



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NO. 4 OF 2017

**IN THE MATTER OF THE PARLIAMENTARY ELECTION FOR GARISSA TOWNSHIP
CONSTITUENCY**

BETWEEN

FARAH MAALIM PETITIONER

AND

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION..... 1ST RESPONDENT

RETURNING OFFICER

GARISSA TOWNSHIP CONSTITUENCY 2ND RESPONDENT

HON. ADEN DUALE..... 3RD RESPONDENT

COUNTY COMMANDANT GARISSA COUNTY..... 4TH RESPONDENT

JUDGMENT

1. The parliamentary contest for Garissa Township constituency in the general election of 8th August, 2017 attracted four (4) candidates. Following the said election, the 2nd respondent declared the 3rd respondent as the Member of Parliament for Garissa Township constituency having garnered 22,587 votes. The other contestants performed as follows;

Maalim Farrah.....14,897

Abdiyare Mohamed454

Mohamed Abdulahi Aden135

Total38,073

2. Being dissatisfied with the declaration of the 3rd respondent as the Member of Parliament for Garissa Township constituency, the petitioner filed the present petition on 5th September, 2017. He questions the election of the 3rd respondent on the main ground of non-compliance with the provisions of the

Constitution and the applicable election laws. According to him, the non-compliance of the law by the respondents substantially affected the final outcome of the election.

3. His petition is founded on three broad grounds set out in part B of the petition (paragraphs 62 – 116). These grounds are:

- (i) Contravention of Regulations Governing Parliamentary Elections.
- (ii) Intimidation, threat of violence and bribery.
- (iii) Electoral offences.

4. The 1st and 2nd respondents filed a joint response to the petition dated 18th September, 2017. They have denied **all** the allegations made against them by the petitioner. It is their contention that they conducted a free and fair election and they complied with all relevant statutory provisions. They dispute the results of the Garissa Township constituency parliamentary elections stated at paragraph 7 of the petition. They provide the declared results to be as follows;

(a) Aden Nare Duale	21,300
(b) Farah Maalim	14,745
(c) Mohamed Abdi Yare	406
(d) <u>Adan Mohamed Abdulahi</u>	<u>131</u>
<u>TOTAL</u>	<u>36,582</u>

5. They have set out the processes followed in the recruitment of presiding officers and deputy presiding officers voting, counting, tallying and announcement of results at the polling stations. All in all, they contend that they were not in breach of and did not contravene the provisions of the Constitution, the Elections Act or of any other Statute as alleged by the petitioner.

6. The 3rd respondent filed his response to the petition dated 18th September, 2017 and denied all the allegations made against him. He asserts that the 1st and 2nd respondents conducted a credible election and he was validly declared as the winner. The 4th respondent did not file any response and did not participate in these proceedings at all.

7. Before the close of the pleadings, the petitioner filed an application dated 6th September 2017 seeking several orders; on access to the Kiems kits for a number of polling stations. The application was heard and the court vide the Ruling dated 6th October, 2017 granted a read-only access to the polling stations enumerated in prayer (b) (vii) of the affidavit in support of the said application.

The exercise was conducted under the supervision of the deputy registrar ***M/s Roselyn Aganyo***. She filed a report dated 8th December, 2017 in respect of the said exercise.

8. To support his allegations, the petitioner called a total of thirteen (13) witnesses including himself for cross examination and re-examination. Eight (8) witnesses who included the 2nd and 3rd respondents testified on behalf of the respondents.

Issues for Determination

9. I have carefully considered the pleadings and affidavits on record plus the evidence of the witnesses in cross-examination and re-examination. I have equally considered the written and oral submissions by learned counsel plus the authorities cited. Each party filed his proposed issues for determination. Upon

considering all the material before me including the issues proposed by learned counsel, I find the following to be the issues falling for determination;

(i) Whether the Garissa Township Constituency Parliamentary election held on 8th August, 2017 was conducted in accordance with the Constitution and the electoral laws.

(ii) Whether there were any electoral malpractices, and/or irregularities during the Garissa Township constituency parliamentary election held on 8th August, 2017 which affected the outcome of the parliamentary election.

(iii) Whether the 3rd respondent was validly elected as the Member of Parliament for Garissa Township constituency in the election held on 8th August, 2017.

(iv) Who should bear the costs of the petition.

10. The general principles of law applicable in election disputes are well set out in the Constitution of Kenya and Electoral laws. The key word is the sovereignty of the people of Kenya as enshrined in Article 1 of the Constitution. This sovereignty is underpinned in Article 38 which sets out the political rights of the Kenyan people. It provides;

38. (1) Every citizen is free to make political choices, which includes the right—

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause.

(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.

(3) Every adult citizen has the right, without unreasonable restrictions—

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and Freedom of association. Assembly, demonstration, picketing and petition. Political rights.

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

11. The political rights of the Kenyan citizens are realized through elections which should be conducted through a working electoral system. Such a system must comply with the principle of free and fair elections. Article 81 (e) of the Constitution sets out what a free and fair election encompasses. It provides;

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

(e) free and fair elections, which are—

(i) by secret ballot;

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

(iii) conducted by an independent body;

(iv) transparent; and

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

12. The body mandated to ensure that Articles 38 and 81 (e) are effected is the Independent Electoral and Boundaries Commission (IEBC), the 1st respondent herein.

Article 86 provides as follows;

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.

13. The whole purpose of an election is to give citizens an opportunity to express their will in a democratic manner in conformity with the Constitution and the electoral laws. An Election Court therefore, undertakes an audit of what may have occurred in an election based on the complaints raised in an Election Petition. Such audit will consider whether the election was conducted in accordance with the Constitution and the electoral laws namely, Articles 38, 81, 83 and 86 of the Constitution as set out above.

14. The standard of proof in an Election Petition is higher than the balance of probabilities in civil cases but below the beyond reasonable doubt in criminal cases. The Supreme Court of Kenya in the case of *Raila Odinga & Others –vs- Independent Electoral and Boundaries Commission and 3 Others, Supreme Court of Kenya [2013] eKLR* held thus;

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

15. The said Supreme Court reaffirmed this position in the case of *Raila Odinga & Another –vs- Independent Electoral and Boundaries Commission & Others [2017] eKLR* where it held;

“In many other jurisdictions including ours, where no allegations of criminal or quasi-criminal nature are made in an election petition an “intermediate standard of proof”, one beyond the ordinary civil litigation standard of proof on a “balance of probabilities”, but below the criminal standard of beyond cases, this court stated in 2013 Raila Odinga case that the threshold of proof should in principle be above the balance of probability, though not as high as beyond reasonable doubt.”

