



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

ELECTION PETITION NO. 4 OF 2017

(HEARING AT KITALE HIGH COURT)

**IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITION RULES, 2017**

AND

**IN THE MATTER OF: THE MEMBER OF NATIONAL ASSEMBLY ELECTIONS FOR SIRISIA
CONSTITUENCY, BUNGOMA COUNTY**

THE HUMBLE PETITION OF:

LEVI SIMIYU MAKALI.....PETITIONER

VERSUS

KOYI JOHN WALUKE.....1ST RESPONDENT

KENNEDY OCHANYO..... 2ND RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....3RD RESPONDENT

JUDGMENT

Background: -

1. The Member of National Assembly seat for Sirisia Constituency in Bungoma County attracted six candidates among them **LEVI SIMIYU MAKALI** (hereinafter referred to as '**the Petitioner**') and **KOYI JOHN WALUKE** (hereinafter referred to as '**Waluke**') in the general elections held on the 8th day of August 2017.

2. The election for Member of National Assembly seat for Sirisia Constituency was among the six elections carried out by the **Independent Electoral and Boundaries Commission** (hereinafter referred to as '**IEBC**') countrywide on the said 8th day of August 2017. I will henceforth refer to it as '**the election**'. **Waluke** emerged the winner in the election with 18077 votes against the **Petitioner** who was the first runners' up with 9669 votes. A Certificate of Elected Member of National Assembly was issued to **Waluke**.

3. Following the declaration of **Waluke** as the duly elected Member of National Assembly for Sirisia Constituency by **Kennedy Ochanyo**, the Returning Officer for Sirisia Constituency (hereinafter referred to as '**the Returning Officer**') the **Petitioner** lodged this Petition on 6th day of September 2017 challenging the election.

4. The **Petitioner** challenged the election on grounds that the election was not conducted in accordance with the principles laid down in the Constitution, the Elections Act and the Regulations thereunder and that the non-compliance notwithstanding, the election was marred with massive irregularities, bribery and treating of voters, violence and interference from the officials of the National Government to the extent of fatally affecting the result of the election. The **Petitioner** swore an Affidavit in support of the Petition and filed 8 Witness Affidavits in further support thereof.

5. The Witness Affidavits were sworn by **Musungu Khaukha Evans Vil (PW2)**, **Vincent Sibi Pepela (PW1)**, **Joseph Makomboti Malaba(PW3)**, **Jackson Marunda** (did not testify), **Dennis Mkwa Situma (PW5)**, **Peter Mutuba Situma** (did not testify), **Suleiman Sisungu Waka (PW4)** and **Edward Barasa Wamunyokoli(PW6)**.

6. The Petition was opposed by all the Respondents. **IEBC** and the **Returning Officer** filed a joint Response to the Petition. The **Returning Officer** also filed an Affidavit in support of the joint Response. **IEBC** and the **Returning Officer** contended that they did not breach the **Constitution**, the **Elections Act** (hereinafter referred to as '**the Act**') or the Regulations made thereunder in conducting the election. That the election and the electoral process was not unlawful, illegal, irregular, unfair, a nullity or unjust as it reflected the will of the voters in Sirisia Constituency which will must be respected and upheld. They further contended that **Waluke** was validly elected as the Member of National Assembly for Sirisia Constituency. They prayed that the Petition be dismissed with costs.

7. **Waluke** filed a Response to the Petition alongside an Affidavit. He also filed the Affidavits of **Wilberforce Wamalwa Wafula(RW1)**, **Edward Wafula Mudogo (RW2)** and **Evans Kiara Zaddock Mafura(RW3)** in support of his Response to the Petition.

8. **Waluke** denied the Petitioner's allegations *in toto*. He contended that the **Petitioner** lost fairly and that he was never involved in any of the alleged violations of the law and as such there was no need of interfering with the election and the will of the of the voters in Sirisia Constituency. He also prayed that the Petition be dismissed with costs.

9. A Pre-trial conference was held on the 4th day of October 2017 where parties agreed on the issues for determination and were directed to file a formal application on the issue of conducting the hearing at Bungoma High Court. The application was filed, heard and disallowed.

