



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

THE ELECTIONS ACT, 2011

ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)

PETITION RULES, 2017

ELECTION PETITION NUMBER 10 OF 2017

BETWEEN

NDWIGA STEVE MBOGO.....PEITITIONER

AND

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

PHILICE KAYIEMBA (THE RETURNING

OFFICER OF THE INDEPENDENT

ELECTORAL AND BOUNDARIES COMMISSION

STAREHE CONSTITUENCY.....2ND RESPONDENT

NJAGUA CHARLES KANYI.....3RD RESPONDENT

JUDGEMENT

1. The Petitioner, **NDWIGA STEVE MBOGO**, was a candidate for the position of Member of the National Assembly for **STAREHE CONSTITUENCY**. He had been nominated by the **ORANGE DEMOCRATIC MOVEMENT (ODM)**.
2. He has brought this petition against three (3) Respondents.
3. The 1st Respondent is the **INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC)**, which is an Independent Commission charged with the constitutional mandate and responsibility to conduct Elections in the Republic of Kenya.
4. The 2nd Respondent, **PHILICE KAYIEMBA**, was the Returning Officer for the Starehe Constituency.
5. The 3rd Respondent, **NJAGUA CHARLES KANYI**, was also a candidate for the position of Member of the National Assembly for Starehe Constituency. After the elections were concluded, the Returning Officer and the **IEBC** declared the 3rd Respondent as the duly elected Member of the National Assembly for Starehe Constituency.
6. However, the petitioner was dissatisfied with the results, and he therefore lodged this Petition in Court.
7. His case is that the **IEBC** and the Returning Officer had abdicated their role and duty, which was to protect and safeguard the sovereign will of the people of Starehe Constituency.

8. Those two respondents are said to have deliberately failed or neglected to act in accordance with the Constitution and the national legislation.

9. The petitioner asserted that the 1st and 2nd respondents had conducted the elections so badly, that the same was marred with irregularities to an extent that it did not matter who had won or who was declared the winner.

10. He further emphasized that the nature and extent of the flaws and irregularities had significantly affected the results, to an extent that the 1st and 2nd respondents could not accurately and verifiably determine the results which any of candidates got.

11. According to the petitioner, the following were the results that the Returning Officer declared on 10th August 2017;

CANDIDATE	TOTAL VALID VOTES
Getanga Thomas Makori Hamed	181
Kirati Rodha Mumu	939
Kwenya John Mwaniki	1,746
Mwangi Boniface	15,831
Ndwiga Steve Mbogo	38,292
Ng'ang'a David Wakahu	165
Njagua Charles Kanyi	61,266
Odero Analalava Moses	233

12. Those are the results cited by the petitioner in paragraph 22 of his Petition.

13. However, at paragraph 23 of the petition, the petitioner stated that the Returning Officer had, through an oral declaration of results, said that the petitioner and the 3rd respondent got 29,660 and 55,761 votes, respectively.

14. Thirdly, the results shown on the **IEBC** Portal were said to be as follows;

Petitioner	38,294
3rd Respondent	61,262

15. All the respondents denied the existence of 3 different sets of results. They said that the only results were those set out in paragraph 22 of the Petition.

16. Therefore, it would be expected that the petitioner would lead evidence to prove the existence of the other 2 sets of results.

17. Considering that the petitioner expressly stated in the petition that the Returning Officer had declared the results tabulated above, and that all witnesses confirmed that fact, I find that the said results were duly declared.

18. Secondly, the said results were entered onto the Form 35B, by the Returning Officer. The said entry was made at the tallying centre, in the presence of both the petitioner and the 3rd respondent.

19. Most significantly, after the results were entered onto the Form 35B, the petitioner's chief agent signed the Form. By appending his signature on the Form 35B, the petitioner's chief agent declared his acknowledgement of the results on that Form.

20. In contrast, the other Form 35B which was produced in evidence, by the petitioner, did not have the signature of either the Returning Officer or the petitioner's chief agent.

21. The source of that other Form 35B remains a mystery, and I find that it was neither authored by the Returning Officer nor used in the declaration of the results for the office of the Member of the National Assembly for Starehe Constituency.

22. As regards the petitioner's contention that a different set of results was posted on the **IEBC** Portal, I find that the petitioner failed to provide evidence from the alleged portal.

23. It therefore follows that the only evidence before the court was that the Returning Officer had declared the results tabulated above. In the event, it is those results which the petitioner is deemed to be dissatisfied with, and to therefore, be challenging through this Petition.

24. In relation to **NGARA WARD**, the information contained in the Form 35B was that there were 1,389 valid votes cast. However, the 3rd respondent was shown as having garnered 12,800 votes.

25. Obviously, as the petitioner correctly pointed out, it is not logical that although there were only 1,389 valid votes, the 3rd respondent got so many more votes.

26. In the circumstances, the petitioner reasoned that the numbers reflected on the Form 35B were inaccurate. His position is, therefore, that the Form 35B calls into question the validity of at least 12,800 votes from Ngara Ward.

