



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ELECTION PETITION NO. 4 OF 2017

**IN THE MATTER OF THE ELECTION ACT NO. 24 OF 2011 LAWS OF KENYA AND THE
ELECTION (GENERAL) REGULATIONS, 2012 AND ELECTIONS (PARLIAMENTARY AND
COUNTY) PETITION RULES 2017**

AND

**IN THE MATTER OF THE ELECTIONS OF WOMEN REPRESENTATIVE FOR KISII
COUNTY, COUNTY NO. 45 HELD ON 8TH AUGUST 2017**

BETWEEN

NAHASHON AKUNGA PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND ...

BOUNDARIES COMMISSION 1ST RESPONDENT

ROBERTY ISAAC SIDNEY NAMULUNGU 2ND RESPONDENT

HON. JANET ONG'ERA 3RD RESPONDENT

JUDGMENT

BACKGROUND

1. This petition was lodged in Court on the 5th September, 2017 by Nahashon Akunga challenging the election of Janet Ong'era as the County Woman Representative to the National Assembly for Kisii County following the general election held on the 8/8/2017 in the Republic of Kenya.
2. The Petitioner is a resident of Kisii County and a duly registered voter at Sombogo TBC Polling Station in Sensi Ward, Kitutu Chache North Constituency.
3. The results of the said election were declared on the 11th August, 2017 as follows;

No. Name	Votes
a) JANET ONG'ERA	171,492

b) DORICE ABURI

144,973

c) MARY SALLY KERAA

28,345

d) REBECCA KEMUMA KEROSI	14,561
e) NORAH MORAA OMBUI	8,516
f) GLADYS KEMUNTO AUNGA	7,959
g) VICKY NYABOKE ONDERI	7,913
h) LILIAN KEMUNTO MARWA	6,608
i) ANN KERUBO MASENGE	4,215
j) ISSABELLA BOCHABERI	4,024
k) LINET MONGARE	3,091
l) PAMELA MORAA	2,233
TOTAL	403,930

The margin of votes between the 3rd Respondent and the next candidate who was Dorice Aburi was 26,519 votes.

THE GROUNDS OF THE PETITION

The petition is premised on 7 grounds as gleaned from the petition which are;

- i) Lack of credible voters register.**
- ii) Differences in number of total votes cast in the 6 elections.**
- iii) Striking coincidences and incredible figures.**
- iv) Voting without ballot box for County Woman Representative to the National Assembly for Kisii County.**
- v) Insecurity of ballot materials.**
- vi) Use of Kisii County Government employees by the 3rd Respondent to further her political interests.**
- vii) Appointment of County Government employees to act as presiding officers and clerks, agents and observers.**

4. In regard to lack of credible voters' register, it is the Petitioner's case that there was no credible voters' register for purposes of the August 8th, 2017 elections. It is contended that the number of registered voters in various polling stations in constituencies in Kisii County varied significantly in the statutory forms returning the results of the 6 elections. Schedule 1 annexed to the petition is relied on.

5. On differences in number of total votes cast in the 6 elections, the Petitioner avers that the total number of votes cast and accounted for by the 1st and 2nd Respondents differ by a big margin in the 6 elections for the same constituency. Schedule 2 is relied on to show this.

6. The Petitioner avers that there are inexplicable coincidences and incredible figures where figures of votes garnered by each candidate including number of rejected votes as declared by the 2nd Respondent are so strikingly similar that they lack credibility.

7. On voting without ballot box for County Woman Representative to the National Assembly for Kisii County, it is the Petitioner's case that at Gusii Stadium Polling Station, Code 025, voting commenced at 6 o'clock with only 5 ballot boxes minus the ballot box for County Woman Representative to the National Assembly for Kisii County. This is a station where candidate Dorice Aburi enjoyed huge support. A complaint was made but the presiding officer took the matter lying down (*sic*). The 2nd Respondent was informed. Voting went on for an hour before the ballot box was availed.

8. On insecurity of ballot materials, it is stated that the ballot papers for the election of County Woman Representative to the National Assembly for Kisii County were spilled on the ground and left open and unattended to after being offloaded from the ferrying motor vehicle.

9. On use of Kisii County Government employees by the 3rd Respondent to further her political interests, it is averred that one Naftal Obwocha, a public officer working in the health department at Kisii County Government as the health records and information management assistant, was appointed as the ODM chief agent. The 3rd Respondent ran on an ODM ticket and thus benefited from the appointment of the said Obwocha.

10. By accepting the appointment to act as ODM Chief Agent, Naftal Obwocha committed an election offence under **Section 15(1)** of the **Elections Act**. By accepting to be represented by the said Naftal Obwocha, it is urged that the 3rd Respondent unlawfully used state resources and the commission of the offence by Naftal Obwocha made her ineligible to contest in the election of 8/8/2017.

11. On the appointment of County Government employees to act as presiding officers, clerks, agents and observers, it is the Petitioner's case that Schedule 4 is a list of County Government employees who acted as presiding and returning officers in the election. This was contrary to a memo issued by the 1st Respondent against the hiring of any government employee to conduct elections as either presiding officer, clerks, agents or observers.

THE 1ST AND 2ND RESPONDENTS' RESPONSE

12. The 1st and 2nd Respondents' response is contained in the Replying Affidavit sworn by Robert Isaac Sidney Namulungu filed in Court on the 20/9/2017. This replying affidavit was deemed as the response pursuant to a ruling by this Court dated 6th day of December, 2017.

13. It is the 1st and 2nd Respondents' case that the impugned election was conducted in a free, fair and transparent manner as espoused in the Constitution and the electoral laws.

14. It is the 1st and 2nd Respondents' case that no verbal or written complaints from any voter, candidate or any other interested party in Kisii County was made and as such the allegations by the Petitioner in the petition are not known to the Respondents and his intentions are questionable.

15. It is averred that there was nothing irregular in the voting and tallying. Any differences from numbers of votes cast in the 6 elections are attributable to voters opting to vote in respect of particular seats only for their known reasons, stray ballots and rejected ones.

16. The appointment of election officials was done in accordance with the law and the list of appointed officers was made public and displayed in respective constituencies in accordance with **Regulation 5** and **6** of the **Elections (General Regulations) 2012**. No objections were raised by the Petitioner verbally or in writing.

17. The 1st and 2nd Respondent maintain that a credible voters' register was used and the form 39C used to declare the results for the 3rd Respondent was authentic and credible.

18. It is denied that there were any grave errors, flaws, fraud, illegalities and irregularities committed by the 1st and 2nd Respondents and no complaints in that regard were lodged with the returning officers in the constituencies or at the County level during and after the General Election of 8th August, 2017.

