



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT SIAYA**

**ELECTION PETITION NO. 3 OF 2017**

**HON. ENG. NICHOLAS O. GUMBO.....PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**RUTH K. KULUNDU.....2<sup>ND</sup> RESPONDENT**

**H.E. CORNEL RASANGA AMOT.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner was one of the candidates in the Siaya County gubernatorial election held on 8<sup>th</sup> August 2017. He was declared as second with 179,368 votes while the 3<sup>rd</sup> respondent was declared the winner with 198,889 votes. The other candidates were Daniel Salim Ogonga Akello 1226 votes, Omoro Daniel Odhiambo 1348 votes and Noah Migudo Winja 787 votes. The petitioner being dissatisfied with the manner in which the 1<sup>st</sup> and 2<sup>nd</sup> respondents conducted the election and their subsequent declaration of the 3<sup>rd</sup> respondent as the winner filed this petition.

2. The petition filed on 7<sup>th</sup> September 2017 is premised on the following grounds:

**a. The 1<sup>st</sup> and 2<sup>nd</sup> respondents conducted the election in a manner substantially inconsistent with the Constitution and the Elections Act and therefore the election was not free and fair.**

**b. That the election was so badly conducted that it was marred with many irregularities that affected the outcome.**

**c. That the counting and transmission of results was not open, transparent, credible, accurate, verifiable, free and fair in that;**

**i. The officials of the 1<sup>st</sup> respondent did not announce the candidate in whose favour the vote was cast.**

**ii. Did not display the ballot paper to agents.**

**iii. Did not count the petitioner's votes accurately.**

**iv. Did not isolate votes cast for the candidates but instead mixed those of the petitioner with those of the 3<sup>rd</sup> respondent.**

**v. Counted votes discreetly and applied a fraudulent counting scheme hence diminishing the petitioner's votes by 2033 votes and increasing those of the 3<sup>rd</sup> respondent by 3949 votes.**

**vi. Altered, manipulated or doctored results hence the votes in the Forms 37A and Forms 37B did not accurately reflect what was garnered by the candidates and announced at the polling stations. Further that the results in Form 37C which was used to make the declaration was in contradiction with the various Forms 37B and was neither**

accurate nor verifiable as they were either completed or were not signed by the returning officers in the handing over section.

vii. Reduced his votes and added them to the 3<sup>rd</sup> respondent in 151 polling stations in Alego Usonga Constituency.

viii. Did not use Form 33.

ix. Allowed more people than were registered to vote in 50 polling stations in Alego Usonga Constituency.

x. Did not electronically send results to the Constituency and County tallying centre for purposes of verification.

d. That the presiding officers allowed a six piece pattern of voting to the detriment of Independent candidates.

e. That the 3<sup>rd</sup> respondent procured votes through undue influence and bribery by the use of relief food to woo voters.

f. That the 3<sup>rd</sup> respondent violated Section 9 of the Elections act by using county resources such as vehicles and staff during the campaigns.

g. That the 3<sup>rd</sup> respondent used a smear campaign against the petitioner who was an Independent candidate portraying him as a Jubilee party mole and hence a traitor and an adversary of the Luo people. Further, portraying that he had obtained his campaign finances through questionable sources including enemies of the Luo people and that a vote contrary to the six piece was a betrayal of the presidential candidature of the de facto Luo leader hence misleading the voters and intimidating them not to vote for the petitioner.

h. That the Returning Officer for Gem Constituency was conflicted and openly biased as he engaged in active business with the 3<sup>rd</sup> respondent and participated in various of his activities and that as a result the said returning officer manipulated the appointment of presiding officers, their deputies and polling clerks who conspired and conferred undue favouritism to the 3<sup>rd</sup> respondent. As a result most of the votes obtained by the 3<sup>rd</sup> respondent in Gem Constituency were procured through undue influence and favouritism.

i. That the 1<sup>st</sup> and 2<sup>nd</sup> respondents declared the 3<sup>rd</sup> respondent as the winner of the election notwithstanding that he did not receive the greatest number of valid votes cast and this court should find the petitioner obtained the highest votes and declare him as the validly elected Governor of Siaya County.

j. That this court should therefore make a declaration that the 3<sup>rd</sup> respondent was not validly elected as the Governor and rescind the certificate issued in his favour and order afresh election.

2. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a joint response in which they stated that they stated that this election was conducted in a free, fair, credible, transparent, accurate and verifiable manner as stipulated in the Constitution; that the 3<sup>rd</sup> respondent was on 10<sup>th</sup> August 2017 lawfully declared the winner with 198,889 votes against the petitioner's 179,368 votes as captured in Form 37C. The 1<sup>st</sup> and 2<sup>nd</sup> respondents denied that any returning officer, presiding officer or clerk was biased. They also deny that campaigning went on at the polling stations and contend further that no agent was denied entry into the polling stations. They state that the agents in fact signed the Forms 37A and Form 37B after announcement of the results which signifies they were satisfied with the process and the allegation of illegality in the vote counting is therefore an afterthought. The 1<sup>st</sup> and 2<sup>nd</sup> respondents further contend that the results entered by the Presiding Officers in Form 37A which is the primary document were a true reflection of what was announced and was used to make Form 37B and the Forms 37B therefore accurately reflect the count of the votes for each candidate. They deny that there was a vote adjustment and manipulation of votes in the 151 polling stations as alleged. They admit there were alterations in some of the forms but state they were few and that their intent was to correct clerical mistakes made by the presiding officers due to oversight. They aver that given the working conditions and pressure it was human for such errors to occur and that the same cut across board but with minimal effect on the final tally. They attribute the addition of 3,949 votes to the 3<sup>rd</sup> respondent to an error where his votes in Pala kobong Polling Station were entered in Form 37B as 3090 instead of 309 as in Form 37A. They contend that even were the 2033 votes, arising from that error, added to the petitioner the final result would not change. In regard to Form 37C it is their contention that the same is a true reflection of the results in Forms 37B save for a few typographical errors. They dispute that any of the results therein are fictitious.