27. The Returning Officer explained that there is a transposition error in the Form 35B for Ngara Ward. She added that the said transposition occurs automatically, when the Returning Officer keys in figures from the respective Forms 35A.

28. Once the process of entering figures onto the system is complete, the system is required to automatically add up the number of votes, and come up with totals.

29. In this case, a perusal of the Forms 35A, for the Ngara Ward reveals that the total number of votes cast was 19,839.

30. Therefore, I find that there was every possibility that the votes assigned to the 3rd respondent were accurate.

31. A closer examination of the results assigned to each of the candidates confirms that the number 1,389, which was shown on Form 35B was definitely an error because it was a major understatement of the actual votes cast.

32. I find that although there was an error, the same was neither intentional nor was it attributable to the negligence of the Returning Officer. I accept the explanation of the Returning Officer, that the error was simply one of transposition, and that it was caused, inexplicably, by the system.

33. More significantly, I find that the error did not occasion any prejudice to the petitioner.

34. Furthermore, the said error did not occasion any undue advantage to the 3rd respondent.

35. Accordingly, the error cannot a basis for the invalidation of the results which were declared by the returning officer.

36. I consider this to be an appropriate point at which to give a summary of the evidence tendered by the parties, and also to analyse the evidence in respect to each of the issues raised by the said parties.

37. **PW1, DR. NYANGASI ODUWO**, is a Medical Doctor by profession. He also holds a Diploma in Research Methods; a Masters Degree in Project Management and Planning; and another Masters Degree in Economic Policy and Analysis.

38. He testified that the petitioner had instructed him to scrutinize various Forms 35A. He scrutinized 181 Forms and found grave anomalies in 160 forms. He summarized the anomalies as follows;

“a) Forms 35As not bearing the Commission's official stamp;

b) Forms 35As not signed by the Presiding Officer and Deputy Presiding Officers;

c) Forms 35As not bearing names or signature of party agents, and without reasons therefore (sic!) from the Presiding Officer;

d) Presiding Officer signing for more than one polling station;

e) Duplicate Forms, etc;

f) Stuffing of ballot boxes”.

39. During his testimony, Dr. Oduwo told the court that he was engaged by the petitioner because of this expertise.

40. Although he said that 160 forms had anomalies, **PW1** only made available some 93 forms. And even out of the 93 forms, the witness conceded that many were duly stamped.

41. The Analysis Report prepared by **PW1** had some 16 polling stations which were not mentioned in his affidavit. That implies that the exhibit went beyond the scope of the evidence tendered by the witness.

42. **PW1** said that there was an “*Alternative Source Data*” which was a part of his analysis. Although he said that the “*Alternative Source Data*” was a part of his affidavit, the witness later conceded that it was not.

43. By providing an analysis based on material which was not made available to the court and to the other parties, the witness made it impossible for the court to verify the accuracy of the analysis.

44. **PW1** did concede that there were many instances when he made errors, such as;

a) stating that the Presiding Officer had not signed a Form 35A, when such form had been signed;

b) failing to provide the Forms 35B which he extracted results from e.g for Central Ward, for Landi-Mawe Ward; for Nairobi South Ward, Ngara Ward and Kariokor Ward.

45. Those errors rendered the Analysis unreliable.

46. Furthermore, the witness failed to give consideration to the results presented by the **IEBC**.

47. The witness could not vouch for the authenticity of the Forms 35A which he based his analysis on. That is because he allegedly got the forms from the petitioner, who, in turn, had obtained the forms from unidentified agents.

48. I also note that although **PW1** had conducted an analysis based on the Form 35B which the Returning Officer and the Petitioner’s Chief Agent had signed, the petitioner deliberately omitted that analysis from the evidence he tendered to the court.

49. Considering that I have already held that the signed Form 35B was the one which was used to declare the results, it follows that an analysis of forms which excluded the legitimate Form 35B renders such analysis of no probative value.

50. **PW2, NDWIGA STEVE MBOGO**, is the petitioner. On 8th August 2017 he vied for the position of Member of the National Assembly for Starehe Constituency. He was nominated by the Orange Democratic Party (**ODM**).

51. In his affidavit, **PW2** confirmed the results which were declared by the Returning Officer, as being those tabulated earlier in this judgement.

52. However, he was aggrieved by the declaration which was made by the returning officer.

53. He stated that he had issues with the voting, counting, tallying, collation and transmission of results.

54. In his view, the results which were declared had massive numerical discrepancies, which therefore affected the final results in a fundamental way.

55. The said view is premised on the “*detailed analysis of the said discrepancies as contained in Dr. Nyangasi Oduwo’s Affidavit*”.

56. Considering that the court has already held that the affidavit of Dr. Nyangasi Oduwo and the analysis attached to it are of no probative value, it follows that it cannot add value to the evidence of the petitioner.

57. The court noted that although the petitioner admitted that his Chief Agent, **LAWRENCE OKINYI OYUGI (PW3)**, signed the Form 35B, he said that **PW3** did so a week after the returning officer had declared the results.

58. When **PW3** testified, he said that he signed the Form 35B about 2 weeks after the returning officer had declared the results.

59. **PW3** was not forced to sign the said Form.

