents is merely administrative in nature and the lack thereof does not invalidate the results for the simple reason that the forms had serial numbers backed by water marks, barcodes as well as anticopying features.

### **Violence and intimidation**

70. The Petitioner claimed that there were acts of violence and intimidation metted upon his supporters. One of his witnesses Samson Ngusya (PW.4) stated that he was at the Constituency tallying centre when the 3<sup>rd</sup> Respondent and his supporters arrived and that one Alex Ngila had been armed with a whip and was joined by a brother to the 3<sup>rd</sup> Respondent one Lole Mwanzia and that a commotion arose forcing the area OCS to intervene and restore order. However, none of those who had been injured or affected in any way ever lodged a complaint with the police and the occurrence booked and there was no evidence that any of the alleged attackers had been charged with a criminal or election offence. The standard of proof in election offences is one of beyond any reasonable doubt and in the absence of any police action having been taken against the perpetrators, I find the allegations of violence and intimidation of voters and agents not proved by the Petitioner. Suffice to add that the alleged violence and intimidation are said to have taken place at the Constituency tallying center where results were being tallied and not at polling stations. Again there was no voter who was called to testify and confirm that he/she was prevented from voting due to violence or intimidation. The alleged acts of violence or intimidation did not materially affect the results of the election.

### **Bribery of voters by the 3<sup>rd</sup> Respondent**

71. The petitioner made a raft of allegations of bribery against the 3<sup>rd</sup> Respondent and called several witnesses to support his assertions. Two of the said witnesses Peter Kithuka Matolo and Moses Muema Maweu testified herein and stated that they attended some public functions at Vota market where the 3<sup>rd</sup> Respondent dished out money to the public going by his campaign slogan “*muvingo muvangoni*” (a plan within a plan) and that the money was shared out and the two received a share of the bribe. The witnesses indeed confirmed before the court that it was wrong to receive a bribe. I find the said witnesses became accomplices and that their evidence required corroboration by other independent evidence by persons who had not taken or participated in the alleged bribe. None of these were called to testify and further there was no evidence that a report was lodged with the police to investigate the alleged bribery of voters. Some photographs were annexed to the affidavits of the Petitioner’s witnesses claiming the alleged bribery but the said photographs were not backed by any certificates. An earlier attempt to introduce the certificates was disallowed by this court as they had been made late after the pre-trial conference had been finalized. The allegations of bribery required a higher standard of proof. In the case of **HOSEA MUNDUI =VS= SAMMY KOMEN MWAITA – ELDORET ELECTION PETITION NO. 11 OF 2013** the court held that the giver and the recipient are distinct offenders and both can be charged independent of each other as principal offenders.

The court went ahead to rely on the case of SAMBU =VS= GENGA Election Petition No. 8 OF 2008 [2008] I KLR 396 where it was held as follows:-

**“More telling in our view, is that the fact that all the three (3) witnesses for the Petitioner are persons who unashamedly told this court that they received bribes. They are therefore accomplices in the commission of the offence of bribery as they received money to the giving of their votes to a particular candidate..... the Petitioner’s witnesses, apart from being shaky in their delivery of their evidence were accomplices whose evidence though admissible is wholly unreliable without corroboration.”**

The 3<sup>rd</sup> Respondent’s Counsel submitted that the Petitioner’s witnesses who came up with the bribery allegations appeared to read from the same script and appeared coached since their affidavits were exactly similar in content save for their names. Indeed the said witnesses having admitted to receiving bribes became accomplices which required independent witnesses to come forward and corroborate their evidence. None came forward and therefore, I find the allegations of bribery attributed to the 3<sup>rd</sup> Respondent were not proved beyond the required standard of proof by the Petitioner. Suffice to say that no effort was made by Petitioner even to report to the police or IEBC for action so as to form a basis for the disqualification of the 3<sup>rd</sup> Respondent to contest in the election in the first place.

