



**Osebe v Independent Electoral & Boundaries Commission & 2 others (Election
Petition 1 of 2017) [2018] KEHC 8431 (KLR) (28 February 2018) (Judgment)**

Walter Enock Nyambati Osebe v Independent Electoral & Boundaries Commission & 2 others [2018] eKLR

Neutral citation: [2018] KEHC 8431 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
ELECTION PETITION 1 OF 2017
JA MAKAU, J
FEBRUARY 28, 2018**

BETWEEN

WALTER ENOCK NYAMBATI OSEBE PETITIONER

AND

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
RESPONDENT**

DAVID KIPRONO TOWETT 2ND RESPONDENT

JOHN OBIERO NYAGARAMA 3RD RESPONDENT

JUDGMENT

1. The second General Elections to be held under the Constitution of 2010, were conducted country wide of 8th August 2017. That following the general election of 8th August 2017, in the County of Nyamira, the 2nd Respondent declared the 3rd Respondent as Governor for Nyamira County having garnered 63,949 votes against his closest rival, the Petitioner herein, Walter Enock Nyambati Osebe, who had garnered 57,432 votes. The Petitioner being dissatisfied with the results and who was amongst 9 contestants in the gubernatorial election for Nyamira County, filed this Petition on 5th September 2017, challenging the declaration made by the 2nd Respondent on 10th August 2017. The Petitioner in support of the Petition filed supporting affidavit dated 4th September 2017, and annexed Nine (9) affidavits sworn by persons who he intended to call as witnesses.
2. The Petitioner, in his Petition made a number of allegations in support of the petition. The petitioner alleged that the 1st and the 2nd Respondents recruited and deployed 8 Presiding Officers working for County Government of Nyamira, who are subordinate to the 3rd Respondent and who owed allegiance to the 3rd Respondent, as the outgoing Governor, seeking a re-election and who had an obvious



- incentive to act and did act at the behest of and in favour of the 3rd Respondent, while Presiding over the election. The Petitioner listed the eight (8) Presiding Officers/Deputy Presiding Officers. In the premises the Petitioner contended that the 1st and the 2nd Respondents in recruiting the eight (8) Presiding Officers/Deputy Presiding Officers were in breach of the Constitution, law and Regulations.
3. The Petitioner contends further that the 1st and the 2nd Respondents breached the law and the Constitution by allowing unregistered voters to vote or by tallying inexistent votes in 47 of the 553 polling centres in Nyamira County, producing results which are illegal and inexplicable and which are higher than the registered voters in said 47 Polling stations (which Petitioner listed under Table 1) and as a result of which Petitioner avers, the 2nd Respondent added the figure of 13,488 to the overall tally of valid votes cast for the candidates in the election to the office of the Governor Nyamira County, an addition that changed the overall results, considering the difference of the declared votes for the 3rd Respondent and Petitioner of 6,517 votes. The Petitioner further alleges, the anomalies stated hereinabove, were deliberate and calculated to produce a result in favour of the 3rd Respondent, and indeed affected the overall results pronounced by the 2nd Respondent, otherwise produced a flawed outcome against the Laws, Regulations and the expectation of the Constitution, all to the detriment of the Petitioner.
 4. The Petitioner further alleges the 1st and the 2nd Respondents in breach of the law and Regulations governing counting and tallying of votes, understated and declared lower tallies of valid votes cast in 13 of 553 polling stations in Nyamira County, thereby failing to account for 803 valid cast votes (which 13 polling stations the Petitioner listed under Table 2). The Petitioner avers the results of the 13 listed polling stations are not ascertainable and are otherwise manipulated and should be nullified and expunged from the record that forms part of the tally for the elections for the office of Governor Nyamira County.
 5. The Petitioner further proceeds to allege that the 1st and the 2nd Respondents in breach of the law and regulation governing the Counting and tallying of votes, overstated and declared higher tallies of valid votes cast in 15 of 553 Polling Stations in Nyamira County, thereby adding to the tally 366 votes that they have not accounted for in respect of any of the candidates (which 15 polling stations the Petitioner has listed under Table 3).
 6. The Petitioner produced Table 4 comprising of 20 polling stations to which he alleges the 2nd respondent at the end of the purported counting and tallying exercise, he produced and relied on the primary and secondary documents, to wit, Form 37A, Form 37B and 37C, that show open discrepancies, unexplained variances and alterations, unsigned and authenticated forms, that cover 20 of 553 polling centres in Nyamira County, in respect of votes cast in favour of the Petitioner, rendering the exercise at its conclusion unverifiable, and at any rate, uncertain and inconclusive.
 7. The Petitioner further in his petition alleges the 2nd Respondent produced results in 13 out of 553 polling stations in Nyamira County that are duplication of each other in Centres located at the same place and as such have suspicious trends that cannot be explained by the random exercise of voters making a choice in a population with uniform demographic characteristics and patterns consistent with manufactured results.
 8. The Petitioner further sets Table 6 of 19 polling stations of 553 under the heading, polling stations with huge inexplicable variances.
 9. Finally, the Petitioner alleges the 2nd Respondent indicated 0 votes for all candidates at Nyaututu Primary School code 0462722901. He alleges further the 3rd Respondent by himself and through agents and proxies engaged in bribery of voters as an inducement to lure and entice voters to cast



votes in his favour and in particular the then Chief Officer, Department of Health Services, Nyamira County, Mr. Douglas Oseko Bosire who was arrested by the Police at Machururiati Polling Centre whilst bribing voters and detained at Keroka Police Station under occurrence Book No. 33/88 of 8th August 2017.

10. The Petitioner claims, in view of the above listed allegations, the election to the offices of Governor Nyamira County, held by 1st and the 2nd respondents on 8th August 2017, was not free and fair, was conducted in a manner inconsistent with the law. That governor elections, and the results therefrom is not verifiable. He further alleges the acts, errors and omissions listed in the petition were consistent with the illegal manner the 1st and the 2nd Respondents conducted the exercise of electing the Governor, Nyamira County and demonstrates the fact that the exercise was not conducted in accordance with the laid down Regulations and Laws.
11. Arising from the aforesaid Pleadings the Petitioner sought various orders being thus:-
 - a. There be a scrutiny of the votes recorded as cast in the election for office of Governor, Nyamira County, on 8th August 2017, particularly the polling centres itemized in Table 1, Paragraph 14 of the Petition, and Table 6, Paragraph 21 of the Petition,
 - b. There be a recount of the votes recorded as cast in the election for office of Governor, Nyamira County on 8th August 2017.
 - c. There be a scrutiny and examination of all Forms 37A, Form 37B and Form 37C, and all accountable documents used in the election for the office of Governor, Nyamira County, on 8th August 2017.
 - d. The election of the Third Respondent as Governor, Nyamira County be determined and declared null and void.
 - e. A declaration that the Third respondent was not validly elected Governor, Nyamira County.
 - f. An order be made for holding a fresh election for the office of Governor, Nyamira County.
 - g. The costs of this petition be awarded to the petitioner.
 - h. The Honourable Court makes any such orders and grants such relief as it deems necessary for the ends of justice.
12. On 4th December 2017, the Court granted orders, in respect of prayers numbers (a), (b), and (c) of the Petitioner's petition, and in view of the Court's ruling prayers numbers (a), (b) and (c) are spent. The only prayer remaining for consideration and determination are prayers numbers (d), (e), (f) and (g) in the petition
13. The Respondents upon being served with the Petition, they filed their respective responses to the petition. The 1st and the 2nd Respondents filed replying affidavit to the petition dated 20th September 2017, which the Court treated as the response and one (1) affidavit of their witness. In the affidavit of the 2nd Respondent dated 20th September 2017, the 2nd Respondent dismissed all allegations by the Petitioner as untrue and all his witnesses affidavits and averred that the 3rd Respondent emerged winner with 63,949 and he declared him as the duly elected Governor of Nyamira County on 10th August 2017 and issued him a Certificate of Election as duly elected governor for Nyamira.
14. As regards the conduct of the election, the 2nd Respondent averred that the same was conducted in accordance with the Constitution, election laws and best election management practices and the same were free, fair and bereft of any irregularities. He urged voting in 553 polling stations proceeded



peacefully without any incident at all and voters who presented themselves at the polling station were duly offered the opportunity to vote.

15. The 2nd Respondent elaborated in detail the steps the 1st Respondent had undertaken to ensure free, transparent, accurate, accountable and credible election, including ensuring the Political Party Agents, Candidates and Agents from Observers Mission, who were present during voting, counting, tallying, collating, announcement, transaction and declaration of results at the Polling Stations in the 4 Constituencies Tallying Centres and County Tallying Centre at Kebirigo Secondary School witnessed the whole process and Agents were given forms to verify and sign. He further avers that all forms from Polling Stations to Constituency Tallying Centre and to County Tallying Centre were delivered in presence of agents.
16. On allegation of breach of the regulations and massive irregularities the 2nd Respondent, response is that those allegation, have no sound foundation when the full view of the polling events are brought into focus, that the alleged irregularities do not have effect on results of the election in anyway or in any significant way. That the 3rd Respondent was validity elected and that the 1st Respondent did not influence the election in his favour or at all as the 1st Respondent did not have specific desired result in the election other than to facilitate the expression of the will of the people of Nyamira County, which the 2nd Respondent alleges they faithfully discharged.
17. The 2nd Respondent on analysis of Forms 37A which is primary source of the results declared at all polling stations, he alleges will show the clear results of the election and that the results declared at polling stations are final and not subject to any review or adjustment (referring to annexures of Forms 37A for the 4 Constituencies marked DKT – 1A, 1B, 1 C and 1 D). The 2nd Respondent on transposition errors, which he stated are few, he avers the same can be corrected by reference to Form 37A, adding that in all cases, the alleged errors will not affect the outcome of the election.
18. On allegation under paragraph 4 of the petition dealing with Presiding Officers/Deputy Presiding Officers, being employees of Nyamira County, the 1st Respondent and the 2nd Respondents alleges they are total strangers and deny the same and proceeded to assert how IEBC recruits its Presiding Officers and their Deputies, averring the procedure laid down was followed and necessary communication and deliveries done and no complaint was ever raised over the alleged Presiding Officers and their Deputies, averring further that the Petitioner did not demonstrate any misconduct on part of the named Officers, so as to deny them the benefit of presumption of good faith, that all Public Servants enjoy. That the Petitioner did not demonstrate irregularities in the Polling Stations in which the said Officers conducted the election nor did he demonstrate any of the said officers committed any irregularity or illegality or abetted such.
19. In response to paragraph 5 of the Petitioner’s affidavit, the 2nd Respondent denied that his officers allowed any unregistered voters to vote, nor tally non-existent votes at all, nor illegal and inexplicable results were included, nor polling stations reported more votes cast than the registered number of voters, that Table 1 annexed as WE04 – 9, in Petitioner’s affidavit is not an official record as the results in election, that Form 37C reflects true and accurate transposition of results from Form 37B except a few where there were errors of transposition, that have since been detected and corrected, that tallies for all candidates in Form 37A are correct in all polling station as transposed, that results were not declared on the basis of total votes cast as indicated on the 13th column of Form 37C as transposed into the 5th column of the Petitioner’s table 1 under paragraph 14 of his petition titled “Declared Valid Votes Cast – IEBC Tally.” That Form 37C is an excel sheet and the 13th column titled “Valid Votes Cast” was a formula function and addition of the 3 columns representing the 8 candidates in Nyamira Gubernatorial contest, that in all the polling station the Petitioner tabulated under paragraph 14, there



