



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELECTION PETITION NO 20 OF 2017

OSCAR OMOKE OCHOLLA.....1ST PETITIONER
KARIUKI KAVORE.....2ND PETITIONER
ODERA DANIEL TRESVANT.....3RD PETITIONER
HILLARY OKUMU MULIALIA.....4TH PETITIONER
KIRAGU MARGERY NDUTA.....5TH PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION.....1ST RESPONDENT
MARTIN SIMOTWO.....2ND RESPONDENT
NIXON KIPROTICH GENERALI KORIR.....3RD RESPONDENT

**IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF THE MEMBER OF NATIONAL ASSEMBLY LANGATA
CONSTITUENCY ELECTION, 2017**

AND

IN THE MATTER OF ARTICLE 1,2,4,10,23,38,47,81,82,86,87,88,101 AND 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 75 & 80 OF THE ELECTIONS ACT, 2011

AND

IN THE ELECTION ACT (ACT NO. 24 OF 2011) AS AMENDED

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS, 2012

AND

IN THE MATTER OF ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITIONS RULES, 2017

JUDGMENT

1. The petitioners herein were among the candidates for Member of National Assembly for Langata Constituency in the election held on the

8th August, 2017.

2. Following the General Election aforesaid, the 3rd Respondent, **NIXON KIPROTICH GENERAL KORIR** was declared elected as the Member of National Assembly for Langata Constituency after he garnered a total of 41,086 votes. The first petitioner was the runners – up having garnered a total of 39,593 votes with a margin of 1493 votes. The 2nd, 3rd, 4th and 5th petitioners in this petition garnered 1,447, 347,433 and 589 votes respectively.

3. The Election was conducted by the Independent Electoral and Boundaries Commission (IEBC), the first Respondent while MARTIN SIMOTWO, (the 2nd Respondent) was the Returning Officer. Langata Constituency has a total of 202 polling stations out of which one of them is in Langata Ward Prison in which only Presidential Elections were held.

4. The first Respondent is established under Article 88 of the constitution which is the body responsible for conducting or supervising referenda and elections, for any elective body or office established by the constitution, and any other elections as prescribed by an Act of parliament. The full functions of the first Respondent are set out in Article 88 (4) of the constitution. Under Article 88 (5), the first Respondent shall exercise its powers and perform its functions in accordance with the constitution and the National Legislation. The functions of the first Respondent are also set out in section 4 of the Independent Electoral and Boundaries Commission Act.

5. Dissatisfied with the results, the petitioners filed this petition on the 6th day of September, 2017. They also filed their respective affidavits, affidavits of witnesses and bundle of documents in support of their petition.

6. The reliefs sought in the petition are as hereunder;

- a) The Honourable court be pleased to order a scrutiny, recount and verification of all the votes cast in the election for Member of National Assembly for Langata Constituency in the elections held on the 8th day of August, 2017.
- b) The Honourable court be pleased to find that the 1st and 2nd Respondents jointly and severally abetted Election offences in the course of the election for Member of the National Assembly for Langata Constituency.
- c) That this Honourable court do find that the elections of Member of National Assembly for Langata Constituency was not free and fair and was vitiated by the illegalities stated above.
- d) An order do issue for a fresh election for the office of Member of the National Assembly for Langata Constituency.
- e) The Respondents be condemned to pay the costs of the petition.
- f) The Honourable court grants such other and further relief or order as it may deem mete and just.

The grounds upon which the petition was based were:

- a) Violation of the principle of free and fair elections and electoral process.
- b) Lack of impartiality , neutrality, efficiency, accuracy and accountability
- c) Lack of verifiability of the results
- d) Contravention of electoral regulations governing voting.
- e) Substantive non-compliance, irregularities and improprieties
- f) Discrepancies in the statutory vote tallying documents leading to the declaration of manifest wrong results.
- g) Irregularities and inconsistencies in the counting, tallying of votes and filling in of forms 35A and 35B.
- h) Failure to properly record the votes, display the same and avail the respective Forms 35A to the agents;
- i) Failure to seal the ballot boxes.
- j) Failure to secure polling stations and their environs
- k) Irregular appointment of polling clerks and
- l) Failure to regulate access to the use of public resources.

7. The petitioners have set out detailed facts that they have relied upon in support of their petition, which I propose to consider later on in this Judgment, when I will be analyzing the evidence on record.

8. All the Respondents filed their respective responses, supporting affidavits and the relevant documents. They have denied the allegations leveled against them. The alleged commission of illegalities, irregularities and improprieties were denied. It was the case of each Respondent that the election was free, fair and credible and that the results declared by the 2nd Respondent reflected the will of the people of Langata. The Respondents also contended that the election accorded with the constitution and the electoral laws and therefore the results declared were valid. It was sought that the petition be dismissed with costs.

9. Before considering the issues raised in this petition, and the evidence on record, it is important to outline the legal framework applicable in election petitions. Those Principles are founded on Article 1(l) of the constitution 2010 which provides;

“All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this constitution.”

Under Article 1(2), the people may exercise their sovereign power either directly or through their democratically elected representatives.

The sovereign power under Article 1(3) of the constitution is delegated to among other state organs,

a) Parliament and the legislative assemblies in the county governments which shall perform their functions in accordance with this constitution.

Article 38 of the constitution which deals with political rights, provides that every citizen is free to make political choices, which include the right

a) To form, or participate in forming, a political party.

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

c) To campaign for a political party or cause

2) Every citizen has a right to free, fair and regular elections based on expression of the will of the electorates for-

a) Any elective public body or office established under the Constitution; or

b) Any office of any political party of which the citizen is a member.

3) Every adult citizen has the right without unreasonable restrictions

a) To be registered as a voter

b) To vote by secret ballot in any election or referendum and

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

10. Article 81 (e) of the constitution outlines the ingredients of free and fair elections

These are

I. By secret ballot

II. Free from violence, intimidation, improper influence or corruption

III. Conducted by an independent body

IV. Transparent and

V. Administered in an impartial, neutral, efficient, accurate and accountable manner.

11. In terms of enabling the citizens to enjoy the right to make those political choices and in particular the right to vote, the IEBC is required by the constitution to ensure certain minimum standards for voting. These are provided for in Article 86 of the constitution which provides for manner and method of voting as follows;

a) Whatever voting method is used, the system shall be simple, accurate, verifiable, secure, accountable and transparent

b) The votes cast are counted, tabulated and the results announced promptly by the Presiding Officer at each polling stations

c) The results from the polling stations are openly and accurately collated and promptly announced by the Returning Officer; and

d) Appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

12. Article 87 of the Constitution entrenches the principle of timely resolution of electoral disputes. It obliges the parliament to enact legislation to establish mechanisms for timely settling of electoral disputes.