3. In regard to Alego Usonga they explain that an error occurred when the Returning Officer inadvertently entered the results of Bukhoba Polling Station and Uwasi Polling Station at the bottom of the template having omitted to enter them at the beginning and the 2<sup>nd</sup> respondent not being privy to the error proceeded to enter the results in Form 37C as pre-printed therefore giving the results of some polling stations to other polling stations. They explain that although this gave the impression of more than 100% voting in some polling stations that was not the case. They state that the error did not change the final tally and categorically deny that more people voted than were registered or that there were polling stations where voters were given more than one ballot paper as alleged by the petitioner.

Regarding the forms the 1<sup>st</sup> and 2<sup>nd</sup> respondents' respond that the same were authenticated by the 2<sup>nd</sup> respondent signing the taking over section and urge this court to note that other than the failure to complete the handing over section properly the results in the Forms 37B are themselves not challenged. They further state that physical delivery of form 37B is anchored in **Regulation 83(1)(h) of THE ELECTIONS (GENERAL)(AMENDMENT) REGULATIONS** and was therefore lawful.

4. As for bribery, six piece and the smear campaign their contention is that as no reports of the same were made the same could not have

occurred.

In her replying affidavit sworn on 23<sup>rd</sup> September 2017 the 2<sup>nd</sup> respondent refers to what she describes as similar chronological sequence of events and alleged malpractices in the affidavits of the petitioner's sub county agents and deposes that these give an indication that the allegations therein are not true and they should be disregarded. She deposes that the elections were free and fair and that she executed her mandate moral and Constitutional to uphold the will of the people without fear and favour. She also deposes that the petitioner has not presented substantial evidence to invalidate this election and the petition ought to be dismissed.

5. On his part the 3<sup>rd</sup> respondent denies all the averments in the petition and the supporting affidavit. He describes the allegations levelled against the 1<sup>st</sup> and 2<sup>nd</sup> respondents as an afterthought as they were never raised or reported during the election. He states that the irregularities pointed out by the petitioner in the tallying and completion of forms was minimal and that they did not affect the result. He disputes that votes were reduced from the petitioner's tally and added to his and points out that the petitioner did not give names of polling stations where that was done. Regarding transmission it is his contention that the failure to send the results electronically cannot without more be a ground to invalidate this election. He also denies holding a smear campaign against the petitioner and states that to the contrary it is the petitioner and one Jakoyo Midiwo the aspirant in Gem Constituency that adopted a campaign strategy of propaganda and character assassination by calling him a thief in all their rallies. He further states that the six piece was a campaign strategy adopted by his party, ODM, to get votes for its candidates in all six positions in the election as it was entitled to but was not used to put pressure on the voters or to label the petitioner a traitor. He disputed that the strategy was unlawful. The 3<sup>rd</sup> respondent also denied that he used his incumbency as Governor to use the county finances and staff in his campaign. He contended that the distribution of relief food was a programme mooted and budgeted for by the County long before the campaigns begun and that the funds used were from the County and were approved by the County Assembly. He stated his role in the programme only involved launching or flagging off the programme. In regard to the Returning Officer for Gem he denied he had any personal relations with him and described the petitioner's allegations as a desperate attempt to drag him into matters of government contracts which he is not privy to. He further stated that those allegations were an afterthought otherwise they should have been reported prior to the election. He contended that the petitioner having anchored his petition on alleged irregularities and noncompliance with the law his prayer that he be declared as validly elected cannot in any event hold and this petition should be dismissed with costs.

Determination

6. The jurisdiction of this court in this matter is derived from Section 75 of the Elections Act which states:

**“75 County election petitions**

**(1) A question as to the validity of an election of a county governor shall be determined by the High Court within the county or nearest to the county.**

**(1A).....**

**(2) A question under subsection (1) shall be heard and determined within six months of the date of lodging the petition.**

**(3) In any proceedings brought under this section, a court may grant appropriate relief, including-**

**(a) a declaration of whether or not the candidate whose election is questioned was validly elected;**

**(b) a declaration of which candidate was validly elected; or**

**(c) an order as to whether a fresh election will be held or not.**

**(4).....”**

7. The above notwithstanding Section 83 of the Elections Act states:

“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.”

8. In effect in determining this petition this court must weigh the facts and evidence presented by the petitioner against the provisions of Section 83 above as it is the only measure by which it can invalidate this election. In my view not only does the provision recognise that no election is perfect but it also guards against the judge usurping the will of the people.

9. The purport of Section 83 of the Elections Act has been the subject of discussion in many election petitions but nowhere has it been clearer than in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR** where the Supreme Court stated:

“216. It is clear to us that an election should be conducted substantially with 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 Act, 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 in accordance with the principles of the Constitution and the Elections Act, then such election is not to be invalidated only on grounds 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 or administrative irregularities and other errors occasioned by human imperfection are not enough, by and of themselves, to vitiate an election...”

10. The Supreme Court reiterated this interpretation in **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 4 Others & Attorney General & Another Election Petition No. 1 of 2017** and stated:

“[209] therefore, while we agree with the two Lord Justices in the Morgan v Simpson case that the two limbs should be applied disjunctively, we would, on our part, not take Lord Stephenson’ route that even trivial breaches of the law should void an election. That is not realistic. It is a global truism that no conduct of any election can be perfect. We will also go a step further and add that even though the word “substantially” is not in our section, we would infer it in the words “if it appears” in that section. That expression in our view requires that, before vitiating it, the court should, looking at the conduct of the whole election, be satisfied that it substantially breached the principles in the Constitution, the Elections Act and other electoral law. To be voided under the first limb, the election should be what Lord Stephenson called “*a sham or travesty of an election*” or what Prof. Ekirikubinza refers to as “*a spurious imitation of what elections should be*”.”

11. It is a canon of the law of evidence that he who alleges must prove. It is no different in election petitions and in this petition the burden of proof lies with the petitioner. It is only once he has discharged that burden that the respondents can be expected to rebut his allegations. In **Raila Amolo Odinga & Another EP 1 of 2017** (supra) it was held:

“[131] Thus a petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds{49} “to the satisfaction of the court.” {50} That is fixed at the onset of the trial and unless circumstances change it remains unchanged....

