



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

(CORAM: KANYI KIMONDO J)

ELECTION PETITION NO. 2 OF 2017

SAMMY KEMBOI KIPKEU.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

MARTIN KITUYI WEKESA, RETURNING OFFICER,

MARAKWET EAST CONSTITUENCY.....2ND RESPONDENT

BOWEN DAVID KANGOGO.....3RD RESPONDENT

JUDGMENT

1. The petitioner craves a *declaration* that the election of the *Member of National Assembly* for Marakwet East Constituency held on 8th August 2017 was *not* free, fair, credible or verifiable.
2. The petitioner pleaded that the *declaration* that *David Bowen Kangogo* (hereafter the 3rd respondent) won the election was *unlawful*; and, it should be *overturned*. In the alternative, he prays that another candidate, *Linah Jebii Kilimo*, be declared the winner.
3. The election was conducted by the Independent Elections and Boundaries Commission (hereafter the 1st respondent or the IEBC). The IEBC is established under Article 88 of the Constitution; and, the Independent Electoral and Boundaries Commission Act. The 2nd Respondent was the Constituency Returning Officer.
4. The petition was lodged on 6th September 2017. It is supported by four affidavits sworn on even date by the petitioner; Nicholas Kipkiror; Barnaba Tiliti; and, Phillip Kiplimo.
5. In a synopsis, the petitioner contends that the elections were systematically *manipulated* in favour of the 3rd respondent; and, that the IEBC shirked the constitutional duty to conduct an *accurate, transparent and verifiable* election as decreed by Article 86 of the Constitution.
6. The petition is contested by all the respondents. Their case is that the election was conducted strictly in accordance with the Constitution, the Elections Act and the Regulations. The respondents submitted that the errors highlighted by the petitioner were *insignificant*; and, they do not justify the nullification of the results.
7. The petitioner (PW1) was a registered voter at Sambalat Primary School. He said the election was marred by “*massive irregularities and illegalities*”. To him, it was flagrant abuse of the will of the people of Marakwet East Constituency.
8. In his evidence in chief, he relied largely on the deposition sworn on 6th September 2017. He testified that there were *five* candidates: David Kangogo Bowen (the 3rd respondent); Mark Bowen; Jonah Khamathew Cherutich; Linah Jebii Kilimo; and, John Kiptoo Marrimoi.
9. On 9th August 2017, the 2nd respondent announced the following results:

a. David Kangogo Bowen: 14,812 votes;

b. Mark Bowen: 1,116 votes;

c. Jonah Khamathew Cherutich: 54 votes;

d. Linah Jebii Kilimo: 13,845 votes; and,

e. John Kiptoo Marrimoi: 387 votes.

10. The petitioner deposed that the 1st and 2nd respondents systematically altered the results in favour of the 3rd respondent. He impugned Form 35B for the constituency for four main reasons. First, the form lacked security features; secondly, the arithmetic indicates that the total valid votes were 30,214. However, the *declared* results indicate the total valid votes as 29,573. Thirdly, the form is silent on the total votes cast and the rejected votes. Fourthly, the form was not signed by the Returning Officer.

11. The petitioner testified that the number of votes *exceeded* the total *valid votes* cast by 641 votes. He claimed that results for Valley Oasis Polling Centre were duplicated while those for Kamasha Primary School were omitted. At Sewerwa Trading Centre Polling Station, form 35A shows that 117 votes were cast but a figure of 177 was entered in form 35B. The petitioner said the declared results were at variance with those displayed on the IEBC public portal.

12. The petitioner said that on 9th August 2017, the police instigated violence at the tallying centre. He said there was sporadic gunfire. Four people were injured; and, a young girl, Nancy Kiprop, died. At that point, he alleged that Kilimo Linah Jebii was leading with 296 votes with only two polling stations unaccounted for.

13. The petitioner's case is that in the ensuing melee, the forms were tampered with in favour of the 3rd respondent. A 1GB flash diskette containing the audio and video recording of the chaos was produced in court (exhibit 3). The petitioner alleged that the results were then hurriedly announced.

14. The two remaining stations were Cheptany Primary School and Mungwo primary school. The petitioner testified that he arrived at the tallying center on the morning of 9th September 2017. At 11:30 a.m., the results from Mungwa Dispensary and Cheptany were finally brought. He said one of the ballot boxes had a missing seal. He took a photograph using his mobile phone (exhibit 1).

15. The petitioner also contended that the results in forms 35A were not transmitted *electronically* from the polling stations as required by section 39 of the Elections Act. At paragraph 43 of the affidavit, the petitioner alleged that Kilimo Linah Jebii won but the 2nd respondent used "*fictitious figures*" to declare the 3rd respondent the winner.

16. The petitioner cited a litany of other irregularities: For instance, at Mureto Primary School (Polling Station 058) the Presiding Officer authorized voting *without* use of the Kenya Integrated Electronic Management System Kits (hereafter the *KIEMS kits*). The petitioner alleged the requisite forms 32A were not filled out creating a loophole for unregistered voters to cast votes.

17. To buttress his case, the petitioner stated that the Presiding Officer was arrested but released under unclear circumstances. The petitioner testified that when he passed outside Mureto polling station, he heard people shouting. By that time, the Presiding Officer had already been arrested.

18. He testified that at Mungwa Dispensary Hall polling station, the 3rd respondent's chief campaigner's wife (one Beatrice) delivered unsealed ballot boxes to the tallying centre. A photographic image of a ballot box with a missing seal was produced (exhibit 1).

19. The petitioner sought to produce video evidence on the shooting or violence. He said that at 12.00 p.m., he and a number of people were ejected from the tallying centre. He claimed that a police officer cocked his gun. He alleged that gunshots were fired in the direction of Kilimo's vehicle. The petitioner lay down. He captured the moment in a video.

20. The respondents objected to the production of that evidence. The court ruled that the maker of the video; and, the person who downloaded it, be called to the stand. This was in compliance with sections 78A and 106B of the Evidence Act.

21. At paragraph 38 of the petition; and, paragraph 37 of his affidavit, the petitioner sets out in great detail the anomalies in Forms 35A in 21 polling stations. They range from blank forms or unexecuted forms by either the officials or agents; absence of the official IEBC stamp; or, that some results were filled out in red ink.

22. The petitioner also pleaded that the 2nd respondent failed to provide agents with Forms 35A and 35B in advance to verify the results; or, sign them. It was averred in the affidavit that agents of Kilimo were ejected them from the tallying centre. The petitioner also alleged that the number of votes announced by the Returning Officer were at variance with registered voters in the KIEMS kit.

23. At the hearing, the petitioner highlighted further anomalies as follows: That Maron polling station (polling station 124) was not *gazetted*. The petitioner testified that Ketmekinget polling station was erroneously listed as polling station 124 in form 35B. Tot Catholic Church (code 093) was not listed in Form 35A. However, there were results in form 35B. He testified at length about the polling stations listed in Form 35B but without corresponding results in from 35A.