16. The burden of proof in electoral disputes is above the balance of probabilities and rests on the petitioner. The petitioner’s case is made out of matters pleaded in the petition and supported by affidavits and oral evidence. The burden only shifts to the respondents once the petitioner has discharged that

burden. In the case of *Raila Amolo Odinga –vs- Independent Electoral and Boundaries Commission & 3 Others 2013 (supra)* the Supreme Court of Kenya held;

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure to compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long standing common law approach in respect 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 authorities departures from the prescriptions of the law.*”

17. The above general principles of law set out the parameters within which an election petition is to be determined. As I embark on this journey, I must bear in mind that an Election Court will not easily upset an election by substituting its decision, conviction or will to that of the electorate. The Election Court must be satisfied that the alleged irregularities affected the will of the electorate. I will now consider the issues framed in relation to the material before me. The first and second issues are related and I shall consider them together.

Issue (i) and (ii)

Was the Garissa Township Constituency parliamentary election held in accordance with the Constitution and electoral law or were there any malpractices and/or irregularities which affected the outcome of the election?

18. The petitioner made several allegations against the respondents in respect to the manner in which this election was conducted. I will now consider the said allegations as set out in the grounds.

(i) Contravention of Regulations Governing Parliamentary Elections.

19. The petitioner contends under paragraph 63, 64 and 86 of the petition that the 1st respondent compromised the integrity of the election by employing partisan polling agents and presiding officers who were openly supporting the 3rd respondent. That the 1st respondent’s agents campaigned for the 3rd respondent in the run up to the election and were seen celebrating his victory after the declaration of the winner at the constituency tallying center.

20. In cross-examination, he confirmed that he had not provided any list of the presiding officers and deputy presiding officers he complained were partisan. He simply said he was unhappy with the list of presiding officers and deputy presiding officers because it was only published a day to the election day contrary to what they had agreed. He was unable to provide a copy of the said agreement. He also claimed to have protested over the list to the 1st respondent but had nothing to show for that. On the allegation that officials of the 1st respondent were campaigning for the 3rd respondent, he said he knew the officials and he had even given their names to the 1st respondent. He however, agreed that the names of the said officials were not in the petition and neither did he have them or name the officials.

21. He further stated that the celebration by these officials following the 3rd respondent’s victory was at the constituency tallying center. Apparently, from his evidence, photos of them celebrating were taken but none was produced in court. He said other photos were taken of the officials campaigning in Waberi, NEP Girls’ and Garissa Ndogo. These were also not produced in court. It is worth noting that the petitioner was not at the tallying center when the alleged celebration was taking place. He was only told which is hearsay evidence and must be supported by any other independent evidence.

22. PW1 Yusuf Mohammed Ahmed who claimed to have witnessed the celebration said he did not know the names of those who were celebrating. One thing he knew was that one celebrant was an official from NEP Girls’ and the other was Ismail. Even from this explanation, one cannot tell who the celebrants were. NEP Girls’ had seven (7) polling stations. It is not stated from which of them the official was. Secondly,

this witness talks of an Ismail, how many people in Mandera go by that name? No one knows whether the person from NEP Girls' and Ismail were presiding officers or deputy presiding officers.

23. The 1st and 2nd respondents denied the petitioners allegations in paragraph 63 and 64 which specifically related to employment of partisan polling agents and presiding officers. They said the recruitment process was transparent, made public, and the successful applicants short-listed and interviewed. The list of names of the interviewed applicants was published and posted outside its constituency office and the petitioner never raised any complaint on it.

24. RW5 Boru Duallacha Duba, the returning officer explained how the process of recruitment of presiding officers and deputy presiding officers had been conducted. He said, considerations were made to cover all the interest groups. The petitioner had given PW5 his list and they sat down to discuss it. The 3rd respondent never gave such a list to him. Recruitment was from 22 clans in Garissa and he tried his best to balance them, he said.

25. Upon considering these allegations, the responses by the respondents and PW1 in cross-examination and the evidence of RW5, I have found that the petitioner had no basis to fault the process of recruitment of the election officials. He failed to lay before this court evidence to support this allegation. There was no evidence that the political parties were not given the list as per Regulation 5 of the Election Regulations. Those who were allegedly campaigning for the 3rd respondent and even celebrating have not been identified to be election officials. This particular allegation has not been proved at all and it fails.

26. The petitioner at paragraph 65 of the petition claimed that the 1st respondent and its agents deliberately delayed voting in polling stations in his strongholds. He said the polling stations opened late and closed early, contravening Article 38 of the Constitution and Regulation 66 (2) of the Election Regulations. The affected polling stations were NEP Girls' and Kazuku polling stations.

27. PW1 Yusuf Mohammed Ahmed the Wiper Democratic Movement party chief agent averred that he had been allowed to go round several polling stations. That he witnessed delays by presiding officers as voting was on going. At NEP Girls, there were delays in voting and this continued up to 5 pm and the voters still on the queue were not allowed to vote.

28. In cross-examination, he said as a chief agent, he was an observer and he could not take any action even when he noticed anomalies. On 8th August, 2017 morning at 7.00 am when he went to Kazuku polling station, voting was going on well but the machines were on training mode. Later in cross examination, he said the kits were actually working. At 5 pm, there were several people in the queue but they were not allowed to vote by the presiding officer. He did not know the exact number of the people not allowed to vote. At NEP Girls' he found the delay on going and he talked to the presiding officers of the 2nd, 3rd and 4th streams.

29. PW10 Abubakar Mohammed Khalif was an MCA aspirant on an ODM ticket and he was unsuccessful. He claimed that voting at NEP Girls started at 10.30 am due to delays by the 1st respondent's officials. As a result, many voters left without voting. In cross examination by Mr. Ahmednassir, he confirmed that he was not at NEP Girls' at 10.30 am when voting allegedly started. In cross-examination by Mr. Issa, he said the delays were only in stream 1 and 2 of NEP Girls.

30. RW1 Ahmed Siyat Ahmed the presiding officer for Kazuku Primary School, stream 02 stated that voting commenced at 6.00 am on 8th August, 2017 and ended at 5.00 pm. He explained the process of identification through the Kiems kit and confirmed having assisted 20 voters who were all satisfied and the Form 35A was signed after the exercise. He explained that the delay complained of was because of the assisted voters.

31. RW2 Anab Dagane Farah the presiding officer for NEP Girls' stream 2 stated that the Kiems Kits in her station had no hitches and no voter was identified using documents. She explained how the petitioner had come to her station with young men who were shouting and threatening. This was between 5.30 pm –

6.00 pm. The petitioner had wanted to know why RW2 had refused his supporters to vote. She explained that the station had opened at 6.21 am and they closed at 5.22 pm with 40 people on the queue who were all allowed to vote. She refused to give into the petitioner's demands to have his supporters come in to vote when the station had already closed hence the complaint.