- was a formula malfunction in which the tally of valid votes cast was erroneously summed up to a figure greater than the actual tally of valid votes cast as entered under Forms 37A, that the formula malfunction did not benefit any of the 8 candidates nor did it disadvantage any of them, but it is a zero sum error and as such it does not affect the result of the election and can be rectified for the record.
20. On allegation under paragraph 5, 6 and 7 of the Petitioner's affidavit the 2nd Respondent denies that any Officer of the 1st Respondent or himself adding the figure 13,480 votes to the overall tally of valid votes as alleged by the Petitioner, adding that the erroneously transposed results in paragraph 14 of the petition, were not included in tally for the 3rd Respondent or any other candidate, that no candidate gained any votes out of the erroneous tally, that the error of transposition was not deliberate and does not change the tallies garnered by the Petitioner and the 3rd Respondent, that the Petitioner is desperately trying to link unrelated entries in Form 37C to stop the gap between him and the 3rd Respondent, that the outcome of the election was not flawed and results were transposed, tabulated, tallied and declared in compliant with the law. The 2nd Respondent avers that the results of election of Governor of Nyamira County were accurately transposed from Form 37A to Form 37B and 37C, that results of election of the 13 polling stations under Petitioner's petition paragraph 17 are correctly recorded, that alleged understated tally of valid votes cast for the Petitioner is an error of transposition in Form 37C. That the tabulated results for each candidate in Form 37C are correct in respect of the 13 polling stations and no candidate lost any votes and no candidates results were affected particularly the Petitioner and the 3rd Respondent, that it is not true to aver that 803 votes as per Petitioner's paragraph 17, were not well accounted for as the results are ascertainable from the results declared in Form 37A. That the 2nd Respondent avers the results for 13 polling stations are ascertainable, that an error of transposition of the character bought out in paragraph 18 of the petition is no justification for expunging the results of the 13 polling station from the record, as the error can be corrected and does not affect the tallies of the candidates in the election as the results can be ascertained from Forms 37As which have been provided to Court.
 21. On the other allegations the 2nd Respondent refutes the contents of paragraph 10 of the petition and denies that there was infiltration of valid votes cast in the alleged named 15 Polling Stations, averring that correct tallies of all the candidates were correctly entered in Forms 37A and was verified and signed by Agents of the Candidates, that all votes were counted and the 2nd Respondent denied adding 366 votes to the final tally, disputing the tabulation of results by the Petitioner under paragraph 19 of the petition as it does not represent the correct scenario.
 22. On contents of paragraph 11 of the Petitioner's affidavit on Forms 37A, 37B and 37C, the 2nd Respondent avers, that was an accurate reflection of the election, stating that there were no open discrepancies between the results in Form 37A, 37B and 37C, that there were no variation and unauthenticated Forms in the tabulated 20 Polling Stations, that the figure 553 represent the number of Polling Stations and not polling centres, that the results were accurately entered in Form 37A in relation to 20 polling stations, that all forms used were original forms of the 1st Respondent, authenticated, verified and signed by the Party and Candidates' Agents in all cases where the Agents were present, that declaration of governor of Nyamira County is verifiable, the result is certain and conclusive, that the primary source documents Form 37A, are helpful in these regard, that few errors detected were insignificant error of transposition, which at any rate did not affect the overall result of the election, and that the total number of votes cast, equated the total number of valid votes cast.
 23. The 2nd Respondent further denies the contents of paragraph 21 of the petition and paragraph 12 of the Petitioner's affidavit, stating the votes cast in the 8 paired polling stations tabulated by the Petitioner under table 5 and marked WOEN – P7, were accurately recorded in Form 37A, that there were no duplication of votes with respect to the named polling stations, that where there were any



errors of transposition of results from Forms 37A to 37B through to 37C, such errors were detected and corrected. The 2nd Respondent further denies contents of paragraph 13 of the Petitioner's affidavit, averring that Form 37A of Nyabigege Polling Station contain correct entry of the total number of votes cast, Form 37C was only, prepared and issued to the chief agents at the Count Tallying Centre at Kebirigo, that Agents of the Candidates were not issued with Form 37C at Nyanchoria Polling Station and the Form 37A issued to them indicates correct entries for all the candidates, and that Form 37A for Nyaututu Primary School Code 0462722901 was correctly filled out in presence of Agents and results therefrom correctly transposed into Forms 37B and 37C. The 2nd Respondents further denies the contents of paragraph 13, 14 and 15 of the Petitioner's affidavit and avers the election of the office of governor, Nyamira county held on 8th August 2017, was free and fair, that the election for governor of Nyamira County was conducted substantially in accordance with the Constitution, the law and best election management practices, the will of the electorate, was expressed and the results recorded in Forms 37A, that the results in Form 37A were correctly transposed to Form 37B and 37C and declared in accordance with the law, that errors of transposition detected were corrected and can be corrected but at any rate the errors did not affect the result of the election and that the 3rd Respondent remains in a clear majority even after the adjustments of those errors are made. The 2nd Respondent denied the contents of the affidavit of the Petitioner's witnesses.

24. On his part the 3rd Respondent filed an amended Response on 28th September 2017 and Replying affidavit in support of an amended Response to the Petition dated 27th September 2017. The 3rd Respondent filed a total of four (4) affidavits in his response, the 3rd Respondent referred to this petition as baseless, frivolous and an abuse of Court process, as all allegations of irregularity or violation of law are devoid of merits and that the Petition should accordingly be dismissed.
25. As regards the allegation that the 3rd Respondent, contravened the provisions of the Constitution of Kenya and/or other written laws, particularly the breach of the principles requiring the conduct of a free and fair election through intimidation and/or improper influence of voters, or that he engaged in conduct or unethical practice, he dismissed them as untrue and devoid of any proof, that on the irregularities as pertains the results, he averred that there was at no point where there were polling stations which voted over and above the registered voters, where there were voters declared were less than the actual turnout and further he averred all polling stations had ascertainable results which can be verified, that votes declared were actual turnout, he denied that there were variances between forms 37A, 37B and 37C, that there were duplication of results relying on bundles of Forms 37A and 37C already filed with his Replying affidavit of 13th September 2017 and as annexure JN1. He further averred the gubernatorial seat of Nyamira County was transparent, impartial, neutral, efficient, accurate and accountable, was conducted in accordance with the principles laid down in the Constitution and the results were announced through a tallying process that was simple, accurate, verifiable, secure, accountable and transparent.
26. As regards the allegation that employees of the County Government owed allegiance to him and that any or all of them had an incentive to act in the 3rd Respondent's favour, he averred that is untrue and very fallacious as the 1st and the 2nd Respondents recruited Presiding Officers mostly from the Public Service, that is P.S.C., T.S.C. and County Service Commission and a few other members of Public, the 1st Respondent is an Independent Body, the Election Act makes it an offence for any party including County Government to restrain any of its employees, the results from the polling stations named were all verified to be true and correct by the Agents of the Petitioner. Under Regulation 5 of the Election (General) Regulations 2012 (as amended in 2017) obliges the 1st Respondent to transparently and competitively appoint Presiding Officers and their Deputies for every Constituency.



27. As regards tallying of votes from non-existent voters allowed to vote in 47 polling stations, higher voter turnout in any polling stations, additional votes being entered in the tabulation, unsigned and/or unauthenticated Forms 37A, 37B and 37C in the 20 polling stations, the variance between tallies in Forms 37A, 37B and 37C, the 3rd Respondent averred all that is untrue and that the variations in Forms 37A, 37B and 37C affected not only the Petitioner and the 3rd Respondent, but also the rest of the candidates, adding that indicates that there were sporadic unintentional errors that were not aimed at benefitting or putting at a disadvantage on any candidate in particular. He therefore averred that there was no statutory violations, gross or widespread irregularities and/or malpractices that occurred nor were there votes wrongly accredited to the 3rd Respondent by duplicity or otherwise and as such he averred there is no basis for seeking nullification as the 3rd Respondent was lawfully declared as the Governor of Nyamira County.
28. As regards of engaging in bribery and breach of the Constitution and/or other written law, engaging in bribery and arrest of Douglas Oseko Bosire for bribing the voters on behalf and under instigation of the 3rd Respondent he denied all that, urging it was baseless allegation. He concluded by denying all the allegations levelled against him, the 1st and the 2nd Respondents urging Court to dismiss the petition.

The Applicable Law:

29. It is admittedly settled law that the principles set out in the Constitution of Kenya 2010, the Elections Act No. 24 of 2011 and subsidiary Regulation thereunder, constitute the substantive and procedural law for conduct of elections.
- a. Burden of Proof:-
30. In *Raila Amolo Odinga and Another v IEBC and 2 Others*, Supreme Court Presidential Petition No. 1 of 2017, the Supreme Court of Kenya held thus:-
130. The law places the common law principle of *onus probandi* on the person who asserts a fact to prove it. Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya, legislates this principle in the words: “Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” In election disputes, as was stated by the Canadian Supreme Court in the case of *Opitz v. Wrzesnewskij*[48], an applicant who seeks to annul an election bears the legal burden of proof throughout. This Court reiterated that position in the 2013 *Raila Odinga* case, thus:
195. There is, apparently, a common thread in ... comparative jurisprudence on burden of proof in election cases ... that an electoral cause is established much in the same way as a civil cause; the legal burden rests on the petitioner
196. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter esse acta*; all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law.”
- (131) Thus a petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduced cogent and credible evidence to prove those grounds [49] to the satisfaction of the court. “[50] That is fixed at the onset of the trial and unless circumstances change, it remains unchanged [51] In this case therefore, it is common ground that it is the petitioners who bear the burden of proving to the required



standard that, on account of non-conformity with the law or on the basis of commission of irregularities which affected the result of this election, the 3rd respondent's election as President of Kenya should be nullified,

Quote paragraph 130, 131, Volume 1 of Petitioner's submission on page 27/351."

Standard of Proof:-

31. In *Raila Amolo Odinga and Another V IEBC and 2 Others*, (supra) it was held thus:-

"[152]We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt. Consequently, we dismiss the petitioners' submissions that the Court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities.

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

32. The electoral process is a realization of the principle of the sovereignty of the people of Kenya as enshrined under Article 1 of the Constitution. Article 38 (2) clearly sets out the political rights underpinning this sovereignty. It is provided as follows:-

- (2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—
 - (a) any elective public body or office established under this Constitution; or
 - (b) any office of any political party of which the citizen is a member."

The key operative words under Article 38 (2) of the Constitution is the right to free, fair and regular election based on universal suffrage, and free expression of the will of the electorate.

33. Article 81 of the Constitution of Kenya 2010, deals with the general principles for the electoral system and provides:-

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

- (a) freedom of citizens to exercise their political rights under Article 38;
- (b)
- (c)
- (d)
- (e) free and fair elections, which are—
 - (i) by secret ballot;
 - (ii) free from violence, intimidation, improper influence or corruption;



- (iii) conducted by an independent body;
- (iv) transparent; and
- (v) administered in an impartial, neutral, efficient, accurate and accountable manner.”

34. Article 86 of the Constitution of Kenya 2010, dealing with voting provides:-

“(86). At every election, the Independent Electoral and Boundaries Commission shall ensure that—

- (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
- (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
- (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
- (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”

35. Article 87 of the Constitution of Kenya 2010 dealing with electoral disputes provides:-

- (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.
- (2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.
- (3) Service of a petition may be direct or by advertisement in a newspaper with national circulation.”