24. The petitioner testified further that at Embokala polling station, there were 171 registered voters. Total valid votes are indicated as 142. However, the last candidate was awarded 194 votes.

25. Upon cross examination, the petitioner conceded that he was not an agent for any candidate. He admitted he was 3 metres away from the tallying station when he took the photograph (exhibit 1). He seemed unaware of the Regulation 63 requiring him to be outside a radius of 400 metres from the polling station. He said he took the photograph at the gate of the tallying centre as the ballot boxes were being off loaded. He said the vehicle carrying the boxes did not enter the polling centre. He conceded that the violence he referred to took place 500 meters from the station. In his deposition, the distance is indicated as *1 kilometer*.
26. He clarified that there was no shooting at the tallying centre. He said the violence started because the public wanted the Returning Officer to announce the final results. The witness said he got the forms annexed to his affidavit from the IEBC. He conceded that the form at page 95 of the replying affidavit by IEBC was not blank; and, that 6 agents had signed it.
27. Upon further cross examination, the witness said that the aggrieved candidate or agents never sought a recount at Maron or Tot polling stations. He agreed that some agents signed the forms. The witness said that the Presiding Officer at Mureto was arrested for allowing people to vote without the use of a KIEMs Kit.
28. The witness also admitted that Philip Kiplimo, who swore an affidavit in support of the petition, did not vote at Kaporon polling station. He also conceded that he did not visit all the polling stations in the constituency. He also did not have documentary evidence or firsthand information to support the allegations at paragraph 17 and 18 (b), (e), (f) and (g) of his deposition. He admitted that the document marked SKK4 was computer generated; and, was undated. It is a spreadsheet showing results for all the six elections.
29. When re-examined, the witness said polling stations 124 and 093 were not *gazetted*. He was not at the two centres when the impugned results were announced. He tried to resile from his earlier testimony on his *actual* location at Mureto. He now stated that he was at least *200 meters* away from the polling station.
30. PW2 was Barnabas Komen. He relied on his deposition sworn on 6th September 2017. He campaigned for candidate Linah Jebii in the elections. At Chechan polling station where he voted, there were no complaints about the polling or counting of votes. Linah Jebii garnered 122 votes while the 3rd respondent got 100 votes. However, the agents added two *spoilt votes* to the 3rd respondent raising his count to 102 votes.
31. On 9th August 2017, he was at the tallying centre at Chesoi tallying centre. He said that one of the ballot boxes from Mungwa Dispensary was unsealed. He supported the version of events narrated by PW1 on the violence. He added that motor vehicle registration number KBZ 855N belonging to Linah Kilimo was shot at in the commotion.
32. Upon cross examination, he clarified that he was 300 metres from the tallying centre; and, that he got information from an agent inside the tallying centre. After the gunshots rang out, he went into hiding. At that point the final results had not been announced. He never returned to the tallying centre.
33. PW3 was Nicholas Kipkiror. He testified that he was an agent for Kilimo, a fact that was contested by the respondents. The witness tried to produce a letter of appointment. As it had not been annexed to his original affidavit, the objection was upheld.
34. He was also at the tallying centre. He said Kilimo was leading with 14,981 votes against Bowen's 14,685. The results for Cheptany and Mungwa stations had not arrived. He claimed that at about 2:00 a.m., the 3rd respondent went into some offices behind the tallying centre accompanied by senior police officers. At 11:00 a.m., the following morning, the results from the two stations were brought.
35. He said the results were received at the gate; in a tent outside the polling station. He said that one of the boxes was not sealed. Soon thereafter gunshots rang out. He said the violence took place 400 or 500 meters away. He said that the Returning Officer was shaken. He then announced the final results.
36. The witness said that the results announced were inaccurate. He also raised an objection about the unsealed box but the Returning Officer dismissed it. He said the projector displaying the results was switched off. He complained about the matter. The security officers told the public to "*relax*".
37. When cross examined further, he said that he did not follow the 3rd respondent into the rooms behind the tallying hall. He claimed that supporters of 3rd respondent, the OCPD and DCIO followed him. He admitted that the results he mentioned in his testimony were based on his own calculations. He said that he did not take a picture of the unsealed ballot box.
38. PW4 was Silas Omundi. He is the one who downloaded the image of the ballot box and three video segments. He holds a Bachelor of Computer Science degree from Masinde Muliro University; and, a Masters from Strathmore University.
39. He testified that on 5th September 2017 the petitioner handed to him his *Tecno* mobile phone GIN6CE0197 IMES – 353513080259. He transferred the image and three *MP4* video files into 5 flash disks; one after the other. He then performed a dry run on one of the flash disks. He prepared a certificate (exhibit 2).
40. PW4 conceded that the 2nd video (covering the shooting) was *edited*. It now contained some still pictures, a voice over and the logo of a television station. The 1st video covered the same event but was *unedited*. He said that part of the photograph of the unsealed ballot box (exhibit 1) may have been blocked due to pixel levels.
41. The 1st and 2nd respondents lined up two witnesses. The first was Martin Kituyi Wekesa. He was the Constituency Returning Officer. He is named as the 2nd respondent in the petition. He relied largely on the response to the petition; and, his deposition sworn on 16th September

2017.

42. The witness explained the procedure of receiving ballot boxes at the tallying centre. There were two check points. At the first point, IEBC officials would verify the identity of the Presiding Officer. If in order, the officer be allowed into the centre. At the gate, the vehicle would go through clearance procedures. The ballot boxes, which were 6 on the average, would be offloaded near the hall.

43. He said that the boxes would then be kept in the designated area in the tallying centre. The Deputy Returning Officer would surrender other materials to the store. DW1 would then examine the Form 35A to establish its authenticity. He would then hand over to his deputy to announce the results. The form would then be photocopied. He would retain the original and then enter the results on his laptop.

44. Regarding the claim that some ballot boxes were unsealed, the response is as follows: that at polling station number 140, the apertures and three points were sealed save for one point. However, the contents could not be removed or accessed.

45. The witness disputed the Form 35B annexed to the supporting affidavit to the petition. He relied instead on the official form annexed to his affidavit marked MKW2. Regarding the alleged violence, he said it occurred over a kilometer away from the tallying centre; and, did not affect the work of election officials. He also disputed the allegation that one candidate, Linah Kilimo, was at that point leading with 296 votes. He testified that the results were streaming in from various stations; and, that they kept on changing. He testified that the final results announced were verifiable and supported by Forms 35A.

46. On the claims at Mureto polling station, the witness responded as follows: that the Presiding Officer was unable to handle the KIEMs kit. The Returning Officer replaced him with another officer. He said the remedial action was timely and did not affect the poll outcome.

47. The witness denied all the allegations at paragraphs 20, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 38, 39, 40, 41, 42, 43, 44, 45, 46, and 47 of the supporting affidavit. He denied that any agents were ejected from the tallying centre as alleged at paragraph 35. Regarding the various forms, he said that they were signed by the presiding officer or his deputy and some agents. He conceded that the forms for three polling stations numbers 008, 114 and 041 did not bear the IEBC stamp. He said they were minor errors that did not affect the overall results.

