



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ELECTION PETITION NO. 6 of 2017
IN THE MATTER OF: THE ELECTIONS ACT CHAPTER 7 LAWS
OF KENYA & THE REGULATIONS MADE THEREUNDER.
IN THE MATTER OF: ELECTION FOR THE MEMBER
OF NATIONAL ASSEMBLY OF MOHAMED ALI
MOHAMED FOR NYALI CONSTITUENCY.
DANIEL ONGONG'A ABWAO.....PETITIONER
-VERSUS-
MOHAMED ALI MOHAMED.....1ST RESPONDENT
MWANAJUMA GANDANI.....2ND RESPONDENT
THE INDEPENDENT ELECTORAL
AND BOUNDARIES COMMISSION.....3RD RESPONDENT

JUDGMENT

Background:

1. Upon the results of the 8th August, 2017 general elections, the 1st Respondent was declared the duly elected Member of National Assembly for Nyali by the 2nd Respondent, who is the Returning Officer of the 3rd Respondent. The particulars of the results that were announced stated that the 1st Respondent had garnered the highest number of votes totalling 26,798.

2. The Petitioner, an aggrieved voter and citizen of Kenya, filed the present Petition dated 6th September, 2017 together with supporting affidavits of 16 witnesses seeking the following orders, jointly and severally against the Respondents:

- i. A declaration that the 1st Respondent was not validly elected as a member of the National Assembly for NYALI Constituency.
- ii. An order for fresh elections to be held within the time permitted by the law.
- iii. A determination that electoral malpractices of a criminal nature may have occurred and an order for the matter to be transmitted to the Director of Public Prosecution for appropriate investigation and action against the named perpetrators of the electoral malpractices.
- v. The Respondents jointly and/or singularly be condemned to bear the Petitioners costs and matters incidental to this Petition.

v. Such further, other and consequential orders as this Honourable Court may deem fit and just to grant.

3. The Petitioner called 14 witnesses in support of his contentions as expressed in his Petition, that the said election was marred with various irregularities and offences on the part of the 1st Respondent and/or his agents as follows: Violence and intimidation, misuse of public resources and national security organs, bribery of voters, campaigning and unduly influencing voters at the polling station and passing off as a member of a political party.

4. Against the 2nd & 3rd Respondents and their agents, the Petitioner contended that there were discrepancies between the polling and tallying stations. Further that there was failure of biometric machines during voting and the IEBC showed bias. They also complained that the 2nd and 3rd Respondents had allowed the display of candidates' campaign material at the polling stations.

5. The Respondents filed their respective responses to the petition together with affidavits in support. The 1st Respondent filed an affidavit sworn by himself and dated 19th September, 2017 wherein he contended that the Petition is bad in law, that he was duly elected and the election was valid. In support of his case, the 1st Respondent called one witness.

6. The 2nd & 3rd Respondents filed a joint response to the Petition dated 25th September, 2017 and a Further Affidavit in support to the response to the petition dated 10th January, 2018. The IEBC denied the averments in the Petition and contended that the alleged impugned election was free, fair, transparent, credible and verifiable. Further that it was conducted in full compliance with the Constitution, the Election Act and all applicable laws and regulations. In support of their case, the IEBC called 4 witnesses.

7. The hearing of the Petition took place on diverse dates between 8th January, 2018 and 19th January, 2018. Parties filed written submissions which were highlighted on 2nd February, 2017. Learned counsels Mr. Balala appeared for the Petitioner, while Mr. Chacha Odera appeared for the 1st Respondent and Mr. Tony Odera appeared for the 2nd and 3rd Respondents.

Issues for determination:

8. The court has considered the pleadings, the evidence tendered and the submissions of the counsels on record and finds that the issues for determination in the petition are, principally:

- a. Whether the Petitioner has proved election offences against the 1st Respondent and his agents as alleged.
- b. Whether any irregularities, election offences and breaches of the law proved amount to substantial breaches of the Constitution and Elections Act, or whether the said irregularities, offences and breaches of the elections Act affected the result?
- c. Whether the 2nd and 3rd Respondents conducted the election of the Member of National Assembly for Nyali in free, fair, transparent and credible manner in accordance with the Constitution and the applicable electoral laws?

The Law and Burden of Proof

9. Let me begin by outlining some general principles applicable to election petitions and on which all counsels, in their written submissions, agreed, and how the courts have interpreted them in various decided cases.