19. It is contended that all the agents of all the candidates for the six elective seats and observers have not and did not raise any complaints as to whether any voter was denied a ballot for any of the six elective seats or issued with less ballots or more ballots and that all voters were issued with the correct number of ballots at the polling stations.

20. It is the 1st and 2nd Respondents' case that where necessary time for voting was extended according to the law and that the election materials were escorted under tight security to all polling stations in Kisii County and that all were at the polling stations by the time of the opening of the polling station.

21. At no time was a complaint lodged either verbally or in writing to the County Returning Officer concerning the missing of County Woman Representative to the National Assembly for Kisii County ballot papers and ballot box as alleged. All six ballot boxes were in place at the time polling opened. In any event the Petitioner is not specific on which polling station was affected whether polling station 01, 02 or 03.

22. It is urged that Janet Ong'era was duly elected and the election was valid.

RESPONSE BY THE 3RD RESPONDENT

23. The response to the petition by the 3rd Respondent is contained in the Response to petition dated 17/9/2017 and filed on 18/9/2017. The response is supported by the affidavit of Janet Ong'era (the 3rd Respondent) sworn on the 17/9/2017.

24. The 3rd Respondent denies totally the unsubstantiated allegations of malpractices alleged in the said Election Petition and avers that she was not involved in any malpractices, irregularities and or unlawful acts in the entire election period.

25. The response answers the petition ground by ground seriatim.

26. On lack of a credible voters register, it is indicated that the elections were conducted based on a valid voters' register and there was never any kind of manipulation of the register. The figures entered in forms 39 showing the number of registered voters are the correct figures for registered voters and are in consonance and tally with the ones in the official certified voters' register.

27. In the tabulation in Schedule 1 of the petition, the total number of valid votes did not exceed the number of registered voters as per the official certified Independent Electoral and Boundaries Commission register.

28. On differences in number of total votes cast in the 6 elections, it is averred that the statistics displayed in **Schedule 2** annexed to the election petition are conjectures and the Petitioner has not demonstrated clearly and/or shown how the same do not capture the votes as garnered by each candidate at the respective polling stations and constituencies. Any difference thereof is expected in any election and was within normal margins as valid votes cast for respective candidates cannot be the same.

29. On striking coincidences and incredible figures, the 3rd Respondent denies the said allegations and avers that the stated **Schedule 3** is not annexed in the election petition and/or the supporting affidavit of the Petitioner thereby making the allegation baseless, threadbare and totally misplaced.

30. It is denied that there was use of fraudulent forms in the election and it is averred that accredited agents and observers were present during vote counting and witnessed forms 39A, 39B and 39C being filled by the presiding officer and some of the agents signed these forms in agreement with details reflected therein as a true reflection of the voters' choice.

31. It is denied that voting proceeded without a ballot box for County Woman Representative to the National Assembly for Kisii County. The Petitioner is put to strict proof. Agents and observers were present during the commencement of the voting and witnessed the opening of the ballot boxes and ballot

papers in respect of all the 6 elective seats.

32. It is urged that indeed the votes cast in all the 6 elections were as follows;

President	1227
Gubernatorial	1216
Senatorial	1225
Member of National Assembly	1225
Member of County Assembly	1231
County Woman Representative to the National Assembly for Kisii County	1227

33. On insecurity of ballot papers, it is the 3rd Respondent's answer that security agencies duly provided security before, during and after the election exercise in various polling stations and tallying centres around Kisii County.

34. On use of Kisii County Government employees by the 3rd Respondent to further her political interests and appointment of County Government employees to act as returning officers, presiding officers, clerks, agents and observers, it is urged that the 3rd Respondent was not handling any office within the County Government.

35. The memo allegedly directing the 1st Respondent not to hire any government employee to conduct the general elections as either presiding officer or returning officer and said to be marked "AN 9" is not annexed. The 3rd Respondent has no role to play in the appointment of the officers complained of. **Regulation 6 of the Elections (General Regulations) 2012** allows political parties and independent candidates to raise objections to the appointments made by 1st Respondent. It is urged that none was raised by the Petitioner. It is urged that there is no law that bars any public servant in participating in critical and important national exercises and activity.

THE PETITIONER'S EVIDENCE

36. The Petitioner's case rests entirely on his evidence as contained in his affidavit in support of the petition and the annexures thereto. He did not call any other witness.

37. Apart from his affidavit evidence which he adopted and relied on as his evidence in chief, the Petitioner was extensively cross-examined at length by both counsels for the 1st and 2nd Respondents and for the 3rd Respondent.

38. Therefore his testimony will be found in his affidavit sworn on 4/9/2017 which affidavit he adopted and relied on as his evidence in chief as well as in the answers he gives in cross-examination by the counsels for the 1st, 2nd and 3rd Respondents.

39. He depones that he filed the petition in his capacity as an aggrieved voter. At paragraphs 10 he depones that arising from the 1st and 2nd Respondents' acts and omissions, the electoral process and the outcome thereof under challenge herein were rampant and flawed in so fundamental and grave a sense, taken together or viewed separately as to completely obliterate the possibility of discerning therefrom whether the said results were the true, lawful and proper expression of the people's will.

40. He avers at paragraph 11 of the affidavit that as a consequence of the aforesaid flaws and irregularities the 3rd Respondent Hon. Janet Ong'era was declared to have won the **gubernatorial** (*sic*) election

allegedly defeating other candidates.

41. It is the Petitioner's evidence that there was no credible voter's register for the purposes of the elections of 8/8/2017 in Kisii County. At paragraph 22, he avers that in the absence of a credible voters' register, the **gubernatorial** (*sic*) election in Kisii County ought to be vitiated. He adds at paragraph 27 that the number of registered voters for **gubernatorial** (*sic*) elections was increased in many polling stations across Kisii County in order to make up for the votes inflated in favour of the 3rd Respondent.

42. The Petitioner avers that he prepared a summary marked "AN3" and a bundle of copies of relevant forms containing the anomalies on number of registered voters annexed and marked "AN3" and "AN4" respectively (Actually the markings are "NA3" and "NA4").

43. The Petitioner depones that some of the statutory forms declaring the results of the elections showed a big disparity in the number of votes cast in the 6 elective seats some varying to 500 votes in some constituencies. He relies on a summary marked "AN5" and a bundle of forms marked "AN6". He asserts that these differences ought not to exist since no voter walked out with a ballot paper(s) from a polling station.