[132].....

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

12. As for the standard of proof it is now settled that it is “**higher than the balance of probabilities but lower than beyond reasonable doubt and that where allegations of criminal or quasi criminal nature are made, it is beyond reasonable doubt.**”(See **Raila Amolo Odinga & Another EP No.1/2017**(supra)-paragraph 152).

13. It is with all the foregoing principles in mind that this court now sets out to determine the following issues, which though filed separately were agreed between the petitioner and the 3<sup>rd</sup> respondent:-

**a) Whether the 2017 election for the position of Governor, Siaya County was conducted in accordance with the Principles laid down in the Constitution, the Elections Act and the Regulations made thereunder.**

**b) Whether there were illegalities, improprieties and/or irregularities committed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, in the conduct of the 2017 election for the position of Governor, Siaya County.**

**c) If the answer to issue No. 2 is in the affirmative, did such irregularities, improprieties or illegalities affect the outcome of the election?**

**d) Whether the 3<sup>rd</sup> Respondent garnered the highest number of valid votes cast during the Gubernatorial Elections for Siaya County held on the 8<sup>th</sup> day of August 2017.**

**e) Did the 2<sup>nd</sup> Respondent validly declare the 3<sup>rd</sup> Respondent as the duly elected Governor of Siaya County pursuant to the elections conducted on 8<sup>th</sup> August 2017?**

**f) Whether the declaration of the 3<sup>rd</sup> Respondent as the duly elected Governor Siaya County was founded on lawful and valid statutory Forms?**

**g) Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein committed electoral offences and if so, what sanctions should the Honourable Court decree and/or make?**

**h) Is the Petitioner entitled to any of the prayers sought in this petition?**

**i) Who pays the costs of this Petition?**

**a) Whether this election was conducted in accordance with the principles laid down in the Constitution, the Elections Act and Regulations made thereunder.**

14. The constitutional principles adverted to above are found in Articles 1(2), 38(2), 81, 82 and 86 of the Constitution. In summary those Articles recognize the sovereignty of the people and protect the people's right to free and fair elections that are regular, by secret ballot, free from violence, intimidation, improper influence or corruption, conducted by an independent body and administered in an impartial, neutral, efficient, accurate and accountable manner. The Constitution also requires that voting be simple, verifiable, secure and transparent and that after the voting the votes are counted, tabulated and the results announced promptly at each polling station and further that the results from the polling stations are openly and accurately collated and promptly announced by the returning officer. These constitutional principles are given effect through the Elections Act and Regulations, the Election Offences Act and the Independent Electoral and Boundaries Commission Act.

15. The petitioner and his Counsel contend that this election did not meet any of the principles set out above as the 1<sup>st</sup> and 2<sup>nd</sup> respondent abdicated their constitutional mandate and themselves occasioned many illegalities and irregularities in the conduct of the election while the 3<sup>rd</sup> respondent involved himself in conduct that compromised the election. It is however noteworthy that neither the petitioner nor any of his witnesses impugn the actual voting. Maxwell Israel Oduor (PW5) and George Oduol Owino (PW6) were the petitioner's agents and therefore witnessed the voting. Both gave voting a clean bill of health. Even Phillip Jalango (PW3) confessed to this court that he did not receive any negative report concerning the voting from their agents. That being the case this court can conclusively determine that voting was conducted in accordance with the principles laid down in the Constitution and the written law. However, this court appreciates that an election is never complete until the votes are counted, collated, tallied and a declaration of the winner made. Under Article 86 of the Constitution it is mandatory that the counting, tabulation and collation of votes be done openly and accurately. In my view the gravamen of this petition is the manner in which the 1<sup>st</sup> and 2<sup>nd</sup> respondents tabulated and collated the votes after the close of polling. There is a separate issue regarding illegalities and irregularities and I shall determine the issue of counting, collation and tallying of votes under that head. The petitioner also made several allegations against the 3<sup>rd</sup> respondent which I shall consider when I determine the issue whether the 2<sup>nd</sup> and 3<sup>rd</sup> respondent committed offences under Section 9 of the Election Offences Act.

16. For now, permit me to say that those who conduct elections are required to be neutral, independent and impartial. However it is the petitioner's case that the returning officer for Gem Constituency was biased and conflicted and for that reason the outcome of the election in that constituency was not free and fair. To support that allegation he produced documents of tenders awarded by the County Government of Siaya to a company in which the returning officer is a co-director and a letter dated 2<sup>nd</sup> August 2017 from one Booker Ngesa accusing the returning officer of impropriety. However it is my finding that the award of tenders to that company does not of itself prove bias and conflict of interest the reason being that it is the position in law that a company is separate from its directors. The petitioner ought to have gone further to prove that the awards were influenced or orchestrated by the 3<sup>rd</sup> respondent due to the returning officer's directorship or that the returning officer had personal dealings with the 3<sup>rd</sup> respondent. There was no such evidence. Moreover the petitioner did not adduce even one incident that can convince this court that the returning officer gave the 3<sup>rd</sup> respondent undue advantage in this election. This is not a matter to be treated lightly as it is an election offence under **Section 6(k) and (l) of the Election Offences Act**. It behoved the petitioner to prove the allegation beyond reasonable doubt.

17. The other allegation of bias was made by Maxwell Israel Oduor (PW5), an agent at Dibuoro Primary School Polling Station 3, who stated that the presiding officer and his deputy were evidently biased in favour of the Orange Democratic Party and gave undue advantage to the 3<sup>rd</sup> respondent. At paragraph 10 and 11 of his affidavit (page 187 of the petition) he deposes that the presiding officer turned a blind eye and took no action against the Member of County Assembly who stuffed the ballot box. It would not only be a serious dereliction of duty but a criminal offence under Section 6(m) of the Election Offences Act for an election official not to prevent or report the commission of an electoral offence as PW5 alleges happened in Dibuoro and PW5 ought therefore to have adduced cogent evidence of his allegations. Instead he treated this court to very inconsistent evidence some of which amounted to no more than hearsay. My finding on this issue is that the election was by and large held in accordance with the principles laid down in the Constitution.