32. The witness said she notified the returning officer of this incident and he too spoke to the petitioner using her phone. The petitioner's supporters were not allowed in even after talking to the returning officer. She also recorded this incident in the polling station diary which was seen by the court. She denied seeing the 3rd respondent or his supporters being brought by anyone to her station.

33. The petitioner had also complained that Regulation 66 (2) of the Election Regulations was applied selectively by the 1st respondent's agents. He claimed that his supporters were locked out from voting in stations where voting had started late. On the other hand, he said the 3rd respondent's voters had been allowed to vote up to 9.30 pm despite there being no voters on the queue. The case in point he said was Al-Fatah Primary School polling station. He added that if there were any voters in the queue, they were too few to warrant a 5 hours extension. To support this allegation was **PW7 Abdikadir Ismail Adow** who was an agent at Al-Fatah Primary School polling station. He was at the station at 5.00 am and voting started at 6.15 am. He stated that at 5 pm, there was a massive entry of people accompanied by the 3rd respondent. That the 3rd respondent directed that all these people should vote. Others also came past 8 pm and voting went on up to 9.30 pm.

34. In cross-examination, he said there were many people on the queue by 5 pm, though he could not state the number. He also confirmed that the last person cast his vote at 8pm and that the Kiems kit worked well after it was repaired by an ICT person who visited the station. He signed the Form 35A results which confirmed his satisfaction with the announced results.

35. The petitioner has accused the 1st respondent's agents of opening polling stations late and closing early. Regulation 66 of the Election Regulations provides;

66. (1) Subject to regulation 64, voting shall commence at 6 o'clock in the morning and end at 5 o'clock in the afternoon on the polling day.

(2) Notwithstanding sub-regulation (1), a person who is on a queue for the purposes of voting before 5 o'clock in the afternoon shall be allowed to vote despite the fact that the voting time may extend to after 5 o'clock.

36. The law therefore allows for the extension of voting time in certain circumstances as provided for in Regulation 66 (2). In paragraph 65 of the petition, the petitioner has only mentioned two polling stations i.e. NEP Girls and Al-Fatah polling stations as those affected. PW1 added another one which is Kazuku Primary School polling station.

37. NEP Girls had 7 polling stations. The petitioner did not indicate which polling station had this problem. In cross-examination, PW1 said it was the 1st and 2nd streams which had problems. He however, only spoke to the presiding officers of the 2nd, 3rd and 4th streams and left out polling station – 01. The presiding officer for NEP Girls stream 2 testified as RW2 and refuted all those claims. She explained how the petitioner had forcefully wanted her to admit voters into the polling station after its closure. She also confirmed that all voters on the queue after the closure had been allowed to vote. No voter testified to refute this.

38. I found this witness (**RW2**) to be an exemplary witness. She knew her role as a presiding officer very well. When there was trouble, she stood her ground and called the returning officer who supported her decision. Above all that, she recorded this incident in the polling station diary and that record remains. RW5 and RW6 who are the returning officer and his deputy, confirmed all this in their testimony.

39. PW10 was not at NEP Girls' at 10.30 am when he alleged that voting started. He does not even know

which streams started voting at 10.30 am. The presiding officer (RW2) refuted all this saying voting started at 6.25 am and the station closed at 5.25 pm and those on the queue were allowed to vote.

40. PW7 Abdikadir Ismail Adow spoke on the issue of voting at Al-Fatah. Voting there started at 6.15 am. The station was to officially close at 5.15pm and not 5 pm given the time the station opened. From his own evidence, he was at the polling station up to the next day. He stated the following in cross-examination;

- There were many people on the queue by 5 pm.
- Voting went on up to 9.30pm
- The last voter cast his vote at 8 pm.
- He signed the Form 35A and even identified his signature

41. He said, several people came in at 5 pm and I find nothing wrong with that irrespective of where they came from as long as they were registered voters. The reason being that the polling station was to close at 5.15 pm having been opened at 6.15 am. He has confirmed that there were many people on the queue by 5 pm. He also confirmed that the last voter cast his vote at 8 pm which was an extension of 3 hours and not 5 hours as claimed by the petitioner. None of the voters on the queue was denied the right to vote. It is not therefore true that voting ended at 9.30 pm as he claimed since the last vote was cast at 8 pm.

42. My finding is that the allegation of delays in opening and early closing polling stations based on the three mentioned polling stations has not been proved. In fact, no evidence of stations that allegedly closed early was given. No voter who was allegedly denied a chance to vote testified.

43. In paragraph 68 of the petition, it was alleged that contrary to Regulation 79 (5) and 85 (1) of the Election Regulations, the 1st and 2nd respondents personally or through their agents chased the petitioner's agents away from the tallying area and polling stations in areas perceived to be the 3rd respondents strongholds. The petitioner averred that his agents did not monitor the election and could not therefore verify the results.

44. Pw1 testified that he was at Bashaal Market center polling station when he witnessed harassment of Wiper Party/NASA agents who were thrown out by the presiding officer. They were only readmitted at the time of counting votes through his intervention. In cross-examination, he said, the two agents thrown out were Holdhan and Zainab. The two did not swear any affidavits and PW1 did not know why they were thrown out.

45. PW2 Abdi Malik Mohamed was an agent at Garissa Primary School stream 2. He was called by his fellow agent in stream 01 called Dekow on phone and informed of a polling official who was not showing agents what she had ticked for assisted voters. With the permission of the presiding officer in stream 2, (RW4) the two agents swapped positions. While in stream 01 he tried to ask the polling clerk to show them what was going on and he was quickly restrained by an IEBC security person. He later informed the petitioner who called the OCS. The OCS came and sorted out the issue and voting went on well. When it came to vote counting, the polling official started again. PW5 raised concern and he was quickly removed by the security, together with Jubilee agents present. He was assaulted and thrown into a Land Cruiser.

46. In cross examination, he said voting went on well after the intervention by the OCS. He admitted that he had moved from stream 02 to stream 01 but he did not inform the security person in stream 01. He also stated that there were other agents present from Jubilee, ANC, Wiper Party and Mohamed Suleh in the said polling station.

47. From the evidence adduced by PW1, it is clear that he was not chased away nor assaulted by anyone. He allegedly intervened for Holdhan and Zainab to be accepted back into Bashaal Market centre polling center as agents. These two agents did not raise any complaints. They did not file any affidavits to

confirm what PW1 told the court. It's therefore not proved satisfactorily that the two persons mentioned were in fact agents and had been ejected as claimed.

48. PW2 was an agent posted to Garissa Primary School stream 02. The person he allegedly swapped with in stream 01 is called Dekow. The said Dekow did not swear any affidavit in respect of his complaint. PW2 did not see any need of making a formal complaint over this matter and neither did he go for treatment following the assault.