60. Elsewhere, **PW3** said that he signed the Form 35B, on the advice of a candidate of **ODM**.

61. If the petitioner and his Chief Agent were to be believed, regarding the contention that the latter signed the Form 35B long after the declaration of results, it would defy logic because it would imply that the chief agent signed a Form containing results which the petitioner was disputing, and he did so willingly, two weeks later! More interestingly, the chief agent was advised by an **ODM** candidate to sign the allegedly disputed results. I find myself unable to believe that improbable story.

62. During his testimony, the petitioner said that he;

a) did not give the names of any voters who were denied ballot papers because their biometrics were missing;

b) did not provide the names of any of his agents who were denied access to polling stations;

c) did not indicate any voter who was given more than one vote in respect of any particular elective position;

d) failed to name any of his agents who were denied the right to affix seals to ballot boxes at the polling stations where such agent had been assigned;

e) failed to identify any fake forms;

f) did not specify how the voting, collation and tallying of votes were not in accordance with the Constitution.

63. Considering that other witnesses give evidence to support the case set out in the petition, it would be expected that the said witnesses who were called by the petitioner would support his case. In the event, if the petitioner has made so many concessions in his case, it would follow that his witnesses would be lending support to that subdued case.

64. I am not suggesting that a petitioner or a plaintiff must have proof of all the elements of his case. Most times, the person who has moved the court would mount the foundation upon which his witnesses would lay the building bricks, which are in the nature of evidence.

65. If such building bricks give rise to a well constructed case, which fits onto the foundation laid by the claimant, the case would be successful.

66. A witness helps in building a successful case by giving evidence which is in tandem with the foundation, and which complements the claimant's case.

67. In this case, the petitioner said that some counter-foils of ballot papers were recovered at the Globe Cinema round-about.

68. A gentleman named **MICHAEL MUTUA** is the person who provided information to the petitioner, concerning the counter-foils. Mutua told the petitioner that the counterfoils were collected by street-children.

69. According to the petitioner, the counter-foils were recovered on 9th August 2017.

70. Meanwhile, the petitioner's Chief Agent (**PW3**) said that the counter-foils were recovered on 8th August 2017. His affidavit mentioned that it was a member of the public who tipped him off about the counter-foils. But in his oral testimony, he said that he was tipped-off by **MICHAEL MUTISO**, who was one of the petitioner's agents.

71. It is thus not clear about who recovered the counter-foils or the date when they were recovered.

72. And it is clear that whoever recovered the counter-foils did not testify in court. Accordingly, the evidence on the recovery of the counter-foils is not only disjointed, but it is also hearsay.

73. As regards the process of voting, the petitioner boldly declared that he did not have any problem with it.

74. And as regards the alleged duplication of Forms used by the **IEB C**, the petitioner withdrew the allegation.

75. Finally, the petitioner said that he was aware that if he or any of his agents desired the recount of votes, he or his said agents could have asked for the same. However, he made it clear that neither he nor his agents asked for the recount of votes at any polling station.

76. When the petitioner made a conscious decision not to seek the recount of votes, the finality of the results which were announced immediately after the conclusion of the process of counting, was affirmed.

77. In the case of **RAILA AMOLO ODINGA & ANOTHER Vs. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND 2 OTHERS, SCK PRESIDENTIAL PETITION No. 1 of 2017**, the Supreme Court quoted the following words with approval;

“It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters' will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character, using the ballot as the primary material, means, as it must, that the count there, is clothed with a finality not to be exposed to any risk of variation or subversion. It sounds ill that a contrary argument, that is so anathema and antithetical to integrity and accuracy should fall from the appellant's mouth”.

78. Neither the Presiding Officer nor the Returning Officer has any mandate to correct, vary or review any results which had been announced at each polling station.

79. Therefore, even assuming that the Returning Officer were to produce a document embodying results which were different from those that were arrived at the end of the counting of the votes, such subsequent document must be disregarded.

80. If the petitioner had shown the results from the **IEBC** portal, which he alleged were different from those that had been declared by the Returning Officer from the Forms 35A, which she had tallied, it is the results of the portal which would have to be disregarded.