10. Full hearing was conducted and at the close of the respective parties' cases, the **Petitioner** filed an application seeking scrutiny and recount which application was partly allowed. The scrutiny and recount were done, and the Deputy Registrar of this Court filed a Report (hereinafter referred to as '**the Report**'). Counsels filed written submissions and highlighted thereon wherein they maintained their respective positions on the Petition.

Analysis and Determination: -

11. Having carefully read and understood the contents of the Petition, the Responses, the witness affidavits, the agreed issues for determination, the evidence, the parties' submissions and the respective decisions tendered in support of each of the parties' cases. I shall hence deal with this matter under the following heads: -

(a) **The Legal Framework;**

(b) **The Burden and Standard of proof in Election Petitions and the effect of interlocutory applications;**

(c) **The agreed issues for determination;**

(d) **Conclusion**

(a) The Legal Framework: -

12. As I recently addressed this issue in **Bungoma High Court Election Petition No. 2 of 2017 Suleiman Kasuti Murunga vs. IEBC & 2 Others** (unreported) (hereinafter referred to as '**the Bungoma Petition**'), I will reproduce that discussion herein: -

"13. Article 1 of the Constitution is on the Sovereignty of the people of Kenya. It is constitutionally provided that the sovereign power, which only belongs to the people of Kenya, can be exercised either directly or through their democratically elected representatives. To immortalize the exercise of such power under the second limb, the Constitution lays down the principles and processes in Articles 38 (Political Rights) of the Constitution as well as Articles 81 to 92 inclusive (Representation of the People) of the Constitution.

13. *Articles 38 of the Constitution provides as follows: –*

"(1)Every citizen is free to make political choices which includes the right-

(a) to form, or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for, a political party; or

(c) to campaign for a political party or cause.

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for –

(a) any elective public body or office established under this Constitution; or

(b) any office of any political party of which the citizen is a member.

(3) Every adult citizen has the right, without unreasonable restrictions-

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and

(c) to be a candidate for public office, or office within political party of which the citizen is a member and, if a elected, to hold office.

14. *Article 81 of the Constitution sets out the general principles on which the electoral system must be hinged on. It provides as follows: -*

"The electoral system shall comply with the following principles: -

(a) freedom of citizens to exercise their political rights under Article 38;

(b) not more than two-thirds of the members of elective public bodies shall be of the same gender;

(c) fair representation of persons with disabilities;

(d) universal suffrage based on the aspirations for fair representation and equality of vote; and

(e) freed and fair elections, which are –

(i) by secret ballot;

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

(iii) conducted by an independent body;

(iv) transparent; and

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

14. The electoral system, as it were, is a complex hub of institutions, activities and processes all intertwined and working together to achieve the constitutional guarantee under **Article 81. Article 88** of the **Constitution** establishes **IEBC** as the institution responsible for conducting or supervising referenda and elections. Under **Article 89** of the **Constitution** **IEBC** is further charged with the responsibility of reviewing the names and boundaries of constituencies as well as the names, number and boundaries of wards periodically.

15. It is still **IEBC** which must ensure that all those eligible to be registered as voters are so registered (**Article 83**) and that the candidates cleared for various positions including independent candidates, so with the registered Political Parties, do comply with the **Electoral Code of Conduct (Articles 84 and 85)**. In respect to the actual voting, **Article 86** of the **Constitution** requires **IEBC** to ensure that: -

“(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;

(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;

(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and

(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”

16. Once the voting is undertaken and the results declared **IEBC** is called upon under **Article 90** of the **Constitution** to allocate party lists seats in Parliament and the County Assemblies. **Disputes** arising from the electoral processes and activities after the declaration of the results of an election by **IEBC** are to be determined by the Courts as provided under the **Act** and the various **Regulations** made thereunder alongside other electoral laws including the **Election Offences Act No. 37 of 2016**.

17. Summing up the foregone, the Supreme Court of Kenya in the **Presidential Election Petition No. 1 of 2017** between **Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR** (hereinafter referred to as **‘the 2017 majority judgment’**) expressed itself in **paragraph 200** as follows: -

“[200] The principles cutting across all these Articles include integrity; transparency; accuracy; accountability; impartiality; simplicity; verifiable; security; and efficiency as well as those of a free and fair election which are by secret ballot, free from violence, intimidation, improper influence or corruption, and the conduct of an election by an independent body in transparent, impartial, neutral, efficient, accurate and accountable manner.”