10. In *Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others*, Civil Appeal (Nyeri) No. 38 of 2013, the Court of Appeal explained the constitutional basis for appraising an impugned election from both qualitative and quantitative perspectives in the following words:

“to determine whether the results as declared in an election ought to be disturbed, the court is not dealing with a mathematical puzzle and its task is not just to consider who got the highest number of votes. The court has to consider whether the grounds as raised in the petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not transparent, free and fair. It is not just a question of who got more votes than the other. It cannot be said that the end justifies the means. In a democratic election, the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that there existed favourable circumstances for a fair election and that no party was prejudiced by an act or omission of an election official.”

11. In 2010, Kenyans adopted a new constitution as one of the means for securing the long-term stability of the State of Kenya. The Constitution of Kenya, 2010 (“**the Constitution**”) introduced radical changes to the Kenyan electoral and electoral dispute resolution systems. The Constitution requires, *inter alia*:

- an electoral system that is “simple, accurate, verifiable, secure, accountable and transparent” (Article 86 (a) of the Constitution);
- a statutory framework characterized by “mechanisms for timely settling of electoral disputes” (Article 87 (1) of the Constitution);
- the administration of (electoral) justice “without undue regard to procedural technicalities” (Article 159 (2) (d) of the Constitution);
- the administration of (electoral) justice in a manner that protects and promotes the purpose and principles of the Constitution (Article 159 (2) (e) of the Constitution); and
- the exercise of judicial authority subject only to the Constitution and the law and not “subject to the control or direction of any person or authority” (Article 160(1) of the Constitution).

12. In considering the current Petition I will echo the words of Majanja J. in **Kisumu Election Petition No. 3 of 2017 in Jackton Nyanungo Ranguma Vs The Independent Electoral And Boundaries Commission & 2 Others** where he stated:

“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. 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. 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.”

13. On the Burden of proof in Election Petitions the petitioner is bound to prove the case he has pleaded. A petitioner is bound by his pleadings and is not permitted to go on a frolic and make a case outside the pleadings. The Affidavits and evidence must be in tandem with the case pleaded. However, although the burden of proof in an election petition lies with the petitioner, an election court is not bound to decide an election petition only on the petitioner’s evidence as was held in **Ramadhan Seif Kajembe v Returning Officer, Jomvu Constituency & 3 Others, Election Petition (Mombasa) No. 10 of 2013**. An election court must consider the totality of the evidence adduced by all the parties instead of dwelling solely on the petitioner’s evidence.

14. Generally, the standard of proof required in Election Petitions is higher than the civil standard of balance of probabilities, but is lower than the criminal standard of proof that is beyond all reasonable doubt. The court in **Hassan Mohamed Hassan & Another v Independent Electoral & Boundaries Commission & 2 Others, Election Petition (Garissa) No. 6 of 2013**, explained the “standard of proof” in Election Dispute Resolution matters as referring to the extent the Petitioner is to go, to sufficiently persuade the election court to interfere with the election results declared in favour of the candidate who scored victory.

15. Section 83 of the Elections Act, 2011 lays down the standard of proof required in election petitions in Kenya. Section 83 stipulates:

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.

This is also in tandem with Lord Denning’s proposition in *Morgan v Simpson* [1974] 3 All ER 722, cited here in part, that

“if the Election was so conducted that it was substantially in accordance with the law as to Elections, it is not vitiated by a breach of the rules or a mistake at the polls—provided that it did not affect the result of the Election”.

Analysis and Disposition

16. The Petitioner asserted that the 1st Respondent was not validly elected as a member of the National Assembly for Nyali Constituency and that the election process was marred with various irregularities and offences on the part of the 1st Respondent and/or his agents. He accused the 1st Respondent and his agents of the following: Violence and intimidation, misuse of public resources and national security organs, bribery of voters, campaigning and unduly influencing voters at the polling station and passing off as a member of a political party. I have considered the evidence on each of the allegations in the succeeding paragraphs.

(i) Misleading and Passing off

17. The Petitioner contended that the campaign materials used by the 1st Respondent were misleading and that the 1st Respondent acted in total contravention of the provisions of the **Electoral Code of Conduct** by using a National Super Alliance Coalition (NASA) affiliate color scheme and the portrait of the Orange Democratic Movement (ODM) Presidential Candidate, Mr. Raila Odinga on his campaign posters. PW1 and PW6 who was the Petitioner gave evidence on the use of Wiper Democratic Movement (Wiper) colours by the 1st Respondent and the portrait of Mr. Odinga. Both shared the same view that the 1st Respondent gained unfairly by using the picture of Raila Odinga who garnered the most votes in Nyali.