13. Pursuant to Article 87 (Supra) parliament enacted the Elections Act 2011, the election offences Act, the political parties Act, public officers Ethics Act and the Independent Electoral and Boundaries Commission Act. In addition, parliament enacted the Elections (General) Regulations, 2012 and the Elections (Parliamentary and County Elections) petitions Rules 2017.

14. **Section 83 of the Elections Act** is central as it sets the tests to be applied by the courts when considering an election petition. It states as follows;

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

15. Upon consideration of this section, the Supreme Court, in case of **Raila 2017** stated ;

“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 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 results of the election”

I now move on to the burden of proof.

16. In election matters there is a presumption that the election was properly conducted and that the results that were declared were correct. See **Raila Odinga & Another Vs IEBC & 3 others Petition No 1/2017**. The burden of proving otherwise rests with the petitioner. He has to prove that the election was not conducted in accordance with the principles laid down in the constitution and the election law and where there are allegations of irregularities, malpractices or misconduct , it is up to him not only to prove that they occurred but also that they were of such a magnitude that they affected the results.

17. The Supreme Court in the **Raila case (Supra)** stated;

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

18. The burden of proof, however, may shift from the petitioner to the Respondent and in this regard, the Supreme Court in the case of Raila, stated;

“There is apparently a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. It’s essence is that an electoral cause is established much in the same way as a civil case; the legal burden rests on the petitioner but depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the court to determine whether a firm and unanswered case has been made.”

19. A petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden.

What about the standard of proof?

20. The standard of proof required in an election petition is higher than a balance of probabilities but lower than beyond reasonable doubt but where there are allegations of commission of election offences, the standard is beyond reasonable doubt. It therefore follows that, for the petitioners to succeed, they must place before the court, cogent and credible evidence to support the allegations pleaded in the petition. As stated earlier in this judgment, they have to prove;

a) That the conduct of the elections in question substantially violated the principles laid down in the constitution as well as other written law on elections or;

b) That, although the election was conducted substantially in accordance with the principles laid down in the constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.

21. Another important legal principle that is applicable not only in election petitions but also in other civil cases, is that, a party is bound by its pleadings. In election petitions, a petitioner is bound by the petition and his affidavits and documents must support the petition. In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also settled legal principle that no party should be

permitted to travel beyond its pleadings and parties are bound to take all necessary material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising from the pleadings. See the case of **Arikala Narasa Reddy vs Ventaka Ram Reddy Reddygari & Another Civil Appeal No 5710 -5711 of 2012 (2014) 2SCR.**

THE PETITIONERS' CASE

22. In support of their case, the petitioners called a total of 9 witnesses out of which five are the petitioners herein. The main witness is **OSCAR OMOKE OCHOLLA** who is the first petitioner.

According to the evidence on record he testified that the election was marred with irregularities and fraud to wit, rigging and illegal maneuvering that was discovered during the voting, tallying and results delivery process in Constituency Tallying Centre. Some of those alleged irregularities as outlined in his affidavit are that results were inflated in favour of the 3rd Respondent in particular polling stations, swapping of lower results of the 3rd Respondent with his results, amending Forms 35A at the tallying center to reflect fraudulent and fictitious figures in favour of the 3rd Respondent, intimidation of agents by the Presiding Officers and the 3rd Respondent and submission of Forms 35A that were not signed by some agents.

23. It was also his evidence that there was lack of impartiality, neutrality, efficiency, accuracy and accountability, lack of verifiability of results, contravention of electoral regulations, failure to seal ballot boxes, irregular appointment of polling clerks and failure to regulate access and use of public resources.

24. Pw2, Daniel Tresvant Odera is the 3rd petitioner. It was his evidence that his agents were denied access in some polling stations, that illiterate voters were allowed to vote without the participation of his agents and in the process they were misled to vote for the 3rd Respondent. It was his further testimony that the valid votes exceeded total number of registered voters and that in 122 polling stations his agents were not supplied with Forms 35A.

25. PW3, Margery Nduta Kiragu, is the 5th Petitioner herein. In her evidence she told the court that her agents were chased away and that they were not given Forms 35A. She stated that her agents were intimidated.

26. PW4, Hillary Mulialia Okumu, is the 4th petitioner in this petition. It was his evidence that there were violations against the candidates which were not acted upon unlike those for the 3rd Respondent who enjoyed a good relationship with the security officers thus giving him undue advantage over the other petitioners. He also told the court that the results were not displayed in most of the polling stations and that security officers refused to remove the 3rd Respondent's security within 400 meters of the polling stations.

27. PW5, Kavore Kariuki, is the 2nd Petitioner. According to him, results were inflated in favour of the 3rd Respondent, his complains to the 1st Respondent were never addressed, his agents were intimidated by the 3rd Respondent, were denied access to the polling stations and that there was interference of elections of Member of National Assembly for Langata by the executive. His other complains were that the listing of candidates in the ballot papers was not done alphabetically which was against the normal practice and that he 3rd Respondent had his symbols supersized while for the rest of the petitioners were minimized which gave him undue advantage.

28. PW6, Joseph Owambo Odira, was an agent for ODM party in Kongoni 3. It was his evidence that he was refused entry at the polling station because he did not have a badge until about 7 am when he was allowed in, that he was beaten up and his phone stolen. He testified that he did not sign Form 35A because there was a seal that was missing on the ballot boxes.

29. PW7, Jacktone Otieno Onyango, was the tallying agent for the first petitioner. It was his evidence that he saw a Presiding Officer by name Martha Ogechi Bonareri filling Form 35A at the tallying centre.

30. PW8, Benard Adhiambo Oguwa, was the Chief agent for the first petitioner and for ODM party. He stated that he received a call on the 9/8/2017 and was told about ballot papers for St. Mary's polling centre that were being burnt. He went and found some that were partly burnt but he was not able to establish whether they were marked or not. However, he was able to establish that they were for Langata and Karen Ward but for an MCA position. It was his further evidence that he was not able to establish the candidate they belonged to. He did not report the incident to the police. He named four agents who were chased away from the polling stations namely Patrick Ludavi KPA 2, Cyrus Agumba NCC2, Ted Maxwell, KPA polling station and Veronica Wandivo.

31. It was his further evidence that some of their agents were not allowed to inspect the ballot papers, these were Robert Emily KPA 5, Fredrick Onyango KPA 3 and Robert Ogonyi, KIRDI polling centre. A number of others were chased away from Langata Primary School polling stations.

32. PW9, Felistas Adhiambo Ochieng was an agent of ODM. In her evidence, the first petitioner got 192 votes in MOW polling station 10 but was given 112 votes in Form 35A. But in cross-examination and on being referred to para 36 of the 1st Petitioner's affidavit, he states that he got 198 votes which was a contradiction.

