



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ELECTION PETITION NO. 3 OF 2017

IN THE MATTER OF THE ELECTION ACT NO 24 OF 2011

AND THE ELECTIONS (GENERAL) REGULATIONS 2012 AND

ELECTIONS (PARLIAMENTARY AND COUNTY) PETITION RULES, 2017

AND

IN THE MATTER OF THE GUBERNATORIAL ELECTIONS FOR KISII

COUNTY, COUNTY NO 45, HELD ON 8TH AUGUST 2017

JOEL MAKORI ONSANDO.....1STPETITIONER

FRANCIS MOCHOGE OMAO.....2NDPETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

ROBERT ISAAC SYDNEY NAMULUNGU.....2ND RESPONDENT

JAMES ELVIS OMARIBA ONGWAE.....3RD RESPONDENT

JOASH ARTHUR MAANGI GONGERA.....4TH RESPONDENT

NAFTALI OBWOCHA ORINA.....5TH RESPONDENT

JUDGMENT

1. On 8th August, 2017 the Independent Electoral and Boundaries Commission (the 1st Respondent), through its returning officer (the 2nd Respondent) conducted the gubernatorial election for Kisii County. There were 8 candidates for this position who garnered results as follows-

- JAMES ELVIS OMARIBA 206,164
- CHRISTOPHER MOGERE OBURE 110,760
- MANSON OYONGO NYAMWEYA 53,083
- JUSTRY P LUMUMBA NYABERI 18,485

- CHARLES MARANGA BAGWASI 4,542
- SAMWEL NYACHWAYA NYAMAO 3,297
- KEPHA MOGENI 3,405
- Total votes cast 402,659

2. The 3rd respondent who was a candidate on the Orange Democratic Movement (ODM) ticket garnered the highest number of votes and was declared by the 2nd respondent on 11th August 2017 as the winner and the duly elected Governor of Kisii County, and was thereafter published in **Gazette Notice No. 7845**. The 4th respondent, his running mate, was declared as the Deputy Governor. The 5th Respondent was the chief agent for the **ORANGE DEMOCRATIC PARTY (ODM)** through which the 3rd and 4th respondent vied for their positions.

The Petitioners' case

3. The petitioners are duly registered voters in Kisii County and have challenged the election of the 3rd and 4th respondents as Governor and Deputy Governor respectively. By their petition dated 4th September, 2017, they have sought orders that-

- a) **A declaration that the non-compliance, irregularities and improprieties in the election for Governor and Deputy Governor for Kisii County were substantial and significant that they affected the integrity and quality of the election and the result thereof;**
- b) **A declaration that the 3rd and 4th Respondents were not statutorily qualified to contest the Kisii County gubernatorial election as Governor and Deputy Governor respectively;**
- c) **A declaration that the 3rd and 4th Respondents were not validly elected to the position of Governor and Deputy Governor Kisii County and the declaration of the result is invalid, null and void;**
- d) **An order directing the 1st Respondent to organize and conduct a fresh election in strict conformity with the Constitution and the Elections Act, 2011;**
- e) **A determination that the 3rd Respondent committed an election offence under section 15(2) of the Election Offences Act;**
- f) **A determination that the 5th Respondent committed an election offence under section 15 (1) (a) of the Election Offences Act;**
- g) **The court do issue an order barring the 3rd and 4th Respondents who have committed serious electoral offences from participating in subsequent elections for a period of at least 5 years or as the Court may deem just and expedient;**
- h) **An order directed towards the 1st and 2nd Respondents to produce the ballot boxes for NYANCHENGE POLLING Station in BOBASI CONSTITUENCY which were allegedly damaged following an accident;**
- i) **The Respondents be condemned to pay the Petitioners' costs of this petition; and**
- j) **Such further, other and consequential orders as this Court may lawfully make.**

4. The petition was supported by the affidavits of the 1st petitioner (PW1) who was the chief agent for Jubilee Political Party and Dennis Orina (PW3) an analyst. PW2 was stood down in the middle of his testimony and was not recalled. The petition is premised on seven grounds as indicated hereunder:-.

(a) Lack of a credible voters' register

5. The petitioners averred that the voters' register that was used in this election was not credible and verifiable as it was manipulated with a view to undermining the integrity of the gubernatorial elections in Kisii County. It was their case that the total number of registered voters in various polling stations in Kisii County varied significantly in the statutory forms returning the results of the 6 elections that were conducted on that day. Based on a comparative analysis of the forms 34B (for the presidential election), 35B (for Member of National Assembly), 37B and C (for Governor), 38B and C (for Senator) and 39B and C (for Women Representative) from various polling stations, they aver that the number of registered voters in a polling station was not uniform in all the statutory forms. [The summary of the polling stations was attached to the petition as schedule 1 and annexed to the affidavit and marked '**JMO 4**'. The forms with the anomalies were marked '**JMO5**'].

6. The petitioners argued that the number of registered voters as declared in the statutory returns must be the same per polling station. Hence, according to the petitioners the difference in the numbers indicates that a faulty register was used to conduct the elections or the voters' register was tampered with by increasing the number of registered voters to favour of the 3rd and 4th respondents. As a result, there was no telling whether ineligible persons voted during the elections.

(b) Differences in number of votes cast in the 6 elections

7. It was the petitioner's case that pursuant to the 1st respondent's memo issued on 3rd August, 2017, it was mandatory for all voters to receive all the 6 ballots for the 6 elective seats. The petitioners state that this polling procedure was meant to ensure that votes cast for all the six seats are identical so as to eliminate rigging through inflation of figures. The petitioners aver there was no compliance with the said memo and the total number of votes cast for the 3rd and 4th respondents differed marginally from those cast in the other elective seats.

8. The Petitioners attached Schedule 2 ('**JMO6**') which was a comparison of the votes cast per seat per polling station as indicated in the forms 34B, 35B, 37B and C, 38B and C and 39B and C for various polling stations in Bomachoge Borabu, Nyaribari Chache and Kitutu Chache Constituencies. The petitioners contended that since no voter is allowed to leave the polling station with a ballot paper then there should not be such a wide difference in the total votes cast, including the rejected and stray ballots, in the six elective posts.

(c) Striking coincidences and incredible figures

9. The petitioners averred that the figures for the votes garnered by each candidate including the rejected votes as declared by the 2nd respondent are so strikingly similar that they lack credibility. According to the petitioners it is not possible for figures obtained by all the candidates and the rejected votes to be the same in two streams of the same polling station and this is evidence that the results were manipulated. He annexed to his petition schedule 3 ('**JMO8**') in which he identified 8 polling centers with 2 streams having the same results for the candidates and the same number of rejected votes, namely:

(d) Disqualification of the 3rd and 4th respondent

10. The petitioners averred that the 3rd and 4th respondents were constitutionally disqualified from contesting in the elections saying the 4th respondent did not pass the integrity test, which would bring honour or promote public confidence in the integrity of the office he purported to run for. This is because the 4th respondent was allegedly charged and convicted by the **Hennepin County District and Anoka District Courts** in the **United States of America** for the offences of disorderly conduct and operating a motor vehicle while under the influence of alcohol respectively. He failed to disclose this to the Ethics and Anti-Corruption Commission (EACC) when filing in his self-declaration form, thus demonstrating a lack of honesty and integrity. In addition to this, the petitioners allege that his ineligibility is said to also affect the 3rd Respondent because they were running mates.

(e) Security of ballot materials

11. It was alleged that the electoral materials for **Nyachenge polling station** in Bobasi Constituency were not in the ballot boxes when they were delivered to the tallying center. The petitioners rejected 1st and 2nd respondents' explanation that the vehicle transporting the ballot materials was involved in an accident as a fabrication because there were no damaged ballot boxes. After protesting they were allowed to note down the serial numbers of the material that was delivered outside the box. He annexed the notes to his supporting affidavit and marked them as '**JMO14**' (which turned out to be a letter dated 7/8/17 appointing **NAFTALI ORINA OBWOCHA** as the ODM party chief agent).

(f) Appointment of County government employees as presiding officers, clerks, observers and agents

12. The 1st and 2nd Respondents were alleged to have appointed the county government employees listed in schedule 4 to act as presiding clerks and observers in the elections against its own memo '**JMO-10**' directing its staff not to appoint civil servants. According to the petitioner, this was in turn described as a ploy intended to manipulate and favour the 3rd Respondent and this compromised the 1st Respondent's conduct of a credible election. The petitioner cited as an example **TRIZA CHEBET** who was the presiding officer at Nyoera (03). Annexures '**JMO11**', '**JMO12**' and '**JMO13**' were copies of the list of county government employees that were appointed by the 1st and 2nd respondents, copies of the election forms that were signed by these officers, and a memo from the departmental promotion of some of the employees.

13. The memo marked '**JMO10**' was not attached to the affidavit. It was pointed out by counsel for the 1st and 2nd Respondents that the documents served upon them were not properly marked. What had been marked as '**JMO11**' was a document with serial numbers on it and did not have the names of the employees who were employed by the 1st respondent. '**JMO13**' was a pay slip. JM12 and the pay slip marked JM13 referred to the affidavit of **JAMES MAKORI OSANDO** whereas the petitioner who swore the affidavit, is **JOEL MAKORI OSANDO**.

Appointment of a public officer as chief agent

14. The 3rd and 4th respondents are alleged to have appointed the 5th respondent to act as their chief agent yet he purportedly works at the Health Department in Kisii County and is therefore a public officer within the definition of **Article 260** of the Constitution. The petitioners argued that **section 12 of the Political Parties Act and sections 16 and 23 (3) (a) of the Leadership and Integrity Act** require State and public officers to remain neutral on political matters and bars them from engaging in political activities that would prejudice or hamper effective delivery of service.

15. The 3rd respondent is said to have contravened **Section 15 of the Election Offences Act** which creates the offence of participating in elections by public officer. Further that by accepting his appointment, the 5th respondent committed the election offence of acting as an agent of a political party contrary to **Section 15 (1) (a)**. That the 3rd respondent contravened **Section 15 (2)** by knowingly aiding the 5th respondent to contravene **subsection (1) (a)**. Committing this offence rendered the 3rd Respondent ineligible to contest for the election.

Authenticity of the form 37C

16. It was alleged that this form lacked watermarks in the last 8 of its 10 pages. PW1 signed the form 37C and although the 1st Petitioner had signed it, he nonetheless was contesting the validity of the election.

(ii) The 1st and 2nd respondents' response

17. The 1st and 2nd Respondents case was that the gubernatorial elections in Kisii County were held in strict conformity with the law, and the elections were free, fair and verifiable. They argued that the register used in the impugned elections was simple, accurate, verifiable, secure, accountable and transparent. It met the constitutional and legislative standards and was credible. The number of registered voters was not altered in any of the polling stations. In response to the allegations concerning discrepancies of the votes cast in the different elective posts, the respondents averred that whereas it is mandatory for every voter to be issued with six ballot papers, it is not mandatory for the voter to vote in the six elections. Some voters did not mark their ballots at all while others put their ballots in the wrong boxes. The difference in votes cast was occasioned by stray ballots.

18. The 1st and 2nd respondents averred that there were no results from the same polling station that were the similar, saying Schedule 3 which particularized the polling stations with striking coincidences and incredible figures either contained a repetition of the results from the same polling station or they were as a result of human error.

19. The 1st and 2nd respondents averred that the vehicle that was transporting election materials to Nyachenge Polling Station was involved in an accident and as a result the ballot boxes were damaged. However, this was after the election had been concluded and therefore the incident did not have a bearing on the process or the results.