**b) Whether there were illegalities, improprieties and/or irregularities committed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the conduct of this election.**

18. It is the petitioner's contention that the 1<sup>st</sup> and 2<sup>nd</sup> respondents committed several illegalities, irregularities and improprieties starting from counting of votes at the polling stations, in the announcement of the results, failure to transmit the results to the constituency tallying centres, the tabulation of the results, tallying at the County tallying centre and the subsequent declaration. He alleges that as a result the counting, tallying and transmission of the results was not open, transparent, credible, accurate, verifiable, free and fair. He gives the particulars of the illegalities and irregularities at paragraph 17 to 29 of the petition. The procedure for counting, tallying and declaration of results is found in **Regulations 73 to 87 of the ELECTIONS (GENERAL) REGULATIONS, 2012**. **Regulation 74** provides for those to attend the counting, **Regulation 75** the sequence of counting and **Regulation 76** sets out a step by step procedure of how the counting should be done. Regulation 76 requires the presiding officer to pour the votes onto the counting table or any other facility provided, to cause to be counted the votes received by each candidate and to record the total number of votes cast in favour of each candidate. The presiding officer must then announce the candidate in whose favour a vote is cast, display it to the candidates or agents present sufficiently for them to ascertain and then place it in the place provided for that candidate. Under **Sub regulation (3)** the count must thereafter be entered in **Form 33**. If any votes are disputed the presiding officer makes a decision. Thereafter the presiding officer announces the results and then requests the candidates or agents to sign the declaration in this case Form 37A. He then delivers the results and other election materials to the returning officer. However **Regulation 82(1)** requires that before leaving the polling station the presiding officer shall submit the results in electronic form to the returning officer. The court heard that in this election "**submitting the results in electronic form**" meant taking a photograph of the physical Form 37A using the KIEMS kit and sending it to the returning officer through the same kit.

19. The petitioner's contention is that the above regulations were violated as during the counting the officials of the 1<sup>st</sup> respondent did not announce the candidate in whose favour the vote was cast, did not display the ballot paper to agents, did not use form 33, did not isolate votes for each candidate but instead mixed them up and that they applied a fraudulent counting scheme hence diminishing his votes. It is my finding however that these allegations were not supported by evidence. To begin with neither the petitioner nor his witnesses identified a

polling station where Form 33 was not used. Secondly the evidence Maxwell Israel Oduor (PW5) and George Oduol Owino (PW6), who were his agents at Dibuoro Primary School polling station 3 and Nyaharwa Primary School polling station 2, respectfully, and the only witnesses who were present during the actual counting of votes was very inconsistent and could not be believed. For instance whereas Maxwell Israel deposes that he witnessed ballot stuffing by a Member of the County Assembly who he knew very well he does not mention his name in the affidavit. He also admitted that although he knew ballot stuffing is an election offence he did not report the occurrence to the police. This raises suspicion that either no such incident occurred or that he was coached to fabricate evidence that it did. Moreover his allegation that more people voted in Dibuoro Primary School polling station 3 than were registered and that more votes were counted than were entered in the Form 37A for that polling station was not proved as he did not produce the piece of paper where he alleged to have recorded the numbers. Indeed in the end he admitted that the petitioner got 192 votes the exact number of votes that were entered for him in the Form 37A for that polling station. It is also unbelievable, as I have already stated, that one could have witnessed such a callous breach of the law and remained silent about it. His evidence that before counting commenced the presiding officer had dinner and held a meeting in the house of the 3<sup>rd</sup> respondent's agent also turned out to be shaky because whereas he gave the name of that agent as Samuel Opaka the 3<sup>rd</sup> respondent's agent, as evidenced by the Form 37A for that polling station, was Richard Mudooro. Even were this court to believe that the agent was Samuel Opaka, Israel Maxwell's evidence would still not be reliable as it is based on hearsay having admitted that he did not know Samuel Opaka prior to that day and so could not have known his house yet those who told him it was were not called as witnesses. If the petitioner wanted this court to rely on this evidence then he should have called those other agents. Most of the allegations made against the presiding officer by this witness are now offences under the Election Offences Act and a higher standard of proof is required to prove them yet what is presented here is hearsay. It would be dangerous for this court to rely on hearsay to vitiate an election. The allegations cannot therefore stand.

20. As for George Oduol (PW6), while in the affidavit he deposed that the presiding officer did the sorting and counting of votes all by himself, that he did not display the ballot paper to show whose vote it was and that he mixed the votes of the candidates, in court he gave a totally different story. He testified that the presiding officer after pouring the ballot papers on the table would read the ballot paper and put it in the heap of the candidate in whose favour it was cast. He even demonstrated how the votes were kept separately and vowed that he could not have allowed the petitioner's votes to be mixed. He also changed tact and stated that he only disputed three votes and further contended that during the counting the votes were shown to them. When cross examined by Mr Wasuna learned counsel for the 3<sup>rd</sup> respondent he stated:

**“During the counting if there was an issue with the ballot we would be called. We were called only if we complained. We were not shown in whose favour a ballot had been marked. At the time of counting I would see in whose favour a ballot was cast. I was very near and could even see where the tick went beyond the box. I would know the vote was cast in favour of more than one candidate. My complaint was that at the time of casting the vote I could not see in whose favour the vote was cast but during the counting I saw.”**

21. From the above it is clear that he had no problem with the procedure at the vote counting. Rather his problem was that at the time of voting he could not see who was being voted for. Whoever told him that he was entitled to see the candidate one was voting for misled him as voting is by secret ballot. It will be seen that later in the questioning he changed his story again to negate what he had stated and so inconsistent was he that this court directed him to take the oath again just to remind him that he was an important witness and what he was telling the court mattered. In the end he disqualified himself as a witness by revealing that he had not sworn an affidavit; that he had just signed it before a clerk in the advocate's chambers but not a Commissioner for Oaths and that no oath was administered. The long and short however is that he did not strike this court as a credible and truthful witness. His evidence was neither trustworthy nor reliable and cannot be taken as proof of the petitioner's allegation that the counting was opaque.