33. On their part the 1st and 2nd Respondents called a total of 9 witnesses, the main one being the 2nd Respondent, Martin Simotwo who was the Returning Officer, Langata Constituency. He was involved in the recruitment and training of the Presiding Officers. According to him, the Presiding Officers were supposed to ensure that there was order in the polling stations, fill the statutory forms and handle everything happening in the polling stations and if unable to, refer such complains to him.

34. It was his evidence that on 8/8/2017, he did not receive any complaint from any of the candidates about the conduct of the elections. He told the court that after votes are counted agents are asked to sign Forms 35A and if they refuse to sign, the Presiding Officer cannot force them. The Presiding Officers are then supposed to take Forms 35A together with the other election materials to the tallying centre where the results are tallied and the winner is declared.

35. The other witnesses who testified for the first and second Respondents are Geoffrey Kipchirchir Limo, Martha Ogechi, Nicholas Mutai, Vincent Arasa, Benjamin Cheruiyot Rono, Dennis Cheruiyot, Gideon Kiprotich Ngetich, Linet Mukhula, Cecilia Nyanjau Thiga, Hellen Ratemo and Caroline Ibwaga who were Presiding Officers for the different polling stations within Langata Constituency save for Dennis Cheruiyot, DW7, who was the Logistics Assistant incharge of Electoral materials.

36. On the part of the 3rd Respondent, a total of 6 witnesses testified. They are Jackline Basiye, Arnold Kipkoech, Joseph Kariuki Kamau, Edmond Ngetich, Stephen Oriema and the 3rd Respondent. They were all agents of the 3rd Respondent in different polling stations, during the August 8th General Elections.

37. The evidence of all the Respondents' witnesses point out to the fact that the election as conducted by the 1st and 2nd Respondents was free and fair though there were some few incidences.

38. DW5, Stephen Oriema was the Chief Constituency Agent for the Jubilee party and also the agent for the 3rd Respondent. According to him, 90% of the agents picked their badges but 10% did not manage. He stated that some of their agents in Uhuru Garden were barred from entering the polling stations but they were later allowed access. He scrutinized and verified Forms 35A and according to him the 3rd Respondent garnered 290 votes at Karen c 3 and not 260 votes as alleged while the first petitioner garnered 181 votes. He stated that all agents signed Forms 35A and the results that were entered in Form 35B were correct. He did not get any report that voters were assisted in favour of the 3rd Respondent.

39. The 3rd Respondent testified as DW6. He was one of the candidates during the August 8th elections. It was his evidence that during the campaigns and on the voting day, none of his agents were involved in any incidents of violence. He stated that he did not violate any electoral laws and he did not engage in any electoral malpractices. He averred that he signed, and he is aware of the electoral code of conduct. He denied that he got favours from the security officers and that he was installed by the Deputy President. It was his evidence that he did not interfere with the Presiding Officers, he had no role to play in their recruitment and that none of them is a relative of his. He averred that he did not use any public resources to campaign and he did not convene the meeting during which some youths in Langata Constituency were allegedly recruited in the National Youth Service. He, however, admitted that he attended the meeting.

40. He denied visiting any polling station on the 8th day of August 2017 as alleged. With regard to the errors on Forms 35A it was his evidence that they did not affect the final results. He denied that the person captured in the video marked 0001(L) (b) was his supporter. On the issue of the Presiding Officer in charge of KIRDI 3 who was caught with election materials at the tallying centre, it was his evidence that he was informed of the incidence by his Chief agent who told him that the materials were for an MCA post and that the Presiding Officer was cleared by the Returning Officer.

41. On Forms 35B on pages 158-159 of the petitioners bundle and that on pages 214 – 215 of the Respondents bundle, he said he signed the one on page 158 which, according to the information he received from the Returning Officer, was a draft but his agent signed Form 35B on pages 214-215 which was the original. He has asked the court to dismiss the petition for want of merit.

42. The court has carefully considered the evidence on record, the pleadings and the submissions by the respective parties. On the 1st of November 2017, parties herein filed statement of agreed issues as follows;

1. What are the Constitutional and statutory standards of holding a free, fair and credible election.

2. Was the election for the Member of National Assembly for Langata Constituency, held on 8/8/2017 in line with or in compliance with the provisions of Article 86 (a) – (d) of the Constitution?

3. Were there any election malpractices, irregularities and illegalities in the election of the Member of National Assembly for Langata Constituency held on 8/8/2017 and if so, what was the magnitude and the resultant effects thereof?

4. Whether there is any basis established for an order of scrutiny, recount and re-tally of the election materials for the election of the Member of National Assembly for Langata Constituency and if so, whether the same should be conducted.

5. What is the outcome of the audit, scrutiny, recount and re-tally of the election materials used, unused and the ballot cast on 8/8/2017 for the election of the Member of National Assembly for Langata Constituency?

6. Was the 3rd Respondent Constitutionally, statutorily and validly returned as the duly elected Member

7. Are the petitioners entitled to the prayers of National Assembly for Langata Constituency? set out in the petition herein?

8. Who bears the costs of this petition?

Analysis and findings

43. In my analysis, I purpose to deal with the issues set out herein above but not necessarily in the order, they appear.

Were there any election malpractices, irregularities and illegalities in the election of the Member of National Assembly for Langata Constituency held on the 8th August 2017?

44. The petitioners have raised a number of allegations under this head. It is alleged that in all polling stations, the petitioners' agents were not allowed in, others were not issued with badges, incessant complains by their agents were disregarded and that they were not provided with serial numbers for the ballot boxes and ballot papers.

45. **Section 2 of the Elections Act** defines an agent as a person duly appointed by a political party or an independent candidate, for purposes of an election or referendum under the Act. The Act provides that a political party may appoint one agent for its candidate at each polling station, where a party does not nominate an agent a candidate nominated by a political party may appoint an agent of his choice. An independent candidate is also entitled to appoint his own agent. All the petitioners testified that their agents either were chased away or were not provided with badges and that their complaints were not acted upon.

46. In an election, agents play a very important role because it is through them that candidates participate in and observe the electoral process. It is the role of the agents to ensure that IEBC officials conduct the election through an impartial, neutral, efficient and accurate manner. Agents are thus an integral part of the voting process and their evidence is crucial in the determination of a petition.

47. The petitioners' complaint on this issue is captured in paragraph 43 of the petition wherein it is alleged that in all the polling stations, the respective agents for the petitioners were not issued with identification badges, that their complaints were disregarded and were unheeded, they were not provided with the serial numbers of the ballot papers used in the election and the serial numbers of the ballot boxes. They have also alleged that presiding officers at some polling stations "assisted" old and illiterate voters to cast their votes in the absence of the party's agents contrary to the regulations and also that the presiding officers in various stations chased agents on various flimsy grounds.

48. Pw1- pw5 (the petitioners herein) gave evidence on these aspects of the complaint. The evidence of pw1 was that his agents were intimidated by presiding officers, his agents were denied an opportunity to participate in the vote counting and tallying of votes. On his part pw2 testified that his agents were denied access at St. Mary's polling center and that his agents were not issued with badges. Similar complaints were made by pw3, pw4 and pw5.