20. They maintained that they complied with the law when appointing presiding officers and polling clerks. That the list of appointees was issued to political parties, the independent candidates and another was displayed in the respective constituencies in accordance with Regulations 5 and 6 of the Elections (General) Regulations, 2012 and that they did not receive any objections to the appointments.

21. On the allegation that the 3rd and 4th respondents used Kisii County Government employees to further their political agenda, the 1st and 2nd respondents' answer was that they received no complaint of violation of the code of conduct or at all against the 3rd and 4th respondents.

22. They maintained that they complied with the law in appointing the polling clerks and presiding officers and did avail the list of appointed officers to the political parties and independent candidates in accordance with **Regulations 5 and 6 of the Elections (General) Regulations, 2012** and no objection was lodged against any of the appointed officers. Concerning the qualifications of the 3rd and 4th respondents, the 1st and 2nd Respondents' argument was that they cannot be faulted for clearing the two because they presented the requisite clearances and in particular the police clearance certificate. There was no complaint that was lodged against their suitability.

The 3rd- 5th Respondents' response

23. The 3rd-5th respondents' response was that the gubernatorial election was free, fair and transparent, it was by secret ballot, it was free from violence, intimidation, improper influence or corruption, was administered in an impartial, neutral, efficient accurate and accountable manner and it was simple, accurate, verifiable, secure, accountable and transparent. They denied the allegations about fundamental errors, fraud, illegalities and irregularities. They argued that the election accorded with the Constitution, the Independent Electoral and Boundaries Commission Act, the Elections Act, the Regulations and all other relevant law.

24. On the allegation that the 3rd and 4th respondents used Kisii County Government employees to further their political agenda, the 1st and 2nd respondents' answer was that they received no complaint of violation of the code of conduct or at all against the 3rd and 4th respondents.

Lack of a credible voter's register

25. The respondents maintained that the 1st and 2nd respondents put in adequate measures to ensure that the register of voters was verified and they published it in the Kenya Gazette. They stated that all voters who voted for the six elective posts in the August 8th, 2017 elections were identified by one principal register which is the legitimate document and should be the sole source of reference of any claims concerning the registration of voters. The respondents insisted that the 1st Respondent used the KIEMS kits for purposes of voter identification which was principally through the use of voter's biometrics, and where that failed, then there was the use of alpha-numeric search (details of the process was enumerated in the pleadings).

26. According to the respondents, the Petitioner has mistaken the Form 37B for the Principal Voter and failed to appreciate what constitutes a valid Voters Register. In reference to the petitioners' schedule 1 particularizing the differences in the registration of voters is termed as irrelevant because it was prepared using the forms 37B and 37C as the basis of determining the registered voters per polling station. According to the respondents, these forms, being derivatives of the forms 37A, cannot invalidate the register of voters or sustain a claim that there were discrepancies in the number of registered voters because they may have errors.

27. They also contended that the schedule was not generated from a comparison of the register of voters and the primary statutory return forms 37A makes it of no probative value. Moreover, the 3rd respondent contended that he examined the forms 37A and 37C against the Gazetted register of voters and the three documents tallied. Also that the number of votes cast did not exceed the number of registered voters in any of the polling stations. He produced his table as exhibit 1.

Differences in the number of votes cast in the six elections

28. The 3rd respondent contended that the requirement was that each voter be issued with six ballot papers not that each voter must mark all the six papers i.e. the variance in the total votes cast may be due to the rejected and stray ballot papers, and the total ballots cast including the rejected ballots would give the total number of votes cast and the variance in the various elective posts. It was contended that the Schedule 2 contains only statistics without any proper referencing as neither did it disclose the source of the information and the documents on which it was premised had not been attached. Hence, the petitioners were faulted for failing to refer to the form 37A as they could not use the returns of the presidential election, the same having already been nullified.

Striking coincidences and incredible figures

29. The respondents contended that the basis on which the claim for striking coincidences was made i.e. the table (schedule 3) was not pegged on the form 37A which is the form that should be used to ascertain the number of votes received by each candidate. Hence, the purported coincidences were described as inadvertent errors which occurred during the recording of the results and were not reflected in the primary form 37A and the declaration form 37C. That in any event, the proved errors were only in regard to 100 votes and they affected all the candidates. These votes cannot overturn the results because he won with over 95,000 votes. Therefore, there was no dispute concerning the voting or counting process.

Disqualification of the 3rd and 4th respondents to run for the election

30. The 3rd and 4th respondents contended that they were cleared to run for the elections having fulfilled the relevant requirements under the law to run and hold public office. The petitioners were faulted for failing to table cogent evidence to support their claim that the 4th respondent was ineligible to be elected and should have been disqualified from running for office. According to the respondents, there was no evidence that the 4th respondent had been charged for a criminal offence as there was no copy of charge sheet annexed nor any official record showing that the 4th Respondent had been convicted of any criminal offence.

Security of ballot materials

31. The 3rd respondent maintained that there was an accident as the ballot boxes were being transferred from **NYACHENGE POLLING STATION** to the tallying center and the incident was reported to police. That there were some damages occasioned to the ballot box but there was no evidence that ballots in the affected box were given to other candidates or any other element of foul play and the same were not delivered outside the ballot box. They also pointed out that as a demonstration that all was well, the parties' agents signed the form 37A is evidence that the same was properly recorded.

Appointment of government employees to act as polling officials/ observers

32. On this issue the respondents maintain that the 1st respondent is an independent office with the powers to appoint its presiding officers and clerks. Hence, the 3rd and 4th respondents had no power to influence the recruitment decisions of the 1st respondent and they were not responsible for the actions of the employees of the 1st respondent or of any other government employee.

33. The 3rd respondent denied any knowledge of any government employee acting as an election official. Whereas he acknowledged being the Chief County Executive, he pointed out that he is not the Human Resource Officer of the County Government of Kisii and is not directly or indirectly involved in recruitment of county employees. He recognized the signature on '**JMO 16**' (Kisii County KICOSSCO participants list 2016)), but he could not tell whether the employees campaigned for him. Thus the list of government officials who allegedly served as polling clerks is described as having no probative value without certificates or a Gazette notice to back it up.

34. That the 3rd Respondent has not been summoned by the Ethics and Anti-Corruption Commission personnel for abuse of a position of power, privilege or influence, including patriarchal, state or traditional authority for political purposes so as to confirm the Petitioner's claims. In reference to the letter dated 7th August 2017 appointing **NAFTALI ORINA OBWOCHA** as ODM party chief agent the same was described as a forgery and the court was urged to demand for the original so as to establish its authenticity of the appointment of the 5th respondent as the 3rd respondent's chief agent.

35. As a consequence thereof, the 3rd respondent denied that the 5th respondent was his agent or that he authored or signed the 5th respondent's the said appointment letter alleging that the signature on the document is a forgery. He testified that the petitioners' exhibit did not have the agent's national identity number, contacts and its contents were obscured by a hand. He also averred that the pay slip produced as evidence referred to **NAFTALI OBWOCHA ORINA** who is different from the **NAFTALI OBWOCHA** named in the exhibit at page 181 of the petition.

36. He confirmed that his agent was **GEOFFREY MOGIRE**, and he produced his letter of appointment as exhibit '**JO03**' dated 7th August 2017 saying it is this agent who has signed the form 37C. He contended that **Section 57(1)** of the **Elections Act** requires every political party to submit to the 1st respondent the names of its National Chief Agent and 47 agents. Therefore, there was no evidence that the 5th respondent was submitted to the 1st respondent as the agent of the 3rd respondent's party.

37. Further that the Petitioner attached document from IEBC (being the form 37 a signed by his agent which clearly showed the name of the agent as **GEOFFREY MOGIRE** and not **NAFTALI ORINA OBWOCHA** as alleged. He further contended that in any event there is no document presented from IEBC showing that the 5th Respondent signed and presented to them a document purporting to be the 3rd Respondent's agent nor is there any evidence demonstrating that the 5th Respondent accepted the appointment and acted as the ODM Chief

Agent in the August 8th 2017 general elections.

38. In conclusion, the 3rd respondent denied that he committed any offence under **Section 15 (2)** of the **Election Offences Act** and argued that there was no complainant to the Ethics and Anti-Corruption Commission, the police or the director of public prosecution. He urged the court to determine that the 3rd respondent was duly elected and the election was valid. Parties adopted their affidavits as evidence in chief and the hearing proceeded by way of cross examination of the witnesses.

Mr. Omwanza and Mr. Begi represented the petitioners although eventually only one petitioner appeared in court.

Mr. Obondi and Mr. Rigoro were for 1st and 2nd respondents while Mr. Omogeni and Mr. Wanyama represented 3rd – 5th respondents.

B. THE EVIDENCE:

39. The 1st petitioners (PW1) on cross examination admitted that the registered voters in **Getai Primary, Nyantira Primary School (01), Riyabu Primary School (01), Nyabisase Primary School (01), Riongocho Primary School, Igorera Primary School (01) and Mogonga Primary School (01)** as stated in schedule 1 and in the forms 37B and C tallied with the Gazetted registers of voters. He also admitted that he had not seen the voters' register before filing the petition, but nonetheless maintained that the voter register in Kisii County was manipulated by increasing the number of registered voters to favour the 3rd Respondent. That for instance, in **Omosaria Primary School**, form 35B had 279 registered voters but both the Gazetted register and form 37C indicated 424 voters. He argued that his argument that the number of voters was inflated was supported by the fact that the form 37C which was used to declare the results had a higher number than the form 37B.

40. That he only saw the forms 37A after they were filed in court. His agents signed the forms 37A. He admitted that there was no evidence of inflated votes in **Ikena Primary School, (01) and (02), Omosaria Primary School, Mosora Primary School and Gionsaria Primary School** as the registered voters did not exceed the votes cast. He also admitted that his schedule was incomplete as It did not have the results for the Member of County Assembly election. In addition, some columns in the polling stations in **Kitutu Chache** Constituency were blank.

41. He was also cross examined on the forms 37A against the forms 37C in two polling stations listed in his schedule **Kemoreko (01) and (02) and Endereti (01) and (02)**. In **Kemoreko Primary School (01) and (02)** the votes were as follows-

Name	Form 37A		Form 37C	
	Stream 1	Stream 2	Stream 1	Stream 2
• Charles Maranga Bagwasi	7	4	7	7
• Kepha Mogeni	5	4	5	5
• Justry Lumumba Nyaberi	10	10	10	10
• Samwel Nyachwaya Nyamao	2	0	2	2
• Manson Oyongo Nyamweya	23	18	23	23
• Christopher Mogere Obure	103	99	103	103
• Boniface Omboto	4	6	4	4
• James Elvis Omariba Ongwae	276	268	276	276
• Rejected votes	5	0	5	5

46. In **Endereti Primary School (01) and (02)** the results were as follows:

Name	Form 37A		Form 37C	
	Stream 1	Stream 2	Stream 1	Stream 2
• Charles Maranga Bagwasi	2	7	2	2
• Kepha Mogeni	2	1	2	2

• Justry Lumumba Nyaberi	4	7	4	4
• Samwel Nyachwaya Nyamao	1	4	1	1
• Manson Oyongo Nyamweya	20	17	20	20
• Christopher Mogere Obure	113	137	113	113
• Boniface Omboto	2	002	2	2
• James Elvis Omariba Ongwae	156	134	156	156

42. He admitted that in **Oroche (02)** the results are also correctly captured in the form 37A and the errors in the three polling stations are only in the form 37C. He stated that he had only collected the data from the form 37C and did not analyze the form 37A. That he was supplied with the results by his agents but he did not tally them. He recanted his claim that the results cannot be explained and that the duplication of results was so widespread. He conceded that there was no pattern of manipulation of the results to favour the 3rd Respondent as the errors affected the candidates indiscriminately. In **Endereti (02)** the 3rd Respondent gained 20 votes and in **Oroche (03)** he lost 7 votes. **Chris Obure** gained 4 votes in **Kemoreko Primary School (02)**.

43. He confirmed that he was not at **Nyachenge polling station** so he could not testify on the events that took place there. That he had agents at this station but they did not report to him of any incidents concerning manipulation of the results. He stated in his affidavit that he was present during the protest that arose when the ballot material was delivered. PW1 produced the copy of the 5th Respondent's appointment letter '**JMO14**', copies of his pay slips '**JMO15**', a list of county government employees who participated in the **KICOSCO** games **JMO16**, and a bundle of the 5th Respondent's Face book posts declaring his support for the 3rd Respondent '**JMO17**'. **JMO17** all of which were expunged from the court record in a ruling dated 23/11/2017.

44. Lastly he insisted, that the election was transparent and peaceful, only that there were problems in the entry of figures, transmission and tallying of the results. He agreed that he signed the form 37C but nonetheless was contesting the validity of the election.

45. **PW3 (DENNIS ORINA)** told the court that he analyzed the Kisii County gubernatorial elections which were published in the 1st Respondent's portal and discovered serious anomalies which he indicated in his exhibit '**DO1**'. He told court that he logged in, identified each and every figure and typed them into an Excel Sheet. However, he did not download the information and had no evidence that the information in his exhibit was obtained from the 1st respondent's portal. He revealed on-cross examination that he did not use the statutory forms 37A, B and C when doing the analysis and on cross examined by Mr. Omogeni, that the aim of the columns colour-coding in different columns was to try and have a comparison between the results for each of the six different positions.

46. In re-examination, he explained that he was requested to enter all the 1126 polling station and that collect totals on the portal for the six elective seats. That as a result, he expected that since every voter was given 6 ballot papers and was supposed to ensure that each ballot is cast into the ballot box, the totals for all the seats should have been close and the difference should not have exceeded 2 votes.

47. **1st and 2nd respondents' witness RW1 (MOSES DAULA)** clarified that he was the returning officer for **Bobasi Constituency** and not **Kitutu Chache Constituency**.

48. In cross examination, he testified that being the returning officer, he prepared the returns for the various elective posts in Bobasi Constituency including form 37B and form 34B. He maintained that the number of registered voters he declared in his returns was the same because the number of registered voters is constant. He was questioned on the statutory forms 37B for **Omosaria Primary School (02)**. In reference to form 37B there were 424 registered voters and in form 37B there were 279 voters. That form 34B is not a register and that the elections are conducted using the A series. He termed it as a transposition error when transferring when transferring results from A series – B series which does not affect the votes garnered by the particular candidate, hence the same did not affect the total number of votes cast (341) and in addition, it has not been shown that the total number of votes cast exceeded total number of registered voters.

49. He admitted that at **Irongo (014)** the total number of registered voters also differed in form 37A and 37B which he also termed as a transposition error by the data entry clerks which did not affect the outcome and it had been corrected in form 37C.

50. He further confirmed that the table showing similarities and coincidences in the results '**JMO4**' as presented by petitioner did not represent the factual position and has many glaring errors. That there were 184 polling stations in **Bobasi** Constituency but the petitioner had left out 67 polling stations in his tables. Among the missing polling stations are: **Nyanuguti primary school polling station, Kenyerere primary school stream 1 and 2, Nyamokenye**

primary school, Riamarube primary school, Ribwago Tea Buying Centre, Nyantira Tea Buying Centre, Nyagiki primary school, Kiongongi primary school, Nyaguku primary school, Rusinga primary school, Rianyachaba primary, Riobara primary school, Riakerongo primary, Nyambuto Tea Buying, Nyachenge primary, Riosonsere, Nyabisia polling station, Kebuko Tea Buying, Turwa, Ikenye, Mochengo, Nyacheki, Riosugo, Ibiyoa, Nyacheki, Sugubo, Keera primary, Riogango, Nyabete primary, Nyaboterere, Nyabiosi, Getai, Ekeonga, Nyamache primary, Nyabigonkoru, Nyameuru, Nyamarambe, Riamati, Kenyoro, Nyakegogi, and Sameta primary school.

51. Hence, he described the table as misleading because the total number of registered voters after adding the polling stations in the schedule

was 55,998 but in reality, they should be 89,310. In addition to this, that the entries for **Gionsaria primary school, Nyakegogi, Birongo primary school, Obuya primary school and Boitangare primary school** were repeated deliberately to mislead the court.

52. He confirmed that the number of registered voters in Form 37C corresponded with the voters register except for a few transposition errors in the column for registered voter. However, that this did not affect the votes garnered by the candidates who took part in the election. He also confirmed that he did not receive any protests from the candidates and in fact the chief agent of candidate number 2 was very cooperative as he was the first one to sign Form 37B after which he was issued with a copy. He also confirmed that without a voter's register, the petitioner cannot allege that there was no credible voter register. That they had one register which was used at the polling station and that the errors in form 37B could not affect the validity of election of Governor as those are two different election positions.

53. In Re-examination he revealed that the register was available to the public as copies were pinned at every polling station in **Bobasi**, 7 days before the date of the election. He reiterated that the number of registered voters was consistent and did not vary at any polling station and that in **Omosaria** the gazetted number of registered voters was 424 which was in line with what was stated in the form 37A.

54. **RW2 (SYDNEY ROBERT ISAAC NAMULUNGU)** was the County Returning Officer, Kisii County, and also the 2nd Respondent. He adopted his replying affidavit he swore on 15th September, 2017 as his evidence in chief and clarified paragraph 10 of the affidavit that the accident happened after and not before the elections.

55. He stated that he compiled Form 37C which indicated that the number of registered voters in **Omosaria primary school** was 424. He explained that he used form 37A, form 37B and the National Voters Register while filling in the form. He admitted that form 37B showed that the number of registered voters was 279. However, form 37A indicated that the registered voters were 424. Hence, he could not tell whether the returning officer used form 37A to collate the results but that human errors could still come into play.

56. He explained that the definition of register of voters meant a current register of persons, figures and includes an electronic register. That the word person was relative and could mean a person's name or numbers. He explained that the actual register to be used at the station must have names of the voters and that one verifies whether a person is a registered voter by checking the person's name and identity card number.

57. He further explained that a voter is not mandated by law to cast the six ballots but however, revealed that it was a criminal offence for the voter to leave the polling station with the ballot papers. In reference to **Omosaria**, he admitted that there were discrepancies in the numbers of registered voters in the various statutory forms for some polling stations. However, he explained that in **Omosaria (01)** the forms 34B and 37C showed that there were 424 registered voters but form 37B showed 279 voters, at **Irongo** Polling Station, the form 34B showed that there were 185 instead of 188 registered voters, at **Rianchaga Primary School** 37B had 674 registered voters and form 34B showed 510 registered voters and at **Nyabisase Primary School (01)** registered voters as per 34B were 220 whereas according to form 37B they were 510.

58. He admitted that, as per the form 37B, the results in **Getai Primary School (01) and (02), Nyantira Primary School (01) and (02), Kemoreko Primary School (01) and (02)** were exactly the same in two streams of the same polling stations. That the results for **Oroche (02)** had been transposed as results for **Oroche (03)**, the results for **Endereti 1** were repeated. He explained that he noted the errors while filling in the form 37C as he was required to compare the forms i.e 37A and 37B but he did make any changes in form 37C as the law did not allow him to amend form 35B.

59. He acknowledged that the errors only affected 1000 votes which when assessed against the winning margin were inconsequential. He argued that form 37A should be used to compare and the same as it did not replicate the errors.

60. In re-examination, he explained that in order to give a conclusive opinion on **Omosaria** polling station, he needed forms 34A which was the original data from polling station as entered by presiding officer and should contain the accurate number of voters as contained in the voters register and form 34C. He maintained that the petitioner did not request for forms 37A and the register of voters which are necessary to determine the issues in this petition and added that there are two registers, i.e. the electronic register in the KIEMS and the printed hard copy. That the presiding officer at a polling station is issued with a register in the KIEMS Kit and a hard copy, another copy is pinned at all door posts of all polling stations three days before the election and If there was concern about voters' register on polling day the petitioner should have accessed it from the presiding officer.

61. He further explained that the form 37A is filled by the Constituency Presiding Officer and his team. That after announcing the results, he pins a copy of the form at the door, puts a copy inside the ballot box, pins another on top and the fourth copy is put in a tamper proof envelope and given to the County Returning Officer who opens it in the presence of all the agents and if they are satisfied that all the entries are correct then they hand over the form to the County Returning Officer who now authorizes the entry clerks to make entries in the Tallying center.

62. He explained that there are 6 entry clerks, they tally the six-election starting with Presidential and finishing with gubernatorial. He admitted that the working environment was very difficult, therefore, transposition errors were inevitable.

63. He further explained that the errors were inadvertent and not meant to benefit any of the candidates and gave an example of **Kemoreko (02)**, where **Chris Obure got 99** but form 35B indicated 103 hence he lost 4 votes. That in the same station, **Ongwae, lost 8 votes as form 35A showed he got 137 but was given 113 votes**. That in **Bobasi**, the error was in **Nyantira (02)** where Obure got 127 votes but was given only 120 votes. Ongwae had 108 votes as per form 37A but was given 98 so he lost 10 votes.

64. He maintained that in total the votes affected by errors in the whole county was not more than 1000, the victory margin was over 90,000 votes and the margin error is so insignificant it cannot affect the final tally.

65. In re-examination, he revealed that there was no allegation that the votes as garnered by any candidate was incorrect or that entries in

Form 37A were incorrect. He clarified that the accident involving the vehicle transporting election materials from **Nyachenge** polling station happened after the results were announced as the ballot box was being returned to the tallying center. That the motor vehicle rolled off the road; security officers and IEBC officials were injured and the ballot box carrying materials for the gubernatorial election was slightly damaged. However, its contents remained intact and form 37A was still attached to the box. That all the contents were delivered at the tallying center and agents allowed to take photos and make notes.

66. He also clarified that there was no replication of results in **Kemoreko** primary school, **Oroche** results in stream I and II and **Endereti** streams 1 and 2 which goes to confirm his averment that the errors in form 37B occurred during transposition of the results.

67. When cross examined by the court, he clarified that Mr. Omwanza cross examined him using the forms 37B which had replicate results for **Kemoreko**, **Oroche** and **Endereti**. In contrast Mr. Obondi re-examined him using forms 37A which were signed by agents and confirmed the results. Hence, what was in 37A is what should have been in 37B but due to transposition errors arising from fatigue it resulted in what Mr. Omwanza was showing him.

68. He further clarified that the copy of the register which is pinned at the door/entry of polling stations had the names of an individual and the polling steam but however, they remove the identity card number and telephone number which the public can be able to access and go through.

The 3rd respondent's evidence

69. The 3rd respondent testified that the petitioners' exhibit did not have the agent's national identity number, contacts and its contents were obscured by a hand. In reference to the pay slip produced as evidence referred to Naftali Obwocha Orina who he said could be different from the Naftali Obwocha named in the exhibit at page 181 of the petition.

70. He stood his ground that his agent was **GEOFFREY MOGIRE**, and produced his letter of appointment as exhibit '**JO03**'. That it is this agent who had signed the form 37C. He contended that **Section 57(1)** of the **Elections Act** required every political party to submit to the 1st respondent the names of its National Chief Agent and forty-seven agents and that there was no evidence that the 5th respondent was submitted to the 1st respondent as the agent of the 3rd respondent's party.

71. He also denied that he committed the offence under **Section 15 (2)** of the **Election Offences Act** arguing that there was no complainant to the Ethics and Anti-Corruption Commission, the police or the director of public prosecution. He urged the court to determine that the 3rd respondent was duly elected and the election was valid.

72. He acknowledged that in a few instances the returning officer did not correctly collate results, but the totaling of the number of votes in question was only 100 and to ask for scrutiny on that basis given the victory margin would beat logic.

This marked the close of the respondents' case.

The issues for determination in this petition are:

- a) Whether the register that was used to conduct the gubernatorial election for Kisii County was credible and verifiable;
- b) Whether there were inconsistencies, irregularities and anomalies in the forms 37A, 37B and 37C;
- c) Whether there were differences in the declarations in the forms 37B, 37C, 34B, 35B, 37B and C, 38B and C and 39B and C;
- d) Whether the 3rd and 4th respondents were eligible to vie for the elections;
- e) Whether the 3rd and 5th respondents committed election offences under sections 15 (2) and 15 (1) (a) of the Election Offences Act;
- f) Whether the irregularities affected the results of the gubernatorial election for Kisii County; and
- g) Who bears the costs of this Petition?

The burden and standard of proof

73. On various occasions the Supreme Court of Kenya has pronounced itself on to the effect that a petitioner in an electoral cause bears the legal burden of proof and depending on the manner in which this burden is discharged, then it may keep shifting. In **RAILA ODINGA AND OTHERS –VS- IEBC AND OTHERS SC ELECTION PETITION NO 5 OF 2013** para 203, the court stated thus:

“...But at the same time, a petitioner should be under an obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability though not as high as beyond reasonable doubt...”

74. This was also echoed in **BERNARD SHINALI MASAKA –VS- BONNY KHALWALE AND 2 OTHERS [2011] eKLR** where Lenaola, J (as he then was) stated:

“... that any allegations made in an election petition have to be proved to the ‘satisfaction of the court’...I am certain that the standard of proof, save in matters where electoral offences are alleged, cannot generally be beyond reasonable doubt...but...it almost certainly on a high degree than merely on a balance of probabilities...”

75. These are the two tests this court will employ in determining the petition and consequently the burden rests on the petitioner to prove each allegation alluded to and the standard this court will apply is higher than a balance of probabilities but lower than beyond reasonable doubt.

Counsel made submissions as follows:

Lack of a credible voters’ register

76. It is the petitioner’s submission that the voters, register is static and not dynamic so it must remain the same for the six elections as it is a critical requirement of a free, fair, transparent and credible election that meets the principles of **Article 86 (a)** of the **Constitution**. Counsel submits that this was the basis for the amendment of **Section 2(d)** of the **Elections Laws (Amendment) Act No. 36 of 2016** by deleting the expression ‘principal register’ and substituting it with ‘register of voters’. The intention was to cure the problem of multiplicity of registers that was experienced during the 2013 elections. In the statement of objects and reasons for amending this legislation, parliament explained that the bill seeks to amend the same to clarify that there is only one register of voters.

77. Counsel submitted that the IEBC (1st Respondent had custody of the register and the manner in which results in the six elective posts differed in terms of registered voters suggested that the 1st respondent was using different sets of registers) He termed as hollow the explanation given that what is pinned at the door/entry of polling stations is a register which has the names of an individual and the polling steam but the identity card number and telephone number is removed for security precautions.

78. Secondly, on the explanation that the numbers featuring in the gazette notice matches those on forms 37A, counsel dismissed that as a fallacious argument calculated to hoodwink the court on the actual anomaly. He submitted that the 1st and 2nd Respondents had a statutory duty to correctly fill the forms containing the results of each of the six elections citing **Regulation 83 (1) (e) of the Election Regulations Rules, 2017** which provides:

Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present complete the relevant Form 35B and 36B for the respective elective position set out in the Schedule in which the returning officer shall declare, as the case may be, the—

- i) name of the respective electoral area;**
- ii) total number of registered voters;**
- iii) votes cast for each candidate or referendum side in each polling station;**
- iv) number of rejected votes in each polling station;**
- v) aggregate number of votes cast in the respective electoral area; and**
- vi) aggregate number of rejected votes;**

79. It was argued that the figures that the 1st and 2nd Respondents were to use in filling the statutory forms ought to have been derived from an official register and since the declared number of registered voters as pleaded in the Petition was not disputed as varying from one election to another, the only reasonable conclusion to draw is that there were many ‘official sources’.

80. Further, that the variance in the numbers of registered voters was not witnessed in one case or ten polling stations but involved 184 polling stations and was seen in all the six elections with a pattern. He further submitted that where the numbers of registered voters is one figure for presidential and parliamentary throughout the 184 specified polling stations and another figure uniform for the MCA, women representative, gubernatorial and senatorial elections. This pattern is described as deliberate, consistent, designed and repeated so many times hence, there is no way it can be wished away as a clerical error.

81. The Respondents are faulted for not explaining where they got the figures from and they never even produced the actual register in court choosing instead to rely on a gazette notice which is not a voters’ register. The Petitioner lamented that the 1st Respondent who is the custodian of the voters’ register chose to blame the Petitioner for not producing the register. Drawing from the decision in the South African case **KHAM AND OTHERS –VS- ELECTORAL COMMISSION AND ANOTHER [2015] ZACC 37**, where a problem arose concerning the voters’ roll. The electoral body did not only give a copy of the register to the candidates, and the register itself also had serious inconsistencies.

82. In a unanimous judgment written by Wallis (AJ), the constitutional court of South Africa held that:

“The process of electing councilors to public office is of cardinal importance for the healthy operation of our democracy at local government level. As such elections take place in wards, it is vitally important and a legal requirement for the chief electoral officer, when registering a voter on the voters’ roll, to register that voter in the voting district in which they are ordinarily resident. This requirement had not been observed by the IEC. In addition, the obligation to provide all candidates with a copy of the relevant segment of the voters’ roll containing the addresses of voters in the ward with their addresses (“where such addresses are available”) was also ignored. That was a serious breach of the IEC’s statutory obligations. Without voters’ addresses, the ability of candidates to canvass voters was significantly impaired. In the respects identified above, the IEC fell short of these standards.”

83. The court was also urged to consider the reasoning by Onyiego (J) in **DAVID K OLE NKEDIANYE & 2 OTHERS –VS- JOSEPH JAMA OLE LENKU & 4 OTHERS [2017] eKLR** where there was a question as to whether or not intended substituted petitioners were registered voters. The court held that IEBC, being the custodian of the voters’ register, ought to produce the voters’ roll to prove its claims. The judge held at paragraph 25:

“The applicants having stated that they are registered voters of Kajiado County and that they did vote on 4th August 2017, the 3rd respondent (IEBC) who are the custodians of the unique electronic voters’ register, were under a duty to rebut that assertion by providing the register.”

84. In reference to the statutory forms returning the elections and the summary of 184 polling stations done pointing out the anomaly in the number of registered voters to justify the claims that the forms showed that there were more than one voters’ register for the elections in Kisii County the petitioner’s counsel drew to the court’s attention that when confronted with this monster of electoral fraud, the Respondents pledged two defenses’: one of human error and another that the anomaly did not affect as the entries in forms 37A tallied with those in the gazetted number of registered voters.

85. The petitioner’s counsel responded on the question of human error, by urging this court to reject such excuses as was the case in **MOHAMED ALI MURSAL –VS- SAADIA MOHAMED & 2 OTHERS [2013] eKLR** where a similar issue of entries made in the statutory forms arose. The Respondents attributed all the anomalies to human error and the court found that argument to be akin to an insult to the voters. It stated:

“It is the view of this court that some errors cannot be excused. For instance it cannot be explained how figures from Forms 35 could not be transmitted correctly to Forms 36 or why all forms do not have statutory declarations. Returning Officers had the responsibility of correctly transmitting all the data from all Forms 35 to the Constituency Form 36 without errors or with minimal errors. Kenya is coming from the history of lack of confidence by the citizens in some of the organs of the Government including the 2nd Respondent and especially its predecessor, the ECK. I think it was time for this institution to rise above board in order to give the electorate confidence that their political rights will be protected.”

86. The 1st and 2nd respondents’ submitted that they used one standard, accurate and verifiable register in the 8th August, 2017 elections. The petitioners’ allegations on the register of voters were faulted as being premised purely on the entries in the secondary forms 37B, 37C, 38C, 39C, 35B and 34B and submitted that the petitioners did not submit any register or other legal instrument to challenge the number of registered voters or the register that was used by the 1st and 2nd respondents in the gubernatorial elections.

87. It was argued that despite acknowledging that the voters’ register was readily available to him, the 1st petitioner admitted in cross examination that he did not refer to it when preparing the schedule annexed to his petition. That he was unable to identify a polling station where the registered voters were inflated in favour of the 3rd Respondent or at all, votes cast exceeded registered voters or where illegal voters were allowed to vote. In the end he admitted that the total number of voters were actually correct and that his claim for inflated voters had no basis.

88. The 3rd - 5th respondents’ pointed out that the petitioners concluded that there was no credible register in Kisii County because of the discrepancies in the declared number of registered voters in forms 37B, 34B, 35B, 36C, 38B and 39B. They argued that court did not have jurisdiction to consider the forms 34B, 35B, 36C, 38B and 39B which concern other elections and are not Voters’ Registers. That any alleged errors in the form 37B must be examined against the primary form 37A and the declaratory form 37C. They further submitted that the register of voters was available online and if it was not, they had the option of requesting for it from the 1st respondent.

89. Counsel drew the attention of this court by alluding to the petitioner’s response on cross-examination in respect of the register of voters:

‘I said there was no credible voters register as the declaration given as voter register differs from what is provided in the statutory register. I have not seen any register either before, during or after the elections.’ (See page 35, Line 16 of the proceedings)

‘I have never seen any voter register but I say the voter registration in Kisii County was manipulated with a view of undermining the integrity of the gubernatorial election in the county.’

90. Mr. Wanyama further submitted by reference to an article by Prof. James Otieno-Odek (JA), entitled **‘Election Technology law and The Concept Of?Did the Irregularity’ affect The Result of The Elections? Observed thus:-**

‘It is anticipated that the requirement to publish the Register of Voters online will put to rest the incessant arguments on where to find the Register of Voters. The on-line Register will be critical in an election petition particularly where an allegation is made that the number of votes cast exceed the registered voters. A prudent petitioner out of abundance of caution should have the on-line register as published in his/her possession. The provisions of the Evidence Act relating to hearsay, admissibility and

authentication of electronic documents must be complied with....”

In the same article at page 36 regarding the register of voters it states:-

‘A common malpractice alleged as an election irregularity is where votes casts exceed the number of registered voters. To prove this allegation, the petitioner must first prove the total number of registered voters in the specific polling station as per the Register of Voters. The second fact to be established and proven is the total number of votes casts in the specified polling station. This is established by producing valid election return Forms. The facts must be proved by authentic, verifiable and admissible statutory documents.’

Court’s analysis and findings:

91. What constitutes a voters’ register? The definition under the Act means “a current register of persons entitled to vote at an election prepared in accordance with **Section 3** and includes a register that is compiled electronically. The contents of the Register under **Section 4** of the **Elections Act** comprise: -

- (a) a poll register in respect of every polling station;
- (b) award register in respect of every ward;
- (c) a constituency register in respect of every constituency;
- (d) a county register in respect of every county and
- (e) a register of voters residing outside Kenya.

92. I concur with the petitioner’s counsel that the voter’s register is the foundation of the electoral process and the right to vote and the court aptly observed **OKIYA OMTATAH OKOITI –VS- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS [2017] eKLR** in which the Court stated at paragraph 321 as follows:

“This court does acknowledge that elections are the heart of democracy and that only a free, fair, credible and inclusive electoral system and related processes can contribute to the meaningful institutionalization of democracy and gain public trust. This is only possible if citizens come under the voter registration process and participate in elections. The significance of voter registration is that it restricts ineligible persons to the poll and ensures that only those people who are entitled to vote in a given polling area can do so and only once. Voter registration therefore brings eligible citizens into the electoral process, ensures quality of the vote and prevents ineligible people from voting thus ensuring that political rights are free from fraud and manipulation. A more accurate and reliable voter register is therefore inevitable for purposes of elections, and it is the registration exercise that results in the compilation of entirely new voters register.”

93. **RW2 (SYDNEY ROBERT NAMULUNGU)** told this court that the register of voters is static and does not change but maintained that petitioners have never requested for a copy of Voters Register nor have they ever protested that the gazetted copy was not a proper register. He explained about the electronic register in the KIEMS and the printed register. Further that the physical register is pinned at all door posts of all polling stations seven days before the polling for inspection and voter verification, yet the petitioner never even got sight of it, despite being aware of such an arrangement.

94. Since the petitioner’s main concern was the number of registered voters in Kisii County, then obviously the document which would settle this concern is the Voter Register from the 1st respondent. Indeed, a petitioner must at the earliest opportunity apply to the Electoral Commission for a copy of the Register as advised by the Supreme Court in the **GATIRAU PETER MUNYA –VS- DICKSON MWENDA KITHINJI & 2 OTHERS (Petition No 2B of 2014)**. In that case, the Supreme Court stated that if an application is made, the Commission should provide the Register as a matter of course. Invariably the burden remains on the petitioner as stated by the court in the aforementioned case that:

“The allegation that the total number of votes cast exceeds the number of registered voters is such a serious one, that an election court would not treat it lightly... The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law.’

95. In contrast, when cross examined by Mr. Wanyama, the Petitioners’ witness, PW1 stated that:

“Yes I said that the voters’ register was manipulated but I have no evidence of the manipulation. The voter register was not credible although I did not see the Register which was used at all the polling stations. I never got a complaint that there was a polling station with a defective register.”

What the IEBC presented in court was not a Voters Register, but the petitioners failed to discharge the burden.

96. The Primary document in the gubernatorial election is the Form 37A which contained the number of votes garnered by each candidate in the Polling Station. This Form contained the number of registered voters at the particular polling station, and the number of people who cast

their votes and in the event of a controversy in the numbers in forms 37B and 37C, then the document to clarify the said controversy should be the Primary Document form that is form 37A's visa vis a Voter Register. Yet the Petitioners did not have nor use the Voters' Register at the time of filing this petition to support their case.

97. As regards the Voters' Register versus the statutory forms, I think Okwany (J) expressed it succinctly through her pronouncements in the case of **CHARLES OBARA ORITO AND ANOTHER vs THE IEBC and 2 others (Kisii Election Petition No 6 of 2017)** whose pleadings and issues raised bear such striking similarity to the instant case,; when she pointed out that there is a clear distinction between lack of a credible Voters' Register vs erroneous entry of figures in the statutory form. She stated thus:

“....The mere fact that there could have been instances of wrong entries being made in the statutory forms....did not connote lack of a credible Voters, Register”

98. The second issue is that Dennis Orina did point out to some instances of wrong entries made in the statutory forms saying he obtained the information from IEBC's portal, yet he did not download it, but instead he typed the information onto an Excel Spreadsheet. Which brings the question what is there to establish its authenticity? A typed document with information whose source cannot be verified cannot be used against the other to theorize that there was more than one voters' register in use without first satisfactorily demonstrating that allegation. The petitioner cannot cry wolf because the court did give directions on 10/10/2017 that the 1st respondent supplies all the parties with fair copies of the statutory forms and Mr. Begi confirmed on behalf of the petitioner that the same had been availed, yet they did not take advantage of the situation!

99. It defeats logic to fault a register which he has never been acquainted with before, during or after the elections. It would not make legal sense to rely on typed figures on the spreadsheet when there is nothing to show that they were obtained from the 1st respondent's portal. I hold that the petitioner failed to discharge the legal burden on this particular issue.

Difference in the number of votes cast in the 6 elections.

100. The petitioners insist upon relying on forms for other electoral positions including the presidential election which has already been dealt with by the Supreme Court arguing that there should not be such a wide margin in the votes cast in each case. Examining the number of votes in each of these elections is not for purposes of determining the validity of the other elections but rather a way of verifying the integrity of the election to determine if the claim that votes were inflated has a basis.

101. The court was asked to note the pattern that the numbers of registered voters is one figure for presidential and parliamentary throughout the 184 specified polling stations were totally different from the uniform figure for the MCA, women representative, gubernatorial and senatorial elections. The Petitioner attached the list of the 184 polling stations (schedule 1) that he said had multiple voters' register.

102. It was the petitioner's contention that examining the number of votes cast in each election against the gubernatorial contest, is not tantamount to determining the validity or otherwise of those other elections but is a judicial way of verifying the integrity of the process with a view of looking into claims of inflation of votes. This comparison of votes cast in various elections has been done in a couple of disputes, among them, the celebrated case **WILLIAM KABOGO GITAU –VS- GEORGE THUO & 2 OTHERS [2010] e KLR**; which will shall discuss in more detail.

103. In considering whether the first and second respondents conducted the election in a transparent, free and fair manner, the court is urged to give appropriate interpretation to the electoral laws and regulations which the two respondents were obliged to adhere to. Such interpretation must be purposive in nature and as will encourage transparency in the electoral process. In **DOROTHY E. BROWTON –VS- JEAN HART KANGAS & OTHERS, Suit No. CI 98 -01-10265 at the Court of Queen's bench of Manitoba, the court quoted Harris –vs- Ryan [1997] M.P.L.R. (2d) (Nfld. S.C.)**, where Barry J. recognized the public interest in interpreting legislation dealing with elections in a purposive fashion to encourage public access and stated as follows at page 201:

“When interpreting legislation relating to elections, one may reasonably conclude the primary purpose is to ensure that we have free, open and properly conducted democratic elections. If there have been irregularities, these should be exposed to the view of the general public through the returning officer and through the candidates and their agents involved in the for the purpose of ensuring that Presidential and Parliamentary elections are conducted in a transparent, free and fair manner.”

104. Mr. Begi for the Petitioners pointed out that when RW2 was cross examined by the Court on 27.10.17, this is what he had to say:

“...When Mr. Omwanza cross examined me he used the forms 37B which had replicate results for Kemoreko, Oroche and Endereti. When Mr. Obondi re-examined me he was using form 37A (the original document from the polling station) which were signed by agents and confirmed the results. So what was in 37A is what should have been in 37B but due to transposition errors arising from fatigue it resulted in what Mr. Omwanza was showing me”.

105. The petitioners contended that from the analysis of the 184 polling stations, they were able to show that there was more than one register that was used in the election. The respondents' first excuse that the differences in the statutory forms was caused by human error is termed as not credible.

106. Reference was made to **Regulation 69 (2) of the Elections regulations 2012** which provides:

“A voter shall, in a multiple election, be issued with the ballot papers for all elections therein at the same time and shall after receiving the ballot papers—

(a) cast his or her votes in accordance with regulation 70 without undue delay;

(b) submit to having one finger as prescribed by the Commission immersed, dipped or marked in ink of a distinctive colour which, so far as is possible, is sufficiently indelible to leave a mark for the period of the election;

(c) where a voter has no finger, make a mark on the next most suitable part of the body; and

(d) upon collecting his or her identification documents, immediately leave the polling station.”

107. It is not in dispute that each voter was being issued with 6 ballot papers at the polling stations. It follows therefore that the total number of votes cast for all the six elections ought to be almost equal. The petitioner pointed that there were margins as wide as over 300 votes as shown in schedule 2 annexed to the petition. The Respondents have attributed the gaps to stray ballots. However, they have not produced the polling station diaries not only to prove that there were stray ballots but also to show the exact number of stray ballot. None of the presiding officers swore an affidavit to explain the number of stray ballots in each case.

108. The petitioner’s counsel argued that a court of law cannot guess, or second guess the numbers of stray ballots in an election, when proffered as an explanation by IEBC without any proof? While relying on **Regulation 81 (1) (f)** of the **Elections Regulations, 2012** which requires the 1st Respondent to safely keep the stray ballots in a sealed envelope counsel submitted that the 1st Respondent ought to have produced the stray ballot papers or even a sample to prove its case.

109. Counsel pointed out that the principle of shifting of burden of proof was discussed at length in **RAILA AMOLO ODINGA –VS- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION** (supra) in which the Supreme Court at paragraphs 132 and 133 stated:

“[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant throughout a trial [52] with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting”[53] and “its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”[54]

[133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law.”

110. Based on the reasoning of the Supreme Court highlighted above, petitioners submit that the burden of proof had shifted to the 1st Respondent to explain the wide margins in number of votes cast. Since the 1st Respondent introduced claims of stray ballots, as its **ALTERNATIVE THEORY**, it should have tendered evidence of the actual number of stray ballots in each case.

111. Reference was made to **KHALID HUSSAIN MAGSI VS. MIR ABDUL RAHIM RIND AND OTHERS, CIVIL APPEAL NO. 1219 OF 2014** the Supreme Court of Pakistan delivered itself as follows at paragraph 7 of the judgment:

“...The other question that arises is why on these 54 polling stations the turnout was almost triple in comparison to turnout on the rest of 111 polling stations i.e. the percentage of turnout on the above mentioned 54 polling stations was 96% whereas turnout in the remaining 111 polling stations stood around 40% only. These unimaginable differences in the voting pattern on 54 polling stations as against the remaining 111 polling stations cannot be a simple case of mere coincidence, given the fact that both the contesting candidates were not candidates with marginal following.”

112. They maintain that accountability and verifiability of elections can be tested through various ways one of them being comparison of turn out and/or votes cast in the 6 elections. This was done in the celebrated case of **WILLIAM KABOGO GITAU VS- GEORGE THUO & 2 OTHERS [2010] e KLR** in which the court compared the presidential, parliamentary and civic elections held on the same day. The court held:

“The difference of over 5,000 votes between the parliamentary vote on the one hand and the presidential and the civic vote on the other, in the circumstances of this petition, is evidence of serious electoral malpractice that was apparent during the conduct of the elections at Juja constituency.”

113. They maintain that the discrepancies in the votes cast were not adequately explained. The respondents alleged that this was due to the stray and rejected ballot boxes, but did not produce the polling station diaries not only to prove that there were stray ballots but also to show the exact number of stray ballot. None of the presiding officers swore an affidavit to explain the number of stray ballots in each case.

114. The respondents conceded that the number of votes cast was different in the various elective posts in **selected** polling stations but this was due to the stray and rejected ballots. They maintain that there was nothing strange or suspicious about the differences. The petitioner and his witnesses were faulted for failing to show any advantage that the 3rd respondent enjoyed as a result of the errors, taking into account that the petitioners did not even know how stray ballots are treated and failed to prove that the votes cast in the gubernatorial election were not accurate.

115. The Respondents insist that the figures appearing on the list were obtained from the entries made in the statutory Form 37C Form 39C 34B for **Bobasi** Constituency showing number of registered voters for the presidential election, Form 38C showing number of registered voters for the senatorial election in **Bobasi** Constituency, Form 34B **Kitutu Chache South** and **Nyaribari Chache** showing number of registered voters for the presidential election.