### **Use of public resources by the 3<sup>rd</sup> Respondent prior to the elections**

72. It was claimed by the Petitioner and his witnesses that the 3<sup>rd</sup> Respondent committed electoral malpractices in that prior to the elections he had donated school buses to Mbembani and Kyambuko Secondary Schools, while at the same time exhorting members of public to vote for him so that he could clear the outstanding purchase price for the buses upon being re-elected as the area Member of Parliament. The Petitioner also accused the 3<sup>rd</sup> Respondent of campaigning while using motor vehicle registration number GK 325S belonging to the Constituency Development Fund contrary to the law. The Petitioner contended that the use of the CDF projects and property during the campaign period disadvantaged him and other candidates. The petitioner’s witnesses stated that they saw the 3<sup>rd</sup> Respondent engaging in the alleged activities and that some of them did annex photographs backing up their claims. The 3<sup>rd</sup> Respondent denied the authenticity of the photographs as photo shops but he admitted on cross – examination that he was present during the launch of the school buses that had been purchased by the Constituency Development Fund and was present by virtue of being the then area member of Parliament and as such played an oversight role.

The petitioner did admit that the 3<sup>rd</sup> Respondent was at liberty to attend the CDF projects as he had an oversight role but not to campaign. The Petitioner’s witnesses claimed that they heard the 3<sup>rd</sup> Respondent campaigning on the material dates but however admitted that they did

not have the tape recording to prove the allegations. As the 3<sup>rd</sup> Respondent had denied the allegations, it was the duty of the Petitioner and his witnesses to prove those allegations to the required standard of proof. Again the claim that a CDF vehicle registration number GK 325S had been used by the 3<sup>rd</sup> Respondent in his campaigns appears not proved at all because there was no evidence that the alleged motor vehicle belonged to the area CDF. It could very well belong to another Government entity. There was no search certificate from the Registrar of Motor vehicles to established beyond doubt that the vehicle belonged to the particular CDF Machakos Town Constituency. I must add that as school buses had been funded by the CDF, it was highly likely that its officials might have been travelling by such vehicle in their official capacities and sanctioned by the CDF Board. There was also no evidence adduced to the effect that the 3<sup>rd</sup> Respondent boarded such vehicle and addressed people while atop of that particular vehicle. Hence I find the Petitioner has not proved the allegations herein beyond the required standard of proof.

### **Bankruptcy allegations against the 3<sup>rd</sup> Respondent**

73. The Petitioner in his evidence before court claimed that the 3<sup>rd</sup> Respondent was an undischarged bankrupt and should not have been cleared in the first place to contest in the election. However on being cross-examined, he agreed that he had not obtained a receiving order from the official receiver over the bankruptcy of the 3<sup>rd</sup> Respondent and further that the petition was silent on the issue of the bankruptcy of the 3<sup>rd</sup> Respondent. The 3<sup>rd</sup> Respondent denied being declared bankrupt as the debt in issue had already been settled and that in any case the Petitioner ought to have raised the issue with the IEBC over any alleged bankruptcy. Hence I find that though the Petitioner did not plead the issue in his petition, he did not manage to prove the said allegation to the required standard of proof.

### **Discrepancies noted during re-sealing of ballot boxes**

74. Prior to the hearing of the petition herein, parties agreed to have the ballot boxes resealed. During the said exercise it was noted that there was a stray ballot box for the election of the woman representative. It was also noted some seals were broken. All the parties or their representatives were present during the exercise aforesaid and that at the close of the hearing herein none raised issue with the report of the Deputy Registrar regarding the resealing exercise. In the premises I find that the few discrepancies noted during the exercise are likely to have been post election in nature associated with the transportation of the election materials from the polling stations to the tallying centres and to the stores or warehouse. Hence the same had no impact at all with the election results announced prior to the movement of the election materials.

75. From the above analysis of the evidence and the several issues raised by the Petitioner in this petition, it is clear that the election of Member of Parliament for Machakos Town Constituency had its own share of imperfections. The Petitioner has urged this court to nullify the elections while on the other hand the Respondents appear to suggest that this court should not throw away the baby with the bath water. I shall be guided by the Supreme Court decision in **Petition Number 1 of 2017 RAILA A. ODINGA & ANOTHER =VS= IEBC & 2 OTHERS** where the court noted as follows:-

**“We must re-emphasize the fact that not every irregularity, not every infraction of the law is enough to nullify an election were it to be so, there would hardly be any election that would withstand judicial scrutiny. The correct approach therefore; is for a court of law to not only determine whether the election was characterized by irregularities were of such nature or such magnitude, as to have either affected the result of the election or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it”.**

