



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ELECTION PETITION NO. 7 OF 2017**

**IN THE MATTER OF THE PARLIAMENTARY ELECTION FOR MANDERA NORTH CONSTITUENCY**

**BETWEEN**

- HUSSEIN ABSHIRO HERIN.....1<sup>ST</sup> PETITIONER
- ISMAIL MOHAMUD IBRAHIM.....2<sup>ND</sup> PETITIONER
- ISSACK SHEIKH AHMED.....3<sup>RD</sup> PETITIONER
- ABDI ADAN.....4<sup>TH</sup> PETITIONER
- ADAN MATHOBE BOSHE.....6<sup>TH</sup> PETITIONER
- HASSAN ISSACK MAALIM.....8<sup>TH</sup> PETITIONER
- MOHAMED ALIOW MOHAMED.....9<sup>TH</sup> PETITIONER
- MOHAMEDNOOR OSMAN MOHAMUD.....10<sup>TH</sup> PETITIONER
- ADOW MOLU KIKE.....11<sup>TH</sup> PETITIONER
- ABDI IBRAHIM MOHAMED.....12<sup>TH</sup> PETITIONER
- IBRAHIM MOHAMED NUNOW.....13<sup>TH</sup> PETITIONER
- SULEIMAN MOHAMED FILA.....14<sup>TH</sup> PETITIONER
- MOHAMUD IBRAHIM ALIOW.....16<sup>TH</sup> PETITIONER
- HASSAN ALI BALAYA.....18<sup>TH</sup> PETITIONER
- KALLA ISSAK ALIOW.....19<sup>TH</sup> PETITIONER
- ALI ABDI ADAN.....20<sup>TH</sup> PETITIONER
- ISSACK ABDIRAHMAN.....21<sup>ST</sup> PETITIONER
- MOHAMED ABDOW ALI.....2<sup>ND</sup> PETITIONER
- HASSAN IBRAHIM ALI.....23<sup>RD</sup> PETITIONER

**AND**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION (IEBC).....1<sup>ST</sup> RESPONDENT**

**THE MANDERA NORTH CONSTITUENCY RETURNING**

**OFFICER (ABDIBASHIR ALINOOR ALI).....2<sup>ND</sup> RESPONDENT**

**BASHIR SHEIKH ABDULLAHI.....3<sup>RD</sup> RESPONDENT**

### **JUDGMENT**

#### **INTRODUCTION AND BACKGROUND**

1. The parliamentary contest for Mandera North Constituency in the general election held on 8<sup>th</sup> August, 2017 attracted five (5) candidates. Following the said election, the 2<sup>nd</sup> respondent declared the 3<sup>rd</sup> respondent (**Bashir Sheikh Abdullahi**) as the Member of Parliament having garnered a total of **24,999** votes. The results of the rest of the candidates were as follows;

Mohamed Ibrahim Abdi.....14,363 votes

Abdullahi Mohamed Ahmed.....20 votes

Abdi Ali Mohamed.....11 votes

Hussein Abshiro Herin.....9 votes

2. Being dissatisfied with the said declaration, Mohamed Ibrahim Abdi who ranked 2<sup>nd</sup> after the 3<sup>rd</sup> respondent filed this election petition on 5<sup>th</sup> September, 2017 through the firm of Prof. Tom Ojienda & Associates. Later on 17<sup>th</sup> November, 2017 he published a notice of withdrawal of the petition in the Daily Nation. His withdrawal was allowed and twenty three (23) petitioners substituted to proceed with the petition. Two of the new petitioners did not file affidavits to support the petition as directed. They are the 5<sup>th</sup> and 7<sup>th</sup> petitioners (Noor Hassan Edo and Hassan Ibrahim Aliow respectively). Besides them, the 15<sup>th</sup> and 17<sup>th</sup> petitioners (Bashir Adan Isaack and Hussein Billow Abdi respectively) elected not to present themselves to the court for cross-examination in support of the petition. The names of the 5<sup>th</sup>, 7<sup>th</sup>, 15<sup>th</sup> and 17<sup>th</sup> petitioners were subsequently struck out of the petition.

3. The petition was therefore supported by the affidavits of nineteen (19) petitioners who presented themselves to court for cross-examination. The petitioners made various allegations against the respondents in the petition. They alleged that the elections were at all material times marred with irregularities and fraud, namely; rigging and other illegal maneuvering of the results before, during and after the voting, especially in Guticha, Morothile and Rhamu-Dimtu wards. All these allegations are found at pages 197 – 259 of the petition. They vary from irregularities, electoral offences and agents being chased away from polling stations.

4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a joint response to the petition dated 18<sup>th</sup> September, 2017 in which they denied all the allegations made against them by the petitioners. It was their contention that they carried out a fair, free and transparent election. The 3<sup>rd</sup> respondent filed a response to the petition dated 15<sup>th</sup> September, 2017 denying all the allegations made against him.

5. Before the close of the pleadings, the parties agreed that the petitioners do have a read only access with permission to copy information relating to the number of servers limited to Mandera North constituency in possession of the 1<sup>st</sup> respondent. Secondly, they were to have access to specific GPRS location of each Kiems kit and their co-ordinates used for the Mandera North Constituency Member of National Assembly election for the period between 5<sup>th</sup> August, 2017 and 11<sup>th</sup> August, 2017. The result of this exercise has not been made known to this court.

6. At the close of the petitioners' case and before the close of the respondents' case, the petitioners filed an application for recount and scrutiny of votes cast in 57 out of the 99 polling stations. After considering the application and arguments, I allowed scrutiny of the process of voting as captured in the SD cards in only eight (8) polling stations. A report on the results of the exercise was filed by the deputy registrar. The parties were also allowed to submit on the said report.

#### **ISSUES FOR DETERMINATION**

7. I have carefully considered the pleadings on record, plus the evidence of the witnesses. I have also considered the written and oral submissions together with the authorities by learned counsel. During the pretrial conference, parties agreed on the following as issues for determination;

i. Whether there were irregularities in the conduct of elections for the Mandera North constituency.

ii. If there were irregularities, what were the irregularities.

iii. Whether the irregularities affected the outcome of the election of the Member of Parliament for Mandera North constituency.

iv. What orders should the court issue and who should bear the costs of the petition.