44. He attacks the striking coincidences and incredible figures found in the number of votes garnered by each candidate and the rejected votes stating that the same are so strikingly similar that they lack credibility. He states he has annexed a summary of such and a bundle of relevant forms marked AN7 and AN8. Notably these are not annexed and an attempt to introduce them was thwarted vide the Court's ruling dated 30/10/2017.

45. The Petitioner faults the appointment of County Government employees to act as presiding officers and returning officers. He faults the appointment of Naftal Obwocha as the Chief Agent of ODM. The said Naftal being a public officer working with the health department at Kisii County Government.

46. It is the Petitioner's evidence that the form 39C used to declare results by the 2nd Respondent was fraudulent and did not have watermark features.

47. On cross-examination by Ms Karanja, learned counsel for the 1st and 2nd Respondent, the Petitioner acknowledges that the document titled Schedule 1 annexed to the petition at page 17 is not a voters register. The source of the information thereon is forms 35B, 37B and C, 38B and C and 39B and C. He personally prepared the entire document. He got details from their agents. There are no features in the document to show a connection with IEBC.

48. He confirms he was the Chief Agent for Jubilee Party. He confirms too that from the petition one cannot tell that he was an agent. He acknowledged that he was present at the County Tallying Centre on the day of tallying and declaration. He signed the forms. He was not forced to sign.

49. Questioned further, the Petitioner stated he never visited all stations. He cannot then say that the counting and tallying was incredible.

50. The Petitioner states that he was not present when there was spillage of ballot papers on the ground as alleged at paragraph 68 of the petition. He did not witness this and he cannot identify the motor vehicle that ferried the materials.

51. The Petitioner confirms that he has not annexed a voters' register.

52. On the list of government officers who allegedly participated in the elections as officials of the 1st Respondent, the Petitioner states that he compiled the schedule. Agents were the source of the schedule. There is an appointment letter for Naftal Obwocha. He did not provide appointment letters for the other persons listed.

53. Questioned on alleged swapping/changing of votes at polling stations, he states that he did not see

anyone swap the numbers. The information is in the form 39C. He states he was not present at voting. He did not know who voted for whom.

54. He confirms that he was not present at Gusii Stadium Polling Station and therefore could not confirm that a ballot box was missing. John Orlale was the agent there. He gave him the information on the missing ballot box.

55. On cross-examination by Mr. Omogeni (Sc) for the 3rd Respondent, the Petitioner confirmed that he was appointed as the chief agent for Jubilee Party. He is a lecturer at Kisii University. He stated that he did not know the code of public officers under the Leadership and Integrity Act. He was not aware that he was not supposed to participate in partisan politics.

56. Questioned on his grouse with Naftal Obwocha's appointment as ODM agent, he admits that his (Petitioner's) appointment as a Jubilee agent was wrong and so was Obwocha's. 2 wrongs did not make a right.

57. He further confirmed that at page 145 of the petition the letter of appointment for Naftal Obwocha does not have his ID card number. Same is erased. The contact too is erased. There is an image of a hand covering part of the document. He did not know what was at the covered area. He confirms attaching a payslip for Naftal Obwocha Orina and a tax return by the same person. He had no other document in support nor did he attach a badge.

58. He admits that at page 144 of the petition (form 39C) the name of Naftal Obwocha does not appear as an ODM chief agent.

59. The Petitioner goes on to confirm that the list of Kisii County employees at page 31 of the petition is not signed and neither is it on a letter head. The Court cannot know the source of the said document.

60. Referred to the document at page 156 of the petition headed "Kisii County Kicosa participants list 2016", he confirms that the said list does not indicate that the persons were participating in political activity. Questioned further, he states that there is no evidence he has placed to link Mr. Obwocha to activities of ODM. He adds "I confirm there is nothing."

61. Questioned on the register of voters, he again confirms that he has not annexed one to his petition.

62. On Bobasi Constituency, the Petitioner acknowledges a table he has drawn at page 61 of the petition. He states that no agent has sworn an affidavit challenging the results in any polling station at Bobasi Constituency.

63. When shown a register of voters annexed at page 27 of the 3rd Respondent's response, he confirms that he did not have this register when he made the table.

64. The Petitioner was referred to several forms 39A and the number of registered voters in those forms tallied with the number of the registered voters as seen in the register.

65. He confirms signing the form 39C at page 144 of the petition. Indeed his name is entered twice at No. 5 and No. 7 in the list of agents. Joel Onsanda is another agent of Jubilee who is listed in the form. Onsanda has not filed a petition. He is not a witness in these proceedings.

66. When referred to the table at page 26 which attempts to show differing numbers of registered voters in the six(6) elective posts, he confirms the table has 9 columns. The table is blank in some areas. This table is not complete. He states that he had no witness from Kitutu Chache Constituency challenging the results. He had not gotten the voters register before he compiled the table.

67. When referred to the "Schedule 2" in the petition which is titled "votes cast per seat per constituency", the witness confirms that the table is blank in some columns and that in all the

constituencies named no agent has contested the results. He admits that the intended comparison is not possible with the blanks in the table.

68. On the missing ballot box at Gusii Stadium Polling Station, the Petitioner states that his witness on this is John Orlale. He would be the right person to answer on what happened there.

69. No woman representative candidate has complained about the votes in this station. Shown that votes garnered by all candidates at this station in the six (6) elective positions ranged from 1216 to 1227 showing not much difference, he states that this does not make his allegation a lie.

70. On the issue of security of ballot materials, he says his witness on this is Andrew Nyagwoka who would tell the Court about that.

71. Finally, he confirms that the 3rd Respondent was not working with the County Government of Kisii. His list of alleged employees is not signed by IEBC. He did not annex their payslips other than for Naftal Obwocha.

THE EVIDENCE OF THE 1ST AND 2ND RESPONDENTS

72. The evidence of the 1st and 2nd Respondents is contained in the replying affidavit of Robert Isaac Namulungu sworn on 18/9/2017 and which he adopted as evidence in chief on 11/12/2017 and in the answers given on cross examination.

73. He stated under cross examination that the register of voters was availed in all polling stations. He confirms that 6 elections were held on 8/8/2017 and that one register was used. He adds that one presiding officer was in charge of a station. One returning officer was signing form 39B and another form 39C. Forms 39A, 39B and 39C are statutory documents.

74. He added that the register of voters is consistent. A presiding officer can make an error and record incorrectly. The returning officer needs to correct that mistake.

75. He added that a voter cannot be forced to cast all the ballots. A voter can put an unmarked ballot in a box where he is not interested.