81. In this case, the results declared by the Returning Officer were the same as those which were later gazetted.
82. **PW3, LAWRENCE OKINYI OYUGI**, was the petitioner's Chief Agent.
83. He testified that the petitioner's agents were denied entry into several polling stations. As a result of that, **PW3** said that there was no transparency in the voting, counting and tallying process.
84. As regards the voting process, the petitioner testified that he had no problem with it.
85. Secondly, the petitioner and his agents did not request for the recount of votes at any polling station. Therefore, as already stated herein, the petitioner and his agents are deemed to have been content with the counting of the votes.
86. But, in any event, **PW3** did concede, during cross-examination, that the petitioner or **ODM** or the **NASA** coalition had agents at most of the polling stations which he had originally alleged that the agents had been denied entry into.
87. Indeed, the agents were not only present, but they did sign the respective Forms 35A.
88. Accordingly, I find no evidence that the agents of the petitioner were denied entry into polling stations, as had been alleged by the petitioner.
89. **PW3** testified that ballot boxes were stuffed at various polling stations. In his affidavit, he cited Jamhuri High School (*which was the tallying centre*) and Juja Road Primary School.
90. He identified two (2) ballot boxes which were stuffed at the tallying centre. Those ballot boxes bore Serial Nos. 120123 and 12330, respectively.
91. However, when he was asked to reveal the polling stations from which those ballot boxes emanated, the witness said that he did not know.
92. The 2 ballot boxes were said to have been brought to the tallying centre in a "Government Vehicle", whose particulars were not noted by the witness.
93. As it is unknown where exactly the ballot boxes were from or what their contents were, it cannot be said that the same had any impact on the elections in issue.
94. In any event, when votes had been counted at the polling stations, and the results were already known, it would neither prejudice nor give an advantage to any of the candidates if ballot boxes were delivered to the tallying centre, containing material that was different from those already counted.
95. Meanwhile, as regards the alleged stuffing of ballot boxes at Juja Road Primary School, **PW3** confirmed that he did not witness it. Therefore, whatever this witness said in regard to Juja Road Primary School was inadmissible hearsay.
96. **PW4, MICHAEL NYAMWEYA MAKORI**, was an Agent for the Orange Democratic Movement (**ODM**) at Mariakani Primary School, Polling Station No.9.
97. He testified that the voting and the tallying processes went on well. However, when he asked to sign the Form 35A, he was told that another Agent had already signed.
98. The implication was that **PW4** was denied an opportunity to sign the Form 35A.
99. However, during cross-examination the witness confirmed that he did sign the Form 35A, as an Agent for the **UDP** Party. He made it clear that he personally wrote his name on the form, before signing it.
100. **PW4** explained that **ODM** had 2 agents at Polling Station No.9, at Mariakani Primary School. Therefore, it was his decision, he said, to let the other **ODM** Agent sign the Form 35A.
101. **PW4** was asked by the **UDP** Agent to sign on behalf of that party, and he did so.
102. Therefore, I find that there was a non-issue in the contention by **PW4**, that he did not sign the Form 35A on behalf of **ODM**.
103. If anything, when another **ODM** Agent signed the form, whilst **PW4** signed on behalf of **UDP** that can only be understood to imply that the two agents were satisfied with the counting of the votes.
104. **PW4** did testify that a vehicle arrived at the polling station No.5, ferrying three (3) ballot boxes, for the Presidential, Gubernatorial and the Member of National Assembly.
105. Upon witnessing that, **PW4** raised an alarm. However, he was allegedly attacked by 3 strong men, who silenced him.

106. Later, **PW4** discovered that those who attacked him were members of the “**SONKO RESCUE TEAM**”.

107. During cross-examination, **PW4** said that although he was beaten up, he neither reported to the police nor went to hospital.

108. It is noteworthy that in his affidavit, **PW4** had made reference to being attacked by **THREE STRONG MEN**. I believe that that reference was intended to relay the message about the intensity of the attack, which then silenced him.

109. It is thus surprising that **PW4** did not report the attack to the police. In all probability it is an incident which did not take place. I so find because the witness was completely uncertain about the time when the incident took place.

110. **PW4** confirmed that at Polling Station No.5, at Mariakani Primary School, the Form 35A was signed by the Agents for **NASA, ODM** and **Wiper**.

111. Surely, if there had been an incident in which 3 ballot boxes were brought to that polling station or to the tallying centre, giving rise to a scene where **PW4** was attacked and silenced, it would have been expected that the Agent for the petitioner would have challenged results that had been influenced by external factors. Instead, the Agents signed the Form 35A!

112. **PW4** said that by signing the Form 35A, he was verifying the results in it. He said that he was present when the votes were being counted, and that the form which he signed reflected the votes which had been counted.

113. In similar vein, it must be deemed that when the Agents in Polling Station No.5 at Mariakani Primary School, signed the Form 35A for that polling station, that constituted their acknowledgment of the accuracy of the results in that form.

114. It cannot have been accurate if it had been affected in any way, by the ballots which had been allegedly stuffed into the 3 ballot boxes.

115. On the issue of the bribery of the Agents of the petitioner, **PW4** testified that the **NASA** agent at Polling Station No. 5, at Mariakani Primary School phoned him, saying that some agents were being bribed.

116. **PW4** went to that polling station, where he found the agent who had called him. However, **PW4** was clear about the fact that the agent who had phoned him had not been bribed.

117. **PW4** did not identify the agents of the petitioner who had been bribed. Therefore, there is no evidence before the court, about the agents of the petitioner who were bribed.

118. Meanwhile, arising from the evidence of **PW4**, it would appear that there was some confusion amongst the agents of the petitioner. I say so because **PW4** insisted that the petitioner’s chief agent was **ANTON MWAMBURI**. He categorically denied that **PW3** was the chief agent.

119. On the other hand, both the petitioner and **PW3** insisted that the chief agent was **LAWRENCE OKINYI OYUGI**. I make this observation only as a matter of record. In my view, the confusion, if any, is a non-issue.