Issues (i) – (iii) are interrelated and I will therefore combine them.

8. The petitioners are the only witnesses who testified to support their grounds in the petition while the 1<sup>st</sup> and 2<sup>nd</sup> respondents called 6 witnesses. The 3<sup>rd</sup> respondent called 4 witnesses.

### **The Applicable Law**

9. The general principles applicable in election disputes are set out in the Constitution of Kenya and the electoral laws. Elections are about the sovereign power of the people. This sovereignty is underpinned in Article 38 which sets out the political rights of the Kenyan people. It provides as follows;

**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**

**(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.**

10. These political rights are realized through elections, which should be conducted through a working electoral system that complies with the principle of free and fair elections. Article 81 (e) of the Constitution sets out the principles governing the electoral system. 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.**

11. The body that Kenyans have bestowed with the mandate to effect the principles found in Articles 38 and 81 is the Independent Electoral and Boundaries Commission, the 1<sup>st</sup> respondent. 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.*

12. The whole purpose of an election is to give the citizens an opportunity to express their will by choosing their leaders in a democratic manner, and in conformity with the Constitution and the electoral laws. An Election Court is not expected to easily upset an election by substituting its decision, conviction or will to that of the electorate. *Majanja J.* in the case of *Jacton Nyanunga Ranguma –vs- Independent Electoral and Boundaries Commission & 2 Others Kisumu E.P No. 3 of 2017 (UR)* put this into perspective when he stated;

***“14. An election petition is not do-over of the just concluded election. It is not an opportunity to conduct another election through the court as every election conducted in accordance with the law is presumed valid unless it is set aside by the court. The burden of establishing the allegations of non-compliance with the Constitution and the law, electoral malpractice and misconduct which would result in the election being declared invalid rests on the petitioner. The court will not interfere with the results of the elections unless it is established to the required standard of proof that such non-compliance with the Constitution and the law, the irregularities and electoral malpractices complained of render the said elections invalid.”***

13. 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 espoused on this in the case of *Raila Odinga & Others –vs- Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR* when it held;

***“[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.”***

14. The same 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 reasonable doubt” is applied.***

***In such 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 ....”***

15. The burden of proof in electoral disputes rests on the petitioner or petitioners. 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 petitioners have discharged that burden. In the case of *Raila Amolo Odinga –vs- Independent Electoral and Boundaries Commission & 3 Others 2013 eKLR*, 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 of 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 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.”***

16. Another key provision to consider while dealing with electoral disputes is Section 83 of the Elections Act (as it was before it was amended by the Election Laws (Amendment Act, 2017) Act No. 34 of 2017) which 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.”***

17. This provision was discussed in the case of *Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others [2014] eKLR* and *Raila Amolo Odinga & Another –vs- Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR*.

From the cited cases, it is clear that where irregularities and malpractices have been found to have occurred, the petitioner must demonstrate that either there was non-compliance with the Constitution and electoral laws or that they were of such a magnitude that substantially affected the outcome of the election.

18. The petitioners have raised several matters which they claim constitute non-compliance with the Constitution and electoral laws. These are;

- i. Irregular deployment of presiding officers and deputy presiding officers.
- ii. Illegal transportation and/or distribution of electoral materials.
- iii. Illegal alteration of polling stations/movement of polling stations.

- iv. Alteration of Form 35A without countersigning.
- v. Chasing away from the polling stations and assault of petitioners’/EFP agents.
- vi. Failure to use the Kiems without following due procedure.
- vii. Voting more than once in several polling stations and stuffing of ballot papers.
- viii. Failure to give voters all ballot papers in violation of the Elections Act 2011.
- ix. Electoral malpractices at the tallying centre/relocation of tallying centre.

19. I have combined issues (i) – (iii) and will consider them as one as follows;

**a. Whether there were irregularities in the conduct of the Mandera North Constituency election, and if there were, whether they affected the outcome of the said election.**

In dealing with this issue, I will consider each of the accusations raised by the petitioners against the respondents.

**a. Irregular deployment of presiding officers and deputy presiding officers**

20. It is the petitioners’ case that the 1<sup>st</sup> and 2<sup>nd</sup> respondents posted strangers to manage polling stations as presiding officers and deputy presiding officers. Lists were produced in court to show who the petitioners believed were the genuine presiding officers and deputy presiding officers and those that were strangers. The reason they give is that upon being interviewed, appointed and trained, the 1<sup>st</sup> and 2<sup>nd</sup> respondents had a duty to deploy all of them to preside over polling stations. According to them, this did not happen as some of them had their names removed and replaced by strangers. Secondly, they say the list of names was never shared with the political parties.

PW12 **Ismail Mohamed Ibrahim**, PW13 **Abdi Adan** PW17 **Isaack Sheikh Ahmed** testified that they had been appointed by the 1<sup>st</sup> respondent as presiding officers but dumped on 7<sup>th</sup> August, 2017 when a list of strangers came up. **PW11 Hussein Abshiro Herin** stated that 46 polling stations were manned by strangers.

21. **Prof. Ojienda** for petitioners submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not conduct the said recruitment transparently and competitively in violation of Regulation 5 of the Elections (General) Regulations and as stipulated under Articles 81 and 86 of the Constitution.

22. **Mr. Abdulahi** for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the appointments complained of were done in accordance with the law. That there was advertisement, shortlisting, interviews and after the appointment, the names of the successful candidates were published by the 1<sup>st</sup> respondent. Counsel referred to the evidence of PW11 in cross examination when he said the people referred to as strangers were strangers to him but not to IEBC. On the evidence of **PW13** and **PW17** he said the two witnesses had no appointment letters from IEBC and failed to produce their oath of secrecy.

