



IN THE HIGH COURT AT KISUMU

BUSIA ELECTION PETITION NO. 2 OF 2017

IN THE MATTER OF THE NATIONAL ASSEMBLY ELECTION FOR

TESO NORTH CONSTITUENCY

BETWEEN

HON. ODERA ARTHUR PAPA.....PETITIONER

AND

OKU EDWARD KAUNYA.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION2ND RESPONDENT

JULIAN GOMITY, TESO NORTH

CONSTITUENCY RETURNING OFFICER.....3RD RESPONDENT

JUDGMENT

Introduction and Background

1. At the conclusion of the General Election of 8th August, 2017, the 1st Respondent was returned as the duly elected Member of Parliament to the National Assembly for Teso North Constituency. The Petitioner challenges this return. The elections results were as follows;

Name of Candidate	Political Party	Number of Votes
Amoo Moses Oude	Labor Party of Kenya	227
Epus Joash Gregory Odeke	Independent	259
Etyang Oprongo	Independent	74
Kaunya Edward Oku	Amani National Congress	14,442

Mamai Lawi Obetele	Orange Movement	Democratic	9,488
Mogoria Daniel EliudNyongesa	Restore and Build Kenya		304
Odera Arthur Papa	Jubilee		12,829
Papa Fredrick Okademi	Wiper Movement	Democratic	1,372
Total Valid Votes			38,995
Registered voters			49,833
Rejected Votes			830
Voter Turnout			79.92%

2. The 1st Respondent garnered 14, 442 votes as against the Petitioner’s 12, 829 votes making a difference of 1, 613 votes representing 4.05% of the votes cast. The Petitioner now seeks to annul or void the 1st Respondent’s election on a raft of grounds outlined in his petition dated 30th August, 2017.

3. The allegations against the 1st Respondent, his agents and supporters are set out in Part F paragraph 26 of the petition. The Petitioner alleges that they were involved in several acts of intimidation, violence and widespread bribery before and during the elections whose effect was to undermine a free and fair election.

4. The Petitioner also made allegations against the 2nd and 3rd Respondents in Part F paragraph 27 of the petition. In the summary, the allegations are that 2nd and 3rd Respondents and their officers showed bias and colluded against the Petitioner on account of him and his agents representing Jubilee Party in a National Super Alliance (“NASA”) stronghold. He claimed that his agents were denied the right to fully participate in the elections as they were ejected from polling stations. He further alleged that Presiding Officers denied his agents the opportunity to verify votes being counted, the right for a recount when sought and the right to access Forms 35A, as the primary tallying documents, within the polling stations.

5. The Petitioner alleged that voters who could neither read nor write were coerced into being assisted in the absence of agents by Presiding Officers and that they were intimidated into voting for persons they did not wish to vote for. He also alleged that at various polling stations, the Presiding Officers failed to deal with assisted voters in accordance with the applicable regulations.

6. The Petitioner contended that the 2nd and 3rd Respondents and their subordinates including Presiding officers and other election officials conducted the elections in a manner substantially inconsistent with the provisions of the Constitution, *Elections Act, 2011* and regulations made thereunder and the *Election Offences Act (No. 27 of 2016)*, the effect of which is that the non-compliance substantially and materially affected the results of the election.

7. The 1st Respondent, in his reply to the petition dated 13th September 2017 and the supporting affidavits, dismissed the Petitioner’s allegations and averred that he was duly elected and declared the winner of election which was free, fair and transparent as it was conducted in compliance with the provisions of **Article 86** of the Constitution. He also dismissed the allegations that he was involved in voter bribery, violence and or any malpractice.

8. The 2nd and 3rd Respondents filed their response dated 13th September 2017 and affidavits detailing how they conducted the 8th August 2017 election and the steps they took to ensure that the same was

conducted in a free and fair manner. They denied that they or their officers were involved in any malpractices. They also denied any incidences of bribery and reiterated that the election was conducted in a free, fair and transparent manner in accordance with the applicable regulations. They averred that the results announced were valid, credible and a true manifestation of the will of the people of Teso North Constituency.

9. At the close of pleadings, the parties agreed that the 2nd Respondent furnish all parties with Forms 35 for the Constituency. The parties also agreed that the 2nd Respondent provide access to all the necessary electronic information collected and stored through the Kenya Integrated Election Management System (KIEMS) through the KIEMS kit. No issue was raised or arose out of the examination of the Forms 35A and 35B or access to electronic information.

10. At the end of the hearing of the entire case, I heard the Petitioner's application for scrutiny of the vote. After considering the application and arguments, I dismissed the request in my Ruling No. 4 dated 15th January 2018.

Issues for determination

11. From the contents of the petition I have summarized above, the issue for determination is whether the Petitioner has proved the allegations against the 1st Respondent in Part F paragraph 26 of the petition and the 2nd and 3rd Respondents in Part F paragraph 27 of the petition respectively and if so, whether he has made out a case for annulment of the election.

12. The Petitioner called 32 witnesses while the Respondents called 20 witnesses. The witnesses adopted their affidavits as evidence in chief and were cross-examined. At the end of the hearing, the parties made written and oral submissions summarizing their respective cases which I have considered and taken into account in this judgment. Before I consider the facts and evidence, I will set out some of the principles applicable to this case and which are common ground.

General Principles Applicable

13. In *Jackton Ranguma v Independent Electoral and Boundaries Commission KSM EP No. 3 of 2017*[2017]eKLR, I stated that, "*an election petition is not a do-over of the just concluded election. It is not an opportunity to conduct another election through the court as every election conducted in accordance with the law is presumed valid unless it is set aside by the court.*" Thus the burden of establishing the allegations of non-compliance with the Constitution and the law, electoral malpractice and misconduct which would result in the election being declared invalid rests on the Petitioner.

14. The court will not interfere with the results of the elections unless it is established to the required standard of proof, that such non-compliance with the Constitution and the law, the irregularities and electoral malpractices complained of render the said elections invalid. The standard of proof was summarized by the Supreme Court in *Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 Others SCK Petition No. 5 of 2013* [2013]eKLR as follows, "[203] *The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question.*"

15. The Supreme Court in *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and 2 Others, Presidential Election Petition No. 1 of 2017* [2017]eKLR expounded on the circumstances under which the election court will invalidate an election under **section 83** of the *Elections Act, 2011*. It held that in order to succeed in annulling an election, the petitioner must establish either that there was non-compliance with the Constitution and the law governing election or that election malpractices and irregularities that took place were of such magnitude that they substantially and materially affected the results of the election (see also *Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others SCK Petition No. 2B of 2014* [2014]eKLR).

16. An election petition is not an appeal against the decision of the IEBC to declaring a candidate a winner. The court does not conduct a wholesale audit of the election to see whether the election was conducted in accordance with the Constitution and the Law. It judges the election according to the case brought by the petitioner thus the petitioner is bound to prove the case it has pleaded. A petitioner is not permitted to make a case outside the pleadings and his affidavits and testimony must be consistent with and support the case pleaded (see *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and 2 Others* SCK Presidential Petition No. 1 of 2017 [2017]eKLR and *Mahamud Muhumed Sirat v Ali Hassan Abdirahman and 2 Others* Nairobi EP No. 15 of 2008 [2010]eKLR).