49. Pw8, Bernard Adhiambo Oguwa was the 1st petitioner's chief agent and a general agent for the ODM party. He stated that on the 8/8/2017, he was moving around Langata Constituency supervising the 1st petitioners' agents and the ODM presidential candidate's agents , when he received information that the agents were not allowed in the polling stations, he intervened and they were allowed in by around 9:00am ,thus they did not witness the opening of the polling stations.

50. It was also his evidence that at the time of voting, he received several complains that their agents were not given an opportunity to witness an illiterate voter being assisted, presiding officers chased away their agents from the polling stations when counting commenced, their agents were not shown ballot papers to inspect, presiding officers refused to recount and recheck the ballot papers when requested to do so. He further stated that presiding officers intimidated agents whenever they raised objections, agents not allowed to inspect forms 35A, agents not allowed to sign forms 35A and agents not duly furnished with copies of forms 35A. He gave the following polling centers as the ones that were affected by the above complains, KPA , Langata Road Primary School, KIRDI, Kongoni, St. Mary's Primary School, Manyatta village, MOW, NCC Social Hall, Uhuru Gardens Primary School, Madaraka Primary School, St. Jude Church and Nyayo National Stadium. He complained that on the election day after 10:00am his calls to the 2nd Respondent were neither answered nor returned.

51. Pw8 heavily relied on the information that he was given by his agents who were on the ground, and the evidence he gave in court is what he was told by them. The same applies to the petitioners herein. On record, is have the evidence of pw6 and pw7 who were agents on the ground. Pw6 was an ODM agent while pw7 was the tallying agent for the first petitioner. He was stationed at the tallying center and had no useful evidence to offer in relation to what transpired at the polling stations. The only other agent who testified is pw9, Felista Adhiambo Ochieng who was the ODM agent and the 1st petitioner's agent at MOW polling station stream 10. In her evidence in chief as captured in her affidavit, her evidence relates to the number of votes that the 1st petitioner and the 3rd Respondent garnered in that particular polling station. In her evidence, the first petitioner got 192 votes in MOW polling station 10 but was given 112 votes in Form 35A which contradicted the evidence of the 1st Petitioner on cross-examination. Form 35B for that particular station shows that he garnered 112 votes Though pw2, pw3, pw5 alleged that their agents were either denied access or mishandled none of them called any evidence to support those allegations and therefore, the evidence that they gave in court amounts to hearsay evidence which has no probative value as it was not corroborated. It would have helped if those agents were called to testify.

52. Another issue that has been raised with regard to the agents is that, the presiding officers denied the petitioners' agent an opportunity to witness illiterate voters who were assisted to vote and in the process they were misled to vote for the 3rd Respondent. Regulation 72 of Elections (General) Regulations, 2012 allows a voter who, because of a disability or being unable to read or write is unable to vote in the manner prescribed in the Regulations to be assisted. Regulation 72 (2) provides that where such a person applies to be assisted, and is not accompanied by a person who is qualified to assist him/her, the presiding officer shall assist such a voter, in the presence of the agents. In their evidence pw1 and pw2 stated that their agents were denied this opportunity. It is noted that this was a general complaint which was not supported with any material particulars. None of those illiterate voters who were assisted was called to testify nor was any of the petitioners' agents called as a witness to support that allegation yet the petitioners had agents in all the polling stations in the constituency.

53. With regard to the complaint that the agents were not shown the ballot papers for inspection, that they were intimidated and were chased away from the polling station, again, it is noted that none of those agents testified in support of those allegations. On record, is the evidence of Joseph Owambo Odira who testified as pw6. He was the agent representing ODM at Kongoni polling station stream 3. In paragraph 5 of his affidavit, he stated that he arrived at the polling station at around 4:50am but he was not allowed to get in until 7am, as he did not have a badge. In cross-examination by Counsel for the 1st Respondent it emerged that he signed the polling station diary at 6:00am on the material

day. Though he alleges that he was beaten up by the 3rd Respondent's supporters he did not tender any concrete evidence to connect the people who assaulted him, if at all, to the 3rd Respondent. Though he alleged that his phone and ID card got lost in the process, he did not report the matter to the police or to the presiding officer yet this allegation is criminal in nature. This raises a lot of doubts as to whether indeed this agent was assaulted as alleged. The witness also came through as one who is not truthful in that in his evidence in chief, he told the court that he was an ODM agent but on cross-examination by counsel for the 3rd Respondent, he is on record as having stated that he was an agent of Ford Kenya party. In view of these two material contradictions, it is highly likely that the evidence he gave to the court is not true and this court forms an opinion that he is not a truthful witness.

54. The other irregularity alleged by the petitioners was that of declaration of results using forms 35A for different polling stations in that, form 35A for Uhuru Gardens Primary School stream 14 of 15 was used to declare results for Nyayo National Stadium stream 11, form 35A for Madaraka Primary School stream 6 of 12 was used to declare results for Madaraka primary school stream 7 of 12. The petitioners contend that the deliberate use of inconsistent and different forms and returns demonstrates lack of consistency, uniformity, neutrality, impartiality and indicates an intention to manipulate the results and the returns.

55. In his evidence, the 2nd Respondent dwelt on this allegation at length. It was his evidence that he was called at around 3pm by the presiding officers who informed him of that anomaly. He admitted there was that anomaly affecting the three stations aforesaid. His explanation was that forms 35A for Madaraka 2 were not delivered, the package that was there was reading Madaraka 7, Madaraka 7 had issues and they used the forms for Madaraka 6. That, to remedy the situation, Madaraka 2 used forms for Madaraka 7 while Madaraka 7 used forms for Madaraka 6 and Nyayo stadium 7 used forms for Uhuru Gardens. He, as the returning officer directed the presiding officers to use the forms that were available. He received the information late as the forms are only supposed to be opened in preparation of counting. He contended that the forms may have been different but the contents were for the correct polling stations. He further explained that the problem was with the printer when the forms were printed. The court is satisfied with that explanation as that was the only reasonable thing to do in those circumstances.

56. The other allegation was on irregular appointment of presiding officers and other election officials. In par 77 of the petition, it is alleged that the 1st Respondent conspired with the 3rd Respondent to engage or to hire supporters and campaigners of the 3rd Respondent as officials in the election. The following were listed as the 3rd Respondents known supporters. Nicholas Mutai, Benjamin Rono and one Essie. Kiprotich Ngetich Gideon was said to be the 3rd Respondents manager in his Lee 63 pub and his chief agent during the jubilee nominations while Dennis Cheruiyot alias Waziri was said to be the 3rd Respondent's store keeper.