13. It is therefore on the foregone legal background that the Petition herein is premised.

(b) The Burden and Standard of proof in Election Petitions and the effect of interlocutory applications: -

14. Likewise, I dealt with this discussion in the **Bungoma Petition** and this is what I stated: -

“21. The issue of the burden and standard of proof in election petitions is by now well settled by the law and binding precedents. That election petitions are not ordinary suits is not in doubt. Election Petitions are special disputes which tend to interrogate whether the electoral system and processes contemplated under Article 81 of the Constitution were adhered to and/or attained in an election. The crux of that interrogation is Section 83 of the Act which provides for instances where an election may be nullified. The said Section 83 provides as follows: -

“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.”

22. That is the rationale why the incidences of proof are to be intently looked at.

(i) The legal burden of proof: -

23. The legal basis for the legal burden of proof is provided in **Section 107 of the Evidence Act, Cap. 80 of the Laws of Kenya**. The said section states as follows: -

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

24. The onus is therefore upon a Petitioner who seeks the annulment of an election ‘on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds ‘to the satisfaction of the court’. That is fixed at the onset of the trial and unless circumstances change, it remains unchanged.....’ (See **paragraph 131 of ‘the 2017 majority judgment’**).

25. That is the legal burden of proof.

(ii) The evidential burden of proof: -

26. The Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the evidential burden of proof.

27. The principle of ‘**evidential burden of proof**’ is hence anchored on the rebuttable presumption of validity of election results. That, until and unless a Petitioner discharges the evidential burden of proof an election is presumed valid. It is on that background that the Court in **Singh vs. Mota Singh & Another (2008) 1 KLR 1** stated that an election is a matter of public importance not to be lightly set-aside and in the case of **Jeet Mohinder Singh vs. Harminder Singh Jassi, AIR 2000 SC**

258the Supreme Court of India stated that ‘the success of a candidate who has won at an election should not be lightly interfered with...Any person seeking such interference must strictly conform to the requirements of the law....’.

28. The Supreme Court in **the 2017 majority judgment** had the following to say on the evidential burden of proof in **paragraphs 132 and 133** thereof as follows: -

“[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

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

29. It therefore follows that the legal burden of proof is static and rests on the Petitioner throughout the trial. It is only the evidential burden of proof which may shift to the Respondents depending on the nature and effect of evidence adduced by a Petitioner.

(iii) The Standard of Proof: -

30. The **Black’s Law Dictionary**, (9th Edition, 2009) at page 1535 defines ‘**the standard of proof**’ as ‘[t]he degree or level of proof demanded in a specific case in order for a party to succeed.’ In many jurisdictions and decisions world over three main categories of the standard of proof emerge being the criminal standard of proof of beyond reasonable doubt; the application of civil case standard of ‘balance of probabilities’; and the application of an intermediate standard of proof.

31. My Lordships and Ladyship in **the 2017 majority judgment** in dealing with this subject and after reviewing many decisions found and held as follows: -

“[152] We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt. Consequently, we dismiss the petitioners’ submissions that the Court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities.

[153] We recognize that some have criticized this higher standard of proof as unreasonable, however, as we have stated, electoral disputes are not ordinary civil proceedings hence reference to them as sui generis. It must be ascertainable, based on the evidence on record, that the allegations made are more probable to have occurred than not.”

32. The foregone is the standard of proof which this Court will adopt in this Petition.

(iv) The effect of interlocutory applications: -

33. A Petitioner must discharge the legal and evidential burdens of proof in an election petition to the required standard of proof as to succeed. This depends on the allegations and/or grounds in support of the Petition. If the allegations are of criminal or quasi-criminal nature, then the

standard of proof is beyond reasonable doubt and in any other case the standard of proof is the intermediate one of above the balance of probabilities but below beyond reasonable doubt.

34. In endeavoring to attain such a legal bar a Petitioner must adduce evidence and may also file an application or applications in accordance with the law. The applications may vary from one matter to the other depending on the circumstances of a case. Regardless of the number and nature of applications which may be filed it must always be remembered that a Petitioner is strictly bound by and limited to the contents of the Petition and the contents of the filed Affidavits accompanying the Petition. The applications are only supposed to aid in proving or disproving the grounds as already tendered in the Petition, but they should not amount to an attempt to change the nature and/or character of a Petition or tend to adduce fresh and further evidence in support of the Petition. It is therefore not open to a Petitioner to use an application as an attempt to introduce new or further evidence or new grounds in support of the Petition. Like a caged animal, a Petitioner is free to move but within the four corners of the Petition.