120. **PW5, JAMES MUHIA NDUATI**, testified that he was the agent for the petitioner at polling station No.9, at the Moi Avenue Primary School.

121. He testified that the voting was conducted smoothly.

122. However, before the votes were counted, the agents were asked to sign “*the results form*”.

123. **PW5** had been trained by **NASA**, that the Form 35A should be signed after votes had been counted.

124. **PW5** said that he was present throughout the process when the votes were being counted, and that he only signed the Form 35A after counting was completed.

125. Therefore, whether or not the presiding officer had requested agents to sign the Form 35A before votes were counted, **PW5** only signed after the votes had been counted.

126. During his testimony, **PW5** said that the results on the Form 35A were accurate.

127. He also confirmed that after the ballot boxes were sealed, he signed the Polling Day Diary to verify that he had witnessed the affixing of the seals.

128. It was the evidence of **PW5** that;

a) All persons who came to vote were given the opportunity to vote;

b) No voter was given more votes than provided for;

c) From 6.00 a.m until the counting was done, there was no disruption at polling station No. 9;

d) Although the Presiding Officer asked the agents to take a rest, they did so after the votes for M P had been counted. Therefore, the fact that the agents took a rest could not have affected the results.

129. From that testimony, it does appear that PW5 did not have much, if anything, to complain about.

130. **PW6, JOHN MWANIKI KWENYA**, was one of the candidates for the position of Member of the National Assembly, for Starehe Constituency.

131. In his affidavit, **PW6** described himself as having been an Independent Candidate.

132. However, when he was confronted with documents, during cross-examination, **PW6** admitted that he was never an Independent candidate. He was a candidate on the **MAENDELEO CHAP CHAP** ticket.

133. **PW6** explained that when he executed his affidavit, saying that he had been an Independent candidate, that was a typographical error.

134. Frankly, the difference, in the spelling of “*Maendeleo Chap Chap*” and “*Independent Candidate*” is so vast that the usage of one instead of the other cannot be attributable to a typographical error. To my mind, that description by **PW6** is a falsehood; nothing less.

135. And when a person begins his deposition with a falsehood, he does not engender confidence in the other parts of his affidavit.

136. As if that were not enough, **PW6** admitted that it was false to describe the Moi Avenue Primary School as a polling station; whereas there were between 18 and 21 polling stations within that school.

137. **PW6** talked about what allegedly took place at one of the polling station stations, saying that although he had earlier seen a “*huge bunch of ballot papers*” showing that he had got many votes, he was later shown to have got only 13 votes.

138. The insinuation was that his votes were reduced substantially.

139. And, in his view the person whose vote count was enhanced by the votes reduced from **PW6's** heap, was the 3rd respondent.

140. However, during cross-examination **PW6** admitted that he did not personally witness his votes being reduced, or varied, or being given to the 3rd respondent.

141. In effect, the assertions concerning the reduction of the votes for **PW6**, and the subsequent increase of the 3rd respondent's votes, could not have been proved by **PW6**, as his evidence in that regard was inadmissible hearsay.

142. A belief held by the witness cannot substitute the need for actual evidence, when a party wishes to persuade a trial court about facts which had transpired.

143. Another issue about which **PW6** testified is that he had been denied access to Moi Avenue Primary School. In contrast, **PW6** said that the 3rd respondent was granted access to all polling stations across Starehe Constituency.

144. On his part, the 3rd respondent said that after he had voted, he visited the following polling stations;

i) Vehicle Inspection Unit;

ii) River Bank;

iii) Kariokor; and

iv) Moi Avenue Primary School.

145. Thereafter, the 3rd respondent went back to his house.

146. As the petitioner's witness did not adduce evidence to show that the 3rd respondent visited all the polling stations, I can only conclude that when **PW6** said that the 3rd respondent had visited all polling stations, that was idle speculation.

147. **PW7, DOREEN ADHIAMBO OWINO**, is a student at the Kenya School of Law. She had downloaded video evidence from YouTube.