36. Section 76 (a) of the Elections Act provides:-

“(76)(a) to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the Gazette and served within fifteen days of presentation;”

37. Election is the ultimate expression of the sovereignty either directly or through democratically elected representatives, the electoral system is therefore designed to ascertain and implement the free expression of the will of the people. The Court dealing with an election dispute should from the evidence ascertain the intent of the voters and give it full effect without compromising with the principles that underscore the right to free, fair, verifiable, simple, transparent and accountable election.

38. Section 80 of the Elections Act sets out the powers of an Election Court in exercise of its jurisdiction to hear and determine election petitions, while Section 83 provides as follows on non-compliance with the law:-

“83. No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance



with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.”

39. Section 84 of the Act deals with costs that Court may award in an election petition and provides:-

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

Parties Evidence:

40. It is against these allegations and counter allegations and accusation a total number of 13 witnesses appeared and testified before me in this Petition. Eight affidavits on behalf of the Petitioner were admitted after the witness appeared and adopted the same as their evidence-in-chief and were cross-examined, whereas the 1st and the 2nd Respondents had one affidavit admitted after the County Returning Officer adopted his affidavit as his evidence-in-chief on his behalf and that of the 1st Respondent, and which affidavit the Court adopted as his evidence-in-chief and was accordingly cross-examined. The 3rd Respondent had four affidavits admitted following the adoption of the same by the respective deponents, as their evidence-in-chief who had them admitted as their evidence-in-chief and were accordingly cross-examined.

Petitioner's evidence:

41. The Petitioner gave evidence and called seven (7) witnesses. The Petitioner contends that the 1st and the 2nd Respondents recruited and deployed 8 Presiding Officers working for the County Government of Nyamira, who are subordinate of the 3rd Respondent and who owe allegiance to the 3rd Respondent as the outgoing Governor seeking re-election and who had an obvious incentive to act and did act at the behest of and in favour of the 3rd Respondent while presiding over the election. That the Petitioner's Agent signed Forms 37A with correct results, however, on being shown Form 37C they discovered the results, entered were different from the ones they had signed for the Petitioner as they showed different figures which revealed the Petitioner votes had been reduced to his disadvantage. They challenged the transposition of the Petitioner's votes on the Form 37C adding that there were obvious transpositional errors. The Petitioner further averred that the 3rd Respondent by himself and through Agents and proxies engaged in bribery of voters as an inducement to lure and entice the voters to cast voters in his favour especially the Chief Officer, Department of Health Services, Nyamira County, RW2, who was arrested by Police while bribing voters, detained at Keroka Police Station under O.B. No. 33/8/8 of 8th August 2017.

42. The Petitioner in his evidence contended that the election for office of Governor, Nyamira County, was marred by massive irregularities, breaches of the law and the Constitution as the 1st and the 2nd Respondents acted in breach of their statutory and legal duty and produced results that were not verifiable in favour of the 3rd Respondent. He averred the eight (8) Presiding Officers/Deputy Presiding Officers, engaged and deployed by IEBC as Presiding Officers in Nyamira County, by nature of their duties at County Office, were Partisan, biased and would not be seen to be neutral in execution of their duties as Presiding Officers, and their employment was against the rules of natural justice, pointing out further their employment was not proper due to conflict of interest in their engagement as IEBC Officials during the 8th August 2017 elections. The Petitioner relied on his affidavit dated 4th September 2017 and annexures thereto making extensive references to his Petition. He stated he was denied his request for verification of the tallying process for North Mugirango Constituency by the Returning Officer. That the Online Portal Results were different from the one declared at the tallying up Centre, on the tables in the Petition, he averred under Table 1 there were polling stations with higher voter



turnout than the Registered voters listing 47 polling stations, as a result he urged the 2nd Respondent added the figure of 13,488 votes to overall tally of valid votes cast for candidates, an addition that changed the overall result. Under table 2 he averred there were 13 polling stations with less declared voters than the actual turnout and thereby understated and declared lower tallies of valid votes cast failing to account for 803 valid votes. Under Table 3, he averred there were 15 polling stations with more declared votes than the actual turnout, thereby adding to the tally 366 votes that has not been accounted for in respect of any of the candidates. Under table 4, he urged there were twenty (20) Polling Stations with discrepancies between Forms 37A, 37B and 37C for the Petitioner, rendering the exercise and its conclusion unverifiable, and at any rate, uncertain and inclusive. Under table 5, he urged there were eight (8) pairs of polling stations with duplication, consistent with manufactured results, whereas under table 6 he urged there were (19) Polling Stations with huge inexplicable variance.

The 1st and The 2nd Respondents' Evidence:

43. The 1st and the 2nd Respondents relied on affidavit of the 2nd Respondent dated 20th September, 2017. The Returning Officer (RW1) testified that the Gubernatorial election in Nyamira was conducted in every Polling Station, that out of 553 Polling Stations, no incident of violence was reported, that the list of Presiding Officers was submitted to the relevant stakeholders as required by law and no objection was raised thereafter, there were no polling stations where voters exceeded the registered number of voters, that IEBC is an equal employment opportunity institution and cannot discriminate in recruitment, that apart from few transpositional or posting errors the gubernatorial elections for Nyamira County were conducted within the provisions of the law and constitution, that where there were errors were due to human error, transpositional errors but were not systematic and deliberate, that IEBC does not work under direction of anyone, that only registered voters voted, that no Agent raised any complaint as to having been denied an opportunity to carry out their duties, that voting was done through a systematic process as witnessed by party Agents, candidate Agents and election observers who oversaw the process, and that he received a written complaint from the Petitioner dated 10th August 2017, against the Returning Officer, North Mugirango Constituency marked WEO – P1 and rectified the situation.

The 3rd Respondent's Evidence:

44. The 3rd Respondent gave evidence and called three (3) witnesses. The 3rd Respondent denied all bribery allegations attributed to himself and his purported Agents pointing out that no one has been charged and arraigned before Court for an offence of bribery, contending that the elections, were conducted in accordance with the law and that no complaints were raised by his Chief Agent during the election, that there were no transpositional errors, which occurred when data was transferred from one document to another, that the errors of transposition were not systematic and deliberence,, that after analyzing all tables in issue, there was no duplication and that after auditing the results the 3rd Respondent had a lead that was unassailable.
45. The 3rd Respondent testified he was not aware of the recruitment of the eight (8) Presiding Officers/ Deputy Presiding Officers from Nyamira County, that voting was an expression of the free will of the people of Nyamira, that huge variances can be expected in non-homogeneous areas and that recount will reveal the 3rd Respondent won the election, he further contended that no evidence was tendered to the Court, suggesting the process of voter registration, voter identification, manual voting and vote counting, were not conducted in accordance with the law, contending what the Petitioner is alleging in his Petition are procedural or administrative irregularities and other errors occasioned by human imperfection, urging the same, are not enough by themselves to vitiate an election, that evidence of Robert Githinji (RW4) revealed there was no polling stations with higher voter turnout as compared



with the registered voters, that the total votes garnered by each candidate in the disputed 46 polling stations did not exceed the registered voters, no evidence that unregistered voters were allowed to vote and the allegation 13,488 votes were added to overall tally of valid votes cast to candidates was not true.

46. The 3rd Respondent further on alleged discrepancies in Form 37A, 37B and 37C, averred that the discrepancies which existed did not affect final results relying on analysis of RW4, pointing out that the discrepancies affected all candidates, but the results were not affected in the long run as the results did not change. On duplication, the 3rd Respondent testified, that there were no polling stations with less declared votes than the actual turnout, and that no evidence was adduced, to the effect that there were 803 votes, that were unaccounted for, or that the votes in 13 polling stations were not ascertainable, on allegation of more declared votes than actual turnout, he stated no allegation of the votes being added to him was proved, on huge inexplicable variance, he contended that there was no evidence to show there was an inexplicable variance.

Issues for determination:

47. Although parties filed different issues for determination initially, when Counsel appeared for highlighting on their written submissions, they all agreed to adopt the issues as drafted, by the 3rd Respondent's Counsel and all appended their signatures to the issues as drafted by the 3rd Respondent's Counsel. The issues for determination therefore as per the Counsel's consent are as follows:-

- (a) Whether the 2017 Nyamira County Gubernatorial election held on 8.8.2017 was conducted in accordance with the Constitutional Principles and all electoral laws?
- (b) Whether the 3rd respondent was validly elected as a Governor of Nyamira County?
- (c) Whether or not there were irregularities, anomalies and illegalities in the conduct of the said elections?
- (d) Whether the election were free and fair?
- (e) Whether the results of the elections expressed the will of the people of Nyamira County?
- (f) Who bears the costs of the Petition?

48. I will now delve into the agreed issues as framed by the parties for determination. I note the first, the 3rd and the 4th issues are intertwined, and can safely be combined and dealt with altogether as one issue as follows:-

(A) Was Nyamira County Gubernatorial Election conducted in accordance with the Constitution and election law or were there electoral irregularities, anomalies and/or illegalities and/or offences, which if there were, did they affect the outcome of the election?

49. This issue relates mainly to general conduct of the elections by the 1st and the 2nd Respondents. In an election it is always presumed that the official acts of the 1st Respondent and its Agents are lawful, valid and in accordance with the Constitution and the law, unless sufficient evidence is produced to prove the contrary. In the instant Petition the Petitioner has made various allegations in an effort to discharge the said presumption.



50. The legal provisions for Kenya’s electoral system are found under Articles 81 and 86 of the Constitution. Article 81 (a) (e) of the Constitution provides:-

“(81) The electoral system shall comply with the following principles—

- a. freedom of citizens to exercise their political rights under Article 38;
- b.
- c.
- d.
- e. free and fair elections, which are—
 - (i) by secret ballot;
 - (ii) free from violence, intimidation, improper influence or corruption;
 - (iii) conducted by an independent body;
 - (iv) transparent; and
 - (v) administered in an impartial, neutral, efficient, accurate and accountable manner.”

“[86] At every election, the Independent Electoral and Boundaries Commission shall ensure that—

- (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
- (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
- (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
- (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”

I will now proceed to interrogate and evaluate the various allegations as set out in the Petitioner’s Petition:-

- (i) Engagement of eight (8) employees of the County Government as Presiding and Deputy Presiding Officers.

51. The Petitioner alleges the 1st and the 2nd Respondents recruited and employed eight (8) Presiding Officers including Deputies Presiding Officers, working for the County Government of Nyamira, who they claimed were subordinates of the 3rd Respondent, and who they claimed owed allegiance to the 3rd Respondent, as the outgoing Governor seeking re-election and who the Petitioner alleges had an obvious incentive to act and did act at the behest of and in favour of the 3rd Respondent while Presiding, over the elections. PW1, Steven Kennedy Oboso, and the Petitioner PW8, in their evidence which was not elaborate, they did not specify the public trust the Officers breached nor the provision of the Public Officer Ethics Act, they violated. PW1 and PW8 in Cross-examination and even in their evidence they did not disclose the laws breached by IEBC in engaging the impugned officers. There was no evidence suggesting they were engaged at the instigation of the 3rd Respondent, save a winding argument that the



Officer were subordinates, of the 3rd Respondent, however, both PW1 and PW8 in cross-examination confirmed that the aforesaid officers were not employees of the Governor, the 3rd Respondent, but of the County Government having been recruited by the County Public Service Board, in which the 3rd Respondent was and is not a Member.