49. The presiding officer for Garissa Primary School stream 02 testified as **RW4 Abdikadir Mohamed Osman**. He explained that he knew PW2 and that the voting process went on well without any hitches. He was the one assisting voters and was occasionally assisted by his deputy. He denied that anyone was ejected from the polling station. RW4 did not mention anything about allowing PW2 to transfer to stream 01 as Dekow came to stream 02 as alleged by PW2.

50. PW2 admitted that Dekow signed the Form 35A for stream 01. If indeed PW2 had officially moved to stream 01 why would Dekow who had allegedly officially moved to stream 02 sign the stream 01 Form 35A? When he allegedly went to stream 01 he never informed the security officers but went straight to engage the IEBC officer who was assisting voters. If that was indeed the case, then the security man had every right to eject him from the station because he did not know him. He did not report this incident to any security agency, though he claims to have been assaulted. It's further noted that Dekow did not testify to confirm this story.

51. **PW5 Abdinasir Hussein Kilas** stated that he was a PNU chief agent and a strong supporter of the petitioner. It was his evidence that there were long delays in Jaribu Primary School, Tetu and Kifri polling stations. In Tetu the presiding officers would say the Kiems kits were not working but immediately the petitioner appeared, they started working.

52. He said security officers in Jaribu polling station harassed the petitioner's agents. That when counting started in Jaribu, the petitioner's agents (Muhidin and Abdi) were chased out by security officers.

In cross-examination, he confirmed that in Jaribu Primary School, the petitioner had 2 agents and 16 people complained of not voting and left due to delays.

53. **PW5** appears to have abdicated his duty as the PNU chief agent. At Jaribu Primary School polling station, there were two agents (Muhidin and Abdi) who were alleged to have been ejected from the station. Their evidence was material to support PW5's evidence but none swore an affidavit to that effect.

54. It is also noted that Jaribu Primary School polling station had two streams. This witness did not state from which stream these things were taking place. I therefore find no proof of any agents having been ejected as claimed.

55. Under paragraph 69 and 98 the petitioner complained of widespread bribery exerted upon voters to induce them to vote for the 3rd respondent. In fact he avers that the 3rd respondent was engaged in this activity. He further claimed that there was widespread buying of votes by the 3rd respondent's agents, contrary to Article 81 (e) (ii) of the Constitution.

56. **PW3 Zakaria Farah** is the son of the petitioner and was an agent at Garissa Government Guest House polling station. He said he saw a navy blue Land Cruiser VX (KBQ 334) vehicle belonging to an associate of the 3rd respondent parked inside the polling station. The associate is called Mama Biladho. He saw people get into this car one at a time and this went on for a while. Some of those who went to the said car were the 1st respondent's agents. He suspected that the lady was bribing voters with money and he raised issue over this. As a result, he was ejected from the polling station by the security personnel.

57. In cross-examination, he said he was at the polling station at 6.30 am but with no portfolio as he waited for the 2pm shift. Out of curiosity, he tried to get to see the people inside the vehicle but he was

unable to since the car's windows were tinted. He saw three (3) people (one who was an IEBC official) go to this vehicle and get back within one hour. He suspected that money was changing hands and he informed the IEBC security person and policeman present. He was however ejected between 2 – 3 pm despite having remained outside the polling station throughout.

58. PW6 Fatuma Ali Abdi claimed that she was in a queue waiting to vote at Bulla Mzuri polling station when she was approached by a man who introduced himself as an agent of the 3rd respondent. He was in a group of people who included the 3rd respondent's brother. The man offered her money but she declined and reported to a polling official who ignored her. She said the other group of people was approaching voters and offering them between Kshs.2,000 - 3,000/- to induce them to vote for the 3rd respondent.

59. In cross-examination, she said it was one Hassan Duale who was talking to every voter on the queue and giving them Kshs.2,000 - 3,000/- which she refused. She reported to IEBC and security officers but was told to keep quiet. She confirmed that the queue was very long and she voted at 11 am. She left and did not report this to any police station and neither did she take any photos of the man offering bribes. The agents present did not take any action.

60. RW5 Boru Dullacha Duba was the returning officer and 2nd respondent in this petition. In his replying affidavit at paragraph 39 and 40, he states;

“39. That, the said voter alleges that she reported the said alleged bribery to one of the 1st respondent's officers but does not identify the said officer by name or in the least by gender. Further, the voter did not report the alleged bribery to any police station or in the least to the security personnel at the polling station whose duty was to keep law and order.

40. That, to date I am not aware of any incident of voter bribery, which is a serious election offence under section 9 of the Election Offences Act, reported either to the police or to myself as the returning officer, or any complaint lodged with the DPP as required under Section 21 of the Election Offences Act, 2016”

61. Both **Mr. Issa** and **Mr. Ahmednassir** for the respondents submitted that bribery is a serious offence under Section 9 of the Election Offences Act and the penalty is grievous.

Mr. Issa referred the court to the case of **Moses Masika Wetangula –vs- Musikari Nazi Kombo [2014] eKLR** at paragraph 39 and 40 and to Halsburys Laws of England 4th Edn. Vol. 15 paragraph 695. He also submitted that the petitioner and his witnesses (PW3 and PW6) did not prove bribery as claimed to the required standard. He further submitted that the petitioner had failed to connect the 3rd respondent to the alleged acts of bribery. He referred to the case of **Mercy Kirito Mutegi –vs- Beatrice Nkatha Nyaga & 2 Others (2013) eKLR** paragraph 42.

62. Mr. Ahmednassir submitted that PW4 and PW6 who testified on this issue of bribery did not report the issue to any relevant authority. That their evidence could not be relied on by the court. He referred to the case of **Joseph Ndungu Kimanyi –vs- Republic [1979] eKLR** where it was held;

“The witness upon whose evidence its proposed to rely should not create an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence.”

63. He also submitted that any allegation of bribery as per Section 9 of the Election Offences Act, 2016 has to be proved beyond reasonable doubt. It was his submission that the petitioner had failed to link the 3rd respondent to the alleged acts of bribery or election malpractices. He referred to the case of **Jagdev Singh Sidhanti –vs- Pratap Singh Danlta & Others, 1965 AIR 183** where the court held;

“It may be remembered that in a trial of an election petition, the burden of proving that the

election of a successful candidate is liable to be set aside on the plea that he was responsible directly or through his agents for corrupt practices at the election, lies heavily upon the applicant to establish his case and unless it is established in both its branches i.e. the commission of acts which the law regards as corrupt, and the responsibility of the successful candidate directly or through his agent or with his consent for its practice not only by mere preponderance of probability, but by cogent and reliable evidence beyond any reasonable doubt, the petition must fail. The evidence may be examined bearing this approach to the evidence in mind.