22. The petitioner's allegation that his votes were not counted accurately is also not borne by evidence. Although he alleged to have come across Forms 37A which had errors he could not identify even one. To the contrary when he was cross examined by Senior Counsel Orengo he was emphatic that neither his agents nor himself had complaints regarding Form 37A save that some were either not signed or stamped. Phillip Jalango, his Chief Agent, was also categorical that not even one agent reported to him that their votes had been stolen. Martin Irungu was one of the two expert witnesses called by the petitioner. In his affidavit he deposes that he scrutinised all the Forms 37A, Forms 37B and 37C and came to the conclusion that the results in Forms 37B did not correspond with those in Forms 37A, those in 37B did not correlate with form 37C and those in Form 37C with 37A. He also deposed that in some polling stations there was more than 100% voter turnout. However when he used the form 37A for Segele polling station where according to his analysis there was more than 100% voter turnout, to illustrate his point, it turned out that he was wrong. He admitted that the results in that form did not disclose a greater voter turnout as compared to the registered voters and stated that he had relied on wrong figures. In the end he could not isolate even one Form 37A to support his conclusion of more than 100% voter turnout. I dare say that he also relied on the fallacy that Form 37C was the final result whereas the correct position is that the results announced at the polling station are the final results. That being the case this court can conclusively determine that the votes were accurately counted and that what was recorded in the Forms 37A were the actual results garnered by the candidates.

23. On the issue of transmission, **Regulation 82(1)** of the **General Regulations** made it mandatory for the presiding officer to send the results to the returning officer in electronic form before leaving the polling station to deliver the physical Form 37A. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not prove that they complied with this regulation. That notwithstanding I do not agree that that is sufficient ground to vitiate this election. To my mind the results decreed to be sent in electronic form were merely intended to aid the returning officers in verifying that the results that the presiding officers subsequently delivered to them physically were the actual results. It was also intended to guard against electoral fraud. On their part the candidates or their sub county agents would already have received copies of the forms from their polling agents and with that would be in a position to verify that what the returning officer was announcing is what was announced at the polling station. There was no credible evidence that the results announced at the tallying centres were different from those announced at the polling stations so that even in the absence of electronic transmission the results were not affected. Streaming of the results in real time was not a requirement in this election and if as is alleged by the 3<sup>rd</sup> respondent it happened it was just but gratuitous. Moreover unlike in the presidential election where under Section 39(1C) of the Elections Act electronic transmission is mandatory and therefore failure to do so is an illegality in our case such failure is but an irregularity. In so saying I find support in **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & Another EP No. 1 of 2017** the Supreme Court stated;

**“[304].....Illegality refers to breach of the substance of specific law while irregularities denote violation of specific regulations and administrative arrangements put in place.”**

24. In respect of this election once the constituency returning officer received the results from the polling stations he/she was required, under **Regulation 83** to collate (arrange in order) and publicly announce them, complete Form 37B, sign and date the form then deliver the collated results to the county returning officer. They were to do this accurately and publicly but unlike in the elections for the members of the County Assembly and the National Assembly the constituency returning officers were not required to tally (calculate the total) the results. Tallying of those results, completion of Form 37C and declaration of the winner of this election is left to the county returning officer. There is evidence that collation of the results from the polling stations by the constituency returning officers was above board. The petitioner's expert witnesses, Martin Irungu Mwangi (PW2) and James Madegwa (PW3) gave the entries in Forms 37B an accuracy rate of more than 90% which in my opinion is good. The petitioner's sub county agents confirmed that the returning officers collated the results using the results they received from the presiding officers. The issue of the results being fraudulent does not therefore arise. Indeed the reasons these agents gave for disagreeing with the Forms 37B varied from the forms not being signed or if signed being signed in the wrong place, not signed in the handing over section, not indicating the number of Form 37A handed over and others being altered and indeed the forms were deficient in those areas. However none of them identified a specific result that was altered by the returning officers and indeed there was no evidence at all of any result in Forms 37B being different from what was in Form 37A. It is not lost to this court that although the sub county agents were assigned to tallying centres which were miles apart their affidavits were the same, word for word, hence giving the impression that they were coached.

25. The submission by Counsel for the petitioner that the Forms 35B ought to be invalidated and the results subtracted from the 3<sup>rd</sup> respondent does not in my view have merit. This is because firstly, the results in those forms were not faulted and indeed were agreed to be accurate. Secondly it would be improper for this court to invalidate the same on the grounds given yet there is no evidence that these infractions affected the results. To me that would be doing what in **Nathif Jama Adam v Abdikhaim Osman Mohamed & 3 Others [2014] eKLR** was referred to as **“visiting the sins of some public official on innocent citizens who have expressed their choice freely..”** In that case the Supreme Court affirmed the decision of the trial judge who had come to a similar decision as I have and reiterated that to succeed on grounds of acts of omission on the part of election officials a petitioner had to demonstrate that the irregularities had affected the outcome of the election. For the Forms 37A that it was alleged were not signed it was demonstrated to this court that where a form was not signed by a presiding officer it was signed by the deputy which in my opinion was sufficient.

26. In my view the greater infraction occurred as the County Returning Officer, the 2<sup>nd</sup> respondent in this case, was posting the results from the Forms 37B to Form 37C. This gave rise to distortion of the results of 50 polling stations in Alego Usonga and an increase of the 3<sup>rd</sup> respondents votes by a whopping 2033 votes in Pala Kobong polling station 1 in Rarieda Constituency. Those results did not reflect those in Form 37B and 37A and in fact gave the impression that more people voted than were registered to vote in those 50 polling stations. The two expert witnesses called by the petitioner described it as over 100% voting and I must confess that before listening to the 2<sup>nd</sup> respondent I was convinced they were right. However I am now satisfied it was an error which arose from the manner in which the returning officer for Alego Usonga Constituency (RW7) collated the results. I am indeed persuaded that had he collated the results starting with those of Bukhoba Primary School and Uwasi Primary School as he should have done the conclusion that there was over 100% voting would not have arisen. Both the 2<sup>nd</sup> respondent and the returning officer attributed this transposition to human error. The 2<sup>nd</sup> respondent also attributed the wrong results in regard to Pala Kobong to fatigue stating that she had been without sleep for several nights. While the explanation given by the two election officials sounded plausible the fact still remains that their conduct gave rise to irregularities. Be that as it may Section 83 of the Elections Act recognizes that elections are never perfect and that no election should be voided on account of noncompliance with the law unless it is shown that those errors affected the result. That then brings us to the next issue.