48. He said that PW2 is not a registered voter in Marakwet East Constituency. He also disputed that Nicholas Kipkiror (PW3) was an agent for Linah. He said he did not allow the witness into the tallying centre. The witness referred to an annexure in his affidavit containing a list of the candidate's agents. Upon cross examination, he acknowledged the list was incomplete. He acknowledged that candidates were at liberty to change agents so long as they notified the commission.

49. The witness denied that the computer screen or projector was switched off at some point. Under cross examination, he said it is not possible to project the entire spreadsheet on a laptop. He testified that one of the candidates, John Kiptoo Marimoi, scored 193 votes and not 387 as alleged by the petitioner.

50. The witness testified at length about the allegations that two of the stations were *ungazetted*. He said the *difference* was in the *names* only. He testified that polling station 093 was *gazetted* as Tot Catholic Church for the 2017 elections. In the 2013 elections, it was named Embokala Nursery. The nursery was taken over by the County Government. It used to be under a tree. There is a Catholic Church in the same compound called *Tot*. IEBC used the church hall. He said the name was changed after consultations. The code however remained the same.

51. The witness admitted there was a discrepancy between forms 35A and 35B for Tot station. He said the valid votes were 142 as in form 35B. The Form 35B had differences with Form 35A because he gave John Marimoi 194 votes instead of 0. He said that it was a typing error.

52. Regarding polling station 124, he said it was *gazetted* as Maron centre. In Form 35B he entered the name as *Ketmekinget Centre*. He admitted it was an oversight. He said the polling stations were moved after consultation with the public. He said it did not affect the poll.

53. Upon cross examination by *Mr. Kivuva*, the witness said that Kilimo was present when the final tally was announced. None of the candidates complained. Kilimo asked for Form 35B to sign. However her agents prevailed upon her not to sign and she left.

54. Upon further cross examination by *Mr. Magare*, he admitted that the video produced recorded him making the announcement of results. He said that the total valid votes cast were 29,968. In the video he is heard saying: "*total valid votes 29,573.....David Bowen 14,812.....Linah Kilimo 13,845 Marimoi 387 ...*" The witness said he was reading Form 35B. He conceded that the figures at paragraph 6 of the petition are similar to what was recorded in the video. The total would be 30,214 valid votes.

55. When put to task, the witness explained that in Form 35B, the total valid votes cast were 29,968. One candidate, Marimoi, had 193 votes and not 387. The witness denied that he announced the candidate had 193 votes. He said Forms 35A have serial numbers, bar codes and anti-copying features.

56. He said the version of the form marked MKW 76 by the petitioner was not genuine. He said the forms annexed to the petition are not official. He said the official form annexed to his affidavit has the word "copy"; the one by the petitioner is faint. He however acknowledged that the two forms do not have a stamp; and, that their handwritten contents are the same. He explained that the stamp is non-strategic. He said the form at page 178 of the petition is blank. The correct form is at page 95 of his affidavit. He said that the Presiding Officers would receive 2 booklets of 5 Forms 35A each. He opined that that may explain the discrepancies.

57. Regarding Mureto polling station, he conceded that a number of people had already voted by the time he replaced the Presiding Officer. He said no voter used form 32A. He said that in Form 35B for Tot, he entered the name of Embokola. The results for Maron station were

recorded as those of Ketmekinget Centre. The witness said that the *gazetted* stations were Maron and Tot Catholic Church. He agreed that the 194 votes entered for Marimoi were wrong; and, would burst the total number of valid votes. At Sewerwa station, he agreed that the figures in Form 35A are correct. However Form 35B contains a record of 117 votes instead of 177.

58. When questioned further on the violence, the witness said he does not know who gave the shooting order. He emphasized that the incident took place over a kilometer away; and, that it did not interfere with his work. He agreed he took cover under a table when the shots rang out.

59. The witness conceded that Form 35A for polling station 76 was neither stamped nor signed by the Presiding Officer and Deputy Presiding Officer. He agreed that the form at page 41 of his affidavit (which is similar to the one at page 72 of petition) is not signed by the Presiding Officer and bears no IEBC stamp. He attributed it to human error because the officers were dealing with numerous forms. He also said that he did not re-seal the ballot box that had a missing seal.

60. During re-examination, the witness explained that the difference of 641 valid votes was a typographical error in transferring results from Forms 35A to Form 35B. At Mogil Primary School (code 36), Form 35B shows 142 votes while Form 35A indicates 135 votes. At Sewerwa polling station (code 64), Form 35B shows 117 votes instead of 177. At Tot station (code 93), Mr. Marimoi's correct votes should be *nil*. At Kachemwang Nursery (code 100), Form 35B shows 197 votes while the correct figure should be 196 votes.

61. In conclusion, the Returning Officer said the *correct* results should be as follows:

| | |
|--------------------------------|----------------|
| Bowen Kangogo..... | 14,812 |
| Mark Bowen..... | 1,116 |
| Jonah Khamathew Cherotich..... | 54 |
| Linah Jebii Kilimo..... | 13,845 |
| John Kiptoo Marimoi..... | 193 |
| <u>Total valid votes.....</u> | <u>30,020.</u> |

62. DW1 emphasized that the above revision *only* affects one candidate, John Kiptoo Marimoi. His view was that those were minor transgressions that do not warrant the annulment of the election. He implored the court to dismiss the petition with costs.

63. That narrative was repeated by his deputy, Chebii Kipkosgei (DW2). When the gun shots rang out, they hid under the tables. He said they resumed their work soon thereafter. There were still five stations to go. He said the results from the polling stations were announced again. He said there were no complaints. He denied that the projector was switched off. Upon cross examination, he said the vehicles delivering ballot boxes would deliver them inside the perimeter fence of the tallying centre. The ballot boxes were then handed over at the door to the tallying centre.

64. That marked the close of the 1st and 2nd respondents' case.

65. The 3rd respondent was Bowen David Kangogo (DW3). He relied on his *response to the petition* dated 18th September 2017; and, a *replying affidavit* sworn on even date. He avowed that he was validly elected. He denied the allegation at paragraph 20 (e) of the petition that his chief campaigner was one *Edwin Kisang*. He also said that he did not know Kisang's wife, *Beatrice*.

66. He said that he arrived at the polling Centre on 8th August 2017 at 10:30 p.m. He passed through the first barrier; and, alighted at the second barrier at the gate. He said that he has an office behind the hall. It is the Constituency Development Office. He said there are other offices and public toilets behind the hall.

67. At around midnight or 1:00 a.m., he went out to collect some warm clothing. He denied meeting with some agents or security officials. The alleged violence occurred the following morning. He said that when the gunshots rang out, three of the candidates were at the tallying centre: He, Linah Jebii and Mark Bowen. It went on for two minutes. He said there were about 10 policemen at the tallying hall.