17. The rules of pleadings are grounded on the fact that the respondents are entitled to know the case they are to meet so as to prepare their defence. The duty of the petitioner to plead his case with particularity is acute in an election petition which must be heard and determined within 6 months of filing the petition. Under **Article 87(2)** of the Constitution, the petitioner has a period of 28 days from the date of declaration of the result to put his case together. The respondents do not have such a luxury as **Rule 11** of the *Elections (Parliamentary and County Elections) Petitions Rules*, provides that they have 10 days from the date of service to respond to the petition augmenting the fact that the petitioner cannot be permitted to litigate outside the petition or go on a fishing expedition as this would prejudice the respondents. In this case, the scope of pleadings cannot be expanded by the use of, “*inter alia*” in reference to polling stations. The evidence must be pointed, precise and exact.

Allegations against the 1st Respondents, his agents and supporters

18. While most of the facts and evidence are overlapping, I will now consider the allegations against the 1st Respondent in Part F Para. 26 of the petition under two heads; violence and intimidation and bribery and undue influence.

Bribery and undue influence

19. Allegations of widespread bribery and undue influence of voters emerged from several witnesses. It is common ground that bribery is an electoral offence. In *Mohamed Ali Mursal v Saadia Mohamed and Others* Garissa EP No. 1 of 2013 [2013]eKLR, Mutuku J., described bribery in the context of an election petition as follows;

Bribery is an electoral offence. It is also a criminal offence in ordinary life. Being such, proof of the same must be by credible evidence and in my view, nothing short of proving this offence beyond reasonable doubt will suffice. There is no distinction as far as I am concerned, and rightly so, between bribery in a criminal case and one in an election petition. Bribery involves offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of the person receiving.

20. The petitioner bears the burden of proving the offensive act or acts by clear and unequivocal evidence. Mere suspicion is not enough and the mere fact that the person alleged to have been bribed confesses is insufficient. The petitioner must also show a relationship not only between the offender and the candidate but also show that the election was thereby affected in the manner contemplated by **section 83** of the *Elections Act, 2011* (see *Halsbury's Laws of England, 4th Edition, Vol 15 para. 780, Simon Nyaundi Ogari and Another v Joel Omagwa Onyancha and 2 others, Kisii EP No. 2 of 2008 [2008] eKLR and Ntwiga v Musyoka and Others (No.2) (2008) 2 KLR (EP) 276*). These requirements were laconically put by Katureebe JSC., in *Rtd Col. Dr. Kizza Besigye v Y.K. Museveni and Electoral Commission Presidential Election No. 1 of 2006 [2007]UGSC 24* as follows;

In cases of bribery, I think it is not enough for a deponent to say "people were being bribed at road junctions." This must be stated with precision as to who gave the money, who received it and the purpose must be to influence their vote. Merely being seen giving money to a person or receiving money from a person cannot per se be evidence of bribery upon which a court can rely.

21. The Petitioner alleged that the 1st Respondent and his agents engaged in widespread bribery before and during the general elections in and outside *Keng'atuny Secondary School Polling Station*. However, he did not call or lead any evidence to support this allegation.

22. The Petitioner pleaded that bribery was taking place at *Osajai Polytechnic Polling Station*. The key witness in this respect was Sammy Martin Odama (PW 5) who deposed that he was the Petitioner's campaign agent and on Election Day he was stationed at *Kaukoit Polling Station*. He received information that the 1st Respondent's chief campaigners, Pascal Ogigi and Parithos Ipara, were giving bribes to voters at *Osajai Polytechnic Polling Station*. As he approached Parithos, he also noticed a police officer approaching him causing him to run away. In cross-examination, PW 5 admitted that although he observed Ogigi and Parithos giving bribes, he did not report the incident to the police. In re-examination, he admitted that a woman told that Ogigi and Parithos were the 1st Respondent's agents. I am not convinced this evidence was sufficient to prove bribery at *Osajai Polytechnic Polling Station*. I find that the allegations are weak tea. The people receiving bribes were not named and it was not proved that the two alleged culprits were agents of the 1st Respondent. PW 5 confirmed that he heard all this information from a woman. The Orange Democratic Movement (ODM) agent present at the polling station, Peter Imokori Epaa (DW 19), deposed that the voting went without incident. The Petitioner's agent, Dennis Omusugu, who was not called to testify, signed Form 35A signaling that polling at *Osajai Polytechnic Polling Station* was without incident.

23. Alice Ajuma Ituboi (PW 12) deposed that on polling at *Kolait Primary School Polling Station* before casting her ballot, "Daddi", whom she knew as the 1st Respondent's campaigner requested her to, "*Pigia Oku halafuu tapatiwa kitu baadaye.*" She was dismayed that the Presiding Officer, who was close by, failed to intervene. She decided to cause commotion but she left. PW 12 referred to the Daddy as Meshack who approached her while she was casting her ballot. She noted that the Petitioner's agent was present and he did nothing. Although he asked her to vote for the 1st Respondent, it is not clear whether he was his campaigner or agent or his acts could be attributed to the Petitioner. Further, the allegation regarding this station was not pleaded.

24. Betty Onyapidi (PW 13), a Jubilee agent at *Kaeset Primary School Polling Station* deposed that with her own naked eyes and ears she observed that polling clerks openly and blatantly whispering to voters and urging them to vote for the 1st Respondent in the process of issuing ballots. The Presiding Officer, Jakait Okaal Collins (DW 18), recalled that he was at the polling station the whole day. He did not witness any bribery and no one informed him of any incidents of bribery. Despite the allegation of massive bribery at the polling station where there were other agents and police officers, PW 13 was satisfied the election was conducted satisfactorily when she, together with 10 other agents, signed Form 35A confirming the Petitioner's at that polling station.

25. Catherine Amoit (PW 14), an agent at *Moding Primary School Polling Station* deposed that one clerk, Patrick Emojong, who had been irregularly employed as he was the 1st Respondent's campaigner was busy issuing money outside the polling station. She stated that a voter whom she did not identify told her that he had been solicited. Simon Amuka (PW 24), an agent for the independent candidate for governor, also deposed that on the material day when the Presiding officer left the polling station, the said Patrick Emojong, started causing trouble by walking in and out of the polling station. He learnt from PW 14, that he had been issuing money to people to come and vote in favour of the 1st Respondent. The 1st Respondent's agent at the polling station, Michael Odeke Okware (DW 7) testified that he was present the whole day and that no bribery took place. The evidence of PW 14 is insufficient as she stated that she came to know of the bribery from an unidentified voter and the evidence of PW 24 is what he told her. Despite observing acts of bribery from the window of the polling room, PW 14 and PW 24 went ahead and signed the Form 35A which indicated that the petitioner had won and in which the Presiding Officer noted that, "*all agents are in agreement.*"

26. The Petitioner's agent at *Changara Polling Station*, Oscar Obukol Obagala (PW 19) testified that he witnessed blatant issuing of money by the chief campaigners of the 1st Respondent. He did not disclose the name of the agent nor report the person to the police officer present.