**c) If the answer to the above is in the affirmative, did such irregularities, improprieties or illegality affect the outcome of the election?**

27. I have found that a few of the officers who presided over this election, the 2<sup>nd</sup> respondent included, committed several irregularities. These range from failure to send the results electronically, failure to sign Forms 37B in the space provided, allowing the forms to be signed by persons who were neither candidates nor agents of the candidates; failure to indicate the number of Forms 37A handed over to the 2<sup>nd</sup> respondent at the county tallying centre; failure to accurately state the date of handing over and then altering it to indicate the correct date without countersigning the alteration; creating a new page of the form upon realising an error had been made in the description of the forms handed over and not following the order of polling stations in the template hence resulting in results being posted to the wrong polling stations. These irregularities were not trivial. Nevertheless it is my finding that they did not affect the outcome of this election. The irregularities cited in respect of forms 37B did not affect the results at all. The results in those forms reflected what was actually in Form 37A.. As I have stated before the petitioner himself told this court that he had no problem with the results as announced in the polling stations. I also found that there was no credible evidence that the results reflected in the Forms 37A were different from those announced at the tallying centres. In **Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others NRB Civil Appeal No. 105 of 2017 [2017] eKLR** the Court of Appeal while reiterating that the results announced at the polling station were final stated –

**“It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voter's will. The counting of 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...**

**Accuracy of the count was fundamental in any election. Voter turnout determined the outcome of any electoral contest. Numbers were therefore not only unimpeachable, but they were everything in an election. The lowest voting unit and the first level of declaration of presidential election results was the polling station. The declaration form containing those results was a primary document and all other forms subsequent to it were only tallies of the original and final results recorded at the polling station.”**

28. It is my finding therefore that in so far as the numbers in Forms 37A were not challenged the same are to be taken to be a true reflection of the will of the people of Siaya County not to be sacrificed at the altar of the errors of the election officials typographical or otherwise.

29. As regards the error committed by the 2<sup>nd</sup> respondent this court ordered a scrutiny of the results in the polling stations affected and a recount in Pala Kobong polling station. The scrutiny and recount was conducted by the Deputy Registrar of this court and his report which is dated 3<sup>rd</sup> January 2017 but filed in this court on 5<sup>th</sup> January 2017 discounts the petitioner's allegation of more than 100% voting. In fact the report shows that despite the error occasioned in the tabulation the votes obtained by the petitioner remained the same. Those of the 3<sup>rd</sup> respondent had been increased by 2033 votes but it is my finding that given the margin of 19,521 votes that did not affect the result because even were we to subtract those votes from the 3<sup>rd</sup> respondent and add them to the tally of the petitioner he would still not emerge the winner. The report on scrutiny and recount brings this petition squarely into the example given in **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others SCK Petition No.2B of 2014 [2014]eKLR** where the court stated:

“[219] by way of example, if there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial Court would not be justified, merely on account of such shortfalls, to nullify such an election. However, a scrutiny and recount that reverses an election result against a candidate who had been declared a winner, would occasion the annulment of an election. Examples of irregularities of a magnitude such as to affect the result of an election, are not however, closed.”

30. Similarly the scrutiny and recount herein having confirmed that there was no over voting and that the results remained the same save for the distortion in the order of the polling stations this court would have no ground to invalidate this election. The report of the Deputy Registrar was simple and to the point: it gave the results of the scrutiny and the recount and does not make reference to other irregularities as alleged by Counsel for the petitioner. If it did those findings were not presented to this court and the court cannot base its findings on the same. Moreover it is a principle of the law that parties are bound by their pleadings and in the case of election petitions in **Zacharia Okoth Obado v Edward Akong'o & 2 Others [2014] eKLR** it was held:

**“[153] We hold it to be improper that, when re-tally is conducted, a party should take this as an opportunity to introduce new spheres of disputes, which had not been signalled in his or her original pleadings. It is vital, in election disputes, that the respondent should know the case that faces him or her. Hence the petitioner ought to have indicated in his or her pleadings the disputed matters, with clarity and specificity, as a basis for being allowed to urge that there were irregularities in those spheres, after re-tally has been conducted. However, where a trial court exercises its discretion and, *suo motu*, orders a scrutiny, recount or re-tally, revealing irregularities other than those that were pleaded, then there is proper basis for any party to pose questions upon such *new findings*; and the court then will make findings on the effect of those irregularities on the declared results”**

31. In this case the scrutiny ordered was upon the application of the petitioner and it was therefore not open to him to raise issues concerning irregularities that were not pleaded in the petition even had they been unearthed. My conclusion on this issue therefore is that the irregularities did not affect the result of this election.

d) Whether the 3<sup>rd</sup> Respondent garnered the highest number of valid votes cast in the election and whether the 2<sup>nd</sup> Respondent validly declared the 3<sup>rd</sup> Respondent as the duly elected Governor of Siaya County in the election?

32. Counsel for the petitioner submitted that the net effect of the irregularities was a decrease of the petitioner's votes by 2,233 while for the 3<sup>rd</sup> respondent it is an increase by 3,949. Even were we to find this to be true the 3<sup>rd</sup> respondent would still be in the lead a fact that was confirmed by none other than the two expert witnesses called by the petitioner. As regards the irregularities concerning the forms, be it failure to sign or stamp whatever form I maintain that as the same did not affect the outcome of the election they cannot be a ground to subtract or add votes to either candidate or to invalidate the results. Accordingly it is my finding that the 3<sup>rd</sup> respondent obtained the highest number of valid votes cast in this election and that the 2<sup>nd</sup> respondent validly declared him as the winner.