23. Regulation 5 of the Election (General) Elections 2012 provides;

**“5. (1) The Commission shall transparently and competitively appoint a presiding officer for every polling station and may similarly appoint such number of deputy presiding officers as may be necessary.**

**(2) Prior to appointment under sub-regulation (1), the Commission shall provide the list of persons proposed for appointment to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them make any representations.**

**(5) The returning officer shall require every presiding officer, deputy presiding officer, clerk, interpreter and agent authorised to attend at a polling station, as soon as he or she has made the oath of secrecy prescribed by the Act, to make before the returning officer, a declaration that the officer making the declaration understands that he or she shall not prompt any voter whom he or she is empowered by these Regulations to assist, and shall strictly follow the provisions of these Regulations, and any instructions which may lawfully be given to him or her relating to the election concerned.”**

A reading of Regulation 5(1) shows that the appointment of deputy presiding officers is not mandatory. **“The Commission may similarly appoint such number of deputy presiding officers as may be necessary”** are the words in Regulation 5(1). The number of deputy presiding officers does not necessarily have to equal the one of presiding officers. Regulation 5 (2) makes provision for the sharing of the list of proposed presiding officers and deputy presiding officers with political parties and independent candidates at least 14 days prior to the proposed date of appointment. It has been alleged by PW11 that the list was never shared with political parties.

24. PW12, PW13, and PW17 were allegedly appointed and trained as presiding officers but were later replaced. PW11 was a candidate vying on a PNU party ticket. He does not hold any position in PNU to speak for the said party. When he says that the list was not shared with the party, he cannot therefore be taken to be speaking for the party but for himself. PW12, PW13 and PW17 were also not party officials of either PNU or EFP. From the Forms 35A produced, it is shown that there were several parties represented in this election, namely; PNU, ODM, Jubilee, CCM, EFP among others.

25. There is no witness who testified on behalf of any political party to confirm to this court that the list of proposed presiding officers and deputy presiding officers was never shared with them. PW11, PW12, PW13 and PW17 cannot therefore purport to speak on behalf of any political party in response to Regulation 5 (2). Secondly, none of them was an independent candidate so as to speak on behalf of independent candidates. Finally, the 1<sup>st</sup> and 2<sup>nd</sup> respondents in their response and through the evidence of **RW6 Abdibashir Alinoor Ali** stated that they followed due process in recruitment and a final list of the presiding officers and deputy presiding officers was published on 7<sup>th</sup> August, 2017.

26. There is no dispute that the 1<sup>st</sup> respondent published the list of the presiding officers and deputy presiding officers it had appointed. It recognized them as the officials it had appointed to man the polling stations. When the petitioners call them strangers, all that one needs to ask is, “strangers to who?” These presiding officers and deputy presiding officers were not strangers to the appointing authority. Even PW11 in cross-examination, told the court that the persons he was calling strangers were only strangers to him but not to IEBC.

27. PW11, PW12, PW13 and PW17 have told the court that as at the time they reported for training, they had been issued with appointment letters. None of them annexed any appointment letter from IEBC. How do they then convince this court that IEBC had employed them?

28. My finding is that the persons who manned the polling stations enumerated at paragraph 33 of PW11’s affidavit were officials duly appointed by the IEBC and were not strangers as claimed by the petitioners.

**b. Illegal transportation and/or distribution of electoral materials**

29. The petitioners have accused the 1<sup>st</sup> and 2<sup>nd</sup> respondents of abdicating their duty of transporting and distributing electoral materials to the police. PW11’s evidence is that police officers were getting electoral materials from the warehouses and distributing them. **PW16 Hassan Ibrahim Ali** a logistics officer on contract with the 1<sup>st</sup> respondent testified that on 7<sup>th</sup> August, 2017, he was at the IEBC store, Mandera North. There was a crowd making noise outside but near the IEBC store and he heard some gunshots. He said there were ballot papers which had been brought on a lorry for distribution but they were taken to the Rhamu police station while the other materials were distributed by the police.

30. **RW6 AbdiBashir Alinoor Ali** stated in paragraph 15 of his replying affidavit that the transportation and the distribution of the electoral materials was undertaken by the 1<sup>st</sup> and 2<sup>nd</sup> respondents’ officials while the police only provided security. In cross-examination, he said the ballot papers were distributed by him while at Rhamu police station for security reasons. The vehicles used to transport the materials and staff were contracted by IEBC for 3 days through a procurement process and he did not have their details. Counsel for the petitioners submitted that following the distribution of the materials by the police, it was clear that the police had taken over the conduct of the elections in that constituency.

31. Regulation 61 (1) provides;

***“The returning officer shall provide each presiding officer with such number of ballot boxes and ballot papers necessary for the effective carrying out of the provisions of these Regulations relating to the election concerned.”***

It is nowhere indicated that the returning officer shall personally provide these materials to the various stations and presiding officers. There were 99 polling stations in this constituency and it is practically impossible for the returning officer to do all this work by himself. The IEBC’s role is supervisory and to ensure the materials reach their destination.

32. PW16 has attested to the chaos that was outside the IEBC offices/stores. Those who rushed to the scene were the OCS, OCPD and DCIO who are security agents. They cannot be faulted for this. There is nothing that PW11 or PW16 could have managed there on their own in terms of security. Lastly, there is no complaint that there is any polling station that was not provided with ballot boxes and ballot papers, as per Regulation 61 (1). This ground is not proved.

**(c) Illegal alterations of polling stations/Movement of polling stations.**

33. PW11 at paragraph 52 of his affidavit enumerates 8 polling stations, he says were moved in violation of Regulation 7 of the Regulations. These are; Gofa Primary School; Yaqila Farms, Qorodobo Nursery School, Korm Adow, Balanqa Shallow Wells, Shangala Primary School, Libi Bul Primary School, Sigara Hills, Saqira village and Dara Farm polling stations. He did not visit any of these polling stations save for Gofa Primary School.