18. Section 6(g) of the **Electoral Code of Conduct** states that:

“6. All those bound by this Code shall, throughout an election period—

(g) avoid plagiarizing the symbols, colours or acronyms of other parties; and to discourage and, if possible, prevent the removal, disfigurement or destruction of political campaign materials of any party.”

19. In rebuttal the 1st Respondent argued that the colours used in his campaign were distinctly different from those used by the Wiper candidate. He pointed out that although both used the colour blue, one was distinctly a darker shade than the other.

20. On the use of the image, the 1st Respondent’s testimony in Court was that it was he who was campaigning for Mr. Odinga and that his support was confined to Mr. Odinga as an individual and not the political party he was affiliated to. Mr. Chacha Odera in his submissions cited **Section 16 of the Political Parties Act No 11 of 2011** which states that a political party, by dint of registration, acquires a corporate personality independent of its members.

21. Both Mr. Chacha Odera and Mr. Tony Odera argued that there was no complaint from either the candidate of Wiper Party or from the

Party itself. Further, no evidence was adduced to establish that the colour used by the 1st Respondent influenced the voters in any particular way or caused any confusion during the election. This being a matter that should have been dealt with by the 3rd Respondent in its disciplinary mechanisms, it was the evidence of the 3rd Respondent that they did not receive any complaint of passing off from any party.

22. PW1 and PW2 both testified that the posters of the 1st Respondent did not cause them any confusion; neither did they produce any evidence to demonstrate that the 1st Respondent gained unfairly by using the picture of Mr. Raila Odinga. In fact, their testimonies were to the contrary. In their testimonies, PW1 stated thus:

“No, I have not named any person in my Affidavit who swore that he was deceived into voting for the 1st Respondent because of the perception that he was of NASA. I was not confused in that way either.”

PW6 testified in the same vein as follows:

“I have not come across anyone who voted for Mohamed Ali. I did not vote for him.”

It would therefore appear that the petitioner’s assertions concerning the influence that the colour and image used in the campaign by the 1st Respondent exerted on the voters are not backed by any evidence to show that the colour and image did influence other candidate’s followers negatively or at all.

(ii) Use of Public Resources/ Armed Prison Officers

23. Mr. Balala learned Counsel submitted for the Petitioner that the 1st Respondent acted in total contravention of Constitutional principles and the law including election laws, in using prison officers as his security through the election period. Counsel asserted that this was contrary to **Sections 12, 14 and 15** of the **Election Offences Act** which states as follows:

Section 12:

“a candidate or any other person who uses a public officer, or national security organs to induce or compel any person to support a particular candidate or political party commits an offence..”

Section 14:

“Use of public resources

(1) Except as authorised under this Act or any other written law, a candidate, referendum committee or other person shall not use public resources for the purpose of campaigning during an election or a referendum.

(2) Deleted by Act No. 34 of 2017, s. 12.

(3) For the purposes of this section, the Commission shall, in writing require any candidate, who is a member of Parliament, a county governor, a deputy county governor or a member of a county assembly, to state the facilities attached to the candidate or any equipment normally in the custody of the candidate by virtue of that office.

(4) A person who is requested to supply information required under subsection (3) shall submit the information within a period of fourteen days from the date of the notice.

(5) The provisions of subsection (3) shall apply with necessary modifications, to an employee of a statutory corporation or of a company in which the Government owns a controlling interest.

(6) A person who fails to comply with the provisions of this section commits an offence and is liable on conviction to a fine not exceeding two million shillings or imprisonment for a term not exceeding six years or to both.

(7) A member of the Commission, any person designated by the Commission or any authorised agency shall have the power to impound or to order the impounding of any state resources that are unlawfully used in an election campaign.”

Section 15:

“(1) A public officer who—

(a) engages in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election;

(b) publicly indicates support for or opposition against any party, side or candidate participating in an election;

(c) engages in political campaigns or other political activity; or

(d) uses public resources to initiate new development projects in any constituency or county for the purpose of supporting a candidate or political party in that constituency or county, commits an offence and is liable on conviction, to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or to both.

(2) A person who knowingly aids in contravention of subsection (1) commits an offence and is liable, on conviction to a fine not exceeding one million shillings or to imprisonment for a term not exceeding three years, or to both such fine and imprisonment.

(3) A candidate who knowingly aids in contravention of subsection (1) shall not be eligible to contest in the election.”