68. The witness explained the status of Tot Polling Station (code 093). He said that it used to be known as Embokala. After public participation they requested to use the nearby Tot Catholic Church. Embokala was a polling station in the 2013 general elections.

69. Regarding Maron Health Centre (Station 124), the witness said that the change resulted from evictions of people from *Embobut Forest*. There used to be polling stations inside the forest such as Ketmekinget. He said Ketmekinget was thus the same as Maron Health Centre. Furthermore, there were no complaints about the results at the station. He said that the polling station is not among the complaints listed at paragraph 38 of the petition; or, paragraph 37 of the supporting affidavit.

70. He said the photographic and video evidence produced by PW4 were edited. While the first and second videos are similar, the second and third ones are edited. He said the properties of the picture show that it was modified on a later date. He said the third video showing the Returning Officer announcing the results is not a full clip. He said that before the announcement, the Returning Officer asked them to cross-check the results. He said there were no objections. The final results were then announced. He said that Linah Jebii even congratulated him before she left the room.

71. When cross examined by Mr Onyinkwa, he clarified that the violence occurred outside the tallying centre; and, did not interfere with the tallying exercise. He denied that IEBC favoured him in the elections.
72. Upon further cross examination by Mr Magare, he said that the final results were signed by the candidates' chief agents. He conceded that he received his certificate at *Iten* and not in the tallying hall. He said the valid votes announced were 29,573 while Form 35B shows a figure of 30,214. He denied that he used his CDF office on the date of the election. But he said that he stayed at the tallying centre until the final declaration of results.
73. Pressed further about the averments in his affidavit, he conceded that he did not know the "*goons or the lorry registration number*" hired out by Linah to attack the tallying centre. He said he was told by the OCPD that the goons had been repulsed. That conversation took place inside the tallying hall.
74. He said that he never recorded a statement about the alleged involvement of Jebii. He could not remember the supporter who told him that supporters of Jebii wanted to storm the tallying centre. He denied that he engineered the commotion in order to interfere with the tallying exercise. When the video was replayed, the witness said the clip showed no lorry or armed people. However, two or three people had sticks. He said it was not very clear.
75. The witness conceded that Embokala and Kepmekinget were no longer polling stations. Embokala is now represented by TOT Catholic Church station. He emphasized that his results were correct in all stations; but, he could not comment about the results for other candidates. He said he had agents at all the polling stations.
76. The witness was referred to various forms. He denied that the form at Chaptany (Code 121) bore similar handwriting for all the 3 agents. At Chesawach (polling station 92) no agents signed. At station number 42 (Tumtany Nursery School) 5 agents signed but there seemed to be a crossing out for the entire section. He agreed that neither the Presiding Officer nor the Deputy Presiding Officer signed the Form 35A for Bororwo (polling station 76). He denied any collusion in the matter.
77. DW3 said that some mistakes were genuine human errors. He gave the example of Sewerwa Nursery School (code 074) where the total valid votes were 177 but Form 35B had a record of 117. At Tot Catholic Church (code 093), John Marimoi garnered *zero* votes. However, Form 35B gave him 194 votes. He said he only learnt of a missing seal on one ballot box after this petition was filed. When he was shown the image of the ballot box, he said the editing was "*amateurish*".
78. The witness was shown the form (in IEBC's replying affidavit) for Kapchebau polling station (code 108). He conceded that the section containing details of agents was blocked by a plain paper. When shown the original form, he said that it was similar to the one filed by the petitioner. He said that after the declaration of the results, the chief agents were asked to sign Form 35B. Those who were present signed. He said his agent; and, the ODM agent signed. The ODM candidate, Cherutich, only garnered 54 votes in the whole election.
79. When re-examined by his counsel, he said that the words "constituency" or "declaration" or "final results" are not spoken by the Returning Officer in the video. He said the image at page 207 of petition showing the IEBC portal has no date or time. He clarified that paragraph 18 of his affidavit was in reference to the entire elections. In that paragraph, he denied that there was violence or irregularities. He denied that there was a correlation between violence 1 kilometer away and the tallying exercise.
80. He said there were public consultations about the relocation of polling stations. It involved religious leaders, members of the public, chiefs and so forth. In Embobut Forest, some stations relocated. Some were moved for security reasons. At Embokala, the station was relocated to Tot Catholic Church. He said the "*locations of the polling stations did not change, it was in names*". He conceded that the Returning Officer made an error in Form 35B for Tot Catholic Church to read *Embokala*; and, for Maron to read *Kipmekinget*.
81. The witness admitted that Form 35A for Chesawach polling station (code 092) was not signed by agents. He said his own agent left early because of security reasons. He said that the polling centre is at a volatile area on the border with Pokot.
82. The witness said the petition has only raised complaints in 21 polling stations. He denied that he had a special relationship; or, that he colluded with the Deputy Returning Officer (DW2). His parting shot was that the elections were conducted in accordance with the law and regulations; and, that he won fair and square. That marked the close of his case.
83. On 29th November 2017, the court ordered for limited or partial scrutiny of election materials in 18 stations. A detailed *Report on Scrutiny* by the Deputy Registrar of the Court was filed on 6th December 2017. Under the Elections (Parliamentary and County Elections) Petition Rules 2017, the report forms part of the *proceedings* in this petition. I will comment on its findings in the course of this judgment.
84. All the parties have filed comprehensive submissions and lists of authorities. Those by the petitioner were lodged on 15th January 2018; those by the 1st and 2nd respondents on 12th January 2018; and, those by the 3rd respondent on 15th January 2018. The 3rd respondent has in addition filed a *digest* of the annexed precedents.
85. I am greatly indebted to all the learned counsel for their elaborate submissions; diligence; and, courtesy to the Court. If I do not make direct reference to all the cited cases and materials, it is not for their lack of relevance.
86. I have considered the pleadings, depositions, witness statements and evidence produced at the trial. I have also paid heed to the written submissions by learned counsel.
87. At the pre-trial conference, the following issues were framed for determination:

- (i) Whether the 1st and 2nd respondents conducted the elections in a free, fair, credible, accurate, transparent, verifiable, accountable and efficient manner in accordance with the Constitution, the Elections Act and Regulations thereunder;
- (ii) Whether the elections were tainted by violence, illegalities, irregularities, and fraud or any other anomaly;
- (iii) Whether the 3rd respondent was validly elected as Member of the National Assembly for Marakwet East Constituency;
- (iv) Whether the petitioner is entitled to the reliefs sought in the petition; and,
- (v) Who will bear the costs of the petition?

88. The framed issues are largely *subsumed* under the *third* one: This court is being asked to determine *whether* the 3rd respondent was *validly* returned as the Member of National Assembly for Marakwet East Constituency.