64. In Moses Masika Wetangula (*supra*), the Court of Appeal held as follows;

*“39. Section 107 of the Evidence Act legislates the obvious principle that he who alleges a fact has the burden of proving his allegation. In election petitions, it is the petitioner who on one or more grounds, seeks the nullification of the election. The burden is therefore upon the petitioner to prove his allegations; and the standard of proof in election petitions is generally to the satisfaction of the court, higher than on a balance of probabilities but not to the level of beyond reasonable doubt. See Raila Odinga –vs- Independent Electoral & Boundaries Commission & Others and Joho –vs- Nyange (*supra*).*

*40. However, if there are allegations of commission of election offences in an election, the law requires that those allegations be proved beyond reasonable doubt. In other words, the standard of proof required in allegations of commission of election offences made in election petitions is beyond reasonable doubt. Once again see Raila Odinga –vs- Independent Electoral & Boundaries Commission & Others and Joho –vs- Nyange (*supra*).*

41. There is good reason for this requirement. Election offences are criminal offences. For anyone to be held criminally liable, Article 50 (2) (a) of the Constitution requires that the case against such person should be proved beyond reasonable doubt. In election petitions, the law requires the election court to report such person to the IEBC, which may bar such person from contesting in that or future elections [16] This is besides the sentence that may be meted out to such person if criminal charges are brought against him. It is on account of these dire consequences that the law demands proof beyond reasonable doubt of allegations of commission of election offences.”

65. The decision above reiterates the need for proof of election offences beyond reasonable doubt. The burden of proof was on the petitioner and the proof must have been beyond reasonable doubt since bribery is an election offence under the law. PW3 was first of all not inside the polling station where the vehicle was allegedly parked. He had not registered as an agent as he was waiting to register for the 2 pm shift. He saw this motor vehicle at 12 noon and the vehicle had tinted glasses. This witness did not personally see the person he believes was Mama Biladho dishing out cash. He asked around and was told she was the one in the vehicle. He did not give any tangible evidence to confirm that any money was exchanged. Even those he alleges were given loads and loads of money were not seen by him carrying anything as they left the said vehicle.

66. According to this witness, he reported to the security officers his high suspicions but no action was taken. He was a free man running errands outside the polling station but he did not deem it fit to rush to a nearby police station to report. He also confirmed that there were Wiper Democratic Party agents inside this polling station (Guest House). None of them testified to confirm what PW3 was saying. It's them who should have informed the court who among the IEBC officials was going to that vehicle if what PW3 was saying was true. The Court of Appeal in the case of Sawe –vs- Republic [2003] KLR 364 had this to say of evidence similar to that of PW3 –

“Suspicion, however strong, cannot provide the basis of inferring guilt which must be proved by evidence beyond reasonable doubt.”

67. PW3 said he was very suspicious of the happenings in the parked vehicle but he took no steps to

confirm his suspicions. PW6 was a registered voter and she voted at Bulla Mzuri. She met the IEBC officials who obviously had badges. She did not bother to take the details of any of them and forward the report to the presiding officer, deputy presiding officer and/or the returning officer or his deputy. She did not also forward her complaint to the police for necessary action. Her evidence cannot assist the court on this allegation.

68. As was stated in the *Moses Wetangula case (supra)*, bribery is an election offence which must be proved beyond reasonable doubt. What has been presented before this court is evidence that is so sketchy and full of suspicion and would not lead to any conviction. The petitioner failed to link the 3rd respondent to these allegations of bribery.

69. At paragraph 70 of the petition, it was claimed that supporters of the 3rd respondent were allowed to vote more than once. **PW4 Yusuf Mohamed** was an agent at Bulla College Primary School 02 and 03. He stated that while in stream 02, he witnessed some voters vote twice. That they did this by bypassing the Kiems kit. Secondly, they did not have their fingers inked. PW10 **Abubakar Mohamed Khalif** said he was at NEP Girls' when he received a report. He states as follows at paragraph 4 of his affidavit;

“That, it was reported to us by our agents that some of the voters were voting for more than one time and I reported the incident to the IEBC officials who never took any action.”

70. **RW2 Anab Dagane Farah**, the presiding officer at NEP Girls' stream 2 explained that the voting went on well at the station until the time the petitioner arrived there with his supporters after the station had closed. **RW3 Halima Adan Shurie** the presiding officer at Bulla College Primary School polling station stream 02 equally explained that everything went well until the petitioner arrived and started chaos.

71. It is trite law that ***“He who alleges a fact must prove it.”*** Section 107 of the Evidence Act provides;

(1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

72. According to paragraph 4 of his affidavit, PW10 relied on reports from agents to make this claim. None of these agents swore an affidavit and/or gave testimony. His claim therefore remains an allegation. PW4 told this court that 20 people voted twice. He was an agent and he just sat there taking no action because he was allegedly afraid. He did not report anywhere and neither did he give the name of a single voter who voted twice. This also remains a mere allegation as it wasn't proved.

73. The petitioner alleged at paragraph 73 of the petition that voters were disenfranchised in his strongholds when the 1st and 2nd respondents set the BVR kits on “training mode” to dupe the voters that they had voted. He only cited NEP Girls' polling station as having been affected by this. **PW7 Abdikadir Ismail Adow** testified to this saying that, when the training mode theory was discovered and rectified 32 persons had already voted and it was not clear what happened to their votes. This was in respect of Al-Fatah polling station. **PW5 Abdinasir Hussein Kilas** testified that there was delay in starting voting at Tetu Primary School because the Kiems kits were in training mode. He had himself voted at the said polling station after being identified by the Kiems kit. When he left the station with the petitioner, the kit was working. So at what point was the machine in the training mode?

74. **RW1 Ahmed Siyat Ahmed** the presiding officer of Kazuko Primary School polling station and **RW4 Abdikadir Mohamed Osman** of Garissa Primary School polling station 02 confirmed that the Kiems kits had worked very well in their polling stations. Further, that only a few people had been identified through the alphanumeric mode of identification which mode is also applied through the Kiems kit.

75. **RW5** who was the returning officer stated that the Kiems kits in his constituency performed well. That

he had only received a report from NEP Girls about the kits being on training mode and he sent an ICT expert who confirmed they were indeed on voting mode. He further clarified that when on training mode, no one can access the register of voters, so a voter cannot be identified when the Kiems kit is on training mode. Voters including PW5 had been identified through the Kiems and they voted.