24. Mr. Balala relied on the testimony of PW5, PW8 and PW9 and submitted that the 1st Respondent, in a show of might and with impunity contravened the Rule of Law by enabling public officers to masquerade as police officers, going around the stations and the constituency in general, threatening and intimidating the electorate.

25. In his evidence, the 1st Respondent stated that he applied for body guards in accordance with the law having requested for security from the County Commandant. According to the letter in the 1st Respondents bundle of documents and within the Court file record, the officers that were deployed to act as his security detail were prison officers.

26. No evidence was tendered in this Court to indicate that the said security personnel campaigned or rallied voters to either vote for the 1st Respondent, or not to vote for any other candidate. The Petitioner did not plead in his petition neither did he lead any evidence to demonstrate that the said bodyguards and their presence hindered the electorate from turning up to vote. Mr. Chacha Odera submitted that the Petitioner’s evidence on misuse of public resources was not proved and as such it should be disallowed.

27. There is also no evidence that the body guards adverted to above interfered with the vote counting, or the declaration, or the tallying of results at the polling station or tallying center. It is in evidence that the 1st Respondent applied for body guards through the laid down procedure and the body guards were assigned to him. Without particulars that demonstrate the manner in which the 1st Respondent misused public resources, or the manner in which his body guards may have influenced the outcome of the election, this ground too must fail.

(iii) Violence and Intimidation

28. The Petitioner alleged that there was violence and intimidation by the 1st Respondent and referred to two incidents. The first was placed at Uwanja wa Mbuji while the 2nd was at Frere Town. I will consider each incident separately.

a) The incident at Uwanja Wa Mbuji

29. It was the evidence of PW9 that on 17th July, 2017 he was attacked by the personnel attached to the 1st Respondent when he informed the drivers of the 1st Respondent to move their cars away from a stadium he was in charge of. Shots were discharged in the air by the security of the 1st Respondent. PW9 was later charged in Court for assault causing bodily harm. The charge sheet however, indicates that the incident took place on the 19th of July, 2017.

30. The 1st Respondent and DW1 denied the assertions made by PW9 and confirmed that the incident indeed took place on 19th of July, 2017. The documents availed in Court also contradicted the evidence of PW9 since the P3 form and Occurrence Book (OB) Report concerning this incident indicate that it was PW9 who assaulted DW1.

31. The motive of PW9 in coming forward to testify also came into question. On his own admission under oath, he came to this court under the illusion that this court could award him compensation for whatever infractions he deems to have been committed against him by PW9, if he testified in this Petition. By his own testimony the events that took place whether it was on the 17th or 19th of July 2017 did not have any impact on the elections at Uwanja wa Mbuji on 8th August 2017 which were stated to have proceeded smoothly.

b) The Incident at Frere Town

32. The Petitioner relied on the evidence of PW5 who testified about an incident that occurred on the evening of 8th of August, 2017 while the counting of votes was on going. He testified that while in the course of duty attending to an emergency call, he was attacked and beaten by the 1st Respondent and his personnel, despite identifying himself. He was later charged in court, and remained in police custody for 8 days before being released.

33. PW1 and PW10 told the court that the 1st Respondent ran towards PW1 on the fateful evening shouting orders to shoot PW1. PW10 in particular heard the 1st Respondent shouting “where is Saido. Those are Saido’s cars. Fire your gun!” PW10 testified that the scene of the fracas was dark. PW11 agreed with him and told the Court that only the headlights on the vehicles around illuminated the scene.

34. The fracas had been captured on video by PW10 and the video clip was introduced in evidence with the consent of all the parties. The evidence in the video clip however, contradicted the testimonies of the eye witnesses. Nowhere in the said video clip for instance, was the 1st Respondent captured either advancing upon any person with a gun, or at all, or uttering the words PW1 and PW10 alleged he uttered.

35. The video clip also revealed that the street lights were functional and there was light at the scene. **PW5** did not avail any evidence to indicate that he was attending to the transformer in the area following an emergency call. According to him the reflector jacket he had should have been sufficient proof that he was on official duty.

36. More importantly none of the witnesses have put forth evidence to demonstrate how this incident, which occurred on a road outside the polling station, affected the tallying and declaration of the results inside the polling station.

37. Mr. Balala urged that it had been established that these incidents occurred and it was incumbent upon the 1st Respondent to bring the security officers as witnesses in the Petition which he failed to do. On the other hand, Mr. Chacha Odera submitted that the Petitioner failed to prove this allegation as none of his witness reported this criminal behavior to the police.