76. He confirms that in the response, they did not file forms 39A as they were not requested. The 3rd Respondent attached forms.

77. Questioned further, he acknowledged several forms were not signed by agents. He adds that it is not a must for agents to sign the forms. The regulations state that the absence of an agent does not hamper the announcement of results.

78. The witness confirms that he used form 39C to declare results of the Woman Representative Member of National Assembly for Kisii County. He admitted that the complaints at Kitutu Chache and Bobasi Constituency were not answered by the returning officers there. He states this is because there were no issues.

79. Further cross-examined by Mr. Omogeni (Sc) he confirms blank spaces in the document relied on by the petitioner at page 28 of the petition. He states the table is very haphazard. The source of information is not shown.

THE EVIDENCE OF THE 3RD RESPONDENT

80. The evidence of the 3rd Respondent is contained in her affidavit in support of the response sworn on the 17/9/2017 and her answer in cross-examination as found from page 60 of the proceedings.

81. She stated in court that the petitioner signed form 39C at the tallying centre. She saw the petitioner at the tallying centre. The petitioner had no problem (sic). She never received a report of a missing ballot box. She had agents in all polling stations. Neither did she receive a complaint about the voters' register. No register is annexed to the petition.

82. The 3rd respondent states she looked at the register. It was published both electronically and in print. She did not see any anomalies in it. No issue about insecurity of ballot boxes was reported to her.

83. Cross-examined by Mr. Begi, she stated that form 39C is meant to authenticate results. The signing by an agent authenticates results signifying that the agent is satisfied.

84. She added that where it was shown the results in form 39A did not match those recorded in form 39C, then there would be a problem with the results.

85. Re-examined by Mr. Omogeni, the witness stated that she did not see a complaint on use of fraudulent form 39C in the petition. The same is found in the affidavit of the petitioner. She confirms that agents of Jubilee candidates signed the form 39C. They included the Petitioner.

SUBMISSIONS

86. Ms Nchogu, Omwanza and Nyasimi Advocates (Mr. Omwanza appearing), Ms J. W. Wambua and Company Advocates (Ms Karanja appearing) and Ms Okong'o Omogeni & Company Advocates (Mr. Omogeni (Sc) appearing) for the Petitioner, 1st and 2nd Respondents and 3rd Respondent respectively have filed detailed learned submissions on points of law and fact and complete with numerous guiding authorities. I am greatly indebted to counsel for their industry and very able exposition of the applicable law.

87. I have considered all the submissions and the same have been a useful source of reference in the evaluation of issues before Court. Indeed, the Court has put into account each and every submission even that which the Court may not make direct reference to hereunder.

ISSUES FOR DETERMINATION

88. The Petitioner framed 6 issues for determination in the petition. The 3rd Respondent was of the view that the issues as framed by the Petitioner were too extrapolated to guide the Court and instead framed 3 issues. It was left upon the Court to frame the issues for determination.

89. Having considered the petition, the responses, the evidence on record and learned submissions by Counsels, the issues for determination crystallise into the issues framed by Court earlier.

90. The Court did frame 6 issues for determination as follows;

1. Whether the election of County Woman Representative to the National Assembly for Kisii County was conducted in accordance with the Constitution and the written law.

2. Whether there was non-compliance, irregularities and improprieties by the Respondents in the conduct of the election and if so whether they materially affected the validity of the results of the election for County Woman Representative to the National Assembly for Kisii County.

3. Whether the 3rd Respondent committed an election offence under S.15(2) and 20 of the Election Offences Act, 2016 and contravened S.35(1) of the Leadership and Integrity Act, 2012.

4. Whether the 3rd Respondent was validly elected and subsequently declared the elected County Woman Representative to the National Assembly for Kisii County subsequent to the

elections held on 8/8/17.

5. Who bears the costs of the Petition.

6. What consequential orders, declarations and reliefs should this court grant if any.

THE APPLICABLE CONSTITUTIONAL AND LEGAL PRINCIPLES

91. It is fitting to begin with a description of what an election petition is and I go no further than seek refuge in the words of the Supreme Court in **Moses Masika Wetangula v Musikari Kombo & 2 Others [2014] eKLR** where the Court stated;

“[107] The description of election petitions as causes *sui generis*, is in every aspect apposite. An election petition is a suit instituted for the purpose of contesting the validity of an election, or disputing the return of a candidate, or claiming that the return of a candidate is vitiated on the grounds of lack of qualification, corrupt practices, irregularity or other factor. Such petitions rest on private political or other motivations, coalescing with broad public and local interests; they teeter in their regulatory framework from the civil to the criminal mechanisms; and they cut across a plurality of dispute-settlement typologies.”

92. Kenya is a sovereign and democratic country based on the values of democracy, human rights and the rule of law. **Article 1(1)** of her **Constitution** provides that all sovereign power belongs to the people and shall be exercised only in accordance with the Constitution. **Article 1(2)** provides for the exercise of this power. It states;

“Article 1(2): The people may exercise their sovereign power either directly or through their democratically elected representatives.”

93. Such elections as envisaged under **Article 1(2)** above must conform to the provisions of **Article 38(2)** of the **Constitution** which provides;

“Article 38(2): Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors.”

94. **Article 81(e)** of the **Constitution** provides the principles which the electoral system shall comply with. It provides;

“The electoral system shall comply with the following principles-

(e) free and fair elections, which are-

(i) by secret ballot;

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

(iii) conducted by an independent body;

(iv) transparent; and

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

95. Under **Article 86** of the **Constitution**, the IEBC is mandated to ensure the following;

“Article 86: At every election, the Independent Electoral and Boundaries Commission shall ensure that—

- (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
- (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
- (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
- (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”

96. The will so expressed by the people through an election is sacrosanct and cannot lightly be overturned and should be given effect whenever possible. In Richard Kalembe Ndile & Another vs Patrick Musimba Mweu & 2 Others [2013] eKLR, the Court observed that;

“Under our democratic form of government, an election is the ultimate expression 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....”

97. Section 83 of the Elections Act is a key provision setting the parameters within which an election can be voided. It provides;

“Section 83: 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. ”

98. This section insulates the outcome of an election from nullification on the basis of errors or irregularities or non-compliance with the law which do not affect the result. Article 86 of the Constitution as seen above bestows a duty on the IEBC to ensure accountability at every election.