76. A Kiems kit is an electronic gadget and may fail at times. Where it has failed, there must be concrete evidence to confirm that. The petitioner's allegation was that this failure was massive in his strongholds. He was only able to mention NEP Girls' as a center without specifics of the polling station/stations. **RW2** was at NEP Girls stream 02 and she refuted those claims. **RW5** has explained that the ICT expert he sent to NEP Girls' after receiving complaints confirmed that the kits were working. **PW5** and **PW7** have also confirmed that people were identified through the kiems kits and they voted. Had the Kiems kits failed as alleged, there would have been no identification of voters to enable them vote as confirmed by PW5 and PW7.

77. Several allegations have been made in paragraphs 74 – 95 of the petition without any evidence being tendered to support them. There is no evidence of vote stuffing on record; there is no listing of affected polling stations where the petitioner's agents were not supplied with Forms 35A; no identification of public servants particularly chiefs, assistant chiefs and county security officers who campaigned for the 3rd respondent; no identification of public officers who were celebrating the 3rd respondent's win; the law requiring the publishing of names of polling clerks was not cited; polling stations where people voted without being identified were not named; no evidence of double marking of ballot papers was adduced; there is no identification of specific Forms 35A which were signed by strangers. All these remain mere allegations.

78. On the issue of unsigned and/or half signed Forms 35A, I refer to Regulation 79 of the Election Regulations which provides as follows;

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

(3) Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.

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

(7) The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under subregulation (2) shall not by itself invalidate the results announced.

Regulation 62 (3) of the said Regulations also provides;

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

79. I have examined the said Forms 35A which are before this court and found that they were signed by either both the presiding officer and deputy presiding officer or by one of them. Under Regulation 79, the failure by the agent/agents to sign the declaration form by itself is not sufficient reason to call for the nullification of the results. A lot more needs to be adduced for such an allegation to lead to the nullification of a result.

80. The Supreme Court of Kenya in the case of **Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others [2014] eKLR** stated thus;

[247] Constitutional provisions are by themselves not enough. The duty-bearers, be they individual voters, political parties, agents, the media, IEBC, the Registrar of Political Parties, the

Constitutional Commissions, the arms of the State, must all invest in emancipating and protecting the vote. Once the Constitution gives citizens the right to vote, the freedom to choose, and conditions are created for the realization of that right, it is not the business of the Court to aid the indolent. If party agents are required to be present, sign statutory forms, and undertake any other legitimate duty that is imposed upon them as part of the political process in an election, then they are under obligation to do it. To fail to do so is not only to fail one's party, but also to fail our democracy. The Courts must frown upon any such inaction, reluctance, or delay.

[248] The election is first and foremost the citizen's election. Every Kenyan must protect his or her right to vote, the right to participate in the political affairs of the nation. It is upon exercising all the rights which the Constitution bestows upon the citizen, that she or he can claim the sovereign power that she or he donates to her or his representative.

[249] It is, therefore, time for us to develop our election-petition litigation: we must depart from the current practice in which a petitioner pleads 30 grounds for challenging an election, but only proffers cogent evidence for 3. A candidate, or her agent, cannot abscond duty from a polling station, and then ask the Court to overturn the election because of her failure to sign a statutory form. Every party in an election needs to pull their own weight, to ensure that the ideals in Article 86 are achieved: that we shall once and for all have simple, accurate, verifiable, secure, accountable, transparent elections. The election belongs to everybody, and it is, therefore, in everybody's collective interest, and in everybody's collective and solemn duty, to safeguard it.

81. My finding on this complaint is that failure by agents to sign Forms 35A in itself is not sufficient ground to annul results.

82. In paragraph 81 of the petition, and paragraph 10 of the supporting affidavit, the petitioner claims that the entire process of relay and transmission of results from polling stations to the constituency tallying centres in Garissa Township was not in any event simple, accurate, verifiable, secure, accountable, transparent, open nor prompt. He claimed that the transmission was not done electronically hence causing delays.

A reading of Section 39 (1A) (ii) of the Elections Act and Regulation 5 (1A) (c) and (d) of the Elections (General) Regulations, 2012 confirms that the results from the polling stations are submitted to the constituency returning officer by the presiding officers. Those electronically transmitted are those of the Presidential candidates only. See the case of *Jackton Nyanungo Ranguma –vs- Independent Electoral and Boundaries Commission & 2 Others Kisumu EP No. 3 of 2017 (UR) paragraph 38*

83. It was not shown how any of the unnamed presiding officers and/or polling stations delayed in submitting the results to the Garissa Township constituency tallying center.

(ii) Intimidation, threat of violence and bribery

84. The issue of bribery has already been dealt with in the preceding paragraphs and a finding made. Those who testified on the allegation of intimidation and threat of violence were **PW4 Yusuf Mohamed**, **PW8 Abdifatah Abdi Digale** and **PW11 Ahmed Mohammed Ibrahim**. **PW4** was an agent at Bulla College Primary School stream 02 and 03. He stated that he was in stream 02 when he saw Ibrahim being chased with a rungu, and there was commotion. He was told it was the Jubilee chief agent who was chasing Ibrahim. He appears not to have seen the said Ibrahim. He went under the table when shots were fired. He added that in fact, several voters chased Ibrahim. After Ibrahim were Wiper Party agents who were chased away from his stream by people wearing Jubilee badges.

85. The petitioner and his chief agent also went there and they too were attacked. He stated that the petitioner was attacked by people using a machete and rungu. According to him, about 40 people attacked the petitioner. He was later chased out and he was assisted by the security people. **PW9 Mohamed Aden Abdi** was an agent at Bulla College Primary School stream 03. He did not witness any of the incidents mentioned by **PW4** as he was out of the polling station. He was only reporting what he had

been told.

86. PW11 Ahmed Mohamed Ibrahim was the one driving the petitioner on the day of elections. He remained outside Bulla College polling station but outside the car as the petitioner entered inside the polling station. He saw the petitioner being chased by someone with a rungu and he went to assist him but he was hit on the back by the rungu man. He saw a lady pour sand on the petitioner, who was with his bodyguard. He said he reported the incident to the police even though it was not in his affidavit.

87. RW3 Halima Adan Shurie, the presiding officer at Bulla College Primary School stream 03 explained that the cause of this fracas was the petitioner, who came to the polling station at 1.00 pm complaining against the IEBC officials. He was accusing them of not acting in accordance with the law. As she stood next to the booklets with the unused ballot papers assisting voters, the petitioner ran and picked one of the booklets. She too ran to stop him and called the security, who removed him. She injured her arm in the process. She later reported the incident to her boss when she went to the constituency tallying center.

88. It was her evidence that as the petitioner left, he was shouting and voters got agitated and that's when the shooting was heard. She blamed the petitioner for all that happened which made the security to force him out.