27. Tobias Imael Emokol (PW 23), the Petitioner's polling agent at *Kajei Secondary School Polling Station* deposed that he witnessed an incident of bribery involving one Lustina Nekesa, a campaigner for the 1st Respondent, who was dishing out money to people just outside the polling station. In cross-examination, he stated that he had never seen the said Lustina Nekesa campaigning with the 1st Respondent nor did he report her to the police or to the Presiding officer. I find this allegation weak and without foundation.

28. Queen Okapadau (PW 29), a campaign co-ordinator for the Petitioner, was informed that a lady campaigning for the 1st Respondent was dishing out money at Kakapel. When she went there and confronted her, she informed her that she was campaigning for the 1st Respondent. She also accosted one Walter Chebon near Kaeset on information that he was bribing voters. He hurriedly left when he saw her. In cross-examination, she told the court that she only knew the first name of the woman who was dishing out money but she did not report her to the police. She told the court that she saw the woman stopping and talking to people, after which they would receive and smile. She concluded that it was money. The full particulars of the woman or the person receiving the bribes were not given. PW 29 admitted in cross-examination that she assumed that what was being given out was money.

29. Erick Papa Etyang (PW 26) alleged that Walter Chebon, a well-known campaigner for the 1st Respondent was stopping people and giving out money. He confronted him and a crowd appeared and Chebon fled in fear. His son Joshua Eriana was also campaigning for the 1st Respondent by urging voters at the entrance of *Kaeset Polling Station* to vote for the 1st Respondent. In cross-examination, he told the court that he knew Walter Chebon and he also knew that he used to give out Kshs. 200/= to bribe voters. There is no evidence that the said Chebon was acting on the 1st Respondent's behalf.

30. Eliam Muruga Edepi (PW 30), a voter and elder recalled that the Chief had requested him to keep a watch over events outside *Kakalet Polling Station*. At the gate of the Polling Station, he saw Ishmael Omuse and Fred Imo, well known campaigners of the 1st Respondent dishing out money to the voters entering the polling station. He approached them and they gave him money stating that, "*Enda pigia Oku Kaunya kura.*" PW 30 admitted that in cross-examination, he was given money to vote for the 1st Respondent. In this case the petitioner did not establish that Omuse and Imo were acting on the 1st Respondent's behalf.

31. William Indeke (PW 31), a retired police officer and an agent for the Petitioner at *Kong'urakol Primary School Polling Station* recalled that he saw two campaigners for the 1st Respondent, Ken Omasete (DW 4) and Bishop Sospeter Omukule (DW 13) issuing money. He tried to inform the Presiding officer but he was rebuffed and warned to stay away from the polling station. He also told the court that he saw bribery taking place outside the polling station as he was seated in a shop and he knew the people involved as they were from Moding. DW 4 denied that he was at *Kong'urakol* on that day as he voted at *Moding Primary School Polling Station* and then made his way to the Constituency Tallying Centre at Amagoro. He then went home where he stayed until 4.00pm when he went to the tallying centre. He only met DW 13 at the Tallying Centre much later. On his part DW 13 denied that he was at *Kong'urakol* as he had gone to vote at Moding but was unable to vote then he went home and waited till evening to go to the Tallying Centre.

32. Peter Echasi Sang'ala (PW 32) a voter noticed 6 people near *Kaeset Primary School Polling Station* giving money to men and lessos to women. He was able to identify Karani, Geoffrey Aluku and Walter Chebon, who were the 1st Respondent's campaigners. When he confronted them, he was roughed up. He reported this to PW 13 but did not report to the police.

33. The Petitioner alleged that there was widespread bribery at *Ketebat Primary School Polling Station*. The Petitioner's agent, Gad Osiya Okello (PW 17) did not depose to any acts of bribery in his affidavit. The Constituency Returning Officer (DW 20) recalled that the Petitioner stormed the polling station on account of the issue of assisted voters. PW 17 signed Form 35A together with 9 other agents after confirming that the Petitioner won.

34. No evidence was led to support the allegation that there was widespread bribery at *Koseny Primary Polling Station, Kakapel Primary School Polling Station, Kakalet Primary School Polling Station and Akichelesit Primary School*. The Petitioner's polling agent at *Kakeriaut Primary School Polling Station*, Lillian Apalei (PW 28), did not depone to any acts of widespread bribery.

35. I have considered the evidence whether the Petitioner proved bribery as pleaded in the petition. The Petitioner was unable to demonstrate that there was widespread bribery and undue influence which undermined the election or indeed affected the result of the election. I therefore dismiss this ground.

Violence and intimidation

36. **Article 81(e)** of the **Constitution** sets out the general principles of an electoral system, which is to achieve free and fair elections. It states, *inter alia*, that the electoral system shall be, "*free from violence, intimidation, improper influence or corruption....*" **Section 11** of the **Election Offences Act, 2016** prohibits use of force or violence during the election period. **Paragraph 6** of the **Electoral Code of Conduct** binds all political parties and candidates to observe certain standards of behaviour throughout the election period set out under the **Second Schedule** to the **Elections Act, 2011** which include condemning and refraining from acts of violence or intimidation.

37. Several cases have dealt with the use of violence in an election and the threshold necessary to invalidate an election on that account. These cases include ***Benson Maneno v Jacob Machekele and Others Malindi EP No. 14 of 2013 [2013]eKLR***, ***Kajembe v Nyange and Others [2008]2 KLR 1***, ***Lenno Mwambura Mbaga & Another v Independent Electoral & Boundaries Commission & Another Malindi EP No. 1 & 3 of 2013[2013]eKLR***, ***Joho v Nyange & Another (No 4)(2008) 3KLR(EP)*** and ***Justus Gesito Mugali M'mbaya v Independent Electoral & Boundaries Commission & 2 Others KKG EP No. 6 of 2013 [2013]eKLR***. These cases establish that for a petitioner to succeed, he must show that the violence is traceable to or attributed to the respondent(s), the violence must be widespread and not isolated and the violence must have affected the voting and the election results.

38. The Petitioner alleged that there was violence and intimidation meted out against him, his agents and supporters. One of the incidents that the petitioner pointed out was the incident at Jaki Guest House in Malaba where he pleaded that he was violently attacked by a mob of people mobilized by the 1st Respondent and his chief Campaigner George Okwara (DW 2) on false allegations that he had convened Presiding Officers of the 2nd Respondent. He averred that the mobilization was done via social media, text messages, phone calls and word of mouth.

39. The basic facts surrounding the incident are not in dispute. The Petitioner, Martin Ichelai (PW 7), his bodyguard, Joseph Ndungu Karanja (PW 8) and Bridget Namarome Simiyu (PW 6) gave evidence on the incident. On the Respondent's side the 1st Respondent, George Okwara Ekirapa (DW 2), Mathew Ekirapa (DW 3), the 1st Respondent's chief agent, Kennedy Tito Omaset (DW 4), Sospeter Omukule (DW 13) and Josphat Doe Okiria (DW 15) testified about the incident.