99. The Court must step in to remedy any derogation from this duty bestowed on the IEBC to ensure that the ultimate expression of sovereignty of the people is ascertained and implemented. The intent of the voters must be ascertained. It is all about the will of the people and only *a clearly pleaded and proved case will warrant the voiding of an election.*

100. In addressing the issue of errors and irregularities in an election, the Supreme Court of Kenya in Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR acknowledged the practical reality that imperfections in the electoral process are expected; that the Court should not lightly overturn the election, especially where neither a candidate nor the voters have engaged in any wrong doing. The Court laid down the following principles.

“216. It is clear to us that an election should be conducted substantially within the principles of the Constitution, as set out in Article 81(e). voting is to be conducted in accordance with the principles set out in Article 86. The Elections Acts, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.

217. If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities.

218. Where, however, it is shown that the irregularities were of such magnitude that they affected the election results, then such an election stands to be invalidated. Otherwise procedural and administrative irregularities and other errors occasioned by human

imperfection are not enough, by and of themselves, to vitiate an election.”

101. The burden of proof in an election petition rests with the Petitioner. The **Supreme Court** in **Raila Odinga and another vs. IEBC and Others** [2013] eKLR laid it bare;

“There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: 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.”

102. The Court further quoted from the **Canadian case Opitz vs. Wrzesnewskyj** 2012 SCC 55-2012-10-256 where it was stated;

“An applicant who seeks to annul an election bears the legal burden of proof throughout....”

103. The Court, however, qualified this position by finding that the burden of proof once discharged by the Petitioner, shifts to the Respondents to disprove the claims made. At **paragraphs 196 and 197**, the Court specified what exactly the Petitioner would be required to do to discharge the burden. The Court held;

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

104. The degree of proof should be above the balance of probabilities though not as high as beyond reasonable doubt. Where the allegation relates to the commission of a criminal offence, the standard of proof is beyond reasonable doubt.

105. The **Supreme Court of Kenya** addressed this threshold in **Raila 2013** where the Court stated;

“... the threshold of proof should in principle, be above the balance of probability though not as high as beyond reasonable doubt.... where there are criminal charges linked to an election, the party hearing the burden of proof must discharge it beyond reasonable doubt.”

106. I sum up the principles applicable by quoting from the decision by the **Supreme Court of India** in **Rahim Khan vs. Khurshid Ahmed & Others**; 195 AIR 290, 1975 SCR (1) 643 in which the **Supreme Court of India** held:

“We have therefore to insist that corrupt practices, such as are alleged in this case, are examined in the light of the evidence with scrupulous care and merciless severity. However, we have to remember another factor. An election once held is not to be treated in a light-hearted manner and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantial grounds and irresponsible evidence, thereby introducing a serious element of uncertainty in the verdict already rendered by the electorate. An election is a politically sacred public act, not of one person or of one official, but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the Court to uphold the corrupt practice alleged against the returned candidate is adduced. Indeed

election petitions where corrupt practices are imputed must be regarded as proceedings of a quasi- criminal nature wherein strict proof is necessary. *The burden is therefore heavy on him who assails an election which has been concluded.*

ANALYSIS AND DETERMINATION

107. I propose to deal with the issues for determination seriatim flowing from No. 1 to 6. Broadly, the Court will have to determine if there was any non-compliance with the Constitution and the law, existence of any irregularities and improprieties on the one hand and where any existed, whether such non-compliance, irregularities and improprieties materially affected the validity of the results. A finding shall also have to be made as to whether any election offence was committed and the resultant effect if at all. This will be achieved by a critical analysis of each and every ground set out in the petition and the evidence in support thereto.

108. In regard to lack of a credible voters' register, the Petitioner depones at paragraph 22 of his affidavit that there was no credible voters' register for the purposes of the August 8th, 2017 elections in Kisii County. At paragraph 22 of the affidavit, he depones, **“That in the absence of a credible register, the gubernatorial election of Kisii County ought to be vitiated as there was no transparent and verifiable elections as required by law.”**

109. It is the Petitioner's case that the registered voters in the six elective posts ought to remain the same. He exhibits a summary showing the varying numbers of registered voters.

110. On cross examination, the Petitioner acknowledges that he prepared the summary. His source of information was forms 35B, 37B and C, 38B and C and 39B and C. The document is not a voters' register. He adds that he was aware the voters' register was published around May. He raised no question on the voters' register.

111. This allegation is based on comparisons of declaration forms in different elections.

112. This Court's jurisdiction is limited to the investigations into the propriety of the election of County Woman Representative to the National Assembly for Kisii County. The Court does not possess the legal mandate nor the necessary capacity to interrogate the happenings in the presidential, gubernatorial, senatorial and member of National assembly elections in the whole of Kisii County.

113. I make reliance on the **Supreme Court** decision in **Gatirau Munya vs. Dickson Mwenda Kithinji [2014] eKLR** where on the issue of the contents of a register of voters the Court had this to say:

“We would agree with the learned Judges of the Court of Appeal, however, that the evidential burden regarding the contents of the register and declared results is on the IEBC; save that this burden is activated in an election petition only when the initial legal burden has been discharged.”

114. What the Petitioner needed to show was that the voters recorded as the registered voters in the County Woman Representative to the National Assembly for Kisii County seat were not as found in the register of voters published by the IEBC. The 3rd Respondent has indeed presented evidence to counter allegations in Schedule marked 1 (in reference to Bobasi Constituency & Kitutu Chache South) and annexure “NA3” of the petition (forms 39B and 39C) by demonstrating that the figures entered in forms 39B and 39C are correct figures for the registered voters which are in consonance and tally with the ones in the official certified voter register which is annexed and marked “JO 1”, “JO 2” and “JO 3”.

115. If there be discrepancies in the recorded numbers of registered voters in other of the six elections, the legal mandate to interrogate such anomalies would be in the hands of the Courts gazetted to deal with any petitions that may arise from such elections. This Court cannot abrogate to itself the duty to determine such questions. Indeed, I take judicial notice of the fact that those elections have attracted petitions which are before my sister Judges in the local jurisdiction. I would be very reluctant to attempt

to make any findings related to the other elections lest I place myself in a position of conflict with the other Courts who would be better placed to answer the questions arising therefrom satisfactorily.

116. In Moses Wanjala Lukoye vs. Benard Alfred Wekesa Sambu & 3 Others [2013] eKLR, the Court at **paragraph 77** citing with approval the decision in Justus Gesito vs. IEBC & 2 Others [2013] eKLR stated;

“It is possible that a voter chooses to vote for only one elective position, say presidential, and leaves the rest. The outcome is that the results of the six elective posts will not tally. For that reason alone, the Court cannot delve into the results of other elective posts in comparison to that of the Member of National Assembly, for doing so will be setting a dangerous precedent.”