148. She did not produce the content, nor did she know the person who had produced it.

149. Apart from down-loading the videos, **PW7** transcribed the words uttered by those who were captured on film.

150. **PW8, KELVIN OFULA**, testified that he completed his studies for a Degree in Computer Science, in July 2017. By the time he was testifying, he was yet to graduate.
151. **PW7**, gave some videos to **PW8**, who then helped to transcribe the words spoken in the said videos.
152. After giving due consideration to the petitioner's application, for the admissibility of the video evidence, the court held that neither **PW7** nor **PW8** could produce them. Those two witnesses had not been the authors of the videos. The videos were, reportedly, recorded by **KTN** personnel.
153. Accordingly, as the petitioner had been unable to demonstrate that there was integrity in the processes needed to produce and to maintain the contents of the videos, the court held that the said videos were inadmissible in evidence.
154. Accordingly, the petitioner's case rested on the evidence tendered by six witnesses.
155. After the petitioner closed his case, the 1st and 2nd Respondents called two witnesses, whilst the 3rd Respondent called six witnesses.
156. **R1-RW1, PHILICE KAYIEMBA**, was the Returning Officer for Starehe Constituency. She said that the results for the constituency were declared by her, at the Tallying Centre, which was located at Jamhuri High School.
157. **R1-RW1** stated that the results tabulated in the petition are the very same ones which she declared. The same results were also appearing on the Form 35B which the petitioner had exhibited at page 499 of his petition.
158. The witness was emphatic that she never declared any other results.
159. It was the evidence of the Returning Officer that the elections were conducted in accordance with the law. However, she also conceded that there were some errors.
160. Nonetheless, her view was that the anomalies and numerical discrepancies were neither grave nor capable of fundamentally affecting the results.
161. An example of the numerical discrepancies was found in the results for Ngara Ward, where the 3rd respondent got about 12,800 votes yet the valid votes cast were 1,389.
162. In the petitioner's view, the Returning Officer was unable to explain that discrepancy. However, as I stated earlier herein, the Returning Officer explained that the error was simply one of transposition.
163. The results of the votes for each candidate remain unchanged. It is only when the system was automatically adding up the figures that the system came up with the erroneous figure for the valid votes cast.
164. On the issue of the failure by Presiding Officers to sign the Forms 35A, the Returning Officer admitted that that was wrong.
165. Similarly, the Returning Officer conceded that it was wrong for Presiding Officers to fail to stamp the Forms, after signing them.
166. Nonetheless, the Returning Officer attributed the failure to stamp the forms to the fact that the Presiding Officers were working under a lot of pressure on the day when elections were held.
167. In the case of **JAMES OMINGO MAGARA Vs MANSON ONYONGO NYAMWEYA & 2 OTHERS, CIVIL APPEAL No.8 of 2010** the court appreciated the fact that the Presiding Officers had a lot of work to do, and that they worked knowing;
- “...the impatience of the electorate to know the results of the voting”.**
168. Nonetheless, the Court of Appeal noted that;
- “The Returning Officer authenticates its validity and correctness by signing it”.**
169. In my understanding, the signature of the Returning Officer or of the Presiding Officer, provided a seal of validation of the results entered onto the Form.
170. But it is not unknown that petitioners sometimes question the results notwithstanding the fact that the Presiding Officer had signed the requisite Form.
171. Even in this case, the petitioner questioned the Form 35B, even though it had been duly signed by the Returning Officer.
172. The signature of the Presiding Officer cannot validate results which were wrong.

173. On the other hand, when the results are right, but the Presiding Officer had not signed the form, the results do not become wrong.

174. In this case, the agents of the petitioner signed many of the forms, including those which the Presiding Officers had not signed. By signing the said forms, the agents were affirming the correctness of the contents of the forms.

175. In my considered view, therefore, the petitioner cannot simply trash results which his agents had acknowledged as being correct.

176. The petitioner herein and his agents have confirmed that they never sought recounts of the votes. Some of the agents have expressly confirmed that the results in the Forms 35A were a true reflection of the results attained after votes were counted. In the circumstances, I find that the failure of some Presiding Officers to sign some Forms 35A did not render inaccurate, the results on those forms.

177. More importantly, the petitioner did not lead evidence to demonstrate that the results in any particular polling station, where the Presiding Officer had not signed the Forms 35A, were wrong.

178. In the case of **HENRY OKELLO NADIMO Vs IEBC & 2 OTHERS, (BUSIA) ELECTION PETITION No.2 of 2013** the Court pronounced itself thus;

“37. For those reasons, how the Agent carries out his duty, conducts himself, treats or is treated by the Polling Officials is important. An agent who accepts or acquiesces to an outcome but wishes to recant it must give plausible reasons for the change of heart. Where, at the hearing, an Agent raises complaints about the conduct of the Election, the Agent must be asked questions about the action taken by him or her to seek intervention when issues arose.

...

The point to be made is that the evidence of Agents can turn out to be crucial in aiding the Court to get a true impression of how an Election was managed and conducted”.

179. If the Presiding Officer had not signed the Form 35A, and so also the Agents, the Presiding Officer would be hard-pressed to persuade the court to accept his or her Form 35A.

180. But I reiterate that where there is other evidence which indicates that the petitioner, his or her Agents or even the Agents of other candidates endorsed the conduct of the elections or the results which were declared, the absence of the signature of the Presiding Officer would not, of itself, render invalid, the results so declared.

181. Meanwhile, the Returning Officer explained that in respect to the different positions for which voters cast their votes on the same day, the number of votes cast for each of the positions would ordinarily be the same. However, she also explained that in the event of stray or rejected votes, the numbers may be different from one position to another.

182. Eventually, however, when a tally of all the votes was done, the Returning Officer said that the Ballot Papers issued to voters should tally with the votes cast, plus the rejected and the stray votes.

183. Accordingly, I find that where there were some discrepancies in the number of votes cast for the candidates for the position of Member of National Assembly, as compared to any other positions, the petitioner has not demonstrated that such discrepancy brought into question the validity or the authenticity of the results which were declared.

184. As regards the use of **KIEMS** Kits, the petitioner submitted that some voters cast their votes without using the said **KIEMS** kits.