89. I will commence with a synopsis of the *relevant* legal regime. In the context of this petition the constitutional design of a free and fair election looms large. Article 1 of our Constitution loudly proclaims the *sovereignty of the people*. See generally *Raila Odinga & another v IEBC & 2 others* Nairobi, Supreme Court, Presidential Election Petition 5 of 2013 [2013] e KLR, *Kakuta Maimai Hamisi v Peris Pesi Tobiko and others* Nairobi High Court, E.P. 5 of 2013 [2013] eKLR, *Gideon Mwangangi Wambua vs Independent Electoral and Boundaries Commission and others* Mombasa, High Court E.P. 4 of 2013 [2013] eKLR.

90. The *political rights* enshrined under Article 38 of the Constitution are partly exercised through *regular elections*. Articles 81 and 82 on the other hand demand for free, fair, transparent and credible polls.

91. These principles were explained well by Majanja J in *Richard Kalembe Ndile and another v Patrick Musimba Musau et al*, Machakos, High Court E.P. 1 of 2013 (consolidated with E.P. 7 of 2013) [2013] eKLR-

“The golden thread running through the Constitution is one of the sovereignty of the people of Kenya articulated in Article 1 of the constitution. The exercise of this sovereignty of the people is anchored by other rights and fundamental freedoms such as the freedom of expression, association and freedom of access to information which are to be found in Articles 33, 36, and 35 respectively of our constitution. In addition, Article 38 articulates political rights which are given effect through the electoral system set out in chapter seven titled ‘Representation of the people’.

“Under our democratic form of government, an election is the ultimate expression of sovereignty of the people and the electoral system is designed to ascertain and implement the will of the people. The bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect whenever possible.”

92. Article 81(e) of the Constitution decrees as follows:

“The electoral system shall comply with the following principles-

- (e) free and fair elections, which are-
 - (i) by secret ballot;
 - (ii) free from violence, intimidation, improper influence or corruption;
 - (iii) conducted by an independent body;
 - (iv) transparent;
 - (v) *administered in an impartial, neutral, efficient, accurate and accountable manner*”.

93. The Elections Act 2011 (as amended from time to time); and, the Regulations thereunder are the legislation contemplated by Article 82. The recent amendments to the Act have introduced other relevant provisions and regulations. Sections 39, 40 and 40A for example now anchor the use of technology in elections. See *National Super Alliance v IEBC & 2 others*, Nairobi High Court, Constitutional Petition 328 of 2017 [2017] eKLR.

94. There are also new Regulations in the Elections Act. An example is the Election (Technology) Regulations 2017. Rule 17 mandates the IEBC to *retain* electronic data in safe custody for *three years* after the elections. The KIEMS kits were deployed in the last election for *electronic* registration and identification of voters; and, transmission of results. See *Henry Tiolo Ndiema v IEBC & others*, Kitale High Court, E.P. 2 of 2017 [2017] eKLR.

95. Prior to its amendment, section 83 of the Elections Act provided 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 result of the election”.

96. I am alive that the Act was amended after the conduct of the impugned election. The amendment is thus *irrelevant* to the present dispute. I concur with Majanja J in *Jackton Ranguma v IEBC & 2 others*, Kisumu High Court E.P. 3 of 2017 [2018] eKLR, that the amendments had no *retroactive* effect.

97. I will thus apply the law as it existed on the date of the election. Section 83 is coached in *negative* language to emphasize the *caveat* placed on the election court. There is in it a *rebuttable presumption* in favour of the respondents that the election was conducted *properly* and in accordance with the law. It also implied by that provision that elections are not always perfect. See *Steven Kariuki v George Mike Wanjohi and others* Nairobi, High Court Petition No 2 of 2013 [2013] e KLR.

98. Consequently, *not* all malpractices will lead to nullification of the result. See the dissenting opinion of Njoki SCJ in *Raila Odinga & another v IEBC & 2 others*, Supreme Court of Kenya, Presidential Petition 1 of 2017 [2017] eKLR, *Morgan and others v Simpson and another* [1974] 3 ALL ER 722.

99. The parties to the petition are *bound* by their pleadings. See *Mahamud Sirat Ali Hassan Abdirahman & 2 others*, Nairobi High Court, E.P. 15 of 2008, *Steven Kariuki v George Mike Wanjohi and others* Nairobi, High Court Petition No 2 of 2013 [2013] e KLR *Jackton Ranguma v IEBC & 2 others*, Kisumu High Court E.P. 3 of 2017 [2018] eKLR.

100. The formal responses to the petition by the 1st to 3rd respondents *join issues* on all the allegations in the petition. The respondents have thus put the petitioner to strict proof. The *legal burden of proof* remains firmly on the shoulders of the petitioner: the petitioner must lead cogent evidence to impeach the poll. The cardinal precept of the law of evidence is that he who alleges must prove; and to the required standard of proof. See section 107 of the Evidence Act. See generally *Onalo v Ludeki and another* [2008] 3 KLR (E.P) 614.

101. The burden of proof was explained well by our Supreme Court in *Raila Odinga and others v Independent Electoral and Boundaries Commission et al* (supra):

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter essa acta: all acts are presumed to be done rightly and regularly. So the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law”.*

102. The Supreme Court’s propositions were not entirely novel. The Court was merely restating a view long held by the High Court in election dispute settlement. See *Munyao v Munuve et al* (2008) KLR (E.P) 20. In *Ole Lempaka v Komen and others* (2008) 2 KLR (E.P.) 83, the learned judges stated that each paragraph of the petition alleging breach of law, rule or regulation or which complains of any malpractice must be proved by evidence. See also *Halsbury’s Laws of England* 4th Ed. Vol. 15 Para 670, *Hawkins v Powell* [1911] 1 KB 988.

103. An election petition must thus succeed or fail on its pleadings and evidence. All that is meant by that *onus probandi* is that first, the petitioner must proffer adequate or sufficient evidence. Secondly, the evidence must be of a persuasive quality. It is then that the respondents are called to rebut it. In the end, the petitioner must show that the preponderance of evidence inures in his favour. If he fails to rise to that standard, the petition must be dismissed.

104. I remain alive that the *evidential burden* keeps shifting in the course of the trial. This was succinctly captured by the Supreme Court in *Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others*, Nairobi, Supreme Court, election petition 5 of 2013 [2013] e KLR:

“The petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden”.

105. The *standard of proof* in election petitions is *higher* than a balance of probabilities in ordinary civil cases but *not* beyond reasonable doubt as required in criminal cases. See *Mbowe v Eliufoo* [1967] E. A. 240, *Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others*, Nairobi, Supreme Court, election petition 5 of 2013 [2013] e KLR, *Muliro v Musonye* (2008) 2 KLR (E.P.) 52, *Rishad Amana v Independent Electoral and Boundaries Commission and 2 others*, Malindi, High Court election petition 6 of 2013 [2013] eKLR.