117. The 3rd Respondent has filed on record a copy of the register of voters. The forms used to declare results for the seat of women representative at the polling is form 39A. A random comparison of the register and the forms 39A filed herein shows that the registered voters as indicated in the voters' register tally with what is recorded in forms 39A.

118. Indeed, when questioned by counsel for the 3rd Respondent, the Petitioner confirms that the position as seen in the randomly picked polling stations viz Mosora Primary, Orogare, Nyakegekemo & Nyabisia Polling stations is that the number of registered voters indicated in the forms 39A tallies with particulars of the register.

119. Suffice it to note there is no whimper of a complaint from any agent over the number of registered voters from any of the polling stations.

120. As readily acknowledged by the Petitioner in cross-examination, the role of agents is to safeguard the interests of the principal (in this case Jubilee Party and the candidates).

121. If there had been a query about the register of voters, the 1st port of call is the polling station from where the complaint should have been lodged. It is to be noted that a copy of the register was displayed at each polling station (and there is no evidence that none was displayed in any of the polling stations) and had there been any anomaly, nothing would have been easier than for the agents in the affected polling stations raising the red flag to their superiors (The candidates and Chief Agent) or to the officials of the electoral body.

122. A comparison of derivative forms used in different elections cannot possibly address the issue of existence or non existence of the voters register.

123. Suppose the officers in transposing the figures made human errors in the transposed figures of registered voters? Would that be a ground to vitiate the proceedings at the polling station where the voting and counting process is not impugned and neither is the declaratory form 39A challenged either in terms of numbers of votes and the registered numbers of voters? The ready answer is no.

124. As per the provisions of **Section 6** of the **Elections Act 2011**, the Commission (IEBC) shall cause the register of voters to be opened for inspection by members of the public at all times for purposes of rectifying the particulars therein. No evidence is led to show that such an inspection was conducted by the Petitioner and to prove that the register used during the elections of the County Woman Representative to the National Assembly for Kisii County was not the genuine register.

125. On the ground of differences in number of votes cast in the 6 elections, it is the Petitioner's evidence that by a memo issued by the 1st Respondent on 3/8/2017, it was mandatory for all voters to receive all the 6 ballot papers for the 6 elective seats. At paragraph 40 of his affidavit, the Petitioner avers that there was no compliance with this memo.

126. It is the Petitioner's case that from some of the statutory forms declaring results of elections in Kisii

County, he noticed that the total number of votes cast and accounted for by the 1st and 2nd Respondent differ by a big margin in the 6 elections for the same constituency. Some vary to as high as 500 votes in some constituencies. The comparison is based on forms 35B, 37B and C and 38B and C and 39B and C. The Petitioner annexes a table showing votes cast per constituency in respect of the various elective seats.

127. He admits in cross-examination that no agent has contested the results as announced at the polling stations and that his summary in the table annexed at page 27 of the petition onwards is incomplete as it is blank in some columns. He readily admits that “the comparison is not possible with the blanks in the table.”

128. The Petitioner has based his complaint on the derivative form 35B, 37A and B, 38A and B and 39A and B. No witness is availed to show that there was non-compliance with the memo requiring each voter to be given the 6 ballots for the 6 elective posts. Indeed no witness (agent) has been called to give an account of a single incidence where a voter was denied any of the 6 ballot papers at the polling station.

129. There is no evidence that the Petitioner disputes the number of votes indicated as garnered by any of the candidates.

130. The margins complained of are not wide in any event given the high number of voters in the County. There were a total of 403,930 declared valid votes cast without factoring in spoilt votes, rejected and stray ballots. The schedule prepared by the Petitioner is based on conjecture and cannot pass an empirical test. In the table there is no reference to stray and rejected ballots. There is a possibility that the alleged margins arose from these and it was incumbent upon the Petitioner to prove with finality that the margins could not be explained.

131. Without eye witness account of agents who were at the respective polling stations, the Court would not be expected to grope in the dark and hazard answers and conclude that the opinion of the Petitioner as expressed in his generated table is satisfactory prove that the alleged differences in the margin of votes did exist, are monumental and they affect the validity of the impugned elections.

132. Reliance has been placed by the Petitioner on the case of **William Kabogo Gitau vs. George Thuo and 2 Others [2010] eKLR**. In that case, the variation of about 5,000 votes in the separate election was based on cogent evidence and indeed the electoral body conceded to the said difference. This must be distinguished from our instant suit where the Petitioner has not presented evidence contesting the results at the polling station level. (See **The IEBC vs. Maina Kiai and 5 Others [2017] eKLR**) and the table relied upon to show the discrepancy complained of is blank in some columns. Indeed in his own words in cross examination the Petitioner has confirmed that, “The comparison is not possible with blanks in the table.”

133. Even assuming that the differences existed, a difference of 500 votes between 2 elective seats in a constituency is in my considered view a realistic possibility putting into account the number of registered voters in each of the constituencies as seen from the register of voters for Bobasi and Kitutu Chache Constituencies, for example. It is expected that arising from stray and rejected ballots, a variance could arise as between valid votes cast in different elective posts.

134. On the question of striking coincidences and incredible figures the Petitioner avers that through **Schedule 3** annexed to the Petition, he has been able to show strikingly similar figures of votes garnered by each candidate including the number of rejected votes as declared by the 2nd Respondent which coincidence he concludes is impossible scientifically, mathematically, logically and humanly.

135. To begin with, the “Schedule 3” which forms the basis of this complaint is not part of the record of Court. The attempt to introduce the same into these proceedings was rejected by Court vide the detailed ruling dated 30th October, 2017.

136. That complaint and the averment in paragraph 56 of the supporting affidavit is left bare and not supported by any evidence. I need not say more on this.

137. In regard to the ground on voting without ballot box for County Woman Representative to the National Assembly for Kisii County, the relevant evidence is found in the Petitioner's responses in cross-examination by Counsels for the 1st and 2nd Respondent and Counsel for the 3rd Respondent. At page 19 of the proceedings the Petitioner in answer to a question by Ms Karanja, Learned Counsel for the 1st and 2nd Respondent replies;

“With regard to Gusii Stadium Polling Station, I allege that voting kicked off without the County Woman Representative to the National Assembly for Kisii County ballot box. I was not present when this happened. Personally I cannot confirm that the ballot box was not there. Our agent was present at Gusii Stadium. I do not know the streams at Gusii Stadium Polling Station. The agent at Gusii Station was John Orlale. He is the one who gave us the information. He did not state which stream was missing the box.”