40. On 4th August 2017, the Petitioner had been campaigning the whole day when they decided to have some refreshments with a few of his supporters and campaign team at a hotel in the evening. While he was there, rumours of him meeting with the 1st and 2nd Respondents' officers started spreading causing a crowd to gather at the hotel thereby forcing the Petitioner to be whisked away for his security. It was not disputed that the District Criminal Investigation Officer (DCIO) and the Commanding Officer Malaba Police Station (OCS) were present at the hotel although they had not come to meet the Petitioner. It was also not disputed that following intervention of the DCIO and OCS, the crowd dissipated by about 8.00pm. The parties also agreed that the Petitioner did not meet with IEBC officials as the rumours alleged.

41. The 1st Respondent and his witnesses denied that there was any violence. He testified that he arrived when the crowd had gathered and that he did not intimidate anyone. He also found the DCIO and OCS outside the hotel who had managed to calm the crowd. Because of the allegation, he decided to address a

letter to the IEBC on the next day raising the issue.

42. The question for determination is whether the Petitioner was violently attacked by a mob as pleaded in the petition. It is true that the situation was very tense but what is clear from the evidence is that the Petitioner was not attacked at all. Because of the crowd that had gathered outside Jaki Hotel, he had to be whisked away. It is also true that there were rumours of the Petitioner meeting election officials but no evidence was led to show that these rumours were started by the 1st Respondent or that he or his agents mobilized the crowd through social media, text message and phone calls. The uncontested testimony of all the witnesses is that the 1st Respondent arrived after the crowd had gathered.

43. I am convinced that the Petitioner and PW 6 were feeling threatened by the crowd that had gathered and had it not been for the timely intervention of the DCIO and OCS who were present at the scene, the situation would have gotten out of hand. The petitioner did not adduce evidence that this incident, occurring a few days before the election, in any way affected the voters or the result. None of the witnesses who testified on the Petitioner's behalf stated that they were affected by this incident and I cannot make that assumption.

44. The Petitioner complained that the 1st Respondent through his agents and supporters orchestrated a wave of intimidation and threats to violence against a specific community living within Malaba town and who were perceived to be supporters of the Jubilee Party. This led to them fleeing the area in fear of the repercussions. The Petitioner also accused the 1st Respondent and his agents of fomenting violence and ethnic hatred against supporters perceived to be supporters of the Petitioner and the Jubilee party.

45. The key witness to support this allegation was a hawker, Joseph Ndung'u Karanja (PW 27) who stated he was a Jubilee mobilizer. He deposed that two weeks before the General Elections he and other residents of Busia County began receiving threats from sources targeted at them for being Kikuyu and members of Jubilee party. On Election Day, he voted at *Post Office Polling Station*, and then he went out to mobilise voters from his community since he had noticed low turnout amongst them. He then crossed the border to Uganda where he was informed that they had been threatened and their names transferred to other counties without their consent. He told the court that most Kikuyu's left for Uganda.

46. In my view this evidence is as threadbare as the allegation. None of the people who received threats were called to give evidence. Given the serious nature of the allegations, one would have expected that it would be reported and taken up by security organs. As relates to the low turnout, there was no proof that members of the Kikuyu community did not turn up to vote. The Petitioner did not tell the court how many of them were registered and how many of them did not vote. Even if they didn't vote, there is no reason to believe that they did not vote because they were threatened. No witnesses came to testify on how their votes were transferred to other counties without their consent. Finally, there was no evidence that the threats would be attributed to the 1st Respondent. I note however that the one person, Ian Karani Wabomba, was charged and convicted at Bungoma Law Courts for distributing leaflets. As the Petitioner admitted in cross-examination, there is no evidence that this miscreant was connected to the 1st Respondent and I find no evidence that this case affected the election and subsequent results.

47. In the petition, the Petitioner alleged that his polling agents scheduled to be stationed at *Osasame Primary School Polling Station* and *Osajai Polytechnic Polling Station* were viciously attacked by the 1st Respondent's agents so as to ensure that they do not carry out their duties at the specified polling stations. In support of this allegation. The evidence of Edwin Otapiro (PW 4) and Sammy Martin Odama (PW 5) deposed was that on the eve of the election at about 8.40pm, they were to proceed to Osere Market and Osajai Polling stations where Edwin Otapiro and Omusugu Denis were to act as agents. As they were proceeding on two motorcycles, a Uganda registered vehicle passed them and then turned back and started chasing them near Osasame Water pump. The motorbike carrying Dennis Omusugu sped off while he and PW 4 were violently forced off the road. Three men whom they identified as the 1st Respondent's agents, Shadrack Mamai, Luke Orapa and one Boma descended on PW 4 with whips and rungs. Boma grabbed and twisted PW 5's hand while he was trying to call. Because of the serious injuries, they went to report the incident at Malaba Police Station (OB No. 2/8/8/2017). Edwin Otapiro was treated at Kocholia

District Hospital and was issued with a P3 form. PW 4 stated that he nevertheless proceeded to discharge his duties as an agent while PW 5 was able to vote.

48. The Petitioner alleged George Okwara (DW 2), whom he described as the 1st Respondent's campaigner, stormed *Korisai Primary School Polling Station* and threatened and or intimidated the Presiding Officer therein, thereby creating disturbance. The Petitioner did not lead any evidence to support this allegation which DW 2 denied.

49. The Petitioner pleaded that at *Akobwait center*, the Petitioner and his agents were violently attacked at his rally by the 1st Respondent's agents and that this event was later used to intimidate and threaten would be supporters of the Petitioner. The Petitioner and his bodyguard, Martin Ichelai (PW 7) testified about the incident that took place on or before the election on 3rd August 2018. The evidence was that the Petitioner had gone to meet the people meeting at *Akobwait Primary School*. While the meeting was going on, one Antony Makana, accompanied by Moses Otwane and Simon Atitwa whom he knew as the 1st Respondent's campaigners, started shouting and demanding that they go away to with their Eurobond money. The three men continued uttering threats while advancing towards the Petitioner. Seeing that the Petitioner was in danger, PW 7 went towards the Petitioner when he intercepted a punch aimed at the Petitioner by Makana. In the meantime, some youths began throwing stones prompting him to fire two shots in the air in order to disperse the now rowdy youth. After this, the youths scampered to safety and the situation calmed down. He later reported the discharge of the firearm to the Administration Police at Changara.

50. The 1st Respondent's campaign agent in *Angurai East Ward*, Davies Barasa Mwanawase (DW 5) confirmed that the meeting at Akwobait took place and that there was a scuffle but that Makana, Okware and Atitwa were not part of the 1st Respondent's campaign team under his co-ordination.

51. Although the Petitioner's evidence is credible that the incident at Akwobait took place, there is no evidence that this incident, coming a few days before the election, affected any voters or affected the results of the election. The Petitioner did not call any witnesses who were dissuaded from voting for him or affected by the incident.