PW8 Abdifatah Abdi Digale was a Wiper party agent at the chief's office Garissa town in stream 02. He confirmed that voting went on very well and ended on 8th August, 2017 at 5.30 pm while counting started at 7 pm till morning. The next day at 9.30 am, there was commotion as the presiding officer and deputy presiding officer were attacked by Aden Lugey a brother to the 3rd respondent. He did not explain the reason for the attack and/or what happened thereafter.

89. PW8 has confirmed that voting went on well at the chief's office Garissa Town stream 02. There is no noted report by the presiding officer and/or deputy presiding officer of any strange happenings. I now come back to the incident at the Bulla College Primary School. PW4 testified that the petitioner was attacked by 40 voters; the driver (PW11) only saw one man with a rungu who did not assault the petitioner but assaulted him instead. There is no evidence that such complaint of assault was made to any police station. PW9 did not witness any of these so his evidence is all hearsay. PW11 confirmed that the petitioner and bodyguard went into the polling station.

90. RW3 has given her version of what transpired that led to the petitioner being ejected out of the polling station. It is therefore the petitioner's word against that of the presiding officer (RW3). Whatever the case, the security officers had to shoot in the air as there was commotion and a security issue had arisen. The police did not shoot at anyone. There is no one reported to have been injured and voting went on soon after the petitioner left and the shooting in the air ceased. Again, no voter testified to show that he or she was intimidated to vote for a candidate who was not of his/her choice.

91. The incident of shooting by the police in the air outside Bulla Collage Primary School polling station was explained by the witnesses and the court has found the then prevailing circumstances to have justified the action. It was said that voting resumed soon thereafter and after the petitioner's departure. I find this not to have affected the results.

92. The petitioner had alleged that there had been threats of deportation of people from rural communities. He said the main target was the Kamba community who were perceived to be associated with the Wiper Party which sponsored the petitioner in the said elections. The 3rd respondent testified and refuted all those allegations.

Again, this allegation was unsupported by any evidence. There is no witness who testified that they had left Garissa and not voted after receiving such threats and/or after being deported.

(iii) Electoral Offences

93. On this ground, the petitioner raised two issues (i) bribery & (ii) undue influence on voters. Both of them are election offences. The bribery allegations have been dealt with in the foregoing paragraphs. It was the petitioner's claim that there was undue influence on the voters to vote for the 3rd respondent. Further, that officials of the 1st respondent denied genuine voters a chance to cast their votes on flimsy grounds. There was no evidence led to show any voter who was influenced to vote for the 3rd respondent against his/her wish. There was no voter who testified that he/she had been denied a chance to vote on account of their names not being in the electronic register. This ground fails.

94. At paragraph 116 of the petition is the issue of the scrutiny of votes. I will first deal with the report by **Dr. Noah Akala (PW12)**.

95. Mr. Ayiro in his submissions stated that PW12 analyzed data extracted pursuant to a Supreme Court order. That the summary he gave to the court in respect of the findings relating to Garissa County & Township cast serious aspersions as to transmission in general through the Kiems kit. He submitted that there were 6 polling stations which had no votes cast; 6 had more votes cast than the registered voters; while 91 out of 97 polling stations had a mismatch as to the number of votes cast vis a vis the registered voters.

96. Mr. Issa for the 1st and 2nd respondents and Mr. Ahmednassir for the 3rd respondent asked the court to disregard the report by PW12 for the reason that the witness never had access to the IEBC servers and did not explain where he had accessed the servers from. Secondly, that he had not given the results of any of the six elections nor the votes cast in his report. That he did not know anything about the constituencies or wards in Garissa Township constituency for him to make any report on them.

97. PW12 filed a seven (7) paragraph affidavit and annexed to it a document (NA 1) which he calls Garissa Township summary.

In this summary, he makes serious findings which are not backed up by any supporting material produced before this court. First of all, the IEBC portal results which he mentions at paragraph 2 of his affidavit is not part of his report. It is from this IEBC portal that he allegedly got data which he used together with data from NASA servers for his analysis.

98. He did not use data from the IEBC servers because they were inaccessible. The data from the NASA servers which are also private is not before this court. This court would be doing an injustice in accepting the kind of information contained in (NA 1) without the backup of data from known and acceptable sources.

99. I will now consider the deputy registrar's report on scrutiny of the SD cards in respect of some polling stations. The petitioner through an application dated 6th September, 2017 sought several orders. The court granted him a read only access to the data extracted from the Kiems kits and stored in SD cards, with respect to specific polling stations enumerated in prayer (b) (vii) of his supporting affidavit. This list contains 35 names of polling stations. From the submissions and the Deputy Registrar's report, it is clear that over 35 polling stations were scrutinized through the SD cards contrary to the orders of this court.

The first exercise was undertaken on a date not indicated and during that time, **66** polling stations were scrutinized. On 23rd October, 2017 some objections were raised by counsel before the deputy registrar and it was agreed that all data in the SD cards including call log time be scrutinized. The exercise took off on 23rd October, 2017 and was concluded on 9th November, 2017 by which time **84** polling stations had been accessed.

100. Since the court order had allowed the access to only 35 polling stations, I went further to establish why the number of polling stations had more than doubled. After counter checking with the Forms 35A and the report, my findings are as follows;

(i) Majority of what were referred to by the petitioner in the petition and application as polling

stations were in fact polling centres.

(ii) In the list of the alleged polling stations were only 9 known polling stations namely; Hiuga Girls Primary School; Garissa Youth Polytechnic; Umu Salama Girls; County High School; Sambul Primary School; Rahma Village Centre; Bulla Noor Primary School; Karakora Primary School and ADC Primary School.

(iii) Besides the 9 mentioned above, the rest were not polling stations but polling centres having more than one polling station or stream each.

(iv) There are 12 polling stations/centres which were not included in the order of 6th October, 2017 at all but were accessed through this exercise. These are Bulla Masalani Market centre; Bulamzuri centre; Naja Primary School; Bashal Market Centre; Bulamzuri Primary School; Bulaa College; Tumaini Primary School; Hiuga Girls Primary School; Bulamaka Market centre; Eldat Village; Bollargy Primary School and Kiwanja Bure Market centre.

101. Access to data in the Kiems kit which is stored in an SD card is part of scrutiny and must comply with the Rules.

Rule 29 (4) of the Election (Parliamentary and County Elections) Petition Rules, 2017 provides as follows;

“The scrutiny or recount of votes in accordance with sub rule (2) shall be confined to the polling stations in which the results are disrupted and may include the examination of ……”

102. This Rule does not mention centers but polling stations. The reason being that each polling station has a presiding officer and deputy presiding officer who are responsible for all activities in that polling station. That is why parties must be specific in their request under Rule 29 (4) of the Election Petition Rules. Without compliance, the respective presiding officers would not know how to respond to the issues being raised. Most of the names appearing in the petitioner’s prayer as polling stations are actually centers with 2 – 7 polling stations/streams each. At the time of scrutiny, all these polling stations were scrutinized without the authorization of the court which was wrong. It can’t be said that when counsel filed the petition and application, the petitioner did not know the difference between polling centers and stations/streams.