138. Questioned by Mr. Omogeni (Sc) Learned Counsel for the 3rd Respondent, the Petitioner stated;

“At page 3, I talk of voting without ballot box for County Woman Representative to the National Assembly for Kisii County seat. My witness on this allegation is John Orlale. He will be the right person to answer on what happened there.”

139. Suffice to say that neither John Orlale nor any other witness was called to give evidence on the issue of the alleged missing ballot box. That complaint miserably fails.

140. On the issue of insecurity of ballot materials, the Petitioner alleges that ballot papers for the election of County Woman Representative to the National Assembly for Kisii County were spilled on the ground when being offloaded from a motor vehicle. No evidence whatsoever was availed in support of the allegation. The affidavit in support of the petition is completely silent on this ground.

141. Suffice it to note that on the issue of voting without a ballot box for the County Woman Representative to the National Assembly for Kisii County seat and the insecurity of elections materials, John Orlale and Andrew Oscar Nyagwoka swore affidavits respectively. The two(2) witnesses however did not testify. The affidavits are on record.

142. I have been urged by Counsel for the Petitioner not to ignore this evidence. Counsel has relied on **Rahman R vs. Local Government Election Court and Others [2016] EWHC 1280 (Admin)** where at page 13 of the judgment, *Justice Lloyd* succinctly defined the role of an election Court as follows;

“An election judge occupies an intermediate position between that of a civil court judge, whose function is (in general) to determine the issues as between the parties to the action being tried, and a coroner, whose function is an inquisitorial function to determine the cause of death and surrounding circumstances. A civil judge has little or no inquisitorial powers: he is trying an adversarial dispute between the parties. A coroner's inquest is not (or should not be) an adversarial process, although coroners usually permit interested parties to participate either in person or through legal representatives.”

143. I agree with the submissions on the scope and role of the electoral Court in these special proceedings. However, directions having been given that witnesses were to adopt their affidavit evidence and be cross-examined on it, the affidavit evidence on record but not tested is of little probative value.

144. At pre-trial, the directions were that parties were to testify through adoption and reliance on their affidavit evidence which evidence would be subjected to cross-examination. The 2 witnesses aforesaid were not availed to testify. The veracity of their evidence was not tested. The weight of that evidence is minimal.

145. Their allegations have been countered by corresponding evidence by the 1st, 2nd and 3rd Respondents. Without the testing of the evidence through cross-examination the resultant effect is the one found in **Section 3(4)** of the **Evidence Act** which provides;

“Section 3(4): A fact is not proved when it is neither proved nor disproved.”

146. On the alleged use of Kisii County Government employees by the 3rd Respondent to further her political interests, the Petitioner in paragraph 88 of his affidavit avers that the 3rd Respondent was required to refrain from any attempt to abuse a position of power, privilege or influence, including parental, patriarchal, state or traditional authority for political purposes.

147. It is urged that the 3rd respondent benefited from the appointment of Naftal Obwocha as the Chief Agent of ODM, the party on which the 3rd Respondent ran.

148. Having considered the evidence for and against this allegation, it is clear that;

1. The identity of Naftal Obwocha alleged to have been a Chief agent is not ascertained. The identity card number and his contact in the document annexed at page 145 of the petition is erased.
2. Part of the document is covered by an image of a palm. One cannot tell what information is obscured by the image of the palm.
3. The payslip annexed at page 146 of the petition is in respect of one Naftal Obwocha Orina. It is not established beyond peradventure that this is the same person as Naftal Obwocha named in the petition.
4. The said Naftal Obwocha's name is not found at page 144 of the petition (form 39C) where chief agents have signed. Indeed, the agents for ODM in that form are shown as Margaret Kerosi, Omari Alberto and Elijah Oenga.

149. In the premises the Petitioner falls short of proving who the alleged Naftal Obwocha was, whether he was a County employee, whether he was appointed as ODM chief agent, and what benefit if at all, the 3rd Respondent gained from such appointment.

150. Indeed, the said Naftal Obwocha is said to have committed an election offence. There is no evidence of a report of this to any authority and/or the police. The said Naftal is not enjoined in these proceedings as a Respondent.

151. Where the declared results are challenged on allegations of an electoral offence(s) it is imperative for the Petitioner to prove beyond reasonable doubt that the returned candidate or his agents working under his instructions committed the alleged offence. The **Court of Appeal** in the case of **Moses Wetangula vs. Musikari Kombo and Others [2014] eKLR** was categorical that where an election offence is alleged in an election petition the standard of proof is beyond reasonable doubt similar to that in criminal matters due to the quasi-criminal nature of the cause.

152. On the appointment of County Government employees to act as presiding officers, clerks, agents and observers, the Petitioner's case is that the 1st Respondent issued a memo directing its staff not to hire any government employee to conduct elections as either presiding officers, clerks, agents and observers. He annexes **Schedule 4** which is a list of County Government employees who allegedly acted as presiding and returning officers in the elections. This was engineered to favour the 3rd Respondent. This infringed on the terms of the memo aforesaid and was a rigging plan by the 3rd Respondent who was a sitting senator at the time of the election.

153. I have had occasion to look at the document marked Schedule 4. It is a list headed “List of Kisii County employees who were presiding officers, deputy presiding officers and support electoral trainers in(sic) 8th August 2017.” The list has columns giving information on name, personal number, designation, constituency in charge and polling station in charge.

154. No evidence of appointment of these persons by IEBC is offered, neither evidence of accreditation as observers. No payslips are attached to the list of employees. In paragraph 70 of the supporting

affidavit, the Petitioner avers that he has attached election forms signed by the listed officers marked “AN 11”. That annexure is not on record. In the absence of the said forms allegedly signed by these officers, evidence is lacking that even assuming that they were employees of the County Government, they participated in the election of 8th August, 2017 as officials of the 1st Respondent. Again it has not been established what positions they held at the County and that they were barred by any law to participate as officials in the election.

155. Schedule 4 attached to the petition remains unhelpful in that it is a document generated by the petitioner and nothing from that document connects any of the listed persons with participation in the elections of 8/8/2017. It is not signed nor is it on a letter head. It remains to be the Petitioner's own assertion backed by no evidence and therefore is of no evidential value.

156. In inexplicable circumstances, the Petitioner has in support of the petition deposed to a ground titled “Use of fraudulent forms” in paragraph 74 to 77 of the supporting affidavit. Of note is that that ground is not pleaded in the petition. Parties are bound by the pleadings and this deposition has no legal standing as it is not in support of any discernable pleading in the petition.