52. Benson Papa Iyese (PW 2) gave evidence to support the allegation that 1st Respondent and his agents also meted out violence against the Petitioner's polling agent and supporters in certain instances violently ejecting them from polling stations. PW 2 was the Jubilee agent at *Kolanya S.A. Nursery Polling Station*. He recalled that during the counting process, he had just walked out of the polling station when he was confronted by several men led by one Jacob Oteba whom he knew as a campaigner of the 1st Respondent. He was attacked by the men who were saying, "*nyinyi watu wa Jubilee mutaona.*" He sustained blunt injuries and could not continue with his duties as an agent. He later reported the incident at Amagoro Police Station (OB No. 26/14/8/2017) and was given a P3 form. Although he deposed that he was unable to proceed with his work, in cross-examination he admitted continuing with his work and he even signed the Form 35A. Ham Emeje (PW 3) confirmed that he witnessed the assault on PW 2 to distract him from keeping a watchful eye on the vote counting. I note that both PW 2 and PW 3 were able to carry out their duties at *Kolanya S.A. Nursery Polling Station No. 1* as they both signed Form 35A on behalf of the Petitioner's party.

53. The Petitioner called Jackline Langat (PW 25), the Presiding Officer of *Keng'atuny Secondary School Polling Station*, to testify how, in the course of assisting an elderly voter found her with a piece of paper with candidates' names and some money. In her deposition, she stated that she did not record the incident in the polling book diary or take any action. This allegation notwithstanding, *Keng'atuny Secondary School Polling Station* is not one of the polling stations pleaded and I accordingly disregard this allegation.

54. The totality of the evidence on the allegations of violence and intimidation were few. The Petitioner did not prove that the acts of violence and intimidation were attributable to the 1st Respondent, were widespread and affected the election results.

Contraventions of the law by the 2nd and 3rd Respondents

55. Under this head, I shall consider the allegations that the 2nd and 3rd Respondents are alleged to have engaged in contravention of the law. The Petitioner averred that they showed bias and colluded with the 1st Respondent thus negating the will of the electorate. These allegations are pleaded in Part F paragraph 27 of the petition. I will deal with the allegations under two heads; general malpractices and bias and assisted voters.

General Malpractices and Bias

56. The Petitioner complained that Presiding Officers refused to ensure that the agents present verified votes being counted. He complained that in certain instances, insisting that votes were counted in a room without light giving the 2nd and 3rd Respondents an opportunity to manipulate results in favour of the 1st Respondent. Unfortunately, the Petitioner did not plead the specific polling station where this took place or the Presiding officer involved.

57. I note, however, that Magdalene Tata Ekasiba (PW 18) testified that she was an agent of the independent candidate for governor at *Kiriko Primary School Polling Station*. She stated that when the voting exercise ended and during the counting of votes noticed that ballot papers clearly marked for the Petitioner were being mixed up with those of the 1st respondent taking advantage of the inadequate lighting in the polling station. PW 5's testimony was undermined by the fact that the Petitioner's own agent, Joseph Emorut, who signed Form 35A was not called as a witness. The Petitioner's agent, John Silanyi (DW 12), testified that the voting went on smoothly.

58. The Petitioner averred that at *Kiriko Primary School Polling Station*, his agents were denied the right to fully participate in the counting of votes as they were representing Jubilee Party in a NASA stronghold. Although the Petitioner pleaded that Magdalene Tata Ekasiba (PW 18) was his agent, according to her deposition, she was the agent for the independent candidate for governor and as I stated elsewhere in the judgment, her allegations were undermined by the fact that the Petitioner's agents in both polling stations at *Kiriko Primary School Polling Centre* were present, signed the Form 35A and were not called as witnesses.

59. The Petitioner complained that his agents were denied the right to request for a recount and the right to access Form 35A's under the guise that they were not enough. He further contended that where these forms were issued, they were barely legible. I find this allegation vague and imprecise as no specific polling station where a recount was requested was denied was pleaded. I also dismiss the allegation that the Petitioner's agents were denied the right to verify the counting and tallying of votes as there was no evidence adduced to support this allegation.

60. The Petitioner alleged that at *Malaba Primary Polling Station*, Presiding Officers refused to ensure that votes being counted were verified by his agents and that they used that opportunity to have votes cast for the Petitioner counted in favour of the 1st Respondent. Christine Okitoi (PW 16), the Petitioner's agent at Malaba Polling No. 2 gave evidence on this assertion. Although she complained that the votes cast for the Petitioner were included in the 1st Respondent's tally, she signed the Form 35A signifying her contentment with the results. No complaint was raised about the other polling stations at *Malaba Primary School Polling Centre* where the Petitioner was represented by agents who all signed the Form 35A.

61. The Petitioner also complained that at *Rwatama Primary School Polling Station*, the Presiding Officer allowed the School's head teacher, who was the 1st Respondent's supporter, unfettered access to the station. He also alleged that the Presiding Officer called him away from the polling station for hours on end. The Petitioner's agent at the polling station, Janet Ato Sogoli (PW 20) recalled that at about 2.00pm, the head teacher came to the polling station and they went out and spent 10 minutes then he returned. Thereafter, he returned and the voting went on. The Petitioner did not name the head teacher and his being away for 10 minutes, in my view, without more could not have affected the voting. Most importantly, the Petitioner did not show how this affected the voting. This allegation is devoid of merit.

62. The Petitioner cited *Rwatama Primary School Polling Station* as one of the polling stations where his agents were denied the right to fully participate in the election on account of representing Jubilee Party in an alleged NASA stronghold. PW 20 deposed that her complaint was that she could not observe the count where she was seated hence she concluded that the counting was unfair. In her own words, “*I would not be surprised if the votes belonging to [the petitioner] were counted for [the respondent] given the evidence [of] bias from the get go.*” From her evidence, the other agents were present and did not complain. PW 20 signed Form 35A signifying that she was satisfied with the result. This allegation, I find and hold, was speculative and not proved.

63. The Petitioner complained that at *Kajei Secondary School Polling Station*, the Presiding Officer disappeared for several hours without indicating his whereabouts contrary to provisions of the law, leaving the polling station in the hands of a partisan Deputy Presiding officer. Tobias Imaet Emokol (PW 23) testified that the Presiding Officer, Ben Osukuku, removed his IEBC jacket and headed away from the polling station on a motorbike and then returned after an hour. When PW 23 inquired about the absence, the Presiding Officer told him that he had been called to sort out an issue regarding missing voting material. From his own evidence, there was nothing suspicious about the Presiding Officer’s absence as he was away for an hour dealing with a problem in another station. There is no evidence that polling did not go on or was interfered with in the one hour he was away. In any case, PW 23 signed the Form 35A which was also signed by the Presiding Officer.

64. The Petitioner complained that at *Moding Primary School Polling Station*, the Constituency Deputy Returning Officer disappeared with the Presiding Officer for hours on end, only returning back to duty in the evening contrary to provisions of the law. The Petitioner’s agent at the polling station, Catherine Amoiti (PW 14) testified that the Presiding Officer left the station at about 2.00pm and left the Deputy Presiding Officer in charge only to return at 6.00pm. During that time, he alleged that bribery was taking place outside the polling station and voters requiring assistance were being assisted in violation of the regulations. The 1st respondent’s agent, Michael Odeke Okware (DW 7), denied that anything untoward happened at Moding on that day. I am inclined to believe that the absence of the Presiding officer did not affect the vote as all the agents including PW 14 and DW 7 were contented with the results of the day and signed Form 35A.