52. In this Petition there is no dispute that the IEBC, the 1st Respondent, runs its own affairs as per Section 88 of the Constitution of Kenya 2010, under no one's directions. PW1 and PW8 in their evidence, failed to lead specific evidence to demonstrate either by way of conduct or otherwise, how the aforesaid officers interfered and/or compromised the election. No evidence was produced to show any irregularities or misconduct perpetrated by the impugned officers in the polling stations they were assigned to serve and served, no irregularity was identified in their stations, no Agent of the Petitioner complained against any of the impugned Presiding Officers.
53. PW1 and PW8 in their evidence, were unable to show or demonstrate the alleged bias and/or conflict of interest or deliberate act on part of the officers in favour of the 3rd Respondent and whether indeed, the 3rd Respondent was favoured by the said deployment and if so by whom, the favour was made. No evidence against any specific impugned presiding officer/Deputy Presiding Officer was adduced showing tilting of scales as alleged. The recruitment of the impugned officers was communicated to the political parties, candidates and was gazetted, yet the Petitioner and his Political Party, never objected to the recruitment of the impugned Presiding Officers and their Deputies despite opportunity being afforded to them. RW1 stated the IEBC is an equal opportunity employer, and it could have been discriminatory for IEBC to have barred any category of persons from applying for the positions advertised, urging further there was no collusion between IEBC and the 3rd Respondent in the recruitment of the officers. RW1, and RW5, the 3rd Respondent confirmed there was no collusion. They denied knowledge of the officers serving as Presiding Officers and Deputy Presiding Officers. The Petitioner was aware of the notice seeking his objection, if any, he did not file any, nor did his party file any. The time for filing an objection lapsed without the Petitioner filing any, the Petitioner and his party, did not raise any complaint of non-receipt of the list of prospective officers at the IEBC County Office. The burden of proof lies with the Petitioner to prove allegation he raised against the impugned officers, which allegation are criminal in nature and the Petitioner did not aver that the criminal investigations or criminal charges were preferred against any of the officers or that there is any particular complaint against any of them. I therefore find the Petitioner and PW1 were only suspicious against the impugned officers, after they lost the election, which suspicion cannot be a basis for laying such serious allegations of irregularities against the impugned officers. The allegations have been exposed to be untenable in law and fact, as there is no cogent evidence in support.
54. In election disputes as was stated in the Canadian Supreme Court in the case of *Opitz v Wrzesne-Wsky* (2012) SCC55, an applicant who seeks to annul an election bears the legal burden of proof throughout, which position was reiterated in 2013 Raila Odinga Case thus:-
- (195) There is, apparently, a common thread in Comparative jurisprudence on burden of proof in election cases That on electoral cause is established much in the same way as a civil cause; the legal burden rests on the petitioner
- (196) this emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. *Ominia praesumuntur rite et solemniter esse acta*: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."
55. I therefore find and hold the Petitioner herein, was obliged and bound to adduce cogent, firm and credible evidence, to prove this ground and more specifically, when the conduct alleged against the



impugned officers being criminal in nature, required a standard of proof beyond reasonable doubt, which was not attempted to be proved by the Petitioner.

56. In the case of *M'nkira Petkay Shen Miriti v Ragwa Samwel Mbae & 2 Others* (Civil Appeal No. 47 of (2013) eKLR the Court stated as follows:-

“From practice and history of this country, the standard of proof required in election petitions is higher than a balance of probabilities but not beyond reasonable doubt save where offences of a criminal nature are in question.”

57. This is the same position that was applied by the Supreme Court in *Shiv Kirpal Singh v. Shri V.V. Giri* [1971] SCR (2) 197. The Supreme Court of Kenya in the *Raila Odinga Case* (2017) has reaffirmed this position by stating at paragraph 152 as follows;

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

(ii) Bribery of Voters

58. The Petitioner, in his Petition has alleged that, the 3rd Respondent by himself and through Agents and proxies engaged in bribing of voters as an inducement to cast votes in his favour. He averred the Chief Officer, RW2, Douglas Oseko Bosire,, Contrary to Section 9 of the Elections Offences Act, PW7, Dennis Ayiera, allegedly witnessed RW2 at the gate of Machururiati polling station bribing voters. The Petitioner, PW8 on his part stated he did not witness the 3rd Respondent or Douglas Bosire bribing voters.

59. PW7's evidence, on alleged bribery, is shrouded with inconsistencies and contradictions. He testified that he witnessed the incident from a distance of 50 metres from RW2, and his vision was partially obstructed by structures and other objects. He described himself as a busy-body without any IEBC accreditation to observe the elections. He did not disclose what time he witnessed the alleged bribery, nor did he give the names or description of the alleged voters being bribed, the currency or denomination used in the bribery nor did he state the candidate's name at whose instance the alleged voter bribing was being done. nor stated what RW2's was telling the voters as he allegedly bribed them. RW2, Douglas Oseko Bosire, denied being at Machururiati Polling Station, nor did he reach its gate but stated he was accosted by a gang of people amongst them PW7 Dennis Ayiera, who roughed him up, took away his phone and wallet and had to be rescued from the mob by policemen, nearby the Polling station, he was taken to Keroka Police Station and later given his phone and wallet and todate, no charge had been preferred against him related to the alleged voter bribery. His stated his current position in the Nyamira County is alleged to be a promotion for assisting the 3rd Respondent. He stated his position is neither a promotion nor a reward as implied by the Petitioner as the position was advertised, he applied for it and he got it on merits.

60. In *Henry Okello Nadimo v IEBC and 2 Others* (Busia) H.E.P. No. 2 of 2013 Hon. Justice E. Tuiyott – J. stated:

“[780.] Proof of bribery. Due proof of a single act of bribery by or with the knowledge and consent of the candidate or by his agents. However, insignificant that act may be, is sufficient to invalidate the election. The Judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances may be, such as they can allow in certain conditions in cases of treating or undue influence by agents. For this reason, clear and



unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive.”

61. In *Khatib Abdalla Mwashetani v Gedion Mwangangi Wambua and 3 Others* (2014) eKLR the Court of Appeal stated:

“(47) The next vexing question is if truly improper influence is different and distinct from undue influence, what is the standard of proof required to establish it “ From the judgment of the election court, proof of improper influence will lead to nullification of the results of an election. Purely from the consequences that flow from the finding that a person is guilty of improper influence, we must conclude that improper influence is serious conduct that has attributes akin to those of an election offence. It is now settled beyond peradventure that the standard of proof where an election offence or such kind of conduct is alleged is proof beyond balance of probabilities. The Supreme Court in *Raila Odinga and Others vs. Independent Electoral and Boundaries. Commission & 3 Others* (Supreme Court Election Petition No. 5 of 2013). Expressed itself as follows on the standard of proof in election petitions:

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

Even the election court observed that the standard of proof in election petitions “depends on the seriousness of the allegations made.” That allegations in a petition are grave and that the party laying the allegations is expected to present cogent, consistent and credible evidence.”

62. In *Mercy K. Mutegi v IEBC and 2 Others* Civil Appeal No. 48 of 2013 (2013) eKLR, the Court of Appeal held:

“The Petitioner has to adduce cogent, compelling, credible and substantial evidence to prove on a standard of proof beyond reasonable doubt that indeed the 1st respondent directly or indirectly bribed voters. Under Rule 12 of the Regulations, witness affidavits should contain the substance of the evidence in support of the fact and grounds in the petitioner’s petition and supporting affidavit I find no tangible evidence was given to associate the alleged persons who were bribing voters with the 1st respondent at all. The standard of proof required to establish the allegations is so high that a mere statement to the effect that they were 1st Respondent’s agents will not do. The Petitioner’s affidavit does not indicate that they were committing the alleged offences with the knowledge of the 1st respondent or at all. Neither was such evidence adduced in account. I find these allegations of bribery of voters whether widespread or isolated were not proved to the required standard and must, therefore, fail.”

63. Having considered the evidence of PW7, PW8 and RW2 and RW5, I find that the Petitioner and PW7 having made allegations on the purported bribery of the voters, the Petitioner and PW7 did not adduce cogent, compelling, credible and substantial evidence linking the 3rd Respondent and RW2 with any bribery to the required standard of proof beyond reasonable doubt, that indeed, the 3rd Respondent directly or indirectly or otherwise through RW2 or any other person, bribed voters to lure or entice them to vote in his favour. The Petitioner has failed to discharge the burden of proof and failed to meet the standard of proof as required. This ground fails.



(iii) IEBC Portal Results.

64. The Petitioner, averred that the declared results of the Gubernatorial candidates was different from the one transmitted electronically, urging the County Returning Officer (CRO), RW1, had confirmed that the results were still streaming on the online portal, even after he had announced the winner CRO termed them as provisional and further stated he did not know where they were coming from. The Petitioner urged, had the results been verified, the online portal results should have been tallying with the declared results, as they are deemed to be originating from one primary source Form 37A, instead they vary, urging that ground alone should and will annul an election.
65. In the Petition, the Petitioner under paragraph 7, gave the results announced and used to declare the 3rd Respondent the winner, whereas under paragraph 9, he gave results as of 31st August 2017, from the 1st Respondent's Website Portal, showing higher number of votes for each candidate, but the 3rd Respondent having the highest votes. He contended the two varying results should have been tallying as the primary source was Form 37A.
66. In the instant Petition, the Petitioner, other than making an averment of the allegedly transmitted results on the online portal, he did not produce any material evidence nor where the alleged IEBC Portal results were documented. He did not produce the portal results as an exhibit. He did not attempt to demonstrate whether the alleged results were a legal requirement, in an election and whether the same were of any legal effect after declaration of the results.
67. RW1, David Kiprono Towett, testified that electronic transmission of results for Governor's position was not a legal requirement and that the IEBC public portal results are provisional results and do not have any bearing at all. I find that the IEBC public portal results are not considered nor used to declared the results of the election and as such are of no legal bearing at all.
68. Considering Section 39 (1) (1C) of the Elections Act dealing with determination and declaration of results, it is clear that it is not mandatory to electronically transmit, any other elections results save, the presidential results.

Section 39 (1) (1C) provides:-

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

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

- a. electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national polling station to the constituency tallying centre and to the national tallying centre;
- b. tally and verify the results received at the national tallying centre; and
- c. publish the polling result forms on an online public portal maintained by the Commission.”

69. In *Jackton Nyanungo Raguma v IEBC and 2 Others* HEP No. 3 of 2017. (2018) eKLR. Hon. Justice David Manjanja, J. stated:-

“A reading of Section 39(1C) of the Act shows that electronic transmission and publication of polling result in a public portal is only a statutory requirement for the Presidential



election. Further, except for voter registration and voter identification; voting, counting tallying and transmission of results for the election of the other elective posts including that of the Governor are mainly manual. In all other cases, including the county Governor election, the transmission of results contemplated by Section 39(1A) and (1B) of the Act that the votes at the Polling Station are counted and recorded in Form 37A. Each Form 37A is forwarded to the Constituency Tallying Centre. The Constituency Returning Officer tallies all the results from all the polling stations and records them in Form 37B. Forms 37B from all the Constituency Tallying Centres are forwarded to the County Tallying Centre where the County Returning Officer tallies all the results from the Forms 37B and announces the election results based on Form 37C.

70. In view of the above-mentioned Section, I find that apart from the presidential election, the results published in a public portal are only provisional, they do not matter nor count at all in the determination of Gubernatorial results as it is not mandatory for Gubernatorial election results to be electronically transmitted. This ground fails.

(iv) Numerical grounds of the Petition:

a. Table 1: polling stations with highest voter turnout than the number of the registered voters.