185. The Returning Officer had testified that all voters in Starehe Constituency used the **KIEMS** kits.

186. However, the Presiding Officer at Polling Station No. 4 of the **NSS F** Grounds (*opposite KCB Kipande House*) had, in the Form 35A commented thus;

“When we started voting in the morning KIEMS machine was still in Training Mode and some two voters voted which was not captured by the machine”.

187. The evidence disproved the testimony of the Returning Officer, to the extent that 2 persons voted without having their particulars captured by the **KIEMS** Kits.

188. The petitioner did not lead evidence to show that, other than those 2 people, there were voters who were not captured on the **KIEMS** Kits, even though they voted.

189. Therefore, I find that the returning officer was generally correct when she testified that in Starehe Constituency, voters used the **KIEMS** Kits. I so find because if only 2 persons did not utilize the **KIEMS** Kits, that would have no more than a nominal impact, if any, on the final results of the elections for that constituency.

190. **R1-RW2, FRANKLINE GATHUITA KONDO**, was the Presiding Officer at the Polling Station No. 9, at the Moi Avenue Primary School.

191. He confirmed that when **IEBC** trained the presiding officers, they were told that they should sign all the Forms 35A. He also confirmed that the Presiding Officers were supposed to stamp and to date the Forms.

192. However, **R1-RW2** signed the Form 35A and stamped it, but he did not date it.

193. Of course, the failure to date the Form was an omission on the part of the presiding officer.

194. However, it is noted that the Form 35A in issue, was duly signed by the **NASA** Agent, the Jubilee Agent and the Agent for Maendeleo Chap Chap.

195. In the circumstances, I find that the failure to date the Form 35A was a minor infraction of the Regulations governing elections. It did not have any impact on the results which had been written in the form.

196. On the issue of the Polling Day Diaries, **R1-RW2** conceded that the Agents of the parties and the candidates did not sign the same in a logical manner, in terms of time.

197. In other words, if the Agent who signed the diary first, indicated that he signed at 6.00 a.m, it would be logical for the Agent who signed after him to sign after 6.00 a.m.

198. However, in this instance the times written by Agents who were lower on the Form, were earlier than that of Agents who were higher up on the Form.

199. The presiding officer did not explain why the Agents entered the seemingly illogical sequence of the timings when each signed the diary. The presiding officer said that his role was simply to direct the Agents to the page on which the Agents were to sign. In effect, the presiding officer was not responsible for ensuring that the Agent indicated the exact time when the Agent arrived at the polling station; that is his view.

200. However, I think that that is not entirely correct. I say so because the Polling Day Diary is supposed to be a true record of what transpires at the polling station. Therefore, if it is to be a legitimate record of the happenings at the polling station, it should reflect the actual times when things did take place. For example, the time when the polling station opens and the time when it closes, are important.

201. Therefore, when the Agents do sign the Diary, it is necessary for the presiding officer to take an interest in ensuring that the information about such an issue as to the time when the Agent arrived, is recorded accurately.

202. In this case the presiding officer said that he had left the responsibility to his deputy, to handle the Agents upon their arrival. Even when the responsibility was delegated, the presiding officer remained ultimately responsible, but in this case he did not discharge that responsibility.

203. Nonetheless, the order in which the Agents arrived at the particular polling station (*No. 9 at Moi Avenue Primary School*), has not been shown to have had any impact on the results.

204. **R3-RW1, EVANS KYALO**, was the Chief Agent for the 3rd respondent.

205. He said that the role of the Chief Agent was to ensure that Agents got to their designated polling stations on time. He also said that the Chief Agent must be at the tallying centre, during the tallying process.

206. In this case, he said that he was at the tallying centre all through the time when tallying was going on.

207. Although he did not sign the Form 35B, the witness said that he agreed with its contents. He added that he did not witness any other results, separate from those declared by the Returning Officer.

208. **R3-RW2, CHARLES KANYI NJAGUA**, was the candidate who was declared by the Returning Officer, as the duly elected Member of the National Assembly for Starehe Constituency.

209. He said that the results were only declared at the tallying centre, after the results had come in from all the polling stations.

210. In his opinion, elections were verifiable if it can be verified how the results were reached.

211. He said that elections were accountable if the results can be traced from the start, to the final tally.

212. And he added that elections were transparent when there was nothing to hide.

213. If the elections could be relied upon, he said that that renders them credible.

214. It was suggested to him that because he had worked as a Director of **NACADA** prior to the elections, he had reason to worry about his security.

215. I believe that the purpose and intent of that line of questioning was to try and demonstrate that the 3rd respondent had reason to arm himself during the elections.

216. However, the 3rd respondent said that he had no reason to worry about his security because, as a Director of **NACADA**, he was not fighting drug addicts. He was only encouraging the youth to avoid drugs.

217. It is significant that the petitioner did not suggest to the 3rd respondent that he had attacked the petitioner.

218. Having not given to the 3rd respondent an opportunity to respond to the allegations of the alleged assault, I deem the petitioner to have abandoned the allegations in that regard.

219. At any rate, even if the allegations were not abandoned, I find that the petitioner did not adduce any evidence to prove that the 3rd respondent, either personally or by proxy, assaulted the petitioner.