65. As regards the complaint at *Kakeriaut Primary School Polling station*, it was alleged that voters were openly and blatantly bribed at the polling station within sight and with the collusion of the Presiding Officer, the Petitioner’s agent, Lilian Ikapel (PW 28) did not depose to this fact. On the contrary she signed the Form 35A in which she signified her agreement with the results of the election.

66. Rispa Amoding’ Osiya (PW 21), the Petitioner’s agent at *Katotoi Primary School Polling station*, was called to support his complaint that voters whose fingerprints were found not to be showing were turned away from voting therefore not given the opportunity to confirm their names from the register, thus denying them the right to vote. PW 21 testified that the polling station opened well on that day and at 11.00am, the KIEMS device failed to work in detecting voters. Because of the failure, the necessary forms to enable the voters to be recorded were not available and had to be brought from the IEBC offices at Amagoro. PW 2 further deposed that by the time the forms were brought at about 5.00pm, a majority of voters had been turned away and the polling station closed thereafter. In his affidavit, PW 21 stated that she did not raise any complaint and that she proceeded to sign various forms issued to her although the Form 35A did not show that only the 1st Respondent’s agent signed the form. In her evidence, the Julian Gomity (DW 1) told the court that none of the KIEMS kits failed. In my view, the Petitioner failed to name anyone who was denied the right to vote or in fact call them as a witness. I also note that despite giving the Petitioner an opportunity to inspect the electronic information, nothing was raised about this polling station. I reject this allegation.

Irregularly Assisted Voter

67. Voters who, as a result of a disability or unable to read and write are entitled to be assisted to vote. **Regulation 72 of the Elections General Regulations, 2012** (“**Regulation 72**”) deals with assisted voters and it provides as follows:

72(1) On the application of a voter who is, by reason of a disability or being unable to read or write, and therefore unable to vote in the manner prescribed in these Regulations, the presiding officer shall permit the voter to be assisted or supported by a person of the voter's own free choice, and who shall not be a candidate or an agent.

(2) Where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such voter, in the presence of the agents.

(3) The presiding officer may make such necessary and respectful inquiry in order to establish that the voter and the person the voter has chosen to assist him or her satisfies the provisions of this regulation.

(4) The person chosen by the voter is not required to be qualified to vote but is required to have attained the age of eighteen years.

(5) The following shall apply with respect to a person who assists a voter under this regulation—

(a) the person shall, before assisting or supporting the voter, make a declaration of secrecy before the presiding officer in Form 32 set out in the Schedule;

(b) a person who breaches his or her declaration commits an offence under the Act;

(c) the person shall assist or support only one voter at that election and have a mark as proof of assisting or supporting a voter.

(6) Where a presiding officer grants the request of a voter under this regulation, the presiding officer shall record in the polling station register against the name of the voter the fact that the voter was assisted and the reason for the assistance.

(7) No person other than a person acting under this regulation shall be present in a compartment of a polling station while a voter is in the compartment for the purpose of marking his or her ballot paper and any person who contravenes this subregulation commits an offence.

88. The tenor of **Regulation 72** is to enhance and fulfil the right of every person to vote by facilitating them in the voting process while ensuring the right to a secret ballot devoid of harassment, threats or intimidation is preserved. Further, because of the possibility of abuse of the process, the regulation ensures that for purposes of transparency and accountability required by **Article 81** of the **Constitution**, the process is well documented.

69. As I set out in the general principles, it is the burden of the Petitioner to prove non-compliance with the regulations to the required standard and show that such irregularities or non-compliance affected the result. I now turn to consider the evidence in light of what the Petitioner had pleaded in the petition on this issue.

70. The Petitioner complained that voters who could neither read nor write were coerced into being assisted in the absence of his agents by Presiding Officers and intimidated into voting for persons they did not wish to vote for. He cited *Kiriko Primary polling station* and in support of his case he called two witnesses; Akiru Ekesa (PW 8), Baraza Chrispinus Namachanja (PW 10) and Joan Suswalkasi (PW 11) and Magadalen Tata Ekasiba (PW 18).

71. PW 8, an elderly woman, recalled that she went to vote with her granddaughter, Brenda Amusolo, who was her chosen assistant. When she reached the polling station, the Presiding Officer, Vincent Omong'or Aleu (DW 16) told her that she could not be accompanied. Instead DW 16 assisted her mark her ballots paper. She deposed that when it was time to vote for the Petitioner, he told her, "*Maneno ya Jubilee Party hatutaki.*" DW 16 proceeded to tick the ballot paper for the 1st Respondent instead of her choice. In cross-examination, she admitted that Brenda was 16 years old. While she had stated that DW

16 is the one who assisted her mark the ballot paper, in re-examination she stated that DW 16 did not assist her mark the ballot paper. DW 16 told the court that he could not allow Brenda to assist PW 8 as she was 16 years and did not have a national Identity Card as required by the regulations. He denied that he influenced any voter.

72. Baraza Chrispinus Namachanja (PW 10) testified that he went to vote and elected to be assisted by Joan Suswa Ikasi (PW 11). When they arrived at the polling station, DW 16 refused to allow PW 11 assist PW 10 as he explained to them that he was the only one allowed to assist candidates. As he was being assisted he was told by DW 16, “*Usilete hapa Jubilee, usifikiri hapa ni Bungoma. Sisi ni watu wa NASA.*” When he pointed to the Petitioner as his preferred candidate, he was threatened but insisted that the ballot paper be marked. DW 16 then marked the ballot paper as per his choice but the tick mark went outside the box making it a spoilt ballot. PW 11 confirmed that she was not allowed to assist PW 10 and when he came out of the polling station he informed her of what had taken place. Magdalene Tata Ekasiba (PW 18), who was an agent of the independent gubernatorial candidate, deposed that all the agents including her were denied the chance to witness the voting by assisted voters who were being helped by the Presiding Officer. When she told the Presiding Officer that the duty of the agent included witnessing the voting exercise by assisted voters, she was warned and told that she would be thrown out of the polling station.

73. What emerges from this evidence at *Kiriko Primary School Polling Station*? As regards PW 16, the assistant brought by her was not qualified to assist as she was underage. She however agreed that she was assisted to vote. On the issue of whether she was coerced into voting, she gave two inconsistent versions when she testified that DW 16 assisted her and then in re-examination stated that she was assisted by someone else. As regards PW 10, he ultimately voted although his complaint was that the ballot paper was spoilt as it was marked beyond the box for the Petitioner. The totality of the evidence on the issue of assisted voters at *Kiriko Primary School Polling Station No. 1 and No 2* is clearly undermined by the fact that the Petitioner’s agents in the two polling stations, Ann Chepkoech and Joseph Emorut, who signed the respective Forms 35A accepted the results and were never called as witnesses thus entitling this court to draw an adverse inference against the Petitioner.