38. I agree with the sentiments of Lenaola J (as he then was) in the case of **Bernard Shikuku v Boni Khalwale & 2 Others [2011]eKLR**, where the Judge held that an assault occurring outside the polling station and which did not affect the results of that election, was a criminal offence to be addressed in the normal manner through the criminal justice system and not in the manner it had been introduced into the election petition.

(iv) Bribery of Voters

39. The Petitioner alleges that there was bribery of voters by both the 1st Respondent and his agents at various polling stations during the election period. The testimonies of PW2, PW7, PW8 and PW12, went towards proving those allegations of bribery.

40. PW2 testified that he saw the 1st Respondent and a Somali woman giving out money at Khadija Primary School Polling station. His testimony was that he was standing next to police officers but only he saw the 1st Respondent give out money. He however did not report the incident to the police officers standing nearby, or to the IEBC agents or any other agents at the polling station.

41. PW7 told the Court that he witnessed one Mr. Otieno enter the 1st Respondent's car at Maweni Primary School and later emerge with his front pockets bulging with what he concluded was money. He later saw Mr. Otieno giving out money at the back of the classroom. In cross examination by Mr. Tony Odera, for the 2nd and 3rd Respondent, PW7 stated that he saw Mr. Otieno inside the village and not at the polling centre. He did not state that he saw the actual money in the pocket, or as it was being distributed. He also did not see the 1st Respondent give Mr. Otieno any money and he did not report this incident to the police or IEBC officers.

42. In light of this evidence, it would be stretching the realms of imagination too far for this Court to presume that what was in the pockets of one Mr. Otieno was money and that he was given the said money by the 1st Respondent. This is especially because PW7 did not see the contents of Mr. Otieno's pocket.

43. PW8 testified that he witnessed women alleged to have been giving out bribes on behalf of the 1st Respondent at Olive Rehabilitation Centre Polling Station, enter the 1st Respondent's car. When he approached the car to confront them on these bribery allegations, he was approached by the 1st Respondent's security whose guns were visible on them.

44. The presiding officers who came before court on behalf of the IEBC stated that they had neither reports of the acts of bribery adverted to nor did they witness them. PW12 testified during cross examination that he did not see the 1st Respondent speak to the Polling Agents at any time, nor did he see the 1st Respondent give anyone money. PW12 clarified that the women who were giving out money were giving it to people who had already voted.

45. For an offence of bribery to be proven in relation to an election petition, it has to be shown that a bribe was offered and received with an intention to influence a voter to vote for a particular candidate. The evidence on which such a finding can be made has to be conclusive and it is not open for the court to make presumptions without a clear and concise basis. It is not clear that there were bribes being given out let alone that they were being given out on behalf of the 1st Respondent.

46. Mr. Tony Odera submitted that the incidents complained of occurred outside the polling station and the Petitioners failed to show how the same affect the polling stations.

47. The foregoing was well stated in the case of **Simon Nyaundi Ogari & Another vs. Joel Omagwa Onyancha & 2 Others [2008]eKLR**, where Musinga J held that:

“Clear and unequivocal proof is required to prove an allegation of bribery. Mere suspicion is not sufficient. It is true that it is not easy to prove bribery, especially where it is done in secrecy. In such cases, perhaps bribery may be inferred from some peculiar aspects of a case but when it is alleged that the bribery took place publicly and in the presence of many people, the court cannot be satisfied by anything less than the best evidence which is always direct evidence given first hand.”

This was restated in **Wilson Mbithi Munguti Munguti Kabuti & 5 Others vs. Patrick Makau King'ola & Another [2013]eKLR**, where Mutende J held that a corrupt motive must be proved, not only in the mind of the person being bribed but also in the mind of the receiver.

48. For an offence of bribery to be proved under the Elections Act, there has to be evidence that voters were influenced. From the evidence the allegation that the 1st Respondent gave out bribes in Nyali Constituency with an intention to influence the voters or at all was not established and this ground must fail.

(v) Display of candidate's campaign materials at polling station

49. The Petitioner complained that there was the public display of the 1st Respondent's posters at Elim Poling Station. It was the testimony of PW14 that he became aware of the posters of the 1st Respondent at 9.30 a.m. although he arrived in the station before 6 a.m. During cross examination he told the court that he did not tell the IEBC agents to remove them. He also confirmed that the posters had been put up way before the polling day during the campaign period. He also admitted that there were pictures of other candidates on the wall too. It was also evident that there had been attempts to deface the posters.