The above Supreme Court remarks appear to echo the provisions of Section 83 of the Elections Act which provides as follows:-

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

It would follow from the above that the exercise of conducting elections the world over ever reaches or achieves the elusive utopian state in which everything is perfect. Hence imperfections cannot be avoided at any given time. The Counsel for the Petitioner has urged this court not to accept what he called “*the new mantra in town – “fatigue and errors.”* It is not possible to avoid the said mantra in the sense that most of the election exercises are always conducted manually and while a little bit is done electronically. Hence until the latter is thoroughly encompassed and adopted, the issue of errors and irregularities will continue to be faced from time to time. I am therefore satisfied that the irregularities and discrepancies noted herein did not substantially affect the outcome of the results and that the elections had been conducted in accordance with the principles laid down in the Constitution and the Elections Act and that the same reflected the will of the voters in Machakos Town Constituency.

### **Conclusion**

76. From the analysis of the various allegations levelled against the Respondents by the Petitioner and the entire evidence presented herein, the following determinations emerge namely:-

- i. The election of Member of Parliament for Machakos Town Constituency had been faced with some few irregularities but that the same did not substantially affect the results.**
- ii. The Petitioner herein Mutisya Albanus Paul did not establish the irregularities, discrepancies and the various allegations complained of to the required standard of proof.**
- iii. The election of Member of Parliament for Machakos Town Constituency held on 8/8/2017 was conducted substantially in**

*accordance with the principles of the Constitution and the Elections Act.*

**iv. The 3<sup>rd</sup> Respondent Munyaka Victor Kioko was validly elected as the Member of Parliament for Machakos Town Constituency on the 8/8/2017.**

**v. No election offence or malpractice has been proved against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.**

### **Costs**

77. As regards the issue of costs, the generally accepted principle is that costs do follow the event. Learned counsels for the Petitioner urged this court to award costs. Similarly the Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents sought for costs. The Counsel for 3<sup>rd</sup> Respondent sought for costs in the sum of Kshs.5 million. The court is always called upon to balance the rights of the parties to access justice as against the work and industry put in by the parties and their Advocates from the inception of the case upto conclusion. Taking all factors into consideration, I order that the costs be capped as follows:- **Kshs.2,000,000/=** for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and **Kshs. 2,000,000/=** to the 3<sup>rd</sup> Respondent.

78. There is the little matter of possible commission of electoral malpractice that arose during the hearing of the petition. Some of the witnesses for the Petitioner stated that they received money, although they appeared inconsistent in their testimonies. Under Section 87 of the Elections Act the court is under a duty at the conclusion of the petition to make a report to the Director of Public Prosecution, the Commission and the relevant Speaker indicating that an election offence has been committed by any person in connection with the election and the names and description of the persons, if any, who have been proved at the hearing to have been guilty of an election offence. However this court did not conclusively establish that the offence as alleged has been proved to the required standard. This court did find that there was need for corroboration of the evidence of those individuals who claimed to have received some alleged bribes. The allegations of voter bribery be comprehensively investigated and appropriate action taken by the relevant bodies.

79. Finally, I wish to appreciate the industry, resourcefulness, patience and diligence of all the learned Counsels in this matter.

### **Disposition**

80. The final orders are as follows:-

**a. The Petition is hereby dismissed with costs to the Respondents.**

**b. The Respondents are awarded costs as herein under:-**

**(i) 1<sup>st</sup> and 2<sup>nd</sup> Respondent capped at Kshs.2,000,000/=.**

**(ii) 3<sup>rd</sup> Respondent capped at Kshs.2,000,000/=.**

**(iii) The costs shall be taxed and certified by the Deputy Registrar of this court.**

**c. A certificate of this determination pursuant to Section 86 of the Elections Act 2011 shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly.**

Orders accordingly.

**Dated and Delivered at Machakos this 28<sup>TH</sup> day of FEBRUARY, 2018.**

.....

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

Makundi - for the Petitioner

Anyoka - for the 1<sup>st</sup> & 2<sup>nd</sup> Respondent

Nyamu/Mbobu - for the 3<sup>rd</sup> Respondent

Kituva - Court Assistant