106. In *Kakuta Maimai Hamisi v Peris Pesi Tobiko and others* Nairobi High Court E.P. 5 of 2013 [2013] eKLR I had the following to say on the subject-

”The crux of the matter is whether all the grounds raised by the petitioner sufficiently challenge the integrity of the poll. The court has to weigh the impact of the alleged irregularities on the outcome of the election. See *James Omingo Magara v Manson Nyamweya and others* Kisumu, Court of Appeal, Civil Appeal 8 of 2010 [2010] eKLR. In the context of a general election for six electoral offices, it would be impractical to demand or expect mathematical precision”

107. I will now return to the matter at hand. From the evidence, the election generally proceeded *smoothly* on the polling day. However, there was a complaint at Mureto polling station (Code 058). The petitioner alleged that the Presiding Officer authorized voting *without* use of the

KIEMS kit. The petitioner alleged that the requisite forms 32A were not filled out which fashioned a loophole for *unregistered* voters to vote.

108. I find little or no merit in that allegation. DW1 explained that the Presiding Officer was *unable* to deal with technical rudiments of the KIEMS kit. He replaced him with another officer. I am satisfied that the remedial action was sensible, timely and did *not* materially affect the poll outcome.

109. The petitioner was highly suspicious of the movements of the 3rd respondent within the vicinity of the tallying hall. From the evidence, the 3rd respondent had an office behind the hall. It is the Constituency Development Office. He was the sitting Member of the National Assembly. There are other offices and public toilets behind the hall. The 3rd respondent denied that he used his CDF office on the date of the election. There was a paucity of evidence to prove that he held meetings with poll officials and senior police officers to interfere with the tallying exercise; or, that he engineered the shooting as a smokescreen to rig the poll.

110. The petitioner alleged that the 3rd respondent's chief campaigner's wife (one *Beatrice*) delivered *unsealed* ballot boxes to the tallying centre. He alleged further that other *unsealed* ballot boxes were delivered to the tallying centre. First, the petitioner was only able to pinpoint *one* ballot box without a seal. It was among materials from Mungwa Dispensary Hall (Station 140) or Mungwa Primary School (code 119). It was unclear which was which. A photograph was produced as *exhibit 1*.

111. From the photograph, only *one seal* is missing at a corner. The petitioner could not say whether the box was from Mungwa Dispensary Hall (Station 140) or Mungwa Primary School (code 119). The Returning Officer (DW1) said the box emanated from Mungwa Dispensary Hall (Station 140). DW1 said that the aperture and three points were sealed; and, the contents could not be removed.

112. The petitioner thus failed to prove that *Beatrice* or other persons delivered "several" unsealed ballot boxes. He also failed to demonstrate that the missing seal on one box left sufficient space to put in or remove ballot papers or a form.

113. However, the *Report on Scrutiny* raised *doubts* about the *integrity* of materials at Chaptany Primary School (code 121), Mungwa Primary School (polling station 119 1 of 1) and Mungwa Dispensary Hall (polling station 140 1 of 1). I will revisit the matter shortly.

114. There was an allegation that the election was riddled with *violence*. From the evidence of the petitioner's witnesses on the one hand, and the rebuttal by the three respondents, I find that an outbreak of violence occurred on 9th August 2017. There was sporadic gunfire. Four people were injured; and, a young girl, *Nancy Kiprop*, died. At that point, the petitioner alleged that one candidate, Kilimo Linah Jebii, was leading with 296 votes with only two polling stations unaccounted for.

115. However, the violence took place *one kilometer* from the tallying centre. The petitioner tried to review the distance to 500 metres. But he cannot resile from paragraph 14 of his affidavit. He deposed there that "*the police instigated violence by shooting the members of the public who were 1 KM away from the tallying centre*".

116. There was *no* allegation that the 3rd respondent instigated the violence. In paragraph 10 (b) of the response to the petition, the 3rd respondent had alleged that "*he came to learn that Linah Jebii Kilimo organized her supporters to attack the tallying centre*". I find that to be classic *hearsay*.

117. I also find that by the time the violence flared up, the process of *voting* had long ended; and, the *tallying* of results was at the *tail end*. DW1, DW2 and DW3 were emphatic that the events had no bearing on tallying of the results. True, they took cover under tables; a reasonable defensive tactic in a shootout. But there is scantiness of evidence that in the ensuing melee, forms 35A or 35B were switched or altered. I am thus *unable* to hold that the election was marred by *violence*.

118. But there is a connection between the violence and the *delay* in announcing the final results. To fully appreciate the matter, the scrutiny exercise becomes relevant. It had *disturbing* outcomes. At Mungwa Primary School (Station 119 1 of 1) the ballot box serial number 120241 was secured by *four* seals 2849225, 2849224, 2849221, and 2849222. Form 35A serial number NA0001426 was safely inside. There were 5 counterfoil booklets numbers 673, 674, 675, 676 and 677. There was one unused ballot booklet number 686. But what was disconcerting were *four broken seals* inside the box numbered 2849440, 2849442, 2849441 and 2849439.

119. At Mungwa Dispensary Hall (Station 140 1 of 1) the ballot box serial number 107021 was secured by *five* seals 2708197, 2707394, 2707396, 1790995 and 2707393. Form 35A serial number NA0001671 was inside. Inside the box were only two used counterfoil booklets numbers 791 and 792. There was one unused ballot booklet number 783. What was again disquieting were *four broken seals* inside the box numbered 2707400, 2707398, 2708488 and 2708485. The votes cast agreed with the details in Form 35A.

120. There was no explanation about the *source* of the broken seals *inside* the *two* ballot boxes for Mungwa Dispensary Hall (Station 140 1 of 1) and Mungwa Primary School (Station 119 1 of 1). To be fair to the parties, the evidence of the broken seals emerged from the scrutiny exercise; and, after close of the evidence by the parties.

121. But I expected parties to address the matter in their final submissions. The petitioner's counsel dealt with the matter at paragraphs 30 and 31 of the written submissions filed on 15th January 2018. The 1st and 2nd respondents' counsel gave the matter a wide berth. Paragraphs 37 and 38 of his submissions filed on 12th January 2018 were completely *mute* on the matter. Paragraphs 37 to 39 of the 3rd respondent's submissions on scrutiny were also *hushed* on the matter.

122. I have perused Regulation 67 and 73 of the General Regulations 2012. Ballot boxes are supposed to be *open* at the commencement of voting exercise. They are then sealed. When voting ends, the seals are broken in the *presence* of agents or the candidates. This is to facilitate

the *counting* of votes. When the counting ends, the boxes are sealed *afresh* and delivered to the Returning Officer. They *cannot* be re-opened without an order of the *election court*.

123. So much so that broken seals may be deposited in a ballot box. But why were broken seals left only in the *two* contested ballot boxes? It left lingering doubts about the *integrity* of the materials inside the two ballot boxes.

124. At Chaptany (code 121), the ballot box serial number 105512 was secured by five seals 2850768, 2850732, 2850767, 2849995 and 28500761. But there was *no* Form 35A *inside*. Instead, there was a *stray* Form 37A for the seat of *County Governor* serial number GV001448. There were 6 counterfoil booklets numbers 683, 684, 685, 687, 688 and 689. There was one unused ballot booklet number 686. The votes cast agreed with the details in Form 35A.