57. Counsel for the petitioners submitted that the appointment of the election officials was irregular and that there are a lot of inconsistencies in their testimony on the criteria and qualification of selecting them as presiding officers. The respondents have denied those allegations. I have considered the evidence on record in that regard. No evidence was adduced to support the allegations that Nicholas Mutai, Benjamin Rono and Essie were supporters of the 3rd Respondent. Similarly, no evidence was adduced to prove that Kiprotich Ngetich and Dennis Cheruiyot alias Waziri were employees of the 3rd Respondent. These were just mere allegations without any basis.

58. The other allegations that were made were that there was failure to regulate access to the use of public resources, interference of the election by the Executive, some presiding officers were caught filling forms 35A at the tallying center, that some ballot boxes were burnt, that the 3rd Respondent visited some polling stations with his security when voting was in progress and that one of his supporters was found with two extra ballot papers.

59. In paragraph 78 of the petition, it is pleaded that the 3rd Respondent who prior to the election was the director for youth affairs at the office of the Deputy President, even after resigning, continued to use government resources in his campaigns. That on the 5/7/2017 he held a function in Langata where he recruited youths to the National Youth Service as part of his campaigns. In support of this allegation, some photographs were produced as exhibits. They can be seen between pages 292 – 296 of the petitioners' bundle of documents. Pw1 and pw6 testified on this and averred that the 1st and 2nd Respondents were under duty to ensure that no candidate took advantage of the use of public resources to aid or uplift their campaigns to the detriment of the other candidates.

60. In cross-examination, pw1 conceded that there was nothing wrong with a leader attending a public function though according to him, the nature of the function was material. On his part the 3rd Respondent denied having used his office to advance his political interest. In his evidence, he admitted that he was employed as the secretary, youth affairs in the office of the president which position, he exited on the 20/12/2016 and he was formally released from public service in February 2017. A clearance certificate was produced as an exhibit in this case. It was his contention that he was not the organizer of the function but only attended the same like any other Kenyan. He stated that his role as the secretary to the youth affairs was to advice the president in terms of the programs, projects, legislation and he was not directly in contact with the young people. His work was to deal with the stakeholders and not the young people directly. He was not dealing with the National Youth Service in the course of his duties and therefore, the allegation that he recruited young people to NYS was false.

61. Counsel for the 3rd respondent raised the issue of the photographs and averred that no certificate was produced for their production by the person who took them. I agree with him in that submission and for that reason the photos are not worth of any probative value. But even without prejudice to that, there is no evidence on record to prove that the function was organized by the 3rd Respondent. He indeed told the court that it was organised by the county commissioner and that evidence was not controverted by the petitioners.

62. On allegations of interference of the election by the executive, burning of ballot papers a supporter of 3rd Respondent being issued with two ballot papers, and a presiding officer having been caught in camera filling forms 35A at the tallying center, four videos were produced as evidence to support these allegations. They were all played in court after they were produced as exhibits and marked 0001K(b), 0001(L)(a), 0001M(a) and 0001 N(a).

63. The first to be played was 0001K(b). This video was allegedly shot at the tallying center at multimedia university. Pw1 stated that he could identify some people among them a Mrs. Osir who was the presiding officer for KIRDI 3 polling station, Mr. Simwoto, who was the

returning officer for Langata constituency and the 2nd Respondent herein and D.C.I.O Karen. According to pw1 the video depicts and illustrates the petitioners averments that many ballot boxes arrived at the tallying center unsealed. He further stated that it also illustrates that the majority of forms 35A were not filled at the polling stations but at the tallying center and that the election materials were not handled in the manner expected.

64. With regard to the issue of Mrs. Osir, DW1, Martin Simwoto stated that the issue was brought to his attention and whatever happened did not affect other candidates in that polling station. He said that the presiding officer caught in the video had not been cleared and it was in order for her to be in possession of the election materials at the tallying center. That the materials that Mrs. Osir was caught with belonged to an MCA elective position and had nothing to do with that of member of National Assembly. This fact was not denied by the petitioners. In relation to this, I wish to state that the court has no proper basis to engage into an inquiry in relation to election results beyond those for the election of the person and constituency whose election is challenged in the petition before it.

65. The other video was marked 0001L(b). The evidence of pw1 with regard to this video was that on the election day, he was called by his agent who informed him about an individual who was arrested with two ballot papers. The said person was arrested and taken to Nyayo National Stadium police post and when his agent went there, he was informed that Langata police station was dealing with the matter. The alleged incident happened at Nyayo Stadium Stream 11.

66. While being cross-examined by counsel for the 3rd Respondent, he admitted that in the video, there was no mention of the elective position in respect of which the man was alleged to have had two extra ballot papers. He further admitted that in his petition, he mentioned the senatorial position as the one in respect of which the allegation relates. There is no evidence adduced by the petitioners to prove that the person arrested was the 3rd Respondent's supporter and/or why they connected him with the 3rd Respondent yet he was not the only candidate. It is also clear from the petition at paragraph 51(ix) that the petitioners have stated that the two extra ballots, the person was found with, if at all, were for the senatorial position and had nothing to do with the member of National Assembly for Langata Constituency. As I have observed elsewhere in this judgment, this court cannot engage in an inquiry in election results for other elective position, which is not the subject of the petition herein.

67. The other video was marked 0001M(b). At paragraph 68 of the petition, it is alleged that some ballot papers were found partially burnt. In the video, some ballot papers are seen partly burnt. Pw8 testified that he was called by Steve Oguwa who informed him that ballot papers for St. Mary's primary were being burnt by the 3rd Respondent's known supporters. He rushed to the scene and found partly burnt ballot papers and from the look, they were for various positions within Nairobi County and the Langata constituency. Of importance to note with regard to this video, is that there is no indication of the polling stations that the ballot papers related or even the constituency. Pw8, who went to the scene where the said ballot papers were burnt could not tell the court whether they were marked or not. On being cross-examined by counsel for the 1st and 2nd Respondents, he stated that he was not able to establish the candidate the ballot papers belonged to. It is worth noting that the person who took the video was not called as a witness. He would have been a crucial witness to shed some light on where the video was taken and what was happening at the scene.

68. As it stands now, the court cannot make a conclusive finding on where the ballot papers were being burnt, whether indeed they were for Langata parliamentary election and for what elective position. In any event, pw8 who visited the scene stated that he could not tell the candidates to whom the ballot papers belonged and who was involved in burning of the same.

69. The last video to be produced was marked as exhibit 0001N(b). This video was intended to corroborate the allegation that the executive interfered with the elections of member of National Assembly for Langata. In the video, the deputy president, His Excellency William Ruto is seen addressing a crowd. The language used in the video is Kalenjin though the footage had translations in English language. In his testimony pw1 averred that the deputy president had asserted that the Langata constituency was reserved for Kalenjin tribe, come 2017. Pw5 in his testimony stated that he asked the returning officer to request the deputy president to stop interfering with the wishes of electorates in Langata. He said he had drawn the attention of the returning officer to that video in which, according to him, the deputy president had publicly declared that Kalenjin tribe should have a member of parliament in Nairobi.