50. The Petitioner did not adduce any evidence from a voter claiming that the defaced posters influenced their choice of a candidate on the day of polling or that they caused them any confusion of some sort. PW14 also testified that the defaced posters did not affect the results of voting and he agreed with the votes as counted. It is instructive to note from the evidence of the witness that he had been at the polling station for about four hours before he noticed the posters and that the voters were taking an average of only five minutes during the voting inside the polling station.

51. DW6 – the Returning Officer Nyali Constituency, led evidence to the effect that she had taken measures to try and deface the posters by tearing them off the wall and anything remaining was not very visible. However, the posters could not be peeled off completely owing to the glue used to paste them on the said wall and the time that they had been on the wall. The Court finds that the Petitioners failed to prove how the defaced posters influenced voters and as such this ground should fail.

52. On whether the election which is the subject matter of this petition was conducted in substantial compliance with the law, it was the Petitioner's contention that the election for the position of the National Assembly Member for Nyali Constituency held on the 8th August 2017 was not free or fair and did not conform with the qualitative target. It was also complained that the election was not administered in an accountable manner.

53. Mr. Tony Odera argued that the Petitioners' allegations are not only general and wanting in nature, but they were also not proved. The witnesses availed in Court testified that there was no problem with the results declared in the polling stations as tallied by the 2nd Respondent. They agreed with the results.

54. The 2nd and 3rd Respondent availed to the Court all Forms 35A and Form 35B showing results from the polling stations and how they were tallied. They also availed to the Court various Polling Station Diaries which gave detailed accounts of the polling officials, party agents and accounts for all the electoral materials including seals, ballot papers, ballot boxes, statutory forms that were issued and the returns after the conclusion of the exercise.

55. The Court has gone through the forms and notes no material discrepancies. The court observes that in any case, none of the witnesses contested the results in those forms. It was further noted that none of the witnesses who testified in this Court regarding the alleged irregularities and offences by the 1st Respondent and/or his agents reported these incidents to the 2nd and 3rd Respondents.

56. On the foregoing Emukule J in **Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 others [2013]eKLR**, stated as follows:

“Indeed if an election is nullified, then the Court has to be satisfied that the election was conducted in a manner in which it was not possible to determine the true winner of the process. It is also accepted that the process cannot be perfect and there are bound to be irregularities and errors. As stated earlier, it is the overall effect of irregularities and malpractices that are complained of that is regarded by the court in making a determination of whether or not an election should be nullified. Even in a case where there are allegations of commission of an election offence, the effect of the acts on the process is relevant for purposes of determining the validity of the election.”

57. Upon considering the pleadings, the evidence and the submissions of the counsels on record, the court finds that there was no evidence that the election herein was compromised or that the voters did not express their will at the ballot. The Petitioner herein has been unable to demonstrate to the required standards that the 1st Respondent committed the election offences as alleged. The Petitioner has also failed to demonstrate that the 2nd and 3rd Respondents failed in their mandate to ensure that the elections were conducted in a free, fair, transparent, credible and verifiable manner, and in compliance with the Constitution, the Election Act and all applicable laws and regulations. In the premise the petition dated 6th September, 2017 is hereby dismissed in its entirety with costs to the Respondents.

58. Section 84 of the Elections Act gives Court jurisdiction to award costs. Accordingly, in making an order for costs a Court may specify the total or maximum amount payable and the person from whom the costs are payable. In awarding costs, the Court is guided by the principle that they ought to be adequate to compensate the work done on the one hand and not to be so high as to undermine access to justice as enshrined in **Article 48** of the **Constitution** on the other hand.

59. With the above in mind I therefore cap the instructions fees at Kenya Shillings 3.5 Million to the 1st Respondent and Kenya Shillings 3.5 Million to the 2nd and 3rd Respondent. In reaching my decision I am guided by the fact that the issues herein which were not complex, the number of witnesses called, the nature of the evidence adduced and the time spent on research, preparation of pleadings, applications and submissions, preparation of witnesses and in court during the actual hearing.

I wish to thank all the Counsels on record for the parties herein for their well researched arguments in prosecuting and in defending this petition and for the courtesy they have shown to each other and to the court.

DATED, SIGNED and DELIVERED at MOMBASA this 23rd DAY OF February, 2018.

L. A. ACHODE

JUDGE

In the presence of for the 1st Petitioner

In the presence of for the 1st Respondent

In the presence of for the 2nd Respondent

In the presence of for the 3rd Respondent