103. I will therefore only consider the results in the deputy registrar’s report in respect of the nine (9) polling stations outlined under paragraph 100 (ii) of this Judgment.

(a) Sambul Primary School: voting opened at 6.10 am and closed at 5.32 pm

Deputy Registrar’s Report		Form 35A	
Registered voters	484	Registered voters	484
Valid votes cast	347	Valid votes cast	347
		Rejected votes	2

(b) Garissa Youth Polytechnic: voting opened at 6.12 am and closed at 5.21 pm

Deputy Registrar’s Report		Form 35A	
Registered voters	417	Registered	417

		voters	
Valid votes cast	297	Valid votes cast	306
		Rejected votes	9

(c) ADC Primary School: voting opened at 6.04 am and closed at 5.04 pm

Deputy Registrar's Report		Form 35A	
Registered voters	541	Registered voters	Not clear
Valid votes cast	386	Valid votes cast	Not clear
		Rejected votes	Not clear

(d) County High School: voting opened at 7.27 am and closed at 5.49 pm

Deputy Registrar's Report		Form 35A	
Registered voters	490	Registered voters	Not clear
Valid votes cast	298	Valid votes cast	298

(e) Bulla Noor Primary School: voting opened at 6.06 am and closed at 5.10 pm

Deputy Registrar's Report		Form 35A	
Registered voters	102	Registered voters	102
Valid votes cast	67	Valid votes cast	67
		Rejected votes	Nil

(f) Rhama Village Centre: voting opened at 6.03 am and closed at 5.06 pm

Deputy Registrar's Report		Form 35A	
Registered voters	216	Registered voters	216
Valid votes cast	170	Valid votes cast	170
		Rejected votes	Nil

(g) Umusalama Girls Secondary School: voting opened at 6.02 am and closed at 5.08 pm

Deputy Registrar's Report		Form 35A	
---------------------------	--	----------	--

Registered voters	368	Registered voters	368
Valid votes cast	294	Valid votes cast	294
		Rejected votes	1

104. I did not find any results for Hiuga Girls Primary School and Karakora Primary School polling stations in the deputy registrar's report. From the seven (7) polling stations above, I find no discrepancies in the number of registered voters and the valid votes cast. The Forms 35A for Korakora Primary School polling stations and Form 35A for Hyuga Girls Primary show as below;

Korakora Primary School		Hyuga Girls Primary School	
Registered voters	477	Registered voters	566
Valid votes cast	348	Valid votes cast	404
Rejected votes	01	Rejected votes	02

Both forms were signed by the presiding officers and the deputies and agents for; Wiper, Jubilee and ODM Parties. Furthermore, the other polling stations scrutinized without the authority of the court do not in any way confirm the petitioner's allegations of the number of votes cast exceeding the number of registered voters.

105. Section 83 of the Election Act 2011 provides;

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.

106. The Supreme Court of Kenya in ***Raila Amolo Odinga & Another –vs- IEBC and 3 others [2017] eKLR*** stated;

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

107. During the highlighting of submissions, Mr. Ayiro told this court that the scrutiny unearthed massive irregularities in 68 – 77 polling stations. As I have stated above, the scrutiny undertaken by the parties herein under the supervision of the deputy registrar was not in compliance with the orders of this court. Polling centres were in actual sense disguised as polling stations. This enabled the petitioner to access 84 polling stations out of 97 polling stations in Garissa Township constituency without this court's authority. What was the motive? To unearth new evidence which had not been pleaded and presented to the court.

108. Mr. Ayiro has mentioned about 9 polling stations whose SD cards were not availed by the 1st respondent. Had those been availed the petitioner could actually have accessed a total of 93 out of 97 polling stations. The issue of the missing SD cards should have been brought to the attention of the court for further directions. This was never done and should not be an issue after the close of the election petition.

109. This court has examined all the allegations made by the petitioner against the available evidence and found none of them proved to the required standard. I have found no irregularity and/or malpractice that could have affected the result of the election of the Member of Parliament for Garissa Township Constituency.

Issue No. (iii) Whether the 3rd respondent was validly elected as the Member of Parliament for Garissa Township Constituency in the election held on 8th August, 2017

110. The above analysis and my findings in respect of each of the allegations raised points to one single conclusion. The conclusion is that the 3rd respondent was validly elected as Member of Parliament for Garissa Township Constituency in the election held on 8th August, 2017 after garnering 21,300 votes. The petition is dismissed.

Issue No. (iv) Who should bear the costs of the petition?

111. Section 84 of the Elections Act provides as follows;

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

Rule 30 of the Election Petition Rules provides as follows;

“(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;”

112. In the case of ***Kalembe Ndile & Another –vs- Patrick Musimba & Others, Machakos High Court EP No. 1 and 7 of 2013 [2013] eKLR***, the court stated;

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

113. This petition was not that complex as the issues were fairly straight forward. I have however taken into account the time spent in court dealing with several witnesses and the scrutiny; research and preparation for the entire case. I have also considered the proposal on costs by counsel for the 3rd respondent.

I will cap the instruction fees for each party as follows; Kshs.3,000,000/- for the 1st and 2nd respondents; Kshs.3,000,000/- for the 3rd respondent.

FINAL ORDERS

1114. (a) The petition be and is hereby dismissed.

(b) The respondents are awarded costs on the following terms;

- (i) Instruction fees for the 1st and 2nd respondents capped at Kshs.3,000,000/=
- (ii) Instruction fees for the 3rd respondent capped at Kshs.3,000,000/=.
- (iii) The costs shall be taxed and the total costs certified by the deputy registrar of this Court.
- (iv) The certified costs awarded shall be paid out of the security deposit on a pro-rata basis.
- (v) A certificate of this determination in accordance with Section 86 (1) of the Elections Act 2011 shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly.

Orders accordingly.

Signed, dated and delivered this 27th day of **February**, 2018 in open court at Nairobi.

HEDWIG I. ONG'UDI

HIGH COURT JUDGE

27.2.2018

Coram

Before: Hon. H. I. Ong'udi Judge

Court Assistant: Ojwang

Mr. Ahmednassir & Ms. Hannan for 3rd Respondent

Mr. D. Maanzo for Petitioner

Ms Ahomo for Mr. Issa for 1st and 2nd Respondents

Ms. Issa & Mr. Ayiro walk in

Court:

Judgment delivered in open court.

H. I. ONG'UDI

HIGH COURT JUDGE

27.2.2017