**f) Whether the declaration was founded on lawful and valid statutory forms.**

33. We have seen that there were several flaws in the statutory forms. The returning officer for Rarieda indicated in form 35B that what she was handing over were Forms 34A. Forms 34A relate to the presidential election so upon realizing the error she created another page which she purported to superimpose onto the initial form. The 2<sup>nd</sup> respondent also attempted to correct the errors in Form 37C by creating what she referred to as an amended Form 37C. For Kaminogedo Polling Station in Rarieda Constituency the results were in a form which belonged to Siger Polling Station 1 but which the returning officer cancelled to read kaminogedo but did not change the name of the Ward where the polling station is situate. This court also notes that there were two Forms 37B in respect of Ugenya the second being intended to correct the date of handing over of the forms. The above are the forms that Counsel for the petitioner referred to as unlawful. I agree with him that to the extent that returning officers are required to collate, sign and date the results publicly, they acted irregularly. They also acted irregularly as they had no authority to alter the forms once they had in the case of constituency returning officers, announced the results, or in the case of the county returning officer, declared the results be it to correct an error or otherwise and more so in the absence of the candidates or their agents. Accordingly the additional pages of those forms shall stand to be expunged. However, I do find that in the case of Kominogedo where the polling station was given a Form 37A that had the name of another polling station there was nothing else for the returning officer to do other than to change the name. I did not hear the petitioner say that the results in the impugned Form 37A belonged not to Kominogedo but to another polling station. In my view the fact that the name of the Ward was not amended is not reason enough to invalidate the results for that polling station. As for the declaration there is evidence that it was done upon the initial Form 37C and that the amended form was made later. Granted the declaration was made using a form with errors but as I have already stated those errors did not affect the result of the election. Moreover, a form does not become unlawful merely because it contains errors. One must consider the intention of the person who made the form and this I shall do in the next issue. For now it is my finding that to hold that this election should be vitiated on account of the 2<sup>nd</sup> respondent making another form long after the declaration, would be tantamount to, as stated earlier, relegating the will of the people to the omissions of those who count the votes. That in my opinion would be a travesty of justice. The people expressed their will at the polling

stations and that will was to the greatest extent accurately captured in Forms 37A and also in Forms 37B only to be incorrectly transposed to Form 37C. My finding on this issue is that the declaration was not founded on unlawful forms as a form that contains errors is not necessarily unlawful.

**g) Whether the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents herein committed electoral offences and if so, what sanctions should this court decree.**

34. As I have stated a form does not become unlawful merely because it has errors. Tied to this I would add that it cannot be said that the 2<sup>nd</sup> respondent committed an election offence merely because she made errors in the declaration form. An election offence must be proved beyond reasonable doubt. That is the standard of proof required for election offences. **Section 6(a) of the Election Offences Act** makes it an offence for election officials to make false entries in the records, returns or other documents they are required to keep or make. Notice however that it becomes an offence if they make an entry they **“know or have reasonable cause to believe to be false, or do not believe to be true.”** The 2<sup>nd</sup> respondent explained that the errors in the 50 polling stations in Alego Usonga Constituency came about because she took it for granted that the returning officer had collated the results in the order the polling stations were arranged in her template only to realise that in his form he had forgotten to enter the first two polling stations but had instead inserted them at the bottom. To me although this was a grave mistake on her part it would not amount to an election offence as there is no proof that she either knew or had reason to believe that the entries she was making would result in a distortion of the results and in any event those results were not false. The burden to so prove lay with the petitioner and it is my finding that he did not discharge it. She may certainly not have been diligent in her work but there is no evidence that she acted fraudulently.

35. In regard to the 3<sup>rd</sup> respondent the petitioner alleges that he procured votes through improper influence in that he used relief food to bribe voters, used his incumbency as the Governor to deploy county staff and resources in his campaigns and worse still ran a smear campaign against the petitioner that he was a jubilee mole, was being funded by the adversaries of the Luo and hence a traitor. Better particulars of the campaign propaganda is contained at paragraph 45 Of the petition.

36. All the above accusations against the 3<sup>rd</sup> respondent apart from going against the spirit of the Constitution regarding elections are all election offences. Use of relief food to woo voters would amount to bribery which is an election offence under Section 9 of the Election Offences Act and as it was alleged that the food was purchased with county funds and distributed using county vehicles it is also an offence under Section 14(1) of the Act which prohibits use of public resources for campaigning. As for the smear campaign the same is criminalised at Section 13(f) (1) which states:

**“13. Offences relating to elections**

**A person who-**

**(f) interferes with free political canvassing and campaigning by-**

**(1) using language which is threatening, abusive or insulting or engages in any kind of action which may advocate hatred, incite violence or influence the voters on grounds of ethnicity, race, religion, gender or any other ground of discrimination;.....**

**Commits an offence and is liable, on conviction, to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding five years or to both.”** (emphasis mine)

37. Counsel for the petitioner has urged this court to find the petitioner guilty of the above election offences. The question however is whether the same have been proved. The standard of proof for election offences is beyond reasonable doubt. In **Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others [2015] eKLR** the Supreme Court held:

**“[120] Now on account of this quasi-criminal aspect of bribery in elections, the offence is to be proved and established beyond any reasonable doubt. The petitioner has to adduce evidence that is cogent, reliable, precise and unequivocal, in proof of the offence alleged. We may draw analogy with the Supreme Court of India decision in M. Narayana Rao v G. Venkata Reddy & Others, 1977 AIR S.C.208, in which it was thus held:**

**...the charge of commission of corrupt practise has to be proved and established beyond doubt like a criminal charge or a quasi-criminal charge, but not exactly in the manner of establishment of guilt in the manner of a criminal prosecution giving liberty to the accused to keep mum. The charge has to be proved on appraisal of the evidence adduced by both sides especially by the petitioner...”**

**[121] A similar perception was recorded by this court in the case of Fredrick Otieno Outa v Jared Odoyo Okello & 4 Others eKLR, Petition No. 6 of 2014(paragraph 109):**