34. His evidence on this is at paragraphs 42 – 46 of his affidavit. This witness in re-examination said the polling stations he visited and found the Kiems kits not working were; Olla Primary School, Borwaqo and Gofa Primary School. The witness did not say he visited these polling stations and found no voting going on there, due to the movement as submitted by counsel. He only spoke about Kiems kits in respect to these polling stations.

35. He did not therefore give any evidence as to stations he visited and found closed as a result of having been moved. The agents who testified for the petitioners on this issue were as follows;

<b>Name</b>	<b>Polling Station</b>
PW1 Suleiman Mohamed Fila	Tossi Primary School
PW2 Kalla Isaak Aliow	Ashabito

PW3	Isaac Abdirahman	Sigare Hills
PW4	Mohamed Aliow Mohamed	Yaqila Farm
PW5	Hassan Isaac Maalim	Korm Adow at Olla Primary School
PW6	Abdi Ibrahim Mohamed	Kubi Primary School
PW7	Adow Molu Kike	Darab Athathi
PW10	Hassan Ali Balaya	Ashabito - 01
PW18	Ali Abdi Adan	ShirShir Primary School
PW19	Mohamud Ibrahim Aliow – was the Chief Agent.	

From this list, it is only PW3, PW4 and PW5 who testified in respect of three (3) of the polling stations in PW11's list. There was no evidence on the rest of the allegedly moved polling stations save for the hearsay evidence of PW11.

36. **PW3 Isaac Abdirahman** said he was an agent at Sigare Hills polling station and went ahead to explain what transpired there. He at no time said Sigare Hills polling station had been moved to Ashabito as claimed.

**PW5 Hassan Isaac Maalim** testified that there had been movement of Korm Adow polling station to Olla Primary School polling station. **RW5 Jelle Abdi Mohammed** the presiding officer at Korm Adow said, the station was never moved. This prompted the court to order for scrutiny on the said polling station. The report on scrutiny was filed by the deputy registrar and it confirms the results in Form 35A in respect of Korm Adow polling station. The report shows that voting took place at Korm Adow polling station.

37. **PW2 Kalla Isaak Aliow** was an agent at Ashabito where Sigare Hills is supposed to have been moved to. This witness did not mention anything about Sigare Hills having been moved there. **PW4 Mohamed Aliow Mohamed** stated that Yaqila polling station had been moved to Shirshir Primary School. **PW18 Ali Abdi Adan** was an agent at Shirshir Primary School where Gofa Primary School, Quordobo Nursery School and Yaqila polling stations are supposed to have been moved to. He did not mention anything about movement of the three polling stations to Shirshir Primary School. Had there been such movement, he would have told the court so.

**PW10 Hassan Ali Balaya** was an agent at Ashabito Primary School stream 01 up to 9.30 am. He too did not mention anything about the movement of Dara Farm and Libi bul Primary polling stations to Ashabito Primary School polling station.

38. I have considered PW11's claims vis a vis the documentary evidence on record in respect to this allegation. I have also noted that no single allegedly disenfranchised registered voter from any of the 9 polling stations testified to confirm the allegation of movement of polling stations or filed such an affidavit in support of the claims. The witnesses have contradicted each other on this matter. I find no evidence to support these allegations.

**d. Alteration of forms 35A without countersigning**

39. The petitioners raised an issue in respect of several Forms 35A which were altered and not counter-signed. The polling stations allegedly affected were; Kajaja - 01; Kubi Primary School - 01; Dara Farm - 02; Bambo West - 01 Ladeni Primary School - 02; Qorahey Primary School - 01 and Barwaqo - 01 and 02

40. This court ordered for scrutiny of the SD cards in respect of five (5) of these polling stations, namely Kajaja - 01; Qorahey Primary School -0; Dara Farm - 02; Barwaqo - 01 and 02.

From the report, there is a difference in the votes as shown in form 35A and the Kiems kit, in the number of identified voters; the difference is as follows;

Kajaja - 01	58 votes
Qorahey - 01	6 votes
Dara Farm - 02	304 votes
Barwaqo - 01	101 votes
Barwaqo - 02	34 votes
<b>TOTAL</b>	<b>503 votes</b>

41. The scrutiny revealed that the results in these stations showed a higher number of valid votes cast compared to the number of voters who had been identified through the Kiems kit. The figures were however lower than the number of registered voters in all instances. Counsel

for the petitioners submitted that the irregularity of altering results which were not countersigned invalidates 2,500 votes. It is not clear how he arrived at that figure. This court has however found this irregularity to involve 503 votes only.

42. Mr. Abdullahi for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that Regulation 79 (2) of the Regulations had been complied with and the agents present had signed the Forms 35A without raising any objections. He referred to the evidence of **RW7 Mohammed Abdi Omar** who testified that no objections were raised by any agent at the tallying center.

43. I have re-examined the Forms 35A in respect of the questioned polling stations and found that all of them were signed by the presiding officer, the deputy presiding officers and the agents. What the 1<sup>st</sup> and 2<sup>nd</sup> respondents have not explained is whether the number of authenticated votes includes the voters who were not identified electronically. My view is that the manually identified voters are not captured in the Kiems kit and that could explain the difference giving rise to the 503 questioned votes.

**e. Chasing away from the polling stations and assault of petitioner's/EFP agents**

44. The 1<sup>st</sup> petitioner claimed that his agents and those of the EFP were ejected from polling stations and even assaulted in some instances. Agents play an important role in elections and their presence is meant to guard against any form of malpractice. They may only be ejected from a polling station and/or tallying centre for very good reasons as provided for by the law. Assault being an election offence must be proved beyond reasonable doubt.

45. Those who testified on this issue were PW1, PW2, PW3, PW4, PW5, PW6, PW7 and PW18. They were agents at Tossi Primary School – 02; Ashabito Primary School; Sigare Hills; Yaquila at Shirshir; Korm Adow at Olla Primary School; Kubi Primary School; Darab Athathi Primary School; Shirshir Primary School.

Their complaint was that they were ejected from the polling centres for raising issues on the malpractices that were on going there. Further that some of them were assaulted. From their evidence, those who were only ejected were PW1 and PW2. Those assaulted were PW6 and PW7 while PW18 was strangled. Those who were allegedly threatened and left were PW3, PW4 and PW5. PW2, PW3, PW6 and PW7 allegedly made reports of these incidents at various police stations. They were however not able to confirm such reports as no police abstracts were produced herein. Production of an OB number is not sufficient as an OB number just confirms a report having been made. The kind of report made is reflected in the police abstract, none of which was produced herein.

46. RW6 told the court in cross-examination that he did not receive reports of agents being chased away from polling centres. The only reports he got were that there had been quarrels and he advised that the concerned persons reconcile and work together.

47. It was Prof. Ojienda's submission that since RW6 had admitted that there was quarreling in some polling station then it amounted to an admission that agents of EFP and PNU political parties were targeted and chased from polling stations. This conduct he argued, prejudiced candidates vying on EFP and PNU tickets. To support this, he cited the case of **Bwana Mohamed Bwana –vs- Silvano Buko Bonaya & 2 Others Malindi EP No. 7 of 2013**. He added that the conduct also discriminated against the 3<sup>rd</sup> respondent's opponent and it amounted to a violation of Article 27 of the Constitution.

48. **Mr. Abdullahi** for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the said respondents complied with Regulation 62 of the Elections Regulations by allowing only authorized agents into the polling stations. That regard was made to Regulation 62 (2) which prohibits admission into a polling station more than one agent for each candidate or political party. He submitted that PW11 did not witness any of the claimed assaults. Further that though PW4 alleged that he escaped because his life was in danger, he only reported to the chief agent and no more. He concluded that the said allegations were not backed by any tangible evidence and should be interrogated further to confirm their credibility. He relied on the case of **Mercy Kirito Mutegi –vs- Beatrice Nkatha Nyaga & 2 Others [2013] eKLR** which quoted the Indian Supreme Court case of **Venkata Reddy –vs- R. Sultan and Others AIR 1976 SC 1599**

49. **PW1 Suleiman Mohamed Fila** in cross-examination said, he witnessed the counting of votes but changed his mind in re-examination. This witness said he witnessed massive irregularities in Tossi polling station from morning until evening. He however, chose to remain there watching the irregularities and taking no action. He was even escorted away to safety by CID officers but made no official report anywhere not even to the CID officers! He can't be taken seriously.

50. **PW2 Kalla Isaak Aliow** was at the polling station (Ashabito) up to the time of counting when he was allegedly kicked out. The Form 35A in respect of this polling station has the presiding officer's remarks showing that PW2 caused chaos in the station claiming that there was rigging. He denied this though in cross examination by Mr. Havi he stated that in his view, the 3<sup>rd</sup> respondent won in Ashabito polling station. In this case, it is PW2's word against that of the presiding officer. His claim is not proved to the required standard.

51. **PW3 Isaac Abdirahman** made it clear that he was not ejected but he voluntarily left the Sigare Hills polling station since he felt he was doing nothing. He claimed to have reported this matter on 13<sup>th</sup> August, 2017 but there is no evidence to support his having made any report.

52. **PW4 Mohamed Aliow Mohamed** was allegedly threatened at Yaquila Farm polling station and he feared for his life and left. He however confirmed in cross examination that he signed the Form 35A though under threats which he never reported. He did not explain the kind of threats that made him sign the Form 35A and whether he had been brought back after the ejection to sign the said Form 35A.

53. **PW5 Hassan Isaac Maalim** claims he was allowed into the Olla Primary School polling station as an agent for Korm Adow polling station and directed to sit at a corner and watch the happenings there. He appears to have been comfortable with that even though he was an agent. He said he was thoroughly threatened by the deputy presiding officer but he continued sitting there and only reported to the chief agent. He told the court that he believed he could only have reported to the police if he had been beaten. He left the station before counting started. He was not chased away from the station but he left after three (3) warnings from the deputy presiding officer.

**54. PW6 Abdi Ibrahim Mohamed** witnessed everything at the Kubi Primary School polling station to the end. The alleged beating on his buttocks was on 8<sup>th</sup> August, 2017 when an alleged illegality occurred after the ballot boxes had been sealed. He did not report nor go for treatment until 14<sup>th</sup> August, 2017. An examination of the polling station diary shows that PW6 was not one of the agents in that station and neither was there any EFP agent present. PW6 said the presiding officer had called villagers to come and vote and at the same time says the ballot boxes had already been sealed. Even if the villagers voted, where were the votes to be placed when the ballot boxes had been sealed? It just doesn't add up!

**PW18 Ali Abdi Adan** testified that he was strangled by an MCA aspirant whom he reported to the same presiding officer who had blasted him for raising the issue of double voting. He made no other official report and he denied signing any Form 35A. He however admitted that the names and ID number appearing in the signed Form 35A are similar to his i.e. Ali Abdi Adan ID No. 11550463. He was an agent at Shirshir Primary School – 01. I found him to be an unreliable witness who could deny very obvious things. He did not even report the MCA candidate who strangled him.

**55. PW7 Adow Molu Kike** an agent at Darab Athathi was at the polling station from morning but allegedly left after he had been hit by the presiding officer with a blow on his face. He claimed not to have signed the declaration forms. The Form 35A was signed by PW7 and the polling station diary shows that he was one of the agents present at the station and witnessed everything to the end. The treatment notes annexed to his affidavit show that he only went to hospital on 14<sup>th</sup> August, 2017. No explanation has been given for the delay in going for treatment. If indeed he was injured on the face on 8<sup>th</sup> August, 2017 as he claims he could not have waited up to 14<sup>th</sup> August, 2017 to seek for medical assistance. He too was not a credible witness. The witnesses who testified on this ground contradicted themselves and I found their evidence to be wanting.

#### **f. Failure to use the Kiems kit without following due procedure**

56. The petitioners have accused the 1<sup>st</sup> and 2<sup>nd</sup> respondents of inappropriate use of identification methods without following the correct procedure. It was PW1's evidence that the Kiems kits at Tossi Primary School worked well up to 1 pm when they were informed the machine was no longer working. PW3 also talked of the Kiems kit at Sigare Hills not working from 12 noon. He said he saw two registers being used i.e. the official one and the printed one. PW4 stated that the Kiems kit at Yaqila Farms worked for one hour after his arrival. That the manual register was resorted to and it was marked in a haphazard manner.

**RW6 AbdiBashir Alinoor Ali** who was the returning officer in cross-examination stated that the Kiems kits were used in all polling stations and none of them failed.

**57. Prof. Ojienda** for the petitioners submitted that the scrutiny report on the 8 polling stations confirmed the contention that most polling stations in Morothile ward, Guticha ward and Rhamu Dimtu ward in Mandera North constituency did not use the Kiems kits. He pointed out that the SD cards for 9 polling stations were never availed to the deputy registrar for preservation which was disobedience of a court order. Further, that 2 SD cards were also not availed for the scrutiny exercise. It was his submission that technology was key in elections and the rationale for its introduction was outlined in the Court of Appeal case of **Independent Electoral & Boundaries Commission –vs- Maina Kiai and 5 Others, Civil Appeal No. 105 of 2017**. He further submitted that the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted arbitrarily and illegally and in blatant disregard of the election laws, namely, Regulation 26 (2) of Election Regulations and Section 44 of the Elections Act as read with Article 86 (a) of the Constitution.

**58. Mr. Abdullahi** for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that voters were identified through the Kiems kit in various ways, namely; fingerprints, National ID card or MRZ code at the back of the ID card which had to be scanned, (RW6's evidence). He further submitted that PW3 confirmed that voting at Rhamu Dimtu Primary School – 02 was through the Kiems kit while the scrutiny from the SD cards also confirmed the same position.

**59. RW1 Osman Muhamed Mohamed, RW2 Adan Dagane, RW3 Ali Osman Abdile, RW4 Hassan Abdi Mohammed, and RW5 Jelle Abdi Mohammed** who were all presiding officers for Ashabito Primary School; Dara Farm – 01; Rhamu Dimtu Primary School – 02; Shirshir Primary School polling stations respectively told the court that identification in their various polling stations was by the Kiems kits which were functioning.

**RW7 Mohammed Abdi Omar and RW8 Musa Abdullahi Sheikh** were constituency returning agents for JP and PDR respectively; **RW9 Hassan Hussein Mohammed** (chief agent JP) and the 3<sup>rd</sup> respondent told the court that they visited several polling stations including Tossi Primary School and Ashabito Primary School and found the Kiems kits to be working and people voting.

60. It is true that technology was introduced in the Kenyan elections to minimize or even eliminate cases of manipulation and/or compromise of the electoral process. It is also correct to state that any complaint of the abuse of the process must be concrete and based on facts which can be verified.

PW4 was an agent at Yaqila Farms. The Form 35A in respect of that polling station shows that PW4 signed it as an EFP agent. The polling station diary also shows that PW4 was present at the polling station up to the time the ballot boxes were being sealed. A report by the presiding officer in the said diary shows that the Kiems kit failed and this was reported at 6.00 am to the ICT office and deputy returning officer. Further that at 9.30 am, the station received an extra Kiems and the voting proceeded.

61. PW3 was an EFP agent at Sigare Hills. The Form 35A in respect of this station was signed by the presiding officer and the deputy presiding officer but none of the agents signed it. The polling station diary was not in the bundle. PW1 was said to have been at Tossi Primary School – 02. The Form 35A of this polling station was signed by Abdikarim Ali of EFP and PW1's name appears nowhere. In the polling station diary, the said Abdikarim Ali of EFP ID No. 34146807 signed most of the documents including witnessing the closure of the polling station. PW3's name only appears at the time of signing in at 6.26 am. The diary also shows that the presiding officer noted at 9 am that there was a technological problem and he sought assistance from the IT expert. I am satisfied that PW3 was not at the polling station

and EFP was ably represented by Abdikarim Ali who could have told the court what exactly took place in that polling station but he did not testify.

62. PW3, PW4 and PW11 testified that when the Kiems kits failed to work, the presiding officers allowed people to vote randomly without any identification and for some they used both the official and printed registers. It is not clear which one was the official register and which was the printed one mentioned by these witnesses. PW11 who was a candidate does not say what he did if indeed he saw this happening.

63. RW6 was categorical that there was no failure of the Kiems kits in Mandera North constituency. He did not need to go further than this because the petitioners did not avail sufficient evidence to prove that the Kiems kits totally failed and there was manual identification of voters or bypassing of the Kiems kits in the three mentioned polling stations.

**64. PW15 Ibrahim Mohamed Nunow** who is the only PNU agent who testified said, he was attached to Usubey polling station – 02. He testified that they had no agent in stream – 01 and he would occasionally check on stream 01. He used the Kiems kit in stream 01 to see how many people had voted. This confirms that the Kiems kit was working otherwise he could not have used it. He said 314 out of the 468 registered voters had cast their votes in stream 01 and he got these figures after successfully using the Kiems kits.

**65. Prof. Ojienda** submitted that the scrutiny report on some 8 polling stations confirmed the failure of Kiems kits. First of all, none of the polling stations where these two witnesses (PW3 and PW4) were agents was among the 8 polling stations scrutinized by the deputy registrar. Secondly, the scrutiny report confirms that indeed the Kiems kits were working as attested to by RW1 – RW10. The polling station diaries for Yaqila Farm and Tossi Primary School – 02 confirm that.

66. The Kiems kit is an electronic gadget and may fail. That does not however become the end of the exercise. It may be repaired or another availed to replace it to enable the exercise proceed. Secondly, failure to have a voter identified through the fingerprints does not mean the machine has failed. It simply means the machine is unable to capture the prints of that person. The clerk then moves to the next mode of identification which is still operated through the Kiems kit. PW3, PW4 and PW11 have not testified on what their exact complaint is. The report by the deputy registrar goes further to confirm that the Kiems kits worked. She was able to capture for the parties the information they wanted.

#### **g. Voting more than once in several polling stations and stuffing of ballot papers**

67. PW1, PW3, PW4, PW6 and Pw11 testified of people who were allowed to vote more than once contrary to Regulation 59 (3) of the Election Regulations 2012. They said the results amounted to an abnormal 80 – 100% voter turnout. PW3, PW7, PW9 and PW10 also spoke of stuffing of ballots in ballot boxes. It is an election offence to vote more than once.

Regulation 59 (3) provides;

***“No person shall cast more than one vote at any particular election.”***

Section 5 (n) of the Election Offences Act No. 37 of 2016 provides;

***“A person who votes more than once in any election commits an offence and is liable on conviction, to a fine not exceeding one million shillings or to imprisonment for a term of not exceeding six years or both.”***

68. PW4 in cross-examination confirmed having signed form 35A for Yaqila Farms and never raised any issue on double voting. PW1, Pw3, PW4, PW6 and PW10 were all EFP agents who were trained by their party. They have all testified as to a variety of malpractices which they allegedly witnessed at their stations but chose to do nothing about them yet they were or ought to have been trained about all this. When some of them left the station, they did nothing beyond murmuring. These agents were and are aware that (i) voting more than once in an election; (ii) an IEBC official colluding with any political party or candidate for purposes of giving an undue advantage to a political party or candidate; (iii) interference with a voter in the casting of his vote in secret; are all offences under the Election Offences Act No. 37 of 2016.

69. In spite of having been trained and allegedly seeing voters voting several times and knowing that to be an election offence, they did not make a formal report to the police. There is no police abstract that was annexed to any of their affidavits. What appeared on some affidavits were OB numbers from a police station. A police abstract gives details of the complaint that has been made at the station. I have not seen anything like that in the record. So who can believe them?

**70. PW9 Mohamed Noor Osman Mohamud** testified of having been issued with 17 ballot papers or 17 sets of ballot papers at Kalicha Primary School polling station – 02. He went to school upto Form 4 but appeared not sure whether what he had been given were 17 sets of ballot papers or 17 ballot papers. In his sworn affidavit at paragraph 8 he avers that the ballot papers he was given were unmarked and that he was asked by the presiding officer to mark all of them in favour of the Jubilee party candidates. He even gave to the court a breakdown of how he distributed the ballots papers.

71. In cross-examination, he changed his story and stated that he had been given already marked papers. My finding on this is that PW9 is an incredible witness. If the presiding officer had already marked those ballot papers, there is nothing that stopped the said presiding officer from putting them in the ballot boxes himself. If what PW9 told the court is true, he committed an election offence under Section 5 of the Election offences Act and should have been charged. He did not see anyone else being given several ballot papers as was allegedly done to him. One wonders how he alone was picked for purposes of perpetrating that illegality. He did not report this incident to any person or authority. I find no sufficient evidence adduced to confirm this allegation.

#### **h. Failure to give voters all the ballot papers in violation of the Elections Act 2011.**

72. Besides the evidence of PW5 and PW6 who were agents, there is no voter who testified to this allegation. Were the literate voters allowing the presiding officers to mark their ballot papers for them? PW5 and PW6 did not name those who were affected by this. All Kenyans who went out to vote knew they were to vote for six different positions. It is not clear how they could only be issued with the ballot for MCA and they accept to vote just for one position without raising questions. None of those who were victims testified before this court and there is no evidence of any formal report having been made by PW5 and PW6. No one can believe their inaction if the allegations are true.

**i. Electoral malpractices at the tallying centre/relocation of tallying centre**

73. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are accused of arbitrarily moving the tallying centre from Rhamu Arid Zone Primary School (Nomadic) to deputy County Commissioner's boardroom (DC boardroom). It is true the movement of this tallying centre is the subject of litigation. The High Court revoked the administrative decision to move the tallying centre vide a decision in High Court Petition No. 362 of 2017. The said High Court decision was however stayed by the Court of Appeal in Civil Appeal No. 118 of 2017.

74. The stay granted by the Court of Appeal therefore allowed the movement of the tallying centre to the deputy County Commissioner's boardroom which had been gazetted. That stay order emanated from the Court of Appeal and the appeal is still pending before that court. I will therefore not discuss the matter any further.

75. On alleged malpractices at the tallying centre, PW11 made allegation upon allegation on this. He purported to know the people who were marking ballot papers and altering results but he never named them nor reported the criminal activities for investigation. When RW6 appeared to testify, he was not asked anything about the illegal barrier he had allegedly created at the entrance to the tallying centre and was being used in the altering of results. Had it been true, counsel could have asked him about it in cross examination.

**j. Scrutiny report by the deputy registrar**

76. Prof. Ojienda has raised issue with nine (9) SD cards that were not surrendered to the deputy registrar for preservation as per the court order of 2<sup>nd</sup> October, 2017. As mentioned elsewhere in this judgment, the petitioners did not file nor serve the results of that read only access granted to them. Secondly, if nine (9) SD were not surrendered as directed, then it amounts to disobedience of a court order. Counsel should have come back to the issuing authority for further directions which he never did. Raising the issue in submissions is too late. Whatever figures he is presenting to the court in respect to those polling stations is unknown to the court and respondents.

77. Mr. Havi for the 3<sup>rd</sup> respondent submitted that the scrutiny done on six (6) polling stations (since SD cards for two (2) polling stations could not be traced) proved that the election met the qualitative test set out under Article 81 (e) of the Constitution. This meant that the principle of a free and fair, transparent and verifiable election had been held, he said.

78. He submitted that the report filed shows that the SD cards for Ali-Hidaya Primary School – 004 and Olla Primary School – 003 are missing. The Forms 35A in respect of the two (2) polling stations were availed to the court as ordered. It is noted that the results for these stations were nullified for the reason that the figures indicated on the Forms 35A were not matching. For Ali-Hidaya Primary School – 004 the number of valid votes were indicated as rejected and so could not match. While for Olla Primary School – 003 one point showed valid votes cast as 460 while another showed it as 560. There was therefore no candidate who benefited from this anomaly as the results were nullified. It was claimed that the action by RW6 was ultra vires and this was never demonstrated by the petitioners.

79. From the report also are large differences in the identified voters and votes cast in Dara Farm polling station – 02 and Barwaqo Primary School polling station – 01. A total of about 405 votes are unaccounted for. I say about 405 votes because the court has to give room for persons not identified through the Kiems kits.

**k. Illegal extension of voting time beyond 6.00 pm**

80. This ground though pleaded in the petition, was not proved as no evidence was adduced to support the allegations. The few polling stations scrutinized show that voting took place within the acceptable timelines depending on when it started.

**l. Failure to count votes, fill in Forms 35A and announce the respective results at the polling stations**

81. This ground though pleaded in the petition, was not proved as no evidence was adduced to support the allegations.

82. Prof. Ojienda submitted that the petitioners have proved that the election in question substantially violated the principles laid down in the Constitution and other written law on elections. Further that the irregularities and illegalities had affected the results, and the election should be annulled. He submitted that human error was not an excuse for inadvertence as was held in the case of **Dickson Mwendu Githinji –vs- Gatirau Peter Munya & 2 Others (supra)**.

Finally, he submitted that the credibility of elections is not just about who got more votes but the means through which a winner is declared.

83. **Mr. Abdullahi** for the 1<sup>st</sup> and 2<sup>nd</sup> respondents submitted that the said respondents conducted the elections in a regular, lawful and fair manner and no evidence was adduced to show otherwise. He relied on the case of **Mercy Kirito Mutegi (supra)** to expound on this. He prayed for the dismissal of the petition with costs.

84. **Mr. Havi** for the 3<sup>rd</sup> respondent submitted that after the qualitative test came the quantitative under Section 83 of the Elections Act. He said the court had in its ruling of 16<sup>th</sup> January, 2018 declined to grant the request for recount and re-tally. He said the key word in Section 83

of the Elections Act is “**substantially**”. He submitted that the 3<sup>rd</sup> respondent had won with a huge margin. That the petitioner who had sought to be declared the winner had abandoned the petition and so the prayer fell on the way.

85. It was his submission that the petitioners had failed to surmount the threshold set out in Article 81 of the Constitution. On this, counsel referred to an article titled “**Scrutiny in Electoral Disputes: A Kenyan Judicial perspective – Justice David Maraga**”. He added that the integrity of this election was confirmed by the report of the scrutiny filed by the deputy registrar.

86. On whether the irregularities are substantial to warrant the nullification of this election, he referred to the Article “**Resolution of Electoral Disputes in Kenya: An Audit of Past Court Decision – Muthomi Thiankolu**”. It was his submission that mere irregularities is not sufficient. He referred to two cases namely;

*i. Jackton Nyanungo Ranguma –vs- Independent Electoral & Boundaries Commission & 2 Others [2017] eKLR* where the court held that there was no need of considering the response in an instant where the petitioners case had not met the threshold. He asked the court to hold so.

*ii. Fredrick Kagosh Ogenga –vs- Independent Electoral & Boundaries Commission & 2 Others [2018] eKLR* where the petition was dismissed in spite of the irregularities.

87. He therefore prayed for the petition to be dismissed with costs. He considered costs of Kshs.5 million – 23 million.

88. In a rejoinder Mr. Hassan for the petitioners reiterated the submissions to the grounds set out in the petition. He submitted that the petitioners had established their case.

## CONCLUSION

89. I have in the analysis above set out each allegation raised by the petitioners and made a finding on it. The petitioners made several generalized allegations against the respondents without cogent, credible and consistent evidence. Most of the witnesses who were themselves petitioners fall into the category of witnesses described by the Court of Appeal in the case of *Kiilu & Another –vs- Republic [2005] eKLR 174* in the following words:

**“4. The witness upon whose evidence it is proposed to rely should not make an impression in the mind of the Court that he is not a straight forward person, or raise a suspicion about his trust worthiness, 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.”**

90. The witnesses made numerous statements which were not supported by cogent evidence. From the totality of the findings, above, I have come to the conclusion that there was no irregularity proved that affected the outcome of the parliamentary election for Mandera North held on 8<sup>th</sup> August, 2017. That answers issues (i) – (iii) combined.

91. I further find that the 3<sup>rd</sup> respondent was validly elected as the Member of Parliament for Mandera North.

### **Who bears the costs?**

92. Section 84 of the Act provides;

**“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 court may, at the conclusion of a petition, make an order specifying –**

**(a) the total amount of costs payable;**

**(b) the person by and to whom the costs shall be paid;”**

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

**“... 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.”**

94. Duly guided by the said finding, and the above provisions I have considered this matter before me. It was a bit complex considering the many petitioners, applications and the work and time put in it. I will accordingly cap the instruction fee at Kshs.3,000,000/= for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and Kshs.3,000,000/= for the 3<sup>rd</sup> respondent. The costs shall be taxed and certified by the deputy registrar.

## **FINAL ORDERS**

95. The final orders of this court are as follows;

- a. The petition is hereby dismissed.
- b. The respondents are awarded costs on the following terms;
  - i. Instruction fees for the 1<sup>st</sup> and 2<sup>nd</sup> respondent capped at Kshs.3,000,000/=.
  - ii. Instruction fees for the 3<sup>rd</sup> 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 money deposited as security herein shall be applied in the payment of taxed costs on a pro-rata basis.
- c. 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 27<sup>th</sup> 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. Havi for 3<sup>rd</sup> Respondent – with Ms. Namole

Mr. Abdullahi for 1<sup>st</sup> and 2<sup>nd</sup> respondents

No Appearance for Professor Ojienda for the petitioners

1<sup>st</sup> petitioner – present

All other petitioners - present

**Court:**

Judgment delivered in open court.

**H. I. ONG'UDI**

**HIGH COURT JUDGE**

**27.2.2018**