125. It is not lost on me that the *delay* in submitting the materials for these stations built up tension *inside* the tallying hall; and, eventually sparked the violence *outside*. At the time the violence started, the petitioner testified that results for Mungwa and Cheptany had not arrived; or, had not been tallied. DW2 on the other hand said that about 5 stations were remaining. The petitioner testified that-

“The violence started because the people wanted the Returning Officer to announce the results. People were shouting. I do not know the immediate cause but the people wanted results announced; to know their leader”.

126. I will turn to the serious allegations of irregularities in forms 35A and 35B. I will classify them into *two*: First, the *excusable*; or, minor omissions and mistakes which had *no* impact on the poll. Secondly, irregularities or illegalities that went into the *root* of the results.

127. The first category applies to a majority of the 21 complaints at paragraphs 37 of the petition; and, 38 of the supporting affidavit. I can isolate three of those complaints: First, where forms 35A are signed by only the Presiding Officer or his deputy; secondly, where some or all agents’ signatures are missing; and thirdly, where the official IEBC stamp impression is absent.

128. While Form 35A has provision for signatures by *both* the Presiding Officer and the Deputy Presiding officer, I hold the view that the signature of *one* of the officials is sufficient to *validate* the form. Regulation 5 (4) of the General Regulations allows the Deputy Presiding Officer to undertake tasks on behalf of the Presiding Officer.

129. In *Kakuta Maimai Hamisi v Peris Pesi Tobiko and others* Nairobi High Court E.P. 5 of 2013 [2013] eKLR, I had this to say on the subject-

“True, the latter forms have not been signed by agents. The [D]eputy presiding officer has not also signed them. The [P]residing [O]fficer has. Those irregularities do not go to the root of the poll.....”

130. The petitioner made heavy capital on missing signatures by agents. It would be *desirable* for agents to sign the forms. It makes the process transparent and verifiable. For example at Maron Primary School (Code 123), the *Report on Scrutiny* confirmed that there was “*overwriting on the total of valid votes cast and the total number of rejected votes*”. No agent signed the form. At Chesawach (polling station 92), no agent signed the form. When such results are questioned, it becomes difficult to *verify* them. Happily, the scrutiny in at Maron Primary School revealed that the votes cast were in agreement with Form 35A. The case for Chesawach however remains moot.

131. The point however is that *signatures* by agents are *not* mandatory. Regulation 79 (6) and (7) provide that the *absence* of an agent or candidate at the *time* of announcing results does *not* invalidate it. Form 35A provides for signatures by agents or candidates *if present*. An aggrieved agent or candidate has a right to protest or refuse to sign the form. Doubt is removed completely because at the foot of the form, there is a space intitled: *Refusal to Sign (if any)*.

132. I am of the opinion that the lack of an IEBC stamp on Form 35A is *not* fatal. For starters, there is no *formal space* set out in the form to place the impression. Secondly, the IEBC stamp constitutes what the Regulations refer to as *non-strategic materials*. Thirdly, there is no express requirement in the Act or Regulations that the Presiding Officer *must* stamp Form 35A. This is unlike the case of a ballot paper.

133. I am not trivializing the matter. Obviously, the stamp creates the aura of an *official* document. But it would be a fallacy to throw out a form for want of a stamp when the maker (the Presiding Officer or Deputy) have *signed* it. See generally Regulation 79. See also *IEBC & another v Stephen Mutinda Mule & 3 others*, Nairobi, Court of Appeal, Civil Appeal 219 of 2013 [2013] eKLR.

134. I will now turn to the second category of serious irregularities or illegalities that go to the *root* of the poll. It must follow as a corollary from the preceding paragraph that a Form 35A that is *not* signed by either the Presiding Officer or Deputy Presiding Officer is fatally defective. It would be a form that lacks validation by the *maker*. Its *authenticity* is immediately cast into *doubt*.

135. Form 35A in my view is the most important *primary* record of the election. All the other forms are built atop it. The sealed ballot boxes delivered to the returning officer cannot be reopened except by an order of the election court. The results in Form 35A are then tallied. They are fed into a computer to generate a spreadsheet now known as 35B. See *Kakuta Maimai Hamisi v Peris Pesi Tobiko and others* Nairobi High Court E.P. 5 of 2013 [2013] eKLR.

136. At paragraph 27 of the petition, it is pleaded that “*a large number of forms 35A were not signed as required under the law and Regulations*”. The petitioner failed to prove “the large number”. But he did so for one station: The certified copy by IEBC of Form 35A for Bororwo Nursery School Polling Station (Station 76 1 of 1) is neither signed by the Presiding Officer nor his deputy. I cannot say it is an official or authentic record of the results at that station. See generally *Raila Odinga & another v IEBC & 2 others*, Supreme Court of Kenya, Presidential Petition 1 of 2017 [2017] eKLR.

137. True the impugned form is *signed* by three agents. But the point to be made is that the agents are not the makers of the document. Sadly, the form indicates that there were 321 valid votes cast: the 3rd respondent garnered 186; Linah Jebii 132; while the other three candidates got 1 vote each. In a synopsis, Form 35A for Bororwo Nursery School Polling Station (Station 76 1 of 1) is *not* a reliable snapshot of the contents of the ballot box. Obviously, it taints the Form 35B built atop it.

139. At Sewerwa Nursery School Polling Station 74, the *total valid votes* cast were 177. The 3rd respondent got 78 votes; Linah Jebii got 95 votes; Bowen Mark 3 votes; John Marrimoi 1 vote; and, Cherutich Jonah, 0 votes. These figures were confirmed by the scrutiny conducted by the Deputy Registrar of the court. But in transposing the results to form 35B, the Returning officer indicated that the total valid votes were 117. The scores of each candidate are *unaffected*.

139. From the report by the Deputy Registrar, the original form is signed by the Presiding Officer, Deputy Presiding Officer and eight agents. The petitioner or Linah Kilimo for that matter, never queried their results or sought a recount. A recount is permitted by dint of Regulation 80.

140. I thus accept that this was an inadvertent error in transposing the results into Form 35B. But the matter does not end there. At Mogil Primary School (Polling Station 36) Form 35B shows 142 votes while Form 35A indicates 135 votes. At Tot Catholic Church (Polling Station number 93) Mr. Marimoi's correct votes should be *nil*. At Kachemwang Nursery (Polling Station number 100) Form 35B shows 197 votes while the correct figure should be 196 votes. A sizeable number of *votes* are unaccounted for in the process. It is important to keep in mind that the margin between the two leading candidates was only 967 votes.

141. The Returning Officer conceded that the video clip (exhibit 3) captures him making the *final* announcement of results. In cross examination, he said he was reading aloud Form 35B. In the video, he announced the results as follows: "*total valid votes 29,573.....David Bowen 14,812.....Linah Kilimo 13,845 John Marimoi 387 ...*"

142. However, Form 35B contains the following results:

- a. David Kangogo Bowen: 14,812 votes;
- b. Mark Bowen: 1,116 votes;
- c. Jonah Khamathew Cherutich: 54 votes;
- d. Linah Jebii Kilimo: 13,845 votes; and
- e. John Kiptoo Marrimoi: **387 votes**

Total valid votes.....30,214.