71. The Petitioner's contention is that the Nyamira Gubernatorial results paints a picture that appears to reflect that the results were not accurately and competently counted and tabulated to yield the totals mathematically. It is further submitted for the Petitioner that after recount and scrutiny exercise was conducted by the Deputy Registrar following the Court's order for scrutiny and recount of various tables as indicated in the Court's order various issues emerged.

72. In *Gatirau Peter Munya v Dickson Mwenda, Kithinji & 2 Others (2014) eKLR*, the Supreme Court acknowledged the practical reality that imperfections in the electoral process are expected, that, therefore, an election court should not lightly overturn the election, especially where neither a candidate nor the voters have engaged in any wrong doing. The court laid down the following principles:-

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

[217.] If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.

[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.”

73. The Petitioner on Table 1 where he had pleaded, that there were 46 polling stations with higher voter turnout than the registered voters in his evidence-in-chief, he confirmed all Forms 37As in respect of the aforesaid polling stations, indicated correct number of the registered voters and that the votes comprising of total number of voters obtained by individual candidates did not exceed the registered voters. PW8 was in his evidence unable to point out a solidly Polling station with more votes cast than the registered number of voters. He was unable to demonstrate the aggregate of votes cast for the



individual candidates in each of the number polling stations compared with the number of registered voters revealed any higher voter turnout exceeding the registered number of voters. He failed to show that the Second Respondent added the figure of 13,488 votes to the overall tally of valid votes cast for candidates and the candidate who benefitted from them.

74. RW1 and RW4 gave evidence touching on Table 1. Their evidence which was not controverted at all showed that there was no polling station that revealed a higher voter turnout as compared to the number of the registered voters. Petitioner never adduced evidence supporting the allegation that unregistered voters were allowed to vote or that inexistent votes in 46 polling stations were tallied so as to result in an illegal and inexplicable results. He failed to demonstrate or show that any single candidate benefitted from the alleged 13,488 votes allegedly added to the overall tally as valid votes cast for the candidates in the election to the office of Governor Nyamira County.
75. The Court in its ruling of 4th December, 2017 ordered scrutiny of the Polling Stations, listed in Table 1, to verify the allegations of a higher voter turnout than the number of the registered voters. The scrutiny Report by the Deputy Registrar sets out columns for registered voters and valid votes cast side by side. I have perused the Report very carefully, in respect of the alleged 46 polling stations as set out in the report and compared the same with Table 1, the Report speaks very fluently on the position and no doubt the Deputy Registrar did not find any single polling stations strained by excess number of the unregistered voters nor crying for removal of the excess votes cast. I find that no single polling station exhibited the burden of having had a higher voter turnout than the registered voters. Form 37A is the Primary Source of the election Results, none of Form 37As supports the Petitioner's allegations. The Forms 37A reveal the aggregate of votes garnered and posted for the individual candidates was less than the registered voters.
76. RW1's in his evidence explained the alleged 13,488 votes was due to what he referred to as formulaic error which occurred in respect of the aforesaid polling stations in the process of transferring votes cast from Forms 37A to 37B. That Form 37C was compiled from Form 37B, he however, testified that error did not affect the result posted for the individual candidates nor affect the election results as the outcome of the election is determined by the votes garnered by the individual candidate and that the column for total votes cast is not used at all in determination of the outcome of the election. RW4, Robert Githinji, a statistical expert, who studied and reviewed the Petitioner's Table 1, found no polling station with a higher voter turnout than as the registered voters. In view of the above, I find the Petitioner failed to prove this ground. It therefore fails.
- b. Table 2, polling stations with less declared votes than the actual turnout.
77. The Petitioner under this table contends, the 2nd Respondent in breach of the law and regulations that govern counting and tallying of votes, understated and declared lower tallies of valid votes cast in 13 out of 553 polling stations in Nyamira County, therefore failing to account for 803 valid votes cast.
78. The Petitioner in his evidence, did not avail evidence that could demonstrate how IEBC understated valid votes by 803 votes. RW1 confirmed in his evidence that 4 out of 13 polling stations under Table 2, though results in Form 37A were accurately recorded, there had been transpositional errors to Forms 37B and 37C. He gave the Stations as Itibo 1, Gekendo, Mogusii 1 and Nyansakia 1, out of which 134 votes were involved and which affected neither the Petitioner nor the 3rd Respondent. He urged that the errors did not affect the outcome of the election.
79. RW4, Robert Githinji a Statistical expert upon studying and reviewing the Petitioner's table 2, he found the results declared in Forms 37A for the disputed polling stations were votes actually cast and that there was no understated and declared lower tallies of valid votes as alleged. The Petitioner on the other hand was unable to identify any understatement of votes of any candidate, adding his



allegation was not based on Forms 37A but on errors of transposition in Forms 37C, which he termed as manipulation of results. RW1 gave sufficient explanation for errors. The allegation on Tombe 1, following recount revealed the Petitioner's votes were 34, whereas in Eronge 2, Keberigo 1, Geturi, Mocha 2, Moitunya SDA 1, Kiende DEB 2, Nyamwanga 1, and Mosobeti DOK, polling station the allegations were not proved. The Report by Deputy Registrar did not unearth the alleged understated and declared lower tallies of valid votes cast in 13 polling stations under Table 2. The Petitioner failed to identify the 803 undeclared votes nor did he show which of the eight (8) candidates benefited from or was disadvantaged by them. I find the Petitioner failed to demonstrate there were 803 votes that were not accounted for nor did he demonstrate the votes in the 13 polling stations were unascertainable. I find no merits on this allegation and the same fails.

c. Table 3: 15 polling stations with more declared votes than the actual turnout.

80. The Petitioner contends, that the 1st and the 2nd Respondents in breach of the law and regulations that govern Counting and tallying of votes, overstated and declared higher tallies of valid votes cast in 15 Polling Stations in Nyamira Court, as set out under, the table 3, thereby adding to the tally 366 votes that they failed to account for in respect of any of the candidates.
81. The Petitioner in his evidence averred under this Table, the only errors which occurred were transposing his results from Form 37A to 37B and 37C. That only 7 out of the 15 Polling Station namely, Riomego 1, Esanige 2, Nyairanga 1, Tinderet 3, Gesebei, Rigona and Isoge were the only stations affected urging the errors were not systematic and was not targeted at him. During cross-examination the Petitioner did not identify which candidate benefitted from the alleged 366 votes. He did not demonstrate nor prove how this adversely affected him or any other candidate. Upon being referred to Forms 37A, he was not able to identify any extra declared votes.
82. RW1, Robert Githinji, who had the opportunity to study and review the Petitioner's Table 3, testified he could not find the 366, alleged votes and stated they did not exist. Guided by Form 37A which he had gone through, he confirmed that there was no polling station with more declared voters than the actual voter turnout. The Petitioner alleged this ground but failed to prove the same. I find it to be unmeritorious and it must fail.

d. Table 4: Discrepancies between form 37A, 37B and 37C for Walter Enock Nyambati Osebe.

83. The Petitioner contends, the 2nd Respondent at the end of the purported counting and tallying exercise produced and relied on primary and secondary documents, to wit, Forms 37A, Form 37B and Form 37C, that showed open discrepancies, unexplained variances and alterations, unsigned and unauthenticated forms, over 20 polling stations, in respect of votes cast in favour of the Petitioner herein, rendering the exercise and its conclusion unverifiable and at any rate, uncertain and inconclusive.
84. The Petitioner, his witnesses PW2, PW3, PW4, PW5 and PW6 testified the results they witnessed and signed for in Form 37A, were indeed different from the ones shown to them in Form 37C, resulting to the Petitioner being awarded less votes. The Petitioner also raised issues with blank Form 37As in respect of the votes garnered by the Petitioner and questioned whether the Returning Officer verified the same before announcing the results with the Primary source Form 37A as required. He urged as such the Returning Officer had predetermined results as they failed to rectify the error while announces the results. He also blamed the County Returning Officer for failure to verify the results and rectify the Position. The Petitioner wonders how such an irregularity could pass through, the three officers unless and indeed verification did not take place, hence allowing their pre-determined results in the result declaration Form 37C.



85. The Petitioner through cross-examination was taken through the IEBC's explanation for the transpositional errors and the Petitioner's results which were blank for Tombe 1 in Form 37A, were established to be 34 through a recount, whereas upon recount the Petitioner's votes in all other polling stations were found to be as had been recorded. The errors of transposition from Form 37A to Form 37B and 37C were noted in the following Polling Stations, Kebabe 2, Enkinda 1, Gatengereirie 2, Ekembo 1, Esanige 2, Getare 1, Geturi, Nyairang'a 1, Nyairang'a 2, Gesebei 3, and Nyachonororia DOK 2. The Petitioner did not identify any Form 37A from the polling stations he had pleaded with the errors. RW5, provided the Court with Form 37A for each of the polling stations in dispute under the table which forms the basis for verification of the election result. Petitioner's witnesses PW2, PW3, PW4 and PW6 in their evidence relied on Form 37As and none of them identified errors on Form 37As.
86. In *Ahmed Abdullahi Mohamed and another v Hon. Mohamed Abdi Mohamed and 2 Others Nairobi H E P No. 14 of 2017 (2018) eKLR* Hon Justice A. Mbaya held that the forms which recorded the election results at each polling station (Form 37A) are at the core election material for verification of the election results.
87. In *Francis Mwangangi Kilonzo v IEBC and 2 Others Machakos H E P No. 2 of 2017 (2018) eKLR* Hon. Justice A. O. Muchelule-J. held as follows:-
- “ there was no evidence on the Forms 35A that the 2nd Respondent, on making the comments, changed any results. It is trite law that the results in Form 35A by the presiding Officer are final (*IEBC v 5 Maina Kiai and 5 Others (2017) eKLR*)”
88. RW1, explained that any differences between Forms 37A, 37B and 37C were errors of transposition which he testified were in significant to change the outcome of the election, urging the Counting of ballots and the recording of the results at polling station were done accurately, which position is buttressed by the Petitioner's witnesses PW2, PW3, PW4 and PW6. The Petitioner through cross-examination admitted that sometimes in data entry mistakes do occur unintentionally.
89. As I consider this issue I am alive to the fact that Form 37A is the Primary Document (See *IEBC v Maina Kiai and 5 Others (2017) eKLR*). That the evidence from RW4 as regards the discrepancies he averred the discrepancies in the stations cut across and affected all candidates but the results were not affected in the long run. That there was evidence in the Deputy Registrar's Report after recount and scrutiny to that effect and the result do not change. There is no evidence on record that the errors were systematic, deliberance or inadvertent transpositional errors. The errors or discrepancies and the irregularities were not substantial so as to affect the results of the election. RW4, upon comparing of Forms 37A and mainly his analysis with Table 4 of the Petitioner and referring to his Table 4 on page 90 of his document and paragraph 8 of his affidavit, he concluded that indeed discrepancies cut across, but upon carrying out tallies for the Petitioner and the 3rd Respondent in respect of all Forms 37A he found the votes garnered by the 3rd Respondent were understated by 802 votes, whereas upon checking of the Petitioner's result as of interest or concern, he found that the Petitioner had a net loss of 27 votes.
90. I have considered the Deputy Registrar's Report on Table 4 vis a vis that of RW4, on page 90 and found the Deputy Registrar's Report also found discrepancies, however the same Table 4, did not take into account the differences, between the Petitioner's and 3rd Respondent's results as a result of the transpositional errors as there was no cross-checking of the 3rd Respondent's votes under the table, the same cannot be given a lot of weight compared to the variance unearthed by RW4, who compared the two candidates results and whose finding was not contested. I find the evidence by RW4, to be more direct and reliable, and find that after he tallied all Forms 37As, he found that it is the 3rd Respondent



who lost the most votes due to transpositional errors as he lost 802 compared to the Petitioner's 27 votes.