35. Therefore, any new or further evidence or grounds attained by the aid of an interlocutory application should not be used to determine a Petition. On an equal footing a Petitioner cannot benefit from rummaging through the documents filed by the Respondents for fresh or further evidence to support the Petition. The position remains so even where a Petitioner attempts to introduce such matters during the cross-examination of the Respondents and/or their witnesses. And, the position does not change when a party makes submissions on an issue which was not part of the Petition. Lastly, a Petitioner cannot benefit from the results of any scrutiny or recount exercises or any other exercise undertaken during the hearing of the Petition by the Court if such results do not support what was pleaded in the Petition.

36. That being the position in law, an election Court still has an **inquisitorial jurisdiction** in an election petition. That jurisdiction should however be sparingly invoked. In exercise of such jurisdiction the Court may on its own motion make enquiries into certain issues or even order for a scrutiny of the votes and/or other election materials as provided under **Section 82(1)** of the Act. When a Court opts to exercise that special inquisitorial jurisdiction, it must be for the purposes of assisting the Court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process but not to aid any of the parties in the case. Any evidence unveiled through the Court's exercise of its inquisitorial jurisdiction which is not founded in the Petition and the accompanying Affidavits, as said before, must not be used to determine the Petition.

37. There is also a further rationale behind the exercise of the inquisitorial jurisdiction by a Court. The Court's exercise may unearth evidence which may at times aid in making recommendations on the electoral processes possibly resulting in electoral law reform. Adding its voice to the issue the Supreme Court in **the 2017 majority judgment** found and held in **paragraph 374** that '.....it is good judicial practice for the court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice.....' That finding of the Supreme Court demonstrates the Court's exercise of the inquisitorial jurisdiction.

38. Courts do not operate in a vacuum; they play a very crucial role in the society being the custodians of justice and as such operate under the societal expectation that through them disputes will forever be determined. In appropriate instances, a Court is expected to make recommendations or orders that may lead to timely resolution of disputes generally or forestall or even reduce the occurrence or frequency of occurrence of disputes or to law reform. A Court must therefore widely open its legal eyes and see past the dispute before it into the society at large. In so doing however, a Court must guard against being carried away by such findings and should remain alive to what it ought to consider in deciding the matter before it.

39. Courts, as well as Legal Scholars, have severally upheld the position that parties are firmly bound by their pleadings. Just to mention a few; the Court of Appeal in **Independent Electoral and**

Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....”

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

40. The Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in respect to the essence of pleadings in an election petition: -

“[52] Further, the Court went on and observed that: -

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.....”

41. This Court also dealt with this question in **Kitale High Court Election Petition No. 1 of 2017 Robinson Simiyu Mwangi & Another vs. IEBC & 2 Others (unreported)** in its **Ruling No. 4** on scrutiny of votes which ruling was delivered on 07/12/2017. This is what I partly stated: -

“77. But what if the issues although not pleaded came up during the cross-examination of the witnesses and are therefore part of the record? The answer is found in the above decisions of the Supreme Court and the Court of Appeal. Such evidence goes to no issue. That seems to be the position taken by the Scholar Hon. Justice (Prof.) Otieno-Odek in his article aforesaid where he stated that ‘A party cannot be allowed to introduce, through cross-examination contests which were previously not specifically raised in the pleadings...’”

42. It is therefore only what is contained in the Petition and the accompanying Affidavits that shall be considered by this Court in determining whether the required standard of proof was attained in respect to the various allegations in the Petition.

201. I believe to have dealt with this issue substantively under the rubric **‘the effect of interlocutory applications’** wherein I also looked at the exercise of the inquisitorial jurisdiction by an election Court. As a way of emphasis, my position remains clear that any issue which is not specifically pleaded in the Petition and supported by admissible evidence even if it comes up during the hearing of the Petition cannot form the basis of determining a Petition. Likewise, any documents obtained and/or used during in the hearing can only go to the extent of proving the allegations already pleaded in the Petition but cannot be a basis of introducing new or further issues. A party which wishes to rely on any new matters must formally so request by way of an application otherwise such a party will be unfairly