**“The principle thus conveyed, is that the pleadings must be clear, the allegations elaborate, and the evidence adduced, focused and clear- cut. The foundation is clear: election offences bear the mark of a criminal conduct within the framework of an election petition, yet outside the normal criminal jurisdiction. Election offences are therefore, quasi-criminal in nature; and the Court ought not to enter a finding of guilt, if the evidence adduced is not definitive and cannot sustain such a finding, or if there is any doubt as to whether such an offence was, indeed, committed, or by whom. The commission of an election offence if proved, will not only lead to the election being set aside, but also to the disqualification of the perceived culprit, from standing as a Parliamentary-election candidate, given the terms of Article 99(2)(h) of the Constitution. The offender is also liable to criminal penalty, under the Elections Act. In these circumstances, the person alleging the commission of the offence is required to prove the ingredients of the offence. And such proof of an offence takes a higher level than the mere**

**preponderance of probabilities.”**

38. Although the above was said concerning bribery it is my finding that it applies to the other election offences alleged against the 3<sup>rd</sup> respondent. In regard to the relief food the 3<sup>rd</sup> respondent admitted that the same was distributed and that he participated in the distribution. He however denied that he used the food as a campaign tool and stated that it was a County programme to which he participated only as the Governor but not as a candidate in the election. Distribution of relief food by a governor is not an offence per se and it behoved the petitioner to prove beyond reasonable doubt that it was used to influence people to re-elect the Governor. It is my finding that the evidence adduced by the petitioner fell short of the standard required. This is because we have evidence that the programme was mooted long before the campaigns begun. There is evidence, which I found credible that the programme was in fact approved by the County Assembly. If the petitioner had evidence to dispute that the County Assembly did not approve of it then he did not bring it to court and my finding is that the 3<sup>rd</sup> respondent adduced sufficient evidence in rebuttal. More importantly I find that the main ingredient of this offence which is **“to influence a voter to vote or refrain from voting ....”** was not proved. In my view it is not sufficient to allege that the petitioner distributed relief food, it must be proved that he did it to influence voters to vote for him or to refrain from voting for the petitioner. A presumption does not arise that because it was done during the election period then it was a campaign tool. It must be proved through cogent, reliable, precise and unequivocal evidence. In our case no evidence was adduced to prove that other than launching or flagging off the programme the 3<sup>rd</sup> respondent actually used it to influence voters to either vote for him or to refrain from voting for someone else. In the petition and even during the hearing the petitioner indicated that he would call one Justus Odimo Odima to prove this fact. The said Justus Odimo Odima had sworn an affidavit in which he alleged to have attended a meeting where relief food was distributed and at which the 3<sup>rd</sup> respondent implored voters to re-elect him and promised them better goodies after the election (see page 191-192 of the petition). Justus Odimo was however not called as a witness and so was never subjected to cross examination to test the veracity of his allegations which therefore amount to mere allegations with no probative value.

39. The petitioner did not provide cogent evidence such as would prove beyond reasonable doubt that the 3<sup>rd</sup> respondent used county personnel, money and motor vehicles in his campaign. He did not furnish this court with the registration numbers of the vehicles used or when and where they were used. When cross examined on the issue his evidence was that he himself was all over and could not tell where the vehicles were used. That evidence is not cogent. For the staff we heard credible evidence from witnesses of the 3<sup>rd</sup> respondent that what they were engaged in was a county and national governments programme to alleviate hunger but not a campaign and these grounds cannot stand.

40. Regarding the smear campaign and six piece pattern of voting the petitioner testified that it influenced the thinking of the voters more and had a demonstrable effect of dissuading illiterate, old and vulnerable voters. What I did not hear him say however is that he personally witnessed this criminal conduct. For this he seemed to have banked on testimony from Justus Odimo Odima, who claimed to have heard the 3<sup>rd</sup> respondent refer to the Petitioner as a jubilee mole and persuade people not to vote for him, but as Justus was not called as a witness what he alleged is not evidence that can be used to invalidate this election. It is also instructive that whereas the petitioner had written a letter to the Chairman of the Electoral Commission complaining about this smear campaign he admitted to have withdrawn it. When asked why he withdrew his complaint he stated that he had only complained because his security had been withdrawn and that it had been restored. That left me wondering why he was raising it in this court. My finding on this issue is that there was not sufficient evidence to prove that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents committed election offences.

#### **h) Is the Petitioner entitled to any of the prayers sought?**

41. Having come to the conclusion that this election was conducted in accordance with the principles laid down in the Constitution and other electoral laws, and having found that although there were irregularities the same did not affect the outcome of the election, and having found that the 3<sup>rd</sup> respondent was validly declared as the duly elected Governor of Siaya County, my finding on this issue is that the petitioner is not entitled to the prayers sought in the petition.

#### **i) Who pays the costs of this petition?**

42. This court has agonised on the issue of costs because whereas **Section 84** of the **Elections Act** provides that costs must always follow the cause, we are here mainly because of the errors committed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents which though they did not affect the result could have, with more diligence, been avoided. On the other hand we have the 3<sup>rd</sup> respondent against whom no fault has been found but who was nevertheless dragged to court and is entitled to costs. Accordingly my determination on this issue is that as between the petitioner and the 1<sup>st</sup> and 2<sup>nd</sup> respondents there shall be no order for costs but as between the petitioner and the 3<sup>rd</sup> respondent the petitioner shall bear the costs. **Regulation 30** of the **Election Petition Rules, 2017** gives this court power to specify the amount of costs of course bearing in mind the usual principles relevant to the assessment of costs. I have in this case considered that while the petition was of importance not just to the parties but the people of Siaya generally it was not that complex. I have also taken note of the time taken to conclude the petition and assessed the total costs of the 3<sup>rd</sup> respondent at Kshs. 3,000,000 (shillings three million) only.

43. Final orders:

- 1. The petition be and is hereby dismissed.**
- 2. As between the petitioner and the 1<sup>st</sup> and 2<sup>nd</sup> respondents there shall be no order for costs.**
- 3. As between the petitioner and the 3<sup>rd</sup> respondent there shall be an order for costs capped at Kshs 3,000,000.**
- 4. A certificate under Section 86(1) of the Elections Act shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the Senate.**

**DATED and DELIVERED at SIAYA this 26th day of February 2018.**

**E. N. MAINA**

**JUDGE**