91. On transpositional errors from Form 37A to Form 37B and 37C, RW1 attributed the some to human errors due to fatigue during the period of the election. He stated the errors were insignificant to change the outcome of the election. As regards the Petitioner's faulting of the Returning Officer and County Returning Officer for their failure to verify the results before announcing the same and correct the errors, I find the same to be without basis as the duty of ordering a counting and rectifying the results, do not lie with the Constituency Returning Officer or the County Returning Officer upon receipt of results from Presiding Officer but the Court at the time of determination of an election Petition if the Court finds that to be appropriate upon being moved. Once results are counted, and tallied and recorded in Form 37A, the Primary source of results, that is final and cannot be altered or rectified thereafter, by the Constituency Returning Officer or County Returning Officer.
92. In *Nicholas Kiptoo Arap Korir Salat v IEBC and 7 Others Civil Appeal No. 228 of 2013*, while referring to the famous case of *Opitz v Wrnnesky 2012 SCC 55, 2012, 2 SCR* where the Supreme Court of Canada stated:-

“If elections can be easily annulled on the basis of administrative errors public confidence in the finality and legitimacy of elections results will be eroded. Only irregularity that affect the results of the elections and thereby undermine the integrity of the electoral process are grounds for overturning an elections.”

93. In the instant case, I have very carefully considered the evidence by the Petitioner, PW2, PW3, PW4 and PW6, as well as by RW1 and RW4 and I am satisfied the irregularities on the transposition of the results were not massive, systemic and deliberate but were occasioned by human error due to fatigue. That no evidence was adduced to show that they were predetermined to achieve specific results as alluded to by the Petitioner. The errors were in my view procedural errors and administrative errors and the same did not affect the results of the election as the difference of votes between the Petitioner and the 3rd Respondent was over 6000 votes. That if the Petitioner lost any votes they were less than 6000. He did not show how much votes he lost but according to the table in Deputy Registrar's Report, under Table 4 of the Petition, assuming the 3rd Respondent lost nothing and that the Petitioner got all the said unadded votes to him numbering to 1,418, the 3rd Respondent will continue to have a clear win. Taking the other scenario as per evidence of RW4, where Petitioner lost only 27 votes and the 3rd Respondent lost 802, the 3rd Respondent will still be the outright winner. This means that transpositional errors, being administrative errors and the irregularities not affecting the election results or undermining the integrity of the electoral process that cannot result in a nullification of the election in favour of the Petitioner. I therefore find the ground on Table No. 4, on discrepancies between forms 37A, 37B and 37C for Petitioner had not been proved to the required standard and the same fails.

e. Table 5:13 Polling Stations with duplication

94. The Petitioner contends the 2nd Respondent produced results in 13 out of the 553 polling stations in Nyamira County that are duplications of each other in Centre located at the same place, which have suspicious trends that cannot be explained by the random exercise of voters making a choice in a population with uniform demographic characteristics and pattern consistent with manufactured results. The Petitioner's Counsel submitted that the Returning Officer admitted to the first two pairs of Table 5 having duplication and submitted that was a clear indication that the results were never verified before they were announced.



95. The Petitioner did not raise a complaint in respect of the results in Form 37A in respect of the polling stations alleged to have duplication of the results, before the Presiding Officers. RW1 testified that there was an error in the first pair of the alleged duplication in transposition of Form 37A results to Forms 37B and 37C. The results of Kebabe 1 in transposing them to 37B and 37C, they were erroneously posted from 37A for Nyamwanchania 1. The Petitioner and his Agents did not identify any Presiding Officer who could have manipulated the results as alleged. RW1 in his evidence testified and demonstrated the Polling Stations alleged as having duplication results actually bore their correct results as recorded in Form 37A, 37B and 37C but only two polling stations were found to have had transpositional errors. The results for Kebabe 2 were correctly captured in Form 37A, but the results of Nyamwanchania 1, were repeated as a transpositional error in Forms 37B and 37C for Kebabe 1, whereas those of Getare 2 were repeated in Forms 37B and 37C for Getare 1.
96. RW4, in his evidence testified he examined Forms 37A. as per the paired disputed polling stations but found no duplication of the results as alleged by the Petitioner.
97. In the recount, as ordered by this Court and as per Deputy Registrar's Report, the Deputy Registrar did not find any duplication. The results of the alleged duplication vindicated RW4's finding that similar voting patterns for stations within the same area are expected. I find that this ground fails as none of the figures obtained and found supports the allegation of the duplication. The transpositional error on the pair admitted by the 2nd Respondent has sufficiently been explained and I find the explanation was not only reasonable but acceptable. I accept the explanation and therefore find no merits in this ground. It fails.
- f. Table 6: 19 polling stations with huge inexplicable variances
98. The Petitioner other than alleging that there were 19 polling stations with huge inexplicable variances he did not lead any evidence to show that there were huge an inexplicable variance. He did not produce any empirical evidence nor did the Petitioner's Counsel submit on this table.
99. The Petitioner under this table, 1 can say he offered an opinion that the figures were manufactured or cooked. That though there might have been transposing errors, the Petitioner was duly bound to prove his allegations by calling evidence. RW1, testified on the allegation and pointed out the omission in Form 37B and 37C in recording the votes of Nyaututu 1, was a transpositional error, as the results were properly recorded in Form 37A which PW8 and RW1 confirmed and further reconfirmed by a recount. The transposition of results from 37A to 37B and 37C affected only a few clusters in this table 6. These included Ekinda 1, Nyaututu 1, Riomore 2, Kerongo 1 and Machururiati. It was not proved that the errors were systematic and the same could change the result of the election. RW4 upon examination of all the impugned Polling stations and upon comparing them with the Petitioner's assertion or allegations, he could not find any support. I find that this ground is not proved. It must fail.
- g Petitioner's complaint through a letter dated 10.8.2017 seeking a recount.
100. Regulation 80 of the Elections (General) Regulations 2012 provides:
- “(80) (1) A candidate or agent, if present when the counting is completed, may require the presiding officers to have the votes recounted;
- Provided that the recount of voters shall not take place more than twice.
- (2) No steps shall be taken on the completion of a count or recount of votes until reasonable opportunity to exercise the right given by this regulation.”



Whereas Regulation 83 (1) (a) of the Elections (General) Regulation 2012, Provides:-

“ 83 (1) Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present.

- a. tally the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly.
- b.;
- c.;
- d. Collate and publicly announce to the persons present the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly;”

101. The Petitioner alleges through a letter of complaint dated 10.8.2017 to the County Returning Officer he complained against the Returning Officer, North Mugirango for refusing his request for recount, however, in the body of the letter he states his protest was against her refusal to give him Form 37B and a request for verification from Forms 37A. RW1 testified that upon receipt of the complaint he resolved the matter by calling the Returning Officer, who told him the Agents were allowed in and the allegation was not true.
102. The Petitioner’s letter is headed “Complaint against Returning Officer North Mugirango 1 request for recount.” The request for recount is usually supposed to be sought before a Presiding Officer as per Regulation 80, the Election (General) Regulations 2012 and not before a Returning Officer whose role is to tally the results from Forms 37A. Secondly the body of the letter by the Petitioner is that he was refused his request for Form 37B for verification with Form 37A. These are two different things and there is a confusion as to what indeed the Petitioner was seeking from the Returning Officer. The Petitioner did not call any of his Agents to support his allegation as to what he had sought from the Returning Officer. He did not call any of his agent to state they were denied Form 37B or 37A for verification purposes or otherwise. I find that this ground was not proved. The same fails.
 - h. Unstamped Form 37As and unsigned Forms 37As.
103. The Petitioner’s Counsel submitted that there were 23 Forms 37As which were not stamped, which were discovered during the scrutiny and recount exercise. The Petitioner’s Petition did not specifically raise the issue of unsigned nor of unstamped Forms 37A but urged that invalid results were allowed into result of the election thereby affecting the result, quality and integrity of the election. He submitted that the unsigned Form 37A by Presiding and Deputy Presiding Officers were 6 in number.
104. The issue of unsigned Form 37A was not specifically pleaded in the Petition nor particularized and no evidence was tendered before Court on the matter regarding non-signing of six (6) Forms 37As by Presiding Officers and Deputy Presiding Officers nor were there any Forms exhibited before Court duly unsigned. The forms tendered before Court were signed, and if there were, any unsigned Forms 37As or unstamped forms the same were not pointed out, So as for the Respondents to respond. The Petitioner and his witnesses did not tender any evidence of any agent being denied to sign any Form 37A. On alleged unsigned forms by Presiding Officers and Deputy Presiding Officers, the Deputy Registrar in her report noted that the same were all duly signed by the Agents as the law demands save three 3



Forms 37As, (whose details are accordingly captured) were found not to have been signed by Presiding Officers/Deputy Presiding Officers.

105. Regulation 79 (1) of the Elections (General) Regulation 2012, requires Presiding Officers, Candidates or Candidate's Agents to sign Forms 37A. It provides thus:-

“79 (1). The presiding officer, the candidates or agents shall sign the declaration in respect of the elections:-

106. Under Regulation 79 (1) of the Elections (General) Regulations 2012, I find that it is mandatory for Presiding Officers/Deputy Presiding Officers to sign Form 37As, however, I find it is not mandatory for statutory forms to bear IEBC stamp.

107. In Chikati V Returning Officer Tongaren Constituency it was held:

“that under Regulation 5 the presiding officer includes both the presiding and the deputy presiding officers. Under Regulation 79 the presiding officer is required to sign the statutory form. It was further held that the statutory form is valid once it has been signed by the presiding officer or the deputy presiding officer or both of them.”

108. I therefore find that lack of the official stamp and signature of statutory form by Agents does not invalidate the forms nor the results therein. Further as all Form 37As bear the signatures of Agents and none was challenged, the alleged failure of the alleged 6 Forms 37As to bear signatures of Presiding Officers and Deputy Presiding Officers prima facie makes them invalid and unacceptable. The failure of Presiding Officers/Deputy Presiding Officers to sign the statutory forms invalidates them. I have however to point out that the allegation was not pleaded and secondly upon perusal of statutory (Forms 37As) put on record by the petitioner and the IEBC as well as the Deputy Registrar's Report listing the alleged Forms 37As allegedly unsigned by the Presiding Officers the Court found only one unsigned statutory form (Form 37A) by Presiding Officer/Deputy Presiding Officer thus for Matongo Primary School Polling Station 2/2 in which the Presiding Officer/Deputy Presiding Officer signatures were lacking but the same is signed by 7 agents. The total number of valid votes cast is 490 out of which the Petitioner got 72 and the 3rd Respondent got 230. The agents were not called to deny the authenticity of the Form 37A concerned nor deny signing the same. That though the same do not bear signature of the Presiding Officer/Deputy Presiding Officer, having been signed by the agents they authenticated the said Form 37A as having been used in the polling station mentioned thereto. The failure of signing by the Presiding Officer/Deputy Presiding Officer means that the statutory form (Forms 37A) in question is invalid. That as a result of invalidation of Form 37A in respect of the above mentioned polling station means the Petitioner would lose 72 votes and the 3rd Respondent 230 votes. That the votes garnered by respective Parties though the same have not been challenged by the agents must be taken as unauthenticated results by virtue of non-signature of Form 37A by Presiding Officer and Deputy Presiding Officer even if there are signatures of the agents. That once statutory form (Form 37A) is not signed by Presiding Officer/Deputy Presiding Officer, the results must be invalidated. The results in the Form 37A, for Matongo Primary School Polling Station 2/2 are invalid by virtue of failure of Presiding/Deputy Presiding Officer to sign the same. The results in respect of the said Polling station are accordingly invalidated. However as the Petitioner lost 72 votes and the 3rd Respondent 230, this does not bridge the gap between the two hence the 3rd Respondent remains an outright winner.