143. At the hearing of the petition, the Returning Officer said the correct results should be as follows:

- a. Bowen Kangogo.....14,812
- b. Mark Bowen.....1,116
- c. Jonah Khamathew Cherotich.....54
- d. Linah Jebii Kilimo.....13,845
- e. John Kiptoo Marimoi.....**193**

Total valid votes.....30,020

144. He clarified that the results of the two leading candidates are unaffected; and, that the revision only deducts the votes erroneously awarded to John Marrimoi. The point however is that Form 35B which was used to announce and declare the results was *inaccurate*. This was a close contest. I said the margin of votes between the candidates was only 967 votes. I remain alive that our electoral system remains *first past the post*. But the *irregularities* here cast doubt on the *numbers*. The winner was not even given his certificate at the tallying hall following the public announcement. He received the certificate later at Iten.

145. My analysis of the evidence so far leads to the conclusion that the results were opaque and unverifiable. In a synopsis, the conduct of the election failed the constitutional test in Article 81 (e) of the Constitution.

146. But if I be wrong on that matter, there is a more *glaring failure* in form 35B: it included results from two *ungazetted* polling stations: *Embokala Nursery School* (appearing as station number 093) and *Ketmekinget Health Centre* (appearing as station number 124). The relevant Kenya Gazette notice appears at pages 204 and 205 of the petition. The Form 35B in turn *omitted* results for *Tot Catholic Church* (the genuine station number 093) and *Maron Health Centre* (the *gazetted* polling station number 124).

147. The Returning Officer and the 3rd respondent were at pains to explain the anomaly. The 3rd respondent explained that *Tot Catholic*

Church Polling Station (093) used to be known as *Embokala*. He said that the change followed public participation. The witness said that the change at *Ketmekinget* resulted from evictions in *Embobut Forest*. *Ketmekinget* used to be a polling station inside the forest. He said it is now located at Maron Health Centre. That may well be so.

148. But the painful truth is that two *gazetted* stations are *not* captured in Form 35; and, two *unofficial* polling stations purport to replace them. It is highly irregular and contrary to the Regulations. Regulation 7 requires the Commission to assign to each electoral area a distinguishing letter or number or both; and, to publish them in the *Gazette* and electronic and print media.

149. *Mr. Kivuva*, learned counsel for the 3rd respondent, sought refuge in Regulation 64. With respect, that Regulation *conditionally* allows a Presiding Officer, after consultation with the Returning Officer, to adjourn polling; and, to *transfer* polling to a new area due to riots, violence, natural disasters and so forth. That was not the case.

150. True, the complaints at *Embokala* and *Ketmekinget* are not *expressly* mentioned in the tables at paragraph 38 of the petition; or, paragraph 37 of the supporting affidavit. However, paragraph 11 of the petition states that “the elections in Marakwet East were marred with irregularities...the 1st and 2nd respondents systematically changed results in favour of the 3rd respondent”. Paragraph 17 of the petition pleads that “*the results as announced were not supported by the results from the polling stations*”. Paragraph 21 adds that the “*Returning Officer hurriedly announced the results without correcting any anomalies*”. Lastly, paragraph 23 makes a general allegation that the elections were *not conducted in compliance with Article 81 (e) of the Constitution*.

151. I thus find that the complaints relating to *Embokala* and *Ketmekinget* were sufficiently pleaded at paragraphs 11, 17, 21 and 23 of the petition. Considering the *entire* petition and *supporting affidavits*, the respondents cannot be heard to say that they did not know the case they were confronting in this petition.

152. The answer to issue number *i*) that I framed earlier is thus in the *negative*. I find that the 1st and 2nd respondents did *not* conduct an *accurate* or *verifiable* election in accordance with the Constitution, the Elections Act and Regulations thereunder

153. My answer to issue number *ii*) above is that the elections were *not* tainted by violence. However there were *serious irregularities and anomalies* which cast *doubt* on the accuracy of the numbers, *verifiability, credibility* or *integrity* of the results.

154. It must then follow as a corollary that the answer to issue number *iii*) is also negative: the 3rd Respondent, David Bowen Kangogo, was *not* validly elected as Member of Parliament for Marakwet East Constituency.

155. Owing to the *serious irregularities and anomalies* which cast a long shadow on the results, it is also *not* feasible to declare *Linah Jebii Kilimo* as the winner.

156. My answer to issue number *iv*) is as follows: The petitioner has *partially* proved his case to the required *standard of proof*. The petitioner has sufficiently challenged the *integrity* of the poll. The impact goes to the root of the results. The appropriate remedy is to *nullify* the poll; and, to grant the people of Marakwet East Constituency a fresh opportunity to exercise their universal suffrage.

157. I thus make the following final orders:

- a. That a *declaration* is hereby issued that the election held on 8th August 2017 for the *Member of National Assembly* for Marakwet East Constituency was *not* free, fair, credible or verifiable.
- b. That the 3rd Respondent, David Bowen Kangogo, was *not* validly elected as the *Member of the National Assembly* for Marakwet East Constituency.
- c. That the prayer that *Linah Jebii Kilimo*, be declared as the winner of the election is hereby *dismissed*.
- d. That the IEBC shall hold a *fresh election* for the *Member of National Assembly* for Marakwet East Constituency in accordance with the Constitution, the Elections Act and the Regulations thereunder.

129. That leaves issue number *v*) on costs. Costs ordinarily follow the event. They are also at the discretion of the Court. Section 84 of the Act provides that an *election court shall award the costs of and incidental to a petition and such costs shall follow the cause*. Rule 30 (1) (b) of the Elections (Parliamentary and County Elections) Petition Rules 2017 empowers the court to set *the maximum of costs payable*.

130. If the Court does not determine the costs, then the Registrar of the Court is required by Rule 31 to tax such costs. I grant the *petitioner* costs. Those costs shall be met in equal shares by the *1st and 3rd respondents*. This was a simple petition that did not raise complex questions of law. Evidence was taken in three consecutive days. The maximum costs shall thus be Kshs. 2,000,000. The Deputy Registrar of this Court shall tax the *Bill of Costs* under Rule 31.

131. Lastly, the security deposit of Kshs. 500,000 paid into court shall be refunded to the petitioner subject to deduction of any unpaid court fees.

132. A certificate of determination of this petition required under section 86 of the Elections Act shall issue forthwith.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 27th day of February 2018.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Mr. Magare with him Mr. Nyambegera for the petitioner instructed by Magare Musundi & Company Advocates.

Mr. Onyinkwa Snr. for the 1st and 2nd respondents instructed by Onyinkwa & Company Advocates.

Mr. Kivuva for the 3rd respondent instructed by Kivuva Omuga & Company Advocates.

Mr. J. Kemboi, Court Clerk.