157. The grounds upon which an election is challenged ought to be contained in the petition (**Rule 8(1)(e)** of the **Elections (Parliamentary and County Elections) Petitions Rules**, and the facts to be relied on by the Petitioner set out in the affidavit in support of the petition (**Rule 8(4)(b)** of the **Elections (Parliamentary and County Elections) Petitions Rules**). This in essence means that the Petitioner's case or grouses against the election must be contained within the 4 corners of the petition and the evidence in support of the petition must be found within the affidavits that were filed in support of the petition. (see **Philip Osore Ogutu vs. Michael Onyura Aringo & 2 Others [2013] eKLR**).

158. I cite with approval the decision by *Kimondo J* in **Kakuta Hamisi vs. Peris Tobiko [2013] eKLR**;

“The motion by the Petitioner is fraught with serious procedural difficulties. A petition is a pleading. There are elementary rules of pleadings. For example, a party cannot expand the boundaries of pleadings to seek reliefs not prayed for; a party shall not lead evidence inconsistent with the pleading; and fundamentally, a Court shall not grant a relief not prayed for.....”

159. Even assuming for a moment that the same was pleaded, I have considered the evidence adduced. The Petitioner's case is that the form 39C used to declare the results of the election for the County Woman Representative to the National Assembly for Kisii County was fraudulent as it did not have security features. It is alleged that the same did not have security features that appear in other forms. The authenticity of the form is thus in doubt and the results are not credible.

160. This coming from the Petitioner is worthy of serious thought and interrogation. The Petitioner was the chief agent for Jubilee Party. He confirms he was present during the tallying exercise at the county tallying centre. He duly voluntarily signed the form 39C declaring the results.

161. Further the Petitioner has not given any evidence on what exactly the security features were and what law requires the said form to have the features. In any event, the statutory forms envisaged under **Regulation 79 and 83** of the **Elections (General Regulations) 2012** are as per the schedule to the regulations. There is no legal requirement that the same should have security features.

162. Having considered this allegation and the available evidence I come to the following conclusions.

163. Once a candidate or an agent voluntarily signs a statutory form declaring results which in effect means that he is in agreement with the results, any deficiencies in the form on which the results are written cannot be a basis to rescind the will of the people which is already expressed and acknowledged by the candidate or agent as such. The signing of the statutory form declaring results is conclusive proof of agreement with the details reflected and/or filled therein as a true reflection of the voters' choice. In my considered view, the allegation of lack of a security feature in the subject form becomes immaterial if

the results can be verified.

164. There is no better verification and validation of election results than the acknowledgement of the correctness of the declared results by a chief agent through the participation in the tallying of the results and appending signature recognizing the results. Such verification and validation becomes even more binding in a situation like the one before Court where the person validating the results is actually the Petitioner! He cannot be allowed to blow hot and cold over this issue.

165. If there was a problem with security features of the form 39C and which the Petitioner considered material, that is an issue that the Petitioner herein should have raised at the tallying centre before signing the form.

166. Allowing him to shift gears and change the goal posts at this belated stage would be a grave travesty of justice to the people of Kisii County whose will he has already acknowledged.

167. Notably, the Petitioner does not challenge the numbers in the declared results. I would be very reluctant to subvert the will of the people of Kisii County regarding their County Woman Representative to the National Assembly based on an afterthought on the part of the Petitioner.

168. It will be noted with benefit of hindsight that the Petitioner in the descriptive part of the petition refers to himself as a voter completely going mute on the fact that he was the chief agent of one of the major political players in the elections of 8/8/2017. This fact only comes out when he is cross-examined. It is not too far fetched to infer that the concealment of this important fact was deliberate and possibly aimed at cushioning him from his earlier acts binding his principal and opening an avenue for him to raise the issue like the one raised in respect of form 39C. It has not been shown how the lack of security features even if true (and which is not proved) affects the results herein. The sacred will of the people reflected in their choice at the ballot must be jealously insulated from trivial complaints.

169. Cognisant of the above, our parliament enacted **Section 83** of the **Elections Act** which provides;

“Section 83: 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.”

170. And finally for the meaning of the term “Affect the result of the election”, I rely on the case of **Mbowe vs. Eliufoo [1967] E.A. 240** where the Court stated;

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

171. In light of the evidence before this court and having considered the pleadings and submissions by Counsel, I come to the unhesitating conclusion that the Petitioner has not established any non-compliance with the Constitution and the law on the part of the 1st and 2nd Respondent in the conduct of the election for County Woman Representative to the National Assembly for Kisii County.

172. No irregularities or improprieties have been proved to vitiate the election and the outcome thereon. No commission of an election offence has been established.

COSTS

173. Section 84 of the **Elections Act** provides that the Court shall award costs of and incidental to a petition and such costs shall follow the cause. The Court has wide powers to determine costs under **Rule 36(1)** of the Rules. That Rule provides;

“Rule 36(1): The Court shall at the conclusion of the election petition make an order specifying-

(b) The total amount of costs payable and

(b) The person by and to whom the costs shall be paid.”

174. I have considered the nature and scope of the petition herein. I have considered Counsels submissions on costs. I place reliance on the decision in **Kalembe Ndile and Another vs. Patrick Musimba and Others [2013] eKLR** where the Court stated;

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

175. This petition generated a lot of interest from the parties. It was, however not complex and the issues were not convoluted. Taking into account the input of Counsel in terms of research, preparation of pleadings, preparations for trial and matters incidental thereto, I am of the considered view that a cap on instruction fee at Kshs. 2.5 million shall be fair and just recompense in costs awarded. Save to state that the costs for the 1st and 2nd Respondent shall be a global sum of Kshs. 2.5 million to both as they mounted a joint defence to the petition.

176. In view of the foregoing I make a finding that, the 3rd Respondent Hon. Janet Ong'era was validly elected and declared as the County Woman Representative to the National Assembly for Kisii County following the general elections held on 8th August, 2017.

177. The petition herein is dismissed in its entirety with costs to the Respondents.

178. A certificate of determination be issued forthwith to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly as per **Section 86(1)** of the **Elections Act**.

179. Costs capped at Kshs. 2.5 million for the 3rd Respondent and Kshs. 2.5 million jointly for the 1st and 2nd Respondents are awarded.

JUDGMENT SIGNED, DATED AND DELIVERED AT KISII THIS 26TH DAY OF FEBRUARY, 2018.

A. K. NDUNG'U

JUDGE

In the presence of:

No appearance for the 1st Petitioner

Ms Karanja for the 1st and 2nd Respondent

Mokua and Kaburi holding brief for Omogeni for the 3rd Respondent

N. Limo Court Assistant

A. K. NDUNG'U

JUDGE