109. In Chikati v Returning Officers Tongaren Constituency it was held that Regulation 79 does not require that statutory forms must be signed by Agents Regulation 79 (6) and (7) are clearly spelled and emphatic that absence of candidates or agents or failure to sign the forms by candidates or Agents



does not invalidate the results declared in the form. Further failure by candidates Agents to sign form 37A and failure to record the reasons for the failure does not in itself result in invalidation of the results announced. The Agents signature without signature of Presiding Officers and Deputy Presiding Officers whether challenged or not by the agents do not authenticate the results. The signature of the Presiding Officer/Deputing Presiding Officer is mandatory and failure of Presiding Officer/ Deputy Presiding Officer to sign the statutory form (Form 37A) would result to invalidation of results announced in the respective statutory form.

110. In a Ghanian Supreme Court Presidential Election Petition of Nana Addo Dankwa & 2 Others v John Dramani Mahama & 2 Others [2013] unreported. It was stated that:

“..... I would in the absence of explicit statutory language that specifies the election is voided because of the failure of the signature of the presiding officer; conclude that votes on the unsigned sheets are valid. Failure by presiding officer to sign declaration form did not affect the results of the elections at the respective polling stations.”

111. I find as there is explicit statutory language specifying that if statutory forms are not signed by Presiding Officer/Deputy Presiding Officer, results can be invalidated. The results on the Form 37A for Matongo Primary School Polling Station 2/2 is accordingly invalidated by virtue of failure of Presiding Officer/ Deputy Presiding Officer to sign the same fails. The announced results in respect of the said polling station are accordingly invalidated.

112. The Petitioner alleges that the 1st and 2nd Respondents allowed more than 2 agents for Orange Democratic Party (ODM) thus prejudicing the Petitioner and showing preference to the 3rd Respondent. Regulation 62 (2) (3) of the Elections (General) Regulations, 2012, provides:

- (1) The presiding Officer shall regulate the number of voters to be admitted to the polling station at the same time, and may exclude all other persons except:-
 - a.
 - b.;
 - c.;
 - d.;
 - e.;
 - f.,
 - g.,
2. Notwithstanding subregulation (1), the presiding officer shall admit to the polling station not more than one agent for each candidate or political party.
3. The absence of agents shall not invalidate the proceedings at a polling station.

In view of the above Regulation as a candidate and his political party is permitted to each appoint one (1) agent, where a candidate appoints one (1) agent and his Party proceeds to appoint one (1) agent, this would mean a party for example Jubilee or ODM would have appointed two agents from the same party and that would be within the law and lawful. The Petitioner has raised this ground after scrutiny and recount and as the same had not been pleaded the Respondents could not have responded on the same. During cross-examination RW1 testified that the power to admit agents to polling stations is bestowed upon the



Presiding Officers on the basis of criteria given. From the provision of Regulation 62 (2) (3) of the Election (General) Regulations, 2012, the Presiding Officer acted within his powers by admitting two agents from one party, thus Orange Democratic Party (ODM). The law allowed him to allow any candidate and his party to appoint one (1) agent each. I therefore find no error nor preference shown to the 3rd Respondent.

i. Scrutiny and grounds not pleaded

113. The purpose of scrutiny is essentially to assist Court verify validity of the Petitioner's allegations and appreciated the impact of the alleged irregularities on the results, it is one of the tools available to the Court to investigate whether an election was conducted in accordance with the Constitutional principles and enable Court to establish whether indeed the result as declared was a reflection of the will of the electorate. The scrutiny and recount are remedy for rectifying the elections result and ascertaining the true result thereof preventing the risk of vitiating the entire election or allowing an erroneous result to stand, however, scrutiny should not be allowed to be used by the Petitioner as a basis of expanding his petition beyond its pleadings or as a fishing expedition to obtain unpleaded and new evidence which he lacked in the first place nor should it be used to repair, rebuild, expand, fill unfilled gaps and bolster up one's case. It is not intended to provide the Petitioner with new grounds to fuel and rekindle the Petition by unearthing new evidence. The scrutiny has its own purposes and should be restricted to the purpose for which scrutiny and recount has been ordered by the Court. The Petitioner should not stray beyond a clearly and unmistakably directed path nor look beyond the pleaded grounds nor the order made by the Court.
114. The order given by the Court for scrutiny and recount in this Petition was inextricably linked to and strictly backed on the pleadings, based on specific Tables which had specific allegations. That following the scrutiny and recount by Deputy Registrar and filing of her report, the Petitioner has in his submissions raised myriads of issues related for example to unmarked Register, sealing of ballot papers by Presiding Officers, unsigned Form 37As by Agents, discrepancies between Polling Station Diary (PSD), Form 37A concerning voter turnout and finally with the actual recount, assisted voters, unstamped Form 37A, unsigned Form 37A by Presiding Officers and Deputy Presiding Officers, missing documents and issue with seals.
115. The Respondents contends, that the Petitioner through his submissions, made an attempt to frame and ventilate grounds over and beyond, and distinct from the ones he specifically pleaded and contrary to Judicial precedent on tendered evidence on issues not pleaded. The unpleaded and new evidence as per Respondents is as follows:-
- (a) Annexing as whole catalogue of evidentiary material to his submissions.
 - (b) Alleged polling stations with more votes cast than the actual turnout.
 - (c) Alleged unmarked voters' registers.
 - (d) The Presiding Officer for Chaina 1 polling station allowed in 2 ODM agents, an open bias towards the 3rd Respondent.
 - (e) The Presiding Officer for Ikonge DEB polling station allowed in 2 ODM agents an open bias towards the 3rd Respondent.
 - (f) At Kenyerere DOK polling station the Presiding Officer did not give reasons why only 2 agents signed.
 - (g) 23 Forms 37A were not stamped under Table"



- The Respondents urges the Petitioner is required by law to prove the case pleaded and that he is not allowed to make case outside his pleadings.
116. In *Raila Odinga (2017) case*, the Supreme Court quoted with approval the Supreme Court of India in *Arikala Narasa Reddy v Verikala Ram Reddy Reddygari and Another Civil Appeals Nos. 5710 – 5711 of 2012 [2014] 2 SCR* where it states that:
- “In absence of pleadings, evidence if any, produced by the parties cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts I support f the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and that they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a Court to frame an issue not arising on the pleadings..”
117. The Petitioner is not allowed to deviate from his pleadings and introduce new supposedly spotted faults arising out of scrutiny and recount. The Petitioner is required by law to prove the case he has pleaded and cannot use the scrutiny and recount to change the nature of his pleadings nor use it as a basis to repair and rebuild his case. Any Petition filed is limited by the grounds pleaded and those grounds are not malleable. It is trite law that parties are bound by their pleadings. In case of *IEBC and another v Stephen Mutinda Mule and Others [2014] eKLR* it was held that:-
- “Parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded. The significance of the principle is that parties are not allowed to depart form their pleadings. This would enable parties to prepare their evidence on the issue as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”
118. I therefore find the Petitioner’s attempt to introduce and seek to rely on unpleaded issues arising out of the scrutiny and recount cannot be entertained at all by the Court nor can Counsel’s efforts to attempt to give evidence through submissions suffice as the legal principles set out above would not permit such an approach for reasons that there was absence of pleadings in the Petition, secondly, the Respondents would be prejudiced as they will not have to deal with the issue through a response and evidence and lastly it is evidence that is being tendered from the bar through submissions which is not allowed and cannot be tested on its veracity.
119. In the instant Petition undoubtedly there is no dispute that transpositional errors occurred during transposition of results from Form 37A to 37B and 37C in *Nyamira Gubernatorial*. The question is did these irregularities and/or errors, affect the result/outcome of the election or did they lead to a result different from the actual and true results being declared? In *Ahmed Abdulahi Mohamed v Mohammed Abdi Mohamed Nairobi E.P. 14 of 2017 [2018] eKLR* Hon. Justice A. Mbaya – J. held that mere irregularities in the conduct of an election that do not affect the results cannot by themselves invalidate an election, relying on the cases of *Evans Kidero v Ferdinard Waititu* and *Mutegi v Nyaga*, he held that this legal position applies to procedural and administrative irregularities and other errors occasioned by human imperfection.
120. In *Raila v IEBC 2013* the Supreme Court held that the correct approach is for the election court not only to determine whether the election was characterized by irregularities, but also whether those



irregularities were of such as nature, or such a 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.

121. The Supreme Court in the *Raila Amollo Odinga and Another v IEBC and 2 Others* [2017] eKLR at paragraph 209 the court observed that it is a global truism that no conduct of any election that can be perfect. It went on to state in paragraph 373 as follows;

“At the outset, 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 in this county, if not the world, 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, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have negatively impacted the integrity of the election, that no reasonable tribunal would uphold it.”

122. In the totality the Petitioner’s evidence is that he has failed to prove any of the alleged irregularities and illegalities resulting in massive systemic, systematic and deliberate non-compliance with the law. He has further not proved the irregularities noted, affected the results and/or outcome of the election.

j Non-Joinder of Deputy Governor:

123. The 3rd Respondent in his submission raised a point of law on non-joinder of the Deputy Governor in the Petition, urging the Petitioner failed to enjoin the Deputy Governor in the Petition within the stipulated legal period of filing the Petitions and/or at all, thus rendering the Petition a nullity and urged the same should be dismissed. He relied on the case of *Mwamlole Tchappu Mbwana v IEBC & 4 Others*, Mombasa H.C.E. P. No. 5 of 2017, where Hon. Lady Justice M. Thande – J. held:

“For the reasons stated above, I uphold the Preliminary Objection. My finding is that failure to comply with the mandatory requirements of Rules 8(1) (c) and (d) and 12(2) (c) and (d) of the Elections Petitions Rules and further, failure to enjoin the deputy governor herein renders the Petition incurably defective. In the circumstances the Petition is hereby struck out.”

124. The Counsel for the 1st and 2nd Respondent supports the 3rd Respondent’s Counsel’s point of law while the Petitioner’s Counsel opposed the same.

125. My reading of Article 180 (1) (5) and (6) of the Constitution is that it provides for election of County Governor. The Article provides thus:-

- (1) The county governor shall be directly elected by the voters registered in the county, on the same day as a general election of Members of Parliament, being the second Tuesday in August, in every fifth year.
- (2)
- (3)
- (4)
- (5) Each candidate for election as county governor shall nominate a person who is qualified for nomination for election as county governor as a candidate for deputy governor.