74. I now turn to *Malaba Primary polling station* where the Petitioner pleaded that his polling agents were intimidated and constantly threatened with being ejected from the polling room in order to prevent them from being present when the Presiding Officer was assisting assisted voters. I have already touched on the evidence of Christine Okitoi (PW 16) who was the Petitioner’s agent at *Malaba Polling Station No. 2*. Her case was that she noticed that all other agents were allowed to the process of assisting voters except her. She also deposed that the Presiding Officer would read to the assisted voter the names of his preferred candidate in a suggestive voice, in this case, the 1st Respondent in an attempt to influence the assisted voter vote for the 1st Respondent. PW 16 in this case did not name any of the voters who were influenced or voted after being intimidated. This would have assisted the Respondents answer the charge pointedly. The Petitioner’s case was further undermined by the fact that PW 16 signed Form 35A implicitly accepting the results.

75. The Petitioner complained that at *Ketabat Primary School Polling Station, Akichelesit Polling Station, Rwatama Polling Station, Kakapel Polling Station and Kaeset Primary Polling Station*, assisted voters were coerced by polling officials into being assisted in the absence of agents and intimidated into voting for persons they did not wish to vote for. Gad Osiya Okello (PW 17) was the Petitioner’s agent at *Ketabat Primary School Polling Station*. He deposed to a general allegation that in total violation of the regulations governing assisted voters, the Presiding Officers were guided to vote in the absence of and without participation of party agents. The allegations by PW 17 were general in nature and at the end of the day, he signed the Form 35A which confirmed that he was satisfied with the result.

76. As regards *Akichelesit Polling Station*, the Petitioner did not call any witness to substantiate the allegations. On the contrary, the 1st Respondent’s agent, Harrison Juma Esiromo (DW 8), told the court that voting went on well at the polling station and at the end of the day, all agents, including the Petitioner’s agent, signed off the Form 35A. At *Rwatama Primary School Polling Station*, Janet Ato Sogoli (PW 20) made the allegation that the Presiding Officer, denied all the agents present to witness the

assisting of voters, claiming that one voter could witness the exercise of a particular voter. In my view, this was clearly a vague averment as no voter was named or pointed out.

77. The Petitioner's agent at *Kakapel Primary School Polling Station*, Queen Okadapau (PW 29) did not set out in her deposition how the regulations in regard to assisted voters were violated. Betty Onyapidi (PW 13), the Petitioner's agent at *Kaaset Primary School Polling Station*, deposed that the Presiding Officer assisted numerous voters who sought for assistance without involving any of the agents at the polling room. She referred to an old lady who walked into the station and expressed loudly her preference for the Petitioner but when she saw the ballot paper, it had been marked for the 1st Respondent. Her complaints to the Presiding Officer were ignored. I would point out again that the voter affected was not named making this allegation a general allegation.

78. The Petitioner averred that at *Chelelemuk Girls polling station*, *Kongurakol Primary School Polling Station*, *Kakurikit Primary School Polling station*, assisted voters were coerced into being assisted in the absence of agents and intimidated into voting for persons they did not wish to vote for and/or ballot papers being intentionally spoilt if they were votes in favour of the Petitioner. The Petitioner did not call any witness to support the allegations regarding *Chelelemuk Girls Boarding Primary School Polling Station*. Likewise, no evidence was led to support the case in respect of *Kakurikit Primary School Polling Station*.

79. In his deposition, William Indeke (PW 31) deposed that he received information from Titus Oroni (PW 22) that agents were not being allowed to witness voting by assisted voters. PW 22, the Petitioner's agent at *Kongurakol Primary School Polling Station* deposed that the Presiding Officer and his deputy declined to allow all agents to witness the process of voting by assisted voters. He was rebuffed when he tried to complain about this. He speculated in his deposition that he noticed a pattern of spoilt votes coming from the Petitioner's side and he concluded that these were spoilt votes as a result of the fact that the Presiding officers denied his agents the opportunity to witness the voting. In this case he deposed that in all the spoilt votes, a tick had been placed next to the name of the Petitioner and an X placed to the 1st Respondent's name. This evidence lacked the particularity required to make any finding. No voters were named and the reason for spoilt votes was based on speculation. The Presiding Officer, Nicholas Asoyong Ambani (DW 17) denied all the allegations. PW 22's evidence is undermined by the fact that he signed Form 35A implicitly accepting the results. Further, the Petitioner won the polling station by a total of 221 votes out of 337 votes cast while the 1st Respondent came second with 101 votes. There were only 14 rejected ballots at this polling station. This allegation is therefore dismissed.

80. Lilian Ikapel (PW 28), the Petitioner's agent at *Kakeriaut Polling Station* deposed that the Presiding Officer denied her a chance to witness the marking of papers by elderly and illiterate voters who were quite substantial in number. She said that due to these irregularities, the election was a sham. Despite the substantial numbers of assisted voters who were neither counted, named nor disclosed, PW 28 endorsed the result by signing the Form 35A together with the other agents present.

81. In *Kolanya SA Nursery Polling Station*, the Petitioner complained that assisted voters were coerced into being assisted in the absence of agents and strong armed into voting for persons they did not wish to vote for and/or ballot papers being intentionally spoilt if one votes in favour of the Petitioner. Benson Papa Iyese (PW 2) deposed that in total disregard of the regulations, the Presiding Officer, assisted several voters who sought for assistance without involving any of the agents present at the polling station, while openly urging them to vote for the 1st Respondent. The agent did not provide any names of those people who were irregularly assisted. I have looked at the Forms 35A for both polling stations at *Kolanya SA Nursery Polling School* and indeed PW 2 signed off the results of station no. 1 and his counterparts acting for the Petitioner, Esnas Ochorodi and William Sirari signed the Form 35A for station No. 2. This allegation is accordingly dismissed.

82. The totality of the evidence I have set out is that the Petitioner failed to prove with particularity the fact that **Regulation 72** was violated in respect of any voters particularly the voters who were called as witnesses. Although the Petitioner alluded to the fact that the violation affected a substantial number of voters, the agents did not give any indication of how many and how extensive the voters were affected.

What emerged from the evidence, and this fact is deponed to by several witness, is that all the agents of all candidates were affected by the manner in which the Presiding Officers elected to deal with assisted voters.

83. The IEBC conceded that it did not comply with **Regulation 72(6)** of the *General Regulations* in so far the Presiding Officer did not mark the physical register to denote that a voter had been assisted and the reasons thereof recorded. The IEBC justified its decision on the basis of the Court of Appeal decision in the case of *National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission & 2 Others NRB CA Civil Appeal No. 258 of 2017 [2017]eKLR* where the Court accepted and directed the IEBC and its officers to adhere to its internal memorandum dated 27th July 2017 on the use of biometric verification and complementary mechanism. The memorandum directed the use of the printed register only after approval by the IEBC upon confirmation that the KIEMS kit had failed and there was no possibility of repair or replacement.

84. I agree with the Respondents that the issue of lack of the marked register was not raised in the petition and would in light of the principles I cited be a matter to be disregarded. In this case though, the issue affected all the candidates equally and I cannot say that there is evidence that all assisted voters would have voted for the Petitioner or that the failure to use the marked register would have affected the result. Perhaps this issue of the marked register vis-a-vis assisted voters may need to be revisited when reviewing the rules in light of use of the electronic register.