70. On his part, the 3rd Respondent denied the allegation that he was installed by the deputy president as it was not possible for him to do so. He said he was present in the meeting when the deputy president made the speech. As a Kalenjin, he understands the language used in the video and according to him the interpretation was not correctly done. He stated that the deputy president in his speech was advising the youth to stop drinking and dancing in clubs and aspire for political positions in towns and in the process he gave him as an example having vied for the same position of member of National Assembly for Langata in the year 2013. It was his evidence that in the 2017 general election there were five candidates from the Kalenjin community and if indeed the deputy president had installed him, then the other candidates from his tribe would not have run against him. He took issue with the translation and contended that it was not done correctly. In his submissions, counsel for the 3rd Respondent also took up the issue of the translation and argued that no certificate of translation was produced. I concur with the counsel, and the contents of the video having been disputed by the 3rd Respondent, it was incumbent upon the petitioners to produce a certificate of translation to confirm the correctness of the translation and in absence of that, the court cannot attach any much weight to the evidence sought to be relied on in that clip. In any event, the speech by the deputy president cannot be said to have influenced election in Langata in any way or form as alleged by the petitioners. The people of Langata were at liberty to elect a person of their choice. In the end, and with regard to the four videos, the court finds that the evidence availed was of no probative value in establishing the petitioners' allegations.

71. The other allegation was failure by the 1st and 2nd Respondents to secure polling stations and their environs. Under regulation 63 of the Elections (General) Regulations 2012, it is the duty of the presiding officer to keep order at his or her polling station. The presiding officer may order the removal of any person who misconducts himself or herself at the polling station or fails to obey the lawful instructions or orders of the presiding officer. The petitioners have at paragraph 70 of the petition alleged that at various polling stations, the presiding officers failed or neglected to remove the 3rd respondent's security within the prescribed 400 meters from the precincts of the polling stations. In paragraph 72 the petitioners states that the first petitioner's agent one Joseph Owambo Odira was mercilessly beaten within Kongoni 3 polling station by the 3rd Respondent's supporters. Among the stations that the 3rd Respondent is said to have visited and interrupted are KIRDI, KPA and KEWI polling centers.

72. With regard to the claim by Joseph Owambo Odira, I dealt with it earlier on in this judgment and I do not wish to repeat the same save to add that on his allegation that the 3rd Respondent went to Kongoni 3 polling station at 6.00 pm during which he threatened him, it is noted that in paragraph 71 of the petition, Kongoni 3 is not listed among the stations where the 3rd Respondent allegedly visited and interrupted the counting of the votes. This incident, if at all it happened, was not reported to the presiding officer or to any police station. With regard to KIRDI, KPA and KEWI no witnesses were called in evidence by the petitioners to support their allegations that the 3rd Respondent visited those stations as alleged and that he interrupted counting of votes

73. The 3rd Respondent's witnesses DW1 and DW2 were his agents at KPA polling stations. They denied the allegation that he visited those polling stations. It was the duty of the petitioners to call evidence and more particularly their agents in those polling centers to wit KIRDI, KPA and KEWI to prove those allegations. They failed to do so. In absence of those witnesses and any other evidence in support, the allegations stand unproven.

74. On failure to seal ballot boxes, the petitioners at paragraph 67 of the petition, avers that many of the ballot boxes delivered to the tallying center bore seals which were suspiciously tampered with or were markedly different from those issued by the 1st and 2nd Respondents. It will be recalled that the court ordered a recount in some six polling stations in which a basis was laid for the recount. Among them are KPA 1 and 2 and St. Mary's primary school stream 4. The petitioners aver that the ballot boxes for St. Mary's Primary School 4 and 5, KIRDI and KPA Centers arrived at the tallying center unsealed. In the report that was returned by the Deputy Registrar, it is clear that the ballot boxes for those stations were found intact. During the recount, all the petitioners were represented by their agents and no complaint was lodged by any of them in that regard. The allegation is therefore dismissed.

75. I now move on to the next issue on whether the election of Member of National Assembly for Langata was held in line with the provisions of the Constitution and the electoral laws.

76. The Petitioners alleged that the elections contravened the provisions of Article 81 of the Constitution as read with section 39 of the Elections Act and Regulations thereunder in that, the entire process of relaying and transmission of results from the polling stations to tallying center was not simple, accurate, verifiable, secure, accountable and transparent.

77. Section 39 provides-

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

(1A) The Commission shall appoint constituency returning officers to be responsible for—

a. tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;

b. collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly; and

c. submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.

(1B) The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.

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

i. electronically transmit and physically deliver the tabulated results of an election for the President from a polling station to the constituency tallying center and to the national tallying center;

ii. tally and verify the results received at the constituency tallying center and the national tallying center; and

iii. publish the polling result forms on an online public portal maintained by the Commission.”

78. Under the Regulations, one of the functions of the Presiding Officer is the transmission of only the presidential election results.

79. Rule 5 (1A) (d) of the Election (General) regulations, 2012 provides -

“The functions of a presiding officer shall be electronically transmitting presidential results to the constituency, counties and national tallying centers.”

80. My reading and understanding of the regulation above is that electronic transmission and publication of polling results in a public portal is only a statutory requirement for the presidential election.

81. In the **High Court (Meru) Election Petition Number 3 of 2017, Mohammed Tubi Bidu Vs IEBC & Mamo Elema Adano and Abdi**

Koropu Tepo, Gokonyo J had this to say about electronic transmission of results;

“There was no evidence that there was any or total failure in the Process of Relaying and Transmitting Results as alleged. I note that the petitioner alluded to electronic transmission of results in his submissions. In passing, my view is that, at the moment, there is no requirement under section 39 of the Elections Act for electronic transmission of results of election for Member of Parliament. Electronic transmission of results to the national tallying Centre is restricted to presidential elections. And I should think that section 39(1C) was part of the progressive implementation of use of technology in electoral process in Kenya which was envisaged in section 44(2) of the Elections Act “

82. I fully agree with the Hon Judge in that regard and in view of the above, the ground cannot stand and is dismissed.

83. The petitioners at paragraph 24 allege that the information recorded in form 34A at the individual polling stations were not accurately and transparently entered into KIEMs kit at the individual polling stations. The court notes that this was a generalized allegation with no particulars of the polling stations. In the Amended Notice of Motion dated the 2nd October, 2017, one of the prayers sought was for “Read Only Access” to the electronic device (s) used to capture forms 35 A onto the KIEMs system. Upon hearing, the arguments by the learned counsel for the petitioners, the court in its ruling delivered on 23rd October, 2017 declined to grant that request on the basis that it was vague and the petitioners had not mentioned any particular polling stations that were affected.