- (6) The Independent Electoral and Boundaries Commission shall not conduct a separate election for the deputy governor but shall declare the candidate nominated by the person who is elected county governor to have been elected as the deputy governor.”
126. In *Wavinya Ndeti & Another v IEBC and Others*, Machakos H.E.P. No. 1 of 2017 [2017] eKLR, Hon. Justice Muchelule, J. considering the issue of non-joinder of Deputy Governor, stated:-
- “In other words the deputy governor is not directly elected by voters in the county. He will only assume office of the governor if it falls vacant under any of the circumstances under Article 182. If the validity of the election of the governor is successfully challenged by petition, then both him and he governor will leave office.”
127. Considering Article 180 (1) of the Constitution, it is clear the person who is required to be directly elected by the voters registered in the County is the Governor. The Article is silent on the election of the Deputy Governor but goes on to state the candidate for election as County Governor shall nominate a person qualified for nomination for election of a County Governor as a candidate for Deputy Governor, that even Article 181 and 182 talks of Removal of a County Governor and vacancy in the office of County Governor respectively without mentioning of the Deputy Governor, but points if vacancy occurs in the office of County Governor, the Deputy Governor shall assume office as County Governor for remainder of the term of the County Governor.
128. In my view therefore as the Constitution do not talk of an election of the Deputy Governor but that of the Governor, who is directly elected by the voters contrary to the nomination of the Deputy Governor who is not elected by the registered voters of the County, I find that he is not a necessary party in an election Petition filed against the Governor who only nominated him as his Deputy. The Governor is a mandatory party because he is directly elected and it is his election that is challenged and not the nomination of the Deputy Governor. That if the Petition succeeds it is mainly the Governor who ceases to hold the office together with his nominee, however if the office of Governor becomes vacant by virtue of Article 182, no election is provided for but the deputy Governor is required to assume office of the Governor for the remainder of the term of the County Governor.
129. In view of the above, the preliminary point of law is dismissed. I find and hold that failure to enjoin the Deputy Governor in this Petition is not fatal to the Petitioner’s Petition. The Petition is therefore not rendered a nullity by non-joinder of the Deputy Governor. This preliminary point of law fails.
- (B) whether the elections were free, fair and expressed the will of the people:
130. The will of the electorate is the exercise of political rights by citizen as guaranteed under Article 38 of the Constitution. Article 81 (e) of the Constitution on the other hand is the yardstick to free and fair elections. The election has to be by secret ballot, free from violence, intimidation, improper influence or corruption, conducted by an independent body, administered in an impartial, transparent, neutral, efficient, accurate and accountable manner. The Petitioner in the Petition made allegations that the sovereign will and power of the people of Nyamira County had been violated, however that has not been proved, nor has it been proved that the freedom of the people of Nyamira County to exercise their political rights was violated or compromised. The Respondents adduced evidence before this Court, that around 553 polling stations in Nyamira County were opened from 6.00 a.m. to 5.00 p.m. where large numbers of registered voters turned out to cast and did cast votes for various political positions and not a single registered voter complained of being denied the right to vote. I therefore find that the Petitioner did not prove that Gubernatorial elections in Nyamira County were not transparent, not free from intimidation or improper influence. The only conclusion the Court can draw from the evidence before it is that the elections process conducted by the 1st and 2nd respondents



for Governor Nyamira County, was that, it was by secret ballot, free from violence, intimidation, improper influence or corruption, transparent, impartial, neutral, efficient, accurate and accountable. That as the elections was conducted in accordance with Article 81 (e) of the Constitution, such an election, I find is presumed to represent the will of the people. The election Court in such a situation is not to substitute its will for that of the voters as to the Court's duty in such a situation is to strive to preserve an election as being in accordance with the law even where there have been significant breaches of official duties and election rules, provided the results of the election are not changed or affected by those breaches so that the Court can give effect to the will of the electorate.

(C) Whether the 3rd Respondent was validly elected as the Governor of Nyamira County?

131. The Petitioner who was a candidate for Nyamira County Gubernatorial seat and amongst other eight (8) candidates testified that he had polling agents in all 553 polling stations. The 2nd Respondent, in his evidence, testified that after he had counted, collated and tallied the results, the 3rd Respondent was confirmed to have garnered the highest votes and he proceeded to declare him the winner after what he described as a free, fair and credible election. He further testified that none of the unsuccessful candidates raised complainant during or after the election.
132. I find that the Petitioner's evidence does not demonstrate that the 3rd Respondent was not validly elected as the Governor of Nyamira County. The evidence of the Petitioner and his witnesses, does not support nor does it disclose such irregularities, anomalies or illegalities on part of the 2nd Respondent as would render his performance questionable or doubtful in conducting the Nyamira County Gubernatorial election.
133. In *Nicholas Salat v. IEBC and others*, Kericho High Court E.P. No. 1 of 2013, Hon. Justice Muchelule – J. considered what legal sufficiency means in an election thus:-
- “I understand legal sufficiency in the election means that the election was conducted in a free, fair and credible manner and that it accurately represented the will of the electorate. It would not necessarily means that the election was devoid of errors, mistakes or irregularities. It means that if, there were such errors, mistakes or irregularities, they were not of such magnitude that they substantially or materially affected the result.”
134. In the instant Petition, the 2nd Respondent did admit to some irregularities, anomalies and mistakes, especially mistakes or errors related to recording and/or transposition of the results from Form 37A to 37B and 37C, which he attributed to fatigue and human error. I considered the evidence from both sides and considered the scrutiny and recount as well, and from that, I did not find that such irregularities, anomalies or mistakes could substantially or materially change the result or the outcome of which the Petitioner complains of and especially due to the fact that the difference between the results garnered by the 3rd Respondent and that of the Petitioner, has a wide gap which cannot be bridged taking into account the votes between the two. The Petitioner did not further adduce evidence to the required standard of proof to warrant a finding by this Court that indeed the election for Governor of Nyamira County was not conducted in accordance with the Constitution, the Elections Act, and the Rules and Regulations made thereunder. In absence of such evidence, I find no otherwise than that the 3rd Respondent was validly elected as Governor of Nyamira County.
135. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* [2014] eKLR, the Supreme Court of Kenya had this to say as regards minor errors and irregularities, in the election process:-



- (213) That the practical realities of election administration are such that imperfections in the electoral process are inevitable, and on this account, elections should not be lightly overturned, especially where neither a candidate nor the voters have engaged in any wrong doing.
- (217) if it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities.
- (218) Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise procedural or administrative irregularities and other errors occasioned by human imperfection are not enough, by and of themselves to vitiate an election.”
136. In the instant Petition, the Petitioner, did not prove the minor illegalities or irregularities were systemic, Systematic and deliberate and that they affected the results or the outcome of the election. The 2nd Respondent admitted that the irregularities were indeed minor administrative and procedural irregularities such as blank entries in few Forms 37As, missing of IEBC stamp or signature of a Presiding Officer or an Agent or transpositional errors in Form 37B and 37C. Those errors, by or of themselves without any cogent evidence from the Petitioner pointing to specific station duly pleaded and showing contravention of the Constitution, Electoral Laws, Regulations and Rules, are in my view not sufficient to invalidate the 3rd Respondent’s election as a Governor, Nyamira County.

Conclusion:

137. From the evidence, submissions and the analysis, I have come to, I find the Petitioner in this case has failed to prove the existence of massive, systemic, systematic and deliberate non-compliance with the Constitution and the Electoral Laws by the 1st and the 2nd Respondents.
- He has also failed to prove that the 3rd Respondent by himself and through Agents and proxies engaged in bribery of voters as an inducement to lure and entice them to cast votes in his favour. The Petitioner has further failed to prove that the 3rd Respondent was not validly elected, Governor of Nyamira County, during the elections held on the 8th August 2017.
138. I find that the evidence on record is cogent, that the 3rd Respondent won the elections by about 6000 votes over his closest rival, thus the Petitioner. Prayers (a), (b) and (c) were disposed of during the ruling on scrutiny and recount. Accordingly prayers which were not dealt with, thus prayers (d), (e) and (f) of the Petitioner’s Petition dated 4th September 2017, be and are hereby dismissed.

(D) Who bears the Costs of the Petition?

139. Section 84 of the Elections Act provides that “An election Court shall award the costs of and incidental to a petition and such costs shall follow the cause.” That such costs are to follow the event and the Court in determining the costs has a broad jurisdiction to determine such as costs.

Section 30 (1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 provides:

“30.(1) The election court may, at the conclusion of a petition, make an order specifying:-

- a. the total amount of costs payable;
- b. the maximum amount of costs payable;
- c. the person who shall pay the costs under paragraph (a) or (b) and



- d. the person to whom the costs payable under paragraphs (a) and (b) shall be paid”
140. In the submissions by the Advocates, the Counsel for the Petitioner did not make any suggestion on the capping of the instructions fees, but left the matter to the discretion of the Court, whereas the Counsel for the 1st and the 2nd Respondents suggested instructions fees to be capped at KShs.6,000,000/= whereas the Counsel for the 3rd Respondent suggested KShs.8,000,000/=.
141. This Petition was not complex and issues were fairly straight forward as per the pleadings and submissions tendered. The Court in capping costs is enjoined to consider the nature of the case, the work done in preparations, the number of witnesses and the conduct of the case. Costs in an election Petition should not be so inordinately high as to make it impossible or difficult for parties to access electoral justice. I have taken into account the awards of instruction fees in recent and similar judgments. In Francis Mwangangi Kilonzo v IEBC and 2 Others, Machakos H.E.P. No. 2 of 2017 [2018] eKLR, costs was capped at KShs 2.5 million, in Ahmed Abdullahi Mohammed & Another v Hon. Mohamed Abdi Mohamed & 2 Others Nairobi H.E.P. No. 14 of 2017 [2018] eKLR, costs was capped at KShs. 2 million, in Jackton Nyanungo Raguma v IEBC and 2 Others, Kisumu H. E.P. No. 3 of 2017 [2018] eKLR costs was capped at KShs. 2.5 million, in Hamzah Musuri Kevongo v IEBC and 3 Others Kakamega H.E.P. No. 11 of 2017 [2018] eKLR, costs was capped at KShs.3 million and Wavinya Ndeti & Another v IEBC and 2 Others, Machakos H.E.P. 1 of 2017 (2018) eKLR costs was capped at KShs.5 million. Considering all the above and doing the best I can, guided by the above mentioned factors, I will cap the instruction fees for the 1st and the 2nd Respondents at KShs.3.5 million and for the 3rd Respondent at KShs.3.5 million. The costs shall be taxed and total costs certified by the Deputy Registrar of this Court.

Final Declarations:

142. The final orders are therefore as follows:-
- (a) The Petition be and is hereby dismissed.
 - (b) The Respondents are awarded costs as follows:
 - (i) Instruction fees for the 1st and the 2nd Respondents are capped at KShs. 3.5 million.
 - (ii) Instruction fees for the 3rd Respondent are capped at KShs.3.5 million.
 - (iii) The costs shall be taxed and the total costs certified by the Deputy Registrar.
 - (iv) The certified costs shall be paid out of the security deposit on a pro rata basis.
 - (c) Under Section 75 (3) (a) of the Elections Act this Court determines and confirms John Obiero Nyagarama, the 3rd Respondent in this Petition was validly elected and gazetted as Governor of Nyamira County.
 - (d) A certificate of this determination in accordance with Section 86(1) of the Elections Act, 2011 shall issue to the Independent Boundaries and Electoral Commission and the Speaker of the Senate.

DATED AND DELIVERED AT NYAMIRA THIS 28TH DAY OF FEBRUARY, 2018.

HON. J. A. MAKAU

JUDGE

COURT ASSISTANTS:



1. Karlbean Mobisa

2. Mourine Akinyi

Mr. Nyaencha

Jointly with

Mr. Eboso for the Petitioner

Mr. Nyamweya:

Jointly with Mr. Mamboleo for the 1st and 2nd Respondents

Mr. Nyanchiro jointly with

Mr. Ligunya

Mr. Orina,

Mr. Rioba for the 2nd Respondent.

Mr. Ndege for the 3rd Respondent.

HON. J. A. MAKAU

JUDGE