220. **R3-RW3, ARON NZOKI KAMAU**, was an Agent for Jubilee party, as well as an Agent for the 3rd respondent. He was responsible for the 30 Agents at Landi-Mawe. Therefore, the witness was not inside any particular polling station. But whenever a designated Agent left a polling station, to use the washrooms, **R3-RW3** ensured that another Agent stood in for him or her.

221. **R3-RW4, ZABLON NDUATI MUGO**, was the Chief Agent for Jubilee. He was also serving the 3rd respondent, as the latter was a candidate on the Jubilee ticket.

222. He noted that in very many polling stations the Agents for either **NASA**, (*the coalition*) or of **ANC** and **ODM** (constituent parties within **NASA**), had signed the respective **FORMs 35A**.

223. **R3-RW5, ERASTUS THUKU CHARAGU**, was an agent for Jubilee party, at the Moi Avenue Primary School. As he was overall-in-charge at that polling centre, the witness did not stick to any particular polling station. However, he did stand-in for particular Agents of Jubilee, when such Agent needed a break.

224. During the counting of votes, he was present. And he testified that the results which were written on the Form 35A, were the correct results as declared, for Polling Station No.9, at Moi Avenue primary School.

225. **R3-RW6, ROBERT MWANIKI NJIRU**, was an Agent for the 3rd Respondent.

226. After votes had been counted, the witness was present when the Ballot Boxes were sealed, using five (5) seals.

227. Mwaniki Njiru signed the Form 35A on behalf of Jubilee, whilst **CAMLUS OMONDI** signed on behalf of **ODM**. They were both Agents at Polling Station No.9, at Mariakani Primary School.

228. That was an attestation to the accuracy of the results, as affirmed by Jubilee and **ODM**.

229. The petitioner submitted that the electoral materials were not secured by the 1st and 2nd Respondents. That submission was based on the alleged discovery of 2 Ballot boxes at the Odeon Cinema Roundabout.

230. I have, earlier herein, already discounted the evidence upon which that submission was based.

231. The petitioner further submitted that because the electoral materials were not securely kept by the 1st and 2nd Respondents, there was a real likelihood of ballot stuffing.

232. I find myself unable to correlate the alleged insecure manner of storing ballot boxes to the stuffing of the same.

233. In any event, the petitioner had indicated that stuffing of ballot boxes happened at Juja Road Primary School and at the tallying centre.

234. I have already analysed the evidence in that respect and found the same to be completely wanting.

235. In his submissions, the petitioner asserted that the Forms 35A were signed by Agents who were fictitious to the parliamentary elections.

236. First, the petition did not ever allude to the presence of persons perceived to have been fictitious to the parliamentary elections.

237. Secondly, the petitioner has not led evidence to demonstrate that the Agents who signed the Forms 35A were fictitious, as alleged or at all.

238. Meanwhile, as regards the submission that the 1st and 2nd respondents made “*irregular and unlawful returns of the election, inter alia, by declaring results in duplicate forms...*”

I note that PW1 had withdrawn all his assertions on the issue of duplicate forms. Later, the petitioner confirmed the withdrawal of that

allegation. Therefore, the final submissions based on an assertion that had been withdrawn has no legs to stand on.

239. Having given careful consideration to all the evidence tendered, I have come to the conclusion that the elections were generally in accordance with the provisions of the Constitution and also of the statutes governing elections in Kenya.

240. The voting, the counting of votes, the tallying of the results from the polling stations and the declaration of the results, by the Returning Officer, were all done in accordance with the law.

241. I have found no evidence of the 1st and 2nd Respondents failing to act as neutral and impartial umpires in the elections.

242. Furthermore, the contention that the results were unlawfully and illegally transmitted from the polling stations to the Tallying Centre, is not borne out from the evidence tendered by the Petitioner.

243. The electoral process is not perfect. There are bound to be some errors either of omission or of commission. When such errors occur, it can be said that the election was, to that extent, non-compliant with the law.

244. However, it is now well settled that the results of an election can only be reversed if the said election was affected by the cumulative effect of the irregularities. As the Supreme Court held in the case of **PETER MUNYA Vs IEBC & OTHERS SC APPEAL No. 23 of 2014**;

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

245. In this case the petitioner did not satisfy the evidentiary and legal burden of proof, that the elections were not conducted in accordance with the law.

246. It therefore follows that the 3rd respondent was validly elected as the Member of Parliament for Starehe Constituency.

247. The petition is dismissed in its entirety, and the petitioner is ordered to pay costs to all the Respondents.

248. The costs to the 1st and 2nd Respondents are capped at Kshs. 5.0 (Five) Million; and the costs to the 3rd Respondent are also capped at Kshs. 5.0 (Five) Million.

DATED, SIGNED and DELIVERED at NAIROBI this 26th day of February 2018.

FRED A. OCHIENG

JUDGE

Judgement read in open court in the presence of

Miss Maumo, Onyango & Ochieng for the Petitioner

T.T. Tiego for the 1st Respondent

T.T. Tiego for the 2nd Respondent

Okatch for the 3rd Respondent