84. The court wishes to note that even after taking evidence, the petitioners did not name any particular polling station in which the data was not correctly entered into the KIEMs kit as alleged. It was just a generalised allegation devoid of particulars. It will be recalled that in the initial stages of these proceedings, the petitioners sought to file an affidavit of Noah Akala Oduwo and the court declined to grant their request as it was made out of time. A cursory perusal of his Affidavit which was annexed to the supporting affidavit of the first petitioner sought to introduce evidence relating to the KIEMs kit but they were not successful. The petitioner could not therefore purport to tender evidence on the KIEMs kit after the court declined to admit the evidence of Dr. akala whose evidence could have shed light on the KIEMs kit had the same been admitted.

85. The other issue raised is with regard to the alterations of forms 35A. It was submitted that a number of forms 35A have alterations. Examples of such polling stations were given as Karen 3/8, Madaraka 11/12, MOW 5, MOW6, KEWI 3, Ngong Forest 2,KEWI 6, St. Jude Church 1, Kirdi 4, Khalsa 6, Nyayo National Stadium 8. I note that the polling stations that have been specified under this complaint are Karen C 3/8, KEWI 3/9, Kongoni 2, Kongoni 3, MOW 9 and MOW 10. I need to mention here that the pleadings by the petitioners contain very generalised allegations and in fact they travelled so far beyond their pleadings. They did not name the polling stations in which they made allegations leaving the respondents in a very disadvantaged position. Counsels for the respondents submitted on this aspect and asked the court to disregard such evidence which did not support the pleadings. When I analysed the principles applicable in election petition, this is one of the principles I dealt with and even the counsel for the petitioners submitted on it. The court was in its analysis guided by this cardinal principle of law.

86. The Court has carefully perused through the forms 35A for the stations that were pleaded and it is true there are alterations. However, it is not true as alleged by the petitioners that the alterations only affected the 3rd Respondent. For example, the alterations that have been made for KEWI 3/8 , Ngong Forest 2/3, Madaraka 11/12 and Mow 6 affected other candidates as well. Some of those alterations were explained. On record, is the evidence of Linnet Mukhula who was the presiding officer for MOW 5, she testified as DW9. It was her evidence that she altered form 35A because in her final computation she had included the spoilt votes which were 4 in number. The alterations only affected the total number of valid votes and not the results for any candidate.

87. Another witness is DW11, Hellen Ratemo. She was the presiding Officer for Karen C 3 who admitted having made some errors in entering results in form 35A and when she informed the agents they agreed to sign. It was her evidence that the errors affected other candidates not just the 3rd Respondent and were not substantial as to affect the outcome of the election.

88. Another witness is Caroline Ibwaga who was the presiding officer for MOW 9 who confirmed that the 3rd respondent garnered 208 votes in that station . She also denied that she changed the first petitioner’s results to read 176 instead of 200. I have perused form 35A for the said station. The results for the 1st Petitioner and the 3rd Respondent are 176 and 208 respectively. The 1st Petitioner has not offered any evidence to show that the results were different from what has been entered therein.

89. As submitted by the Counsel for the Petitioners, it’s true that the 1st and 2nd Respondents did not call all the presiding officers for the polling stations where forms 35A have been altered but my considered view is that the errors in respect of those forms 35A were not of substantial nature that would have a cumulative effect on the integrity of the process or the results of the election. In coming to the conclusion on this aspect, I rely on the case of **Joho Vs. Nyange (2008) 3 KLR** where it was stated:

“...Error is to human. Some errors in an election petition are nothing more than what is always likely in the conduct of human activity. If the errors are not fundamental they should always be excused and ignored.”

90. The other complaint was that of failure to sign forms 35As. Counsel for the Petitioners submitted that several forms have not been signed by the agents and they do not have comments why the agents did not sign. He further averred that some forms 35A did not bear the IEBC stamp. Some of those stations are NCC 7/7, Karen C 3, KCC 6/7, St. Mathews 7/9, St. Mathews 3/9, St. Mathews 8/9, Manyatta1/2, Madaraka 6/7, Langata 8/9 and Uhuru Gardens 2/15. The Court has perused the said forms that are in the 1st and 2nd Respondents bundle and has compared them with those in the petitioners bundle . The explanation tendered to court by the respondents why the petitioners’ documents are not stamped is because they are copies . The petitioners urged that this explanation cannot be said to be credible because some forms have the stamp yet others have none. In answering this question, I would wish to rely on the case of **John Murumba Chikati v Returning Officer Tongaren Constituency & 2 others (supra)** where the Court held as follows:-

“What about Forms 35A which had not been stamped? The court takes the view that affixing the official stamp is important, but, lack of it does not invalidate the Form. The requirement of the law under regulation 79 of the Elections (General) Regulations, 2012 is that the Presiding Officer signs the statutory Form. Under Regulation 5 of the General Regulations, Presiding Officer includes the Presiding officer and Deputy Presiding Officer duly appointed by IEBC. The statutory Form is valid once it has been signed by the Presiding officer; both the Presiding Officer and the Deputy Presiding Officer or by either of them. The Forms were signed by the Presiding Officers appointed for the polling stations in question and therefore, lack of the official rubber stamp does not invalidate the Form or the results thereto.”

91. Another allegation related to this, is failure by the agents to sign forms 35A for some polling stations. Is the omission fatal? The answer lies in Regulation 79 (6) of the Elections (General) Regulations, 2012. Section 79 (1) provides:

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

(2) For purposes of sub regulation (1), the declaration for—

(a) Presidential election results shall be in Form 34A set out in the Schedule; and

(b) National Assembly, County women representatives, Senator, Governor and county assembly elections shall be in Forms 35A, 36A, 37A, 38A, and 39A set out in the Schedule.”

92. Regulation 79 (2A) provides

“The presiding officer shall—

(b) Request each of the candidates or agents present to append his or her signature;

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

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

93. In my view and going by the provisions of section 79 (6) (7) failure by agents to sign forms 35A is not fatal and cannot be used as a reason to invalidate an election.

94. The petitioners have contended that some of their agents refused to sign forms 35A because they did not agree with the results. Such an agent has a right under **Regulation 80 of the Elections (General) regulations, 2012** to ask for a recount of the votes. **Regulation 80 (1)** provides:-

“A candidate or agent, if present when the counting is completed, may require the presiding officer to have the votes rechecked and recounted or the presiding officer may on his or her own initiative, have the votes recounted:

Provided that the recount of votes shall not take place more than twice.”

95. Indeed, the regulation gives an agent/candidate the opportunity to have the votes recounted twice. I have keenly perused through the proceedings and the evidence on record. None of the Petitioners' agents alleged that he sought to exercise this right and the presiding officer declined to grant their request. Failure to exercise this right leads to a logical conclusion that the agent or the candidate was satisfied with the results entered on form 35A in that station.