85. In my Ruling No. 4, I rejected the Petitioner's application for production of Form 32A's and polling diaries to assist the court discern which and how many assisted voters were assisted in the voting. In my view, as I have shown, no basis was laid for this as the evidence in support of this ground was general in nature and devoid of particulars. Form 32A's would identify specific voters who are not named in the petition or affidavits. The Respondents would not have the opportunity to call them or cross-examine them and the court would be none the better.

86. Having considered all the evidence as whole, I find and hold that the Petitioner failed to prove that the rights of assisted voters were violated to the extent that the election ought to be nullified.

Determination

87. I have dealt with the allegations made in Part F of the petition and found that the evidence to support those allegations falls below the threshold required to annul an election. I however wish to comment of few issues.

88. Counsel for the Petitioner emphasized that the Teso North Constituency election was closely fought and in looking at the evidence I must take into account the margin of 4.05% between the Petitioner and 1st Respondent. Second, I must take into account that the Petitioner was a Jubilee candidate facing other NASA affiliated candidates in a hostile environment.

89. The margin of votes alone is not a reason to annul an election. Elections in Kenya are on the basis of the first past the post system and even a margin of one vote is enough for the winning candidate to be declared winner. In this case, nothing has emerged from the evidence to show that the irregularities cited affected that result.

90. Even though other candidates were from the NASA coalition, each candidate was fighting this election to win as reflected by the margin of votes between the three front-runners. That the Petitioner came a healthy second is only testament of the fact that the election was hard fought and margins tight. Teso North Constituency achieved a 79.92% turnout which, by all accounts, is a high turnout.

91. I will be remiss if I did not comment on the place of Form 35A which I have referred to in my analysis of the evidence. Form 35A is the primary form in the electoral process, where the results of the election at the polling station are recorded. In *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others NRB CA Civil Appeal No. 105 of 2017 [2017]eKLR* which was cited with

approval by the Supreme Court in *Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and Others*[2017] (Supra at para. 264), the Court of Appeal underpinned the finality of results recorded at the polling station as follows:

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.

92. The Forms 35A were all submitted to court and they tell their own story. Out of the 118 Forms 35A, all but 2 were signed by one or more agents. In all of them the Petitioner's agents did not sign 11 forms and out of those polling stations, the Petitioner only raised an issue about *Katotoi Primary School Polling Station* which I have dealt with above. The sum of this evidence is that the election was free and fair and indeed accepted by the Petitioner's agents across the constituency.

93. I should not be seen as laying down a general rule that once the Form 35A is signed by the agent, it is uncontestable. Form 35A is one but a step in documenting the election. It contributes towards transparency, verifiability and accountability in an election. The ultimate duty of the court is to consider the election process as a whole in light of the evidence led by the Petitioner. Each step in the process contributes to the integrity of the process and each step ought not to be considered in isolation but in light of the other steps and processes each supporting each other and contributing to integrity of the whole process. In this case, the Petitioner was unable to surmount the threshold necessary to annul election.

94. At the beginning of these proceedings, I granted the Petitioner and 1st Respondent full access to all electronic information from the KIEMS Kit for each polling station. Despite the unlimited access, the Petitioner did not point to anything that implied that the polls were not free and fair. Since nothing was raised in that regard or put to the 2nd and 3rd Respondents and their witnesses in cross-examination, the only inference I can draw is that elections were free and fair.

95. I have stated enough to show that the petition must fail and is therefore dismissed.

Report on Electoral Malpractices

96. Notwithstanding the fact that I have dismissed the petition, Pursuant to **section 87** of the *Elections Act, 2011* this court is, at the conclusion of a hearing, required to determine whether an electoral malpractice in the nature of electoral offence under the *Election Offences Act, 2016* may have occurred.

97. There is clear evidence that several incidents of violence occurred and were reported to the police as follows;

- a. Assault on Sammy Odama and Edwin Otapiro reported as OB No. 2/8/8/2017 at Malaba Police Station.
- b. Violence at Akobwait reported as OB No. 10/3/8/2017 at Amagoro Polling Station.
- c. Assault on Benson Iyese at *Kolanya Nursery SA Polling Station* reported as OB No. 26/14/8/2017 at Amagoro Criminal Divisional Headquarters.

98. The Deputy Registrar is directed to forward this Judgment to the Director of Public Prosecutions for such action on the matters I have set out in paragraph 97 above as he may deem fit.

Costs

99. **Section 84** of the *Act* provides that, "*An election court shall award the costs of and incidental to a*

petition and such costs shall follow the cause.” Such costs are to follow the event and it is now accepted that the Court has broad jurisdiction to determine costs and impose a cap on the total costs payable.

100. In considering the cap, I have considered similar cases where the court has capped costs, the need to maintain a reasonable cap that compensates the other party for work time while ensuring that the amount is not excessive to the extent that it dents the public confidence in the court and impedes the right of access to justice protected under **Article 48** of the **Constitution**.

101. This petition was not complex and the issues were fairly straight forward as manifested by the pleadings and submissions tendered, the number of witnesses and the nature of their evidence on record. In reaching the cap, I have taken into account the time spent on research, preparation of pleadings, applications and submissions, preparation of witnesses and in court during the actual hearing of the case and the parties’ proposals.

102. Although, this petition was heard in Kisumu thereby increasing the costs to the parties, all the parties suffered the expense as the decision to hear the matter was taken by the Chief Justice in light of number of petitions filed at the Busia High Court being dealt with by the single judge at that station. The Petitioner should not be penalized for this and the Deputy Registrar is directed to tax the bill of costs as if the matter were being heard in Busia.

103. Taking all the factors I have outlined above, the instructions fees for each party shall be capped as follows; **Kshs. 1,000,000/00** for the 1st Respondent and **Kshs. 1,000,000/00** for the 2nd and 3rd Respondents.

Disposition

104. The final orders are therefore as follows;

- a. The petition be and is hereby dismissed.
- b. The Respondents are awarded costs on the following terms:
 - i. Instruction fees for 1st Respondent are capped at **Kshs. 1,000,000/00**.
 - ii. Instruction fees for the 2nd and 3rd Respondent are capped at **Kshs. 1,000,000/00**.
 - iii. The costs shall be taxed and the total costs certified by the Deputy Registrar of this court.
 - iv. The certified costs awarded shall be paid out of the security deposit on a pro-rata basis.
 - v. The Deputy Registrar is directed to forward this judgment to the Director of Public Prosecutions for further action in accordance with **section 87** of the ***Elections Act, 2011***.
 - vi. A certificate of this determination in accordance with **section 86(1)** of the ***Elections Act, 2011*** shall issue to the Independent Boundaries and Electoral Commission and the Speaker of the National Assembly.

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

D.S. MAJANJA

JUDGE

Mr Walukwe with him Ms Kendi instructed by Okong’o Omogeni & Company Advocates for the Petitioner.

Mr Odera instructed by Odera Obar & Company Advocates for the 1st Respondent.

Mr Juma with him Mr Kubebea instructed by Mukele Moni & Company Advocates for the 2nd and 3rd Respondents.

Court Assistants: Ms Lombaka & Ms Atieno.