116. The respondents counsel also alluded to the Petitioner's attached schedule 2 which contained a summary of the total number of votes cast in each of the six elections. Again, they contend that the figures appearing in the schedule were obtained from the statutory forms annexed to the petition and include 37C, 38C and 39C already referred to above as well as Form 34B for **Bomachoge Borabu constituency**, Form 39B for **Bomachoge Borabu constituency**, Form 37B for **Bomachoge Borabu constituency**, Form 34B for **Nyaribari Chache constituency**, form 38B for **Nyaribari Chache constituency** Form 35B for **Nyaribari Chache constituency** and Form 36B for **Nyaribari Chache constituency**.

117. They argue that schedule by PW3 was prepared from the results published in the 1st respondent's portal therefore irrelevant and were in any event based on derivative forms. The court was asked to consider the Petitioners' response during cross-examination by Mr. Omogeni stated that:

'I only had a look at Form 37A when they were filed in court' (See page 46, Line 6 of the proceedings) 'Yes if I had gotten Form 37A earlier it would have been easier for me to analyze the results before filing petition....I will now agree that if there is a problem in my column on entry of votes, the votes garnered by candidates in form 37A will not be affected.'

The schedule marked "JMO4" meant to show the differences in registered voters is described as completely misleading because several polling stations have been repeated in the said table.

118. **Court's analysis and findings:** I note that the Petitioners did not attach any primary results declaration forms used for the election of President, Senator, Member of Parliament, Women representative or Member of the County Assembly for the court to make comparison with the secondary results declaration forms. **DENNIS ORINA** (PW2) analyzed data based on the entries on the 1st respondent's public portal which I have already faulted.

119. Moreover, the report he annexed to his affidavit sworn on 4th September 2017 contained data for other elective positions but not for the position of Governor which is in contest in this Petition. In any event, the Petitioner admitted in cross examination t by Mr. Obondi that: -

"I was not present at any Polling Station during the counting of votes. Yes, I am in no position to claim that votes were not properly counted."

He also acknowledged that no agent from the nine Tallying Centres filed an affidavit attacking the transmission"

120. There may be some logic in the petitioner's reliance on statutory forms for the other elections including presidential elections since the elections were conducted on the same day, as there ought not to be a wide margin in votes cast in each case. However, how does a court place reliance on the declaratory forms rather than the primary forms 37A, 35A, 34A, 38A and 39A and most importantly those other four elective posts are also the subject of litigation in other courts in Kisii!

121. I am alive to the court's sentiments in **WILLIAM KABOGO GITAU –VS-GEORGE THUO & 2 OTHERS [2010] eKLR** in which the court compared the presidential, parliamentary and civic elections held on the same day. The court held:

"The difference of over 5,000 votes between the parliamentary vote on the one hand and the presidential and the civic vote on the other, in the circumstances of this petition, is evidence of serious electoral malpractice that was apparent during the conduct of the elections at Juja constituency."

122. Yet I wonder can the court ignore the fact that a voter may collect all the six ballot papers but only choose to mark for his favorite candidate contesting one position and leave the others either blank or elect a candidate from a totally different party? I share the views expressed in **JUSTUS GESITO –VS- I.E.B.C. & 2 OTHERS** cited with approval in **MOSES WANJALA LUKONYE -VS BERNARD ALFRED WEKESA SAMBU & 3 OTHERS [2013] eKLR** the court held that:

"it is possible that a voter chooses to vote for only one elective position, say presidential, and leaves the rest, The outcome is that the results in the six elective posts will not tally. It is for this reason that the court cannot delve into the results of other elective posts in comparison to that to which the petition before it concerned for that will be setting a dangerous precedent."

123. This is further amplified by case of **RAILA ODINGA & ANOTHER –VS- IEBC & 2 OTHERS PRESIDENTIAL PETITION NO. 1 OF 2017**, the Supreme stated as follows in respect to rejected votes:

"Since, in principle, the compliant ballot paper, or the vote, counts in favour of the intended candidate, this is the valid vote; but the non-compliant ballot paper, or vote, will not count in the tally of any candidate; it is not only rejected, but is invalid, and confers no electoral advantage upon any candidate. In that sense, the rejected vote is void"

124. PW1 acknowledged that when he prepared the petition, he had not seen the Form 37A and the distinct impression I get is that the petitioner was bent on fault finding of the electoral process without adequate information, and at best his complaint under this head is speculative. There is no proof on this allegation.

Striking coincidences and incredible figures.

125. Regarding the question of similarity of votes obtained by all the candidates across board in two streams of the same polling station, the petitioners singled out 12 polling stations where the anomaly arose saying the figures were obtained from form 37C. They insisted that the similarities defied human, scientific or mathematical logic. These were:-

- **Kemoreko Primary School stream 1 and 2**
- **Oroche Primary School stream 1 and 2**
- **Endereti Primary School stream 1 and 2**
- **Ntamocha Primary School stream 1 and 2**
- **Getai Primary School stream 1 and 2**
- **Nyantira Primary School stream 1 and 2**
- **Nyaguku Primary School stream 1 and 2**
- **Rusinga Primary School stream 1 and 2**

DAVID ORINA testified that he did his analysis using results of the 1126 polling stations published in the public portal and discovered serious anomalies which he attached and marked JMO1

126. On the claim concerning striking coincidences and incredible figures, the 1st and 2nd respondents submitted that this allegation was not proved. They pointed out petitioner was taken through the forms 37A for the polling stations where these allegations were made and he admitted that there were no similarities. Furthermore, he admitted that he did not analyse the forms 37A and didn't rely on them when preparing the petition. The Respondents cited the extracts of the 1st petitioner's evidence at pages 38 and 52 of the proceedings.

127. Counsel for 3rd to 5th respondents cited failure to produce the forms 37A which they argued was deliberate because the contents of these forms negated the allegations in the petition. Where irregularities were proved, they were not widespread and the respondents offered plausible explanations and therefore those errors cannot result in the nullification of the election. Counsel relied on the decision in **WAVINYA NDETI –VS- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 4 OTHERS [2013] eKLR**.

128. It was submitted that the allegations in the petition were premised on ignorance. The petitioners' witness, **DENNIS ORINA**, relied on results which he declared himself from unverified sources. His evidence had no probative value and the results he attached are inadmissible because they are not the official election results. Counsel relied on **ZACHARIA OKOTH OBADO V EDWARD AKONGO OYUGI & 2 OTHERS [2014] eKLR** where the Supreme Court held that it would only recognize as the officially-declared results, those results declared by the public electoral body, in the prescribed manner, and by the designated officials for the respective areas.

129. **Court's analysis and findings:** On the issue of numbers, I am guided by the case of **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSIO vs MAINA KIAI & 5 OTHERS [2017]eKLR** where it was stated that:-

“Accuracy of the count is fundamental in any election. Voter turnout determines the outcome of an electoral contest. Numbers therefore are not only unimpeachable but they are everything in an election....The declaration form containing those results is a primary document and all other forms subsequent to it are only tallies of the original and final results recorded”

130. I have perused the results as recorded in Form 37B and confirm that there were indeed striking similarities in the aforementioned polling stations. However, RW2 explained that some of the discrepancies were as a result of transposition errors and not any malicious manipulations. That these errors which gave the impression of striking similarities were actually results in stream 1 being repeated in stream 2.

131. **SYDNEY NAMULUNGU** in his testimony confirmed that he noted them but could not make a change in the statutory form-instead he made the correct entry in form 37C. He explained that these were errors occurring due to fatigue and lack of sleep in an emotional exercise which went on for 4 days, thus such errors were bound to happen. Indeed PW1 acknowledged on cross-examination that Form 37C accurately recorded the results, and conceded as much.

132. I also note that the petitioner agreed that for Oroche stream 1 the results were accurately recorded in Form 37A and there was no pattern of favouring any candidate. Also that Endereti stream 1 results were accurately recorded and its results duplicated in Form 37B, and differed with what was in Form 37A but he said, **“There was no pattern of manipulation”**.

133. In essence then, the petitioner simply confirmed the explanation given by the 1st and 2nd respondents that there was no foul play, but simple transposition of errors when he said **“ The duplicity of results was not widespread....I can no longer maintain my stand that the results cannot mathematically, scientifically, logically and humanly be explained.”**

134. The Supreme Court in **GATIRAU PETER MUNYA -VS- DICKSON MWENDA KITHINJI & 2 OTHERS (PETITION NO 2B OF 2014)** at paragraph 182 of its judgment expressed as follows on the issue of votes cast exceeding registered voters: -

“The allegation that the total number of votes cast exceeds the number of registered voters is such a serious one, that an election court would not treat it lightly. If proved, such an occurrence would call into question the integrity of the electoral process. The person who makes such an allegation must lead evidence to prove the fact. She or he bears the initial legal burden of proof which she or he must discharge. The legal burden in this regard is not just a notion behind which any party can hide. It is a vital requirement of the law.”

135. My finding is that the writing is clearly on the wall as there was a human and scientific and very logical explanation for the purported similarities...they were as a result of fatigue and lack of sleep, and the correct entries were made in the Form 37C. I can do no better than to echo Majanja (J) in Wavinya Ndeti (supra) that:-

“An election is a human endeavor and is not carried out by programmed machines. Perfection is an inspiration, but allowance must be made for human error”

This limb fails to meet the required standard of proof.

Disqualification of 3rd and 4th respondents

136. The Petitioners' contention was that he obtained information from the internet that the 4th respondent faced charges of driving while under the influence of alcohol while in the United States of America. The 1st petitioner accused the 4th respondent of failing to disclose his conviction by the American courts in his declaration form to the EACC. However, it was also his evidence that he did not see this form and therefore he could not accuse the 4th respondent of non-disclosure.

137. The respondents pointed out that the 1st petitioner's accusations against the 4th respondent was dented by his own admission that he did not see the form purportedly submitted to the Ethics and Anti-Corruption Commission (EACC) so he had no basis for alleging non-disclosure. Moreover, the judgments are electronic records as they were downloaded from a website and then printed and are inadmissible pursuant to section 106B of the **Evidence Act, Cap. 80** which sets out conditions that must be met before electronic records are admitted as evidence.

138. It is a fact that the petitioners did not produce a certificate from the person who prepared the electronic record. Exhibits 'JMO18', conviction notice was expunged from the court record as the witness did not meet the requirements under section 106 B of the Evidence Act and this claim ended up having no leg on which to stand. This allegation also failed to meet the test.

Appointment of a public officer as chief agent

139. Counsel for the petitioners submit that by appointing the 5th respondent as his chief agent, the 3rd respondent contravened **Section 16** of the Leadership and Integrity Act, 2012 which mandates State or public officers to remain politically neutral and avoid situations where their personal interests conflict with their official duties. **Section 23 (3) (a)** of the said **Act** prohibits a state or public officer from acting as an agent for a political party or candidate in an election. As a result of the actions of the 5th respondent, the integrity of the election was greatly undermined.

140. The petitioners contend that they were able to prove that the 3rd respondent benefited politically from the services of the 5th respondent who is a public officer employed in the Health Department of Kisii County Government. Counsel argued that it was immaterial that the 5th respondent did not sign any statutory forms as he could have been in charge of monitoring the voting process, coordinating agents or protecting the 3rd respondent's interest in other ways.

141. Counsel contended that the appointment letter was erroneously marked as being an exhibit in support of the affidavit of James instead of Joel, the 3rd respondent. Counsel submitted that this mistake was only on the documents served on the petitioner and not the ones filed in court. He urged the court to use its record as the point of reference. In addition, counsel submitted that this was an inadvertent mistake, a mere technicality, for which the petitioner should not be penalized.

142. The petitioners maintain that Naftal Obwocha was engaged in the elections as the ODM chief agent, relying on the officer's appointment letter dated 7th August 2017. Counsel submitted that evidence showing the employment status of the officer is contained in the copies of pay slips annexed and that in any event, the employment status of the said public officer was not disputed.

143. The petitioner's counsel relied on the 'empty chair doctrine' as espoused by Robert H Steir Jr in his article '**Revisiting the Missing Witness Inference- Quieting the Loud Voice from the Empty Chair**' in urging the court to draw an adverse inference in the failure to have **NAFTAL OBWOCH ORINA**'s non-attendance yet he was a crucial witness, to shed light on them was vital. The Empty Chair Doctrine is that "a litigant's failure to produce an available witness who might be expected to testify in support of the litigant's case, permits the fact-finder to draw the inference that had the witness chair been occupied, the witness would have testified adversely to the litigant"

144. The court was urged to draw a similar inference with regard to a number of critical witnesses against whose conduct allegations were made. These listed witnesses as Geoffrey Mogire (alleged to have acted as Chief Tallying Agent) and the 3rd Respondent's agent, the 4th Respondent whose qualification and integrity status was called to question, the Returning Officers for **Bomachoge Borabu, Bomachoge Chache, Kitutu Chache South, Kitutu Chache North, Nyaribari Chache and South Mugirango** constituencies (needed to testify over

the issue of similarity of votes and the wide margins in votes cast.

145. This is said to have denied the Petitioner an opportunity to test, by way of cross-examination, all the evidence that is adduced against them; and, most importantly, guarantee their inalienable fair trial. This is what the Nigerian court of Appeal said in **Chief Raphael Onwuka v Lukuman Owolewa (CA/10/99) in which the court held:**

“Under the adversarial system of jurisprudence, the art of cross examination is the greatest weapon to attack an adversary. It is fundamental, it is the pivot, the central hub and gravity of the civil system. This is so because, cross examination is based on the rules of pleadings with its source on the rule of natural justice of audi alteram partem (that is, hear the other side). To deny a party the right to cross-examine his adversary without legal reasons amounts to denial of fair hearing as enshrined in section 36(1) of the 1999 Constitution of Nigeria”

146. The respondents reply to this is empty chair argument is that the quality or credibility of a witness is more important than the quantity of witnesses. Drawing from observations made by Odek (J) in the earlier mentioned article the respondents submit that corroboration is not generally required but is often times advisable to have corroborating material or witnesses and the fact that a party decides to call only one witness is not fatal so long as the witness is credible.

147. **Court’s analysis and findings:** Has it been proved that Naftali Obwocha was engaged in the polls? The 3rd Respondent did confirm during cross-examination that he appointed a number of agents to ensure transparency of the process. The letter of appointment relied on has questionable features on it which were not explained at all by the petitioner. Whereas at first glance the letter appointing Naftali (5th respondent) and Mogire appear identical, the one alleged to be in respect of the 5th respondent has the identity card number and telephone number blotted out by a dark ink. There is also the image of a hand which suggests that there was another document being super-imposed over it, and it is obvious that the person who erased the portions referred to had no clue what Naftali’s details were so as to insert them on the deleted portion and create a convincing image.

148. I find that it would be unsafe to rely on the letter purported to have appointed **Naftali Obwocha Orina** as Chief ODM agent. On the other hand the letter appointing **Geoffrey Mogire** to the same position is clean and has all the appropriate details- it is safer to rely on that letter which has nothing to hide.

149. There was also evidence acknowledged by the Petitioner that actually the statutory forms were signed by three ODM agents, among them being **Geoffrey Mogire**, and the Petitioner did not present a single form signed by the 5th Respondent. The allegation against the 3rd and 5th respondent was not proved.

150. On the ‘**Empty Chair**’ doctrine with reference to persons who swore affidavits but failed to attend court, I think the burden remained with the petitioner to establish their allegations before the respondents would be expected to attend court for cross examination. It is not the duty of the respondents to bring in their witnesses simply to fill in the loop-holes left by the petitioner, or satisfy his curiosity.

Appointment of county government employees as polling officials.

151. The 1st petitioner attached to his petition a list showing the county employees who were allegedly employed by IEBC (as annexure JMO11) and forms signed by the said employees marked as JM12. From that list, the petitioner only pointed out one “**TRIZA CHEBET**” who was said to be the presiding Officer at **Nyoera polling Station Stream 3.**

152. The 1st and 2nd respondents submitted that on appointment of government employees there was no evidence that county government employees were employed to act as presiding officers, clerks, agents or observers. The petitioners also failed to attach the 1st Respondent’s Memo which purported to bar the appointment of public officers.

153. The Petitioner on cross-examination stated thus:

“I do not have evidence that these are employees of Kisii County Government. I did not prepare any schedule to show how they interfered with the results in specific polling stations...”

154. He did not disclose the source of his information about the employees or the pay slips, only saying that it was from his personal knowledge. In the absence of information about the source of information, then it is easy to infer that the pay slips are on a higher balance of probabilities self-generated and not obtained from records of Kisii County Government.

Security of ballot materials

155. Counsel for the petitioners rejected the explanation offered about the election materials for **Nyachenge** polling station in **Bobasi** Constituency insisting that the same were delivered outside the ballot box and claims about the vehicle ferrying them having been involved in an accident is an afterthought. This premise is supported by the conflicting testimonies of the 2nd Respondent who said the accident occurred before voting and the Presiding Officer who talked of after voting and counting bespeaks fabrication regarding the anomaly. The petitioners argue that the Returning Officer **Bobasi** did not explain what transpired while the Presiding Officer made a report on the incident a month after it allegedly occurred.

156. It was the 1st and 2nd respondent’s contention that the incident at Nyachenge Polling Station took place after the polls were closed and so it did not affect the election or the result. In response to the petitioners’ submission, the respondents submitted they insisted that there was

no contradiction in the evidence of the presiding officer and the 2nd respondent.

157. **Court's analysis and findings:** I find that indeed an accident did occur and a report was made to police. The accident happened after the election and evidence by way of photographs were annexed to confirm that. Infact the **Nyachenge** incident is partly what led to the court ordering for scrutiny of the ballot box and content, which exercise commenced on 17th January 2017 under the supervision of by the **Deputy Registrar (Hon Pauline Mbulika)** at the IEBC offices situated in **OGEMBO**. Her report dated 24/1/2018 noted that the ballot box for **NYACHENGE Primary School polling station stream 1** was intact with a crack on one side of the box. It had the four seals, and the original form 37A was attached to the box. There were 2 votes marked in favour of **Christopher Obure** which ought to have been counted in favour of **James Ongwae** and all those present during the exercise unanimously agreed that 2 votes ought to be deducted from **Christopher Obure** and added to **James Ongwae**. There was one disputed ballot paper marked in favour of Christopher Obure and extending to Tom Marube.

158. For **NYACHENGE Primary School stream 2**, the ballot box was ragged and damaged, with a hole measuring 7.8cm in diameter, and the copy of form 37A was not attached. A record regarding the accident was not entered in the polling day diary (obviously because the accident occurred after the boxes had been sealed and no one could retrieve the diary to record the incident). The diary was intact but slightly covered slightly in mud. The votes cast in favour of Christopher Obure was less by one. The issue about security of election materials was properly explained and would not be a basis to invalidate the results.

Use of invalid forms to declare results and security of ballot materials

159. The petitioner's counsel submitted that the 1st Respondent designed specific features for the statutory forms used in the elections. The security features were to guard against forgery of forms and ensure that the election results were contained in the prescribed forms. The forms were designed to have watermarks and remain uniform. The overall aim was to secure the integrity of the process.

160. In the instant dispute, the 1st and 2nd Respondent used different forms for different situations. Form 37C which returned the results of the 3rd Respondent possess the watermarks in only the first 2 of its 10 pages. The Respondents are accused of not offering any explanation on this merely falling back on the refrain that as long as the form was signed by all the agents, it was valid. The court is called to determine whether a candidate's signature can validate what the statute considers invalid.

161. They submit that the issue of some forms having security features and others lacking the features was a great concern to the Supreme Court in **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (presidential election petition No. 1 of 2017)** where the 1st Respondent informed the court that all Forms 34A and 34B issued to presiding and returning officers had serial numbers, barcodes and the IEBC watermarks. It was the 1st Respondent's argument that these security features were meant to help authenticate the results. The Petitioners picked issues with the forms produced in court in which Form 34C presented did not have a watermark and serial number and it looked like a photocopy. The Petitioners argued that Form 34C which was used to announce the presidential results had no security features and hence the authenticity of the results as announced in Form 34C could not be guaranteed.

162. The Supreme Court pronounced itself in different parts of the judgment as follows:

“The Court notes.... As pointed out by the petitioners, there is a reasonable expectation that all the forms ought to be in a standard form and format; and though there is no specific provision requiring the forms to have watermarks and serial numbers as security features, there is no plausible explanation for this discrepancy.”

163. The petitioners contend that Form 37C has watermarks only on the first two pages and the remaining 8 pages are manifestly photocopies whose sources and authenticity could not be explained by the 1st and 2nd Respondents.

164. The respondents argue that even with the lack of security features alluded to, the Petitioner who was the Jubilee Chief Agent signed the impugned forms signifying acceptance of the results contained therein. They urged the court to be guided by the observations made in **NANA ADDO DANKWA AKUFO-ADDO & 2 OTHERS and JOHN DRAMANI MAHAMA & 2 OTHERS:-**

“Agents are not merely exalted observers. For those reasons, how the Agent carries out his duty, conducts himself, treats or is treated by the Polling officials is important. An Agent who accepts or acquiesces to an outcome but wishes to recant it must give plausible reasons for the change of heart where at the hearings an Agent raises complaints about the conduct of the Election the Agent must be asked questions about the action taken by him or her to seek intervention when the issues arose. Where the Agent is guilty of inaction, then the Agent will be hard put to explain the inaction. On the converse the Court may take a benign view of the evidence of an Agent who raises a legitimate complaint or query in a formal and timorously fashion. These are but a few instances on how the evidence of an Agent can assist the Court to assess the credibility of the Election process.....”

165. **Court's analysis and findings:** I note that in the instant case the 1st Petitioner signed the now impugned declaration form, thus acquiescing and accepting the said results. There was no suggestion that he was coerced or tricked into signing for results then he now suddenly turns around to question the very results he had accepted.

166. The Petitioners submitted that going by the Supreme Court in the afore-cited decision which pointed out that such inexplicable irregularities go to the very heart of electoral integrity, this court must make a similar pronouncement. In my opinion the prevailing situation in this case can be distinguished from the **RAILA AMOLO AND OTHERS –VS- IEBC AND OTHERS 2017** case because in the present case the numbers are themselves a product, the expression of the free and sovereign will of the people, and the many questions the petitioner raised have received adequate and satisfactory answers.

Whether the anomalies can warrant invalidation of the election results

167. Lastly, on the ultimate question of whether or not the illegalities and irregularities highlighted above can warrant invalidation of the election. Referring to the Supreme Court in **RAILA AMOLO ODINGA –VS- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION** (supra) correctly interpreted section 80 of the Elections Act to be disjunctive. The court found:

“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.”

168. The petitioners contend that the irregularities and illegalities demonstrated each on their own is enough to nullify the elections.

169. On the effects of alleged errors and noncompliance with the law on the election the respondents on section 83 of the Elections Act 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 in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the results of the election.”

170. They also relied on the Supreme Court’s pronouncement in **PETER MUNYA –VS- I.E.B.C. & OTHERS**, that: -

“If it is shown that an election was conducted substantially in accordance with the principles of the Constitution and the Elections Act, then such election is not to be invalidated only on the grounds of irregularities. When however, it is shown that the irregularities were of such magnitude that they affected the election results, then such an election stands to be invalidated. Otherwise procedural or administrative irregularities and other errors occasioned by human imperfections are not enough by and of themselves to vitiate an election.”

171. They submitted that the petitioners must prove an irregularity and non-compliance with the law and that the irregularity and non-compliance affected the results. In **JOHO –VS- NYANGE & ANOTHER [2008] 3 KLR**, the court held that the result of an election is affected when the cumulative effect of the irregularities reverses it.

172. **Court’s analysis and findings:** Indeed, the petitioner did not seem to

have a serious complaint regarding the voting, counting, tabulation and announcement of the votes by the presiding officers at the polling stations. The entire petition is based on isolated data entry and transposition errors which the petitioner admitted could be attributed to long working hours.

173. In **MBOWE V ELIUFOO [1967] E.A. 240** the court held that:-

“...the phrase ‘affected result’ means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making the adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance with the rules.”

174. The factual errors noted in the statutory forms related to:-

- **OMOSARIA stream 1** with regard to the total number of registered voters;
- **IRONGO (014)** regarding the total votes cast;
- The six polling stations with two streams where results were replicated;
- In some polling stations the 3rd petitioner lost by 1-12 votes as did his closest runners up and in others they gained by 1-7 votes.

This was confirmed by the scrutiny exercise already alluded to and whose objective was to scrutinize the ballot boxes and recount to ascertain the total number of valid votes cast and assigned to the 3rd respondent and the first runners-up-namely **Christopher Obure**, the rejected ballot papers and the spoiled ballot paper. The report by the Deputy Registrar stated that:

a) Endereti Primary School stream 2-2 rejected votes ought to have been counted in favour of **James Ongwae**. The final result in

this stream would then have been **Christopher Obure-137; James Ongwae 136;**

b) Getai Primary School stream 1-had three ballot papers which were disputed as the mark made by the voter extended to another candidate's box. The mark on one ballot paper in favour of **James Ongwae** extended to that of **Tom Marube**; and the mark on two ballot favours in favour of **Christopher Obure** extended to **Tom Marube**;

c) **Nyantira Primary School stream 1** had one disputed ballot paper;

d) There were 5 ballot papers which were disputed and respective counsel had indicated they would address the court on the matter, but they did not do so orally or in their submissions;

e) Some statutory forms were not signed by party agents.

175. The victor had over 90% win and indeed RW2 noticed the errors by entry clerks in Form 32B but felt inhibited to change records in a statutory document. I think of greater significance is his acknowledgement that the votes affected by the errors in the entire Kisii County was not more than 1000, and given the victory margin, then the error was insignificant. These errors were far in between and did not substantially affect the net outcome; and as was stated in **JOHO -VS- NYANGE (supra)**-

“Errors are human. Some errors in an election like this conducted under a frenetic schedule are nothing more than what is always likely in the conduct of any human activity. If they are not fundamental, they should always be excused and ignored.”

176. The 1st petitioner, who was the Chief Agent for the Jubilee Party signed the form 37C thus negating any contention that the election was invalid. By signing, he approved the results and cannot now turn around and challenge the form.

177. I also share the views expressed in **HENRY OKELLO NADIMO -VS- I.E.B.C. & 2 OTHERS [2013] eKLR** where the court held that an agent who accepts and acquiesces to an outcome but wishes to recant it must give plausible reasons. The petitioners have not challenged the results and did not adduce sufficient evidence to support their claim for lack of a credible register or manipulation of the results. I concur with the respondents' counsel that at the hearing, the Petitioners introduced new claims challenging the forms 37A for **Getai Primary School, Rianchaga Primary School (01), Igoma Primary School (01), Nyabite Tea Buying Centre (01) and Rionsoti Primary School (01)** which were not pleaded and a party, being bound by his pleadings, cannot raise new claims at the hearing.

178. I confirm that there were errors and anomalies in some forms relating to a few polling stations but the sum total does not substantially affect the net outcome of the general elections conducted on 8th August 2017 in respect to the seat of Governor for Kisii County.

Who bears the costs of this petition?

179. The petitioners submitted for costs of Kshs. 2.5 million as instruction fees for two counsel which they argued has been the sum awarded by most of the courts handling petitions. In the event the petition does not succeed, the respondents' should still be penalized to pay costs pursuant to **Rule 30 (2) (b)** because they have forced the petitioners to incur the unnecessary expenses of filing this petition by their conduct.

180. It is their contention that it was proved that the respondents interfered with the voters' roll, failed to secure the ballot material, used forms with mismatching security features and committed errors. Therefore, although the general principle is that costs follow the event, the court should exercise its unfettered discretion in this case to deny the respondents' costs should the petition fail because of their discreditable and reprehensible conduct.

181. The 1st and 2nd Respondents counsel pegged no figure to the issue of costs. 3rd - 5th respondents urged the court to dismiss the petition and award them costs noting that they were represented by two counsel one who was a senior counsel based at Nairobi. They asked the court to consider **Martha Wangari Karua & Another v I.E.B.C. & 3 Others [2017] eKLR** where the court capped costs for the respondents at Kshs. 10,000,000/=.

182. **Section 84 of the Elections Act 2011[Revised 2016]** provides:

An Election Court shall award the costs of and incidental to a Petition and such costs shall follow the cause.” This must be read alongside Rule 30 which provides that:

“30 (1) the court shall at the conclusion of an election petition make an order specifying

i. total amount of costs payable

ii. the maximum amount of costs payable

iii. the person who shall pay the costs...

iv. the person to whom costs... shall be paid.”

183. Clearly **Section 84** of the **Elections Act** and **Rule 30 (1)** of the **Elections (P&C) Petition Rules** place an obligation upon an election

court to award costs and cap costs of, and incidental to the petition. As discussed in the Bench Book on Electoral Disputes Resolution at pg. 101, the rationale for capping costs is to encourage genuine petitioners to challenge flawed elections without being unduly hindered by the fear of incurring huge costs. It also prevents the mischief of runaway costs witnessed in yester-years and must be viewed as a tool for promoting access to justice under **Article 48** of the **Constitution of Kenya**.

184. While I recognize that the phrase ‘costs follow the event’ implies that the successful party is to be compensated for the trouble taken in prosecuting or defending legal proceedings, I am also alive to the fact that an award of costs is not intended to punish the losing party. Yet at the same time I cannot ignore the provision under **rule 30 (2) (b)** to the effect that the court may impose the burden of payment on the party who may have caused an un-necessary expense as well as sentiments expressed in **DICKSON MWENDA KITHINJI –VS- GATIRAU PETER MUNYA (MERU) ELECTION PETITION NO 1 OF 2013** regarding surrogate litigation where the court pointed out that:

“The Petitioner who agrees to bring a petition on behalf of an unsuccessful candidate should be ready to meet the consequences of a failed petition and cannot hide behind the fact of being a sponsored petitioner....The petitioner...should not be left unpunished for his actions as by failing to do so would encourage the unsuccessful candidates to use men of no means to file petitions with the hope of getting away without paying costs in case the Petitioner does not succeed”

185. Whereas I concur with the sentiments expressed in the afore-cited case, I would be hesitant to use the word ‘punish’ when considering the award for costs because it connotes punitive action. I think it should only be a punitive measure where it is demonstrated that the petition was motivated by malice and ill will. A litigant may file a petition in the belief that there is merit in the grievance, and still lose the petition-in such an instance using costs to punish a petitioner would be counter the constitutional ideals of access to justice.

186. **JOHNSON MUTHAMA –VS- MINISTER FOR JUSTICE AND CONSTITUTIONAL AFFAIRS & ANOTHER [2012] eKLR** where the court observed that:

“Provision for payment of costs by a party coming before the court Given the nature of elections, it serves a useful and rational purpose of ensuring that only those who have a serious interest in challenging the outcome of an election do so.”

187. I will therefore endeavor to balance all the aforesaid considerations and also consider the energy and industry employed in pursuing and canvassing the issues in this matter, the time and resources involved in taking instructions, preparing and compiling documents (including the volume), researching, preparing witnesses, the length of time the hearing took (including the number of witnesses called), extent and volume of relevant paper work (as opposed to flooding the record with repetitious volumes).

188. I also take note that this petition was fraught with multiple applications and that Counsel for the respondents are not based in Kisii and had to travel from Nairobi.

189. In **MABLE MURULI –VS- WYCLIFFE AMBETSA OPARANYA & 3 OTHERS KAKAMEGA HC EP NO. 5 OF 2013 [2013] eKLR**, the court ordered the 4th respondent to pay costs which were capped at 5 million to be shared equally between the petitioner and the 1st and 2nd respondents.

190. In **EDWARD AKONG’O OYUGI –VS- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS KISII HC EP PETITION NO. 3 OF 2013 [2013] eKLR** costs payable by the 1st respondent to the petitioner and the 3rd respondent were capped at Kshs. 1 million for each party. Costs payable by the 1st and 3rd respondents equally to the petitioner were capped at Kshs. 3 million in **WILLIAM ODHIAMBO ODUOL –VS- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS KISUMU HC EP NO. 2 OF 2013 [2013] eKLR**.

191. In **DICKSON MWENDA KITHINJI -VS- GATIRAU PETER MUNYA & 2 OTHERS MERU HC EP NO. 1 OF 2013 [2013] eKLR** the costs awarded to the respondents and those for the 1st respondent was capped at Kshs. 2.8 million while the 2nd and 3rd respondents capped at Kshs. 2.2 million. The costs in **FERDINARD NDUNG’U WAITITU –VS- INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 8 OTHERS NAIROBI EP NO. 1 OF 2013 [2013] eKLR** the total costs were capped at Kshs. 5 million.

192. Guided by the afore-going considerations I find it reasonable to cap costs for the 1st and 2nd Respondents at Ksh.2 million and for the 3rd – 5th Respondent who engaged two counsels, including a senior counsel Ksh. 3 million.

193. The upshot is that the petition is dismissed with costs.

FINAL ORDERS

a) I declare that the IEBC conducted a credible and accountable election in Kisii County for the seat of governor and Deputy Governor. The identified non-compliance and irregularities were insignificant and not substantial to affect the integrity and quality of the general elections held on 8th August 2017 for the seat of governor of Kisii County

b) I declare that the alleged non-disclosure by **JOASH ARTHUR MAANGI GONGERA** to the Ethics and Anti-Corruption Commission regarding his conviction for an offence of driving while under the influence of alcohol has not been proved.

c) I declare that no evidence has been presented to demonstrate that **JAMES ELVIS OMARIBAONGWAE** and **JOASH ARTHUR MAANGI GONGERA** were not qualified to contest the position of Governor and Deputy Governor of Kisii County in

the concluded 8th August 2017 general elections held in Kisii County.

d) I declare that **JAMES ELVIS OMARIBA ONGWAE** and **JOASH ARTHUR MAANGI GONGERA** were validly elected to the position of Governor and Deputy Governor respectively of Kisii County in the 8th August 2017 elections.

e) I declare that there was no proof that **NAFTALI OBWOCHA ORINA** committed an election offence under **Section 15** of the **Election Offences Act**.

f) The Petitioner shall bear the costs of this petition which is capped at Kshs. 2 million in favour of the 1st and 2nd Respondents, and Kshs. 3million in favour of the 3rd - 5th respondents.

194. I direct that a certificate of validity as to the election do issue as provided under **Section 86** and a copy shall issue to the Independent Electoral and Boundaries Commission (IEBC) and the Speaker of the Senate be notified.

Delivered and dated this 27th day of February 2018 at Kisii

H.A.OMONDI

JUDGE

Acknowledgement

To all counsel for their professionalism during the proceedings.

To the litigants for maintaining dignity in their conduct.

To the Deputy Registrar in conducting scrutiny at such short notice.

H.A. OMONDI

JUDGE