96. On similarity of results for Kongoni 3 and 4 and failure to seal ballot boxes, this court ordered a recount of votes in some polling stations. This was informed by among other reasons, the petitioners' allegations under these two heads. In paragraph 26, the petitioners stated that the ballot boxes for St. Mary's primary school, KIRDI 4/5 and KPA polling centers arrived at the tallying center unsealed.

97. Following the recount, a report was returned to court and according to that report, all the ballot boxes and seals were intact save for Kongoni 4, which had one seal on the side, missing.

98. As for Kongoni 3 and Kongoni 4, the recount revealed that the results for the candidates were not the same but the discrepancy was in Kongoni 3 only in which, the 3rd Respondent had been added 1 vote while the first petitioner had been denied 7 votes.

99. At KPA 2, upon recount, the report showed that the bunch of votes for the 3rd Respondent was missing. Thus, 220 votes had not been accounted for. Even taking into account the said 220 votes, the 3rd Respondent still maintains the lead with a margin of 1183 votes.

100. The petitioners also raised the issue of the portal and alleged that the results as reflected in the portal were different from what was announced by the returning officer. Regulation 82 of the Elections (General) Regulations, 2012 provides as follows;

“(1)The presiding officer shall, before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in electronic form, in such manner as the Commission may direct.

(2)The results submitted under sub-regulation (1) shall be provisional and subject to confirmation after the procedure described in regulation 76.”

101. The Returning Officer, while testifying in this petition, stated that he used the results he tallied at the tallying center to declare the 3rd Respondent the winner because these are the results, which he is supposed to use under the law. He further stated that the results posted in the portal are provisional. It was his evidence that he still would have declared without the results in the portal. He admitted that some of the results were reflected late in the portal because the transmission system was being used for the whole country and because of the high data there was delay. I concur with the Returning Officer that the results in the portal are provisional as provided for in regulation 82 (2) of the regulations and cannot be used as a basis for declaration of results.

102. On the issue of use of non-statutory forms, Counsel for the petitioners submitted that form 35B that was used to declare the results has no security features and it did not have the serial number. That it had more valid votes than the registered voters. They further submitted that the form on pages 214-215 of the 1st and 2nd Respondents’ bundle which the Returning Officer said he used to declare the results, was an afterthought. It was further submitted that the said form had errors that the returning officer could not explain. In response to this, the returning officer averred that form 35B on pages 158-159 of the petitioners’ bundle of documents was a working draft, which he produced from his laptop. He admitted that the valid voters entered in the form on page 159 is different from the ones on page 215 but stated that, it was an error. It was his evidence that after he realised that he had made a mistake, he printed another document, which is the form 35B on page 215. In cross-examination, he stated that the only difference between form 35B on pages 158-159 and that on pages 214-215 is on the valid votes of every polling station. The explanation he gave was that the excel programme that they were using picked up numbers for all the registered voters. He averred that the error did not affect the results that he declared. The entry for the total number of valid votes in both forms is 92,524, while the total number of rejected votes in both forms is the same. The court has looked at the two forms 35B, it is true that the form on page 215 has some errors but which did not affect the results declared by the returning officer. The total number of valid votes garnered by each candidate is the same in both forms. The petitioners did not tell the court how the errors in form 214-215 affected the results if at all.

103. Finally, have the petitioners succeeded in clearly and decisively demonstrating that the conduct of the election for the Langata member of National Assembly was so devoid of merits and so distorted as not to reflect the expressions of the peoples’ electoral intent and has the evidence disclosed profound irregularities in the management of the electoral process?

104. This takes us back to section 83 of the Elections Act. In the case of **Ferdinand Ndung’u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others [2013] eKKLR**, the court stated that :

“to constitute a void election on account of non-compliance with the law, the evidence of irregularities and discrepancies in the election must be of such nature as to disclose through clear and weighty evidence, any one or more of the following:

a. An attempt to establish a winner otherwise than in compliance with the Constitution; and or

b. An attempt to suppress, alter or undermine the will of the voters exercising their rights under Article 38 in such a manner as to affect the overall outcome of an election; and or

c. A failure by or of the electoral system, or in the processes used therein, such as to constitute non-compliance with the general principles of the electoral system under Article 81 of the Constitution; and or

d. Such clear and glaring flaws in the conduct of the elections as substantially render any of the aspirations of Article 86 (a),(b), (c) or (d) to be meaningless; and or

e. That the non-compliance with the electoral law or regulations was substantial enough to, and did in fact, affect the result of the election;”

105. Having considered the pleadings and all the evidence on record, rival submissions by Counsels and the authorities relied upon by the parties in support of their respective cases and the analysis that I have made, I find that the petitioners have failed to prove that there was massive, systematic and willful non compliance with the Constitution and electoral laws by the respondents. The petitioners have failed to prove all the allegations to the required standard. They have further failed to prove that the third respondent was not validly elected the member of the National Assembly for Langata constituency during the elections of 8th August, 2017.

106. I am satisfied with the evidence recorded, that the 3rd Respondent won the elections. I accordingly, find the petition to be unmeritorious.

107. Accordingly, prayers (a) (b) (c) (d) are hereby dismissed.

108. On costs, **section 84 of the elections Act** provides that **“An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.”**

109. The learned Counsels submitted on the issue of costs. The petitioners have suggested total sum of Kshs. 3 Million while the 1st and 2nd respondents have suggested a figure of 7 million. The 3rd respondent on his part suggested Kshs. 5 million.

110. In awarding costs, the court should be guided by a number of issues such as the complexity of the matter and the time taken in preparing and hearing the matter. I have considered the petition and I find that it was not complex but it was involving. Accordingly, I will cap the instruction fees at Kshs. 2,500,000/= for the 1st and 2nd Respondents and Kshs. 2,500,000/= for the 3rd respondent.

111. The final orders are therefore as follows;

a. The petition be and is hereby dismissed.

b. Hon. Nixon Kiprotich Korir , the 3rd Respondent in this petition was validly elected and gazetted as the member of National Assembly for Langata Constituency.

c. The Respondents are awarded costs on the following terms:

i. Instruction fees for the 1st and 2nd Respondents are capped at Kshs. 2,500,000/=

ii. Instruction fees for the 3rd Respondent capped at Kshs. 2,500,000/=

iii. The costs shall be taxed and the total costs certified by the Registrar of this court.

iv. Part of the certified costs awarded shall be paid out of the security deposited on pro rata basis.

v. A certificate of determination in accordance with section 86 (i) of the Elections Act, 2011 shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly.

Orders accordingly.

Dated, signed and delivered at Nairobi this 27th day of February, 2018.

L.NJUGUNA

JUDGE

In the presence of

.....for the Petitioners.

.....for the 1st and 2nd Respondents.

.....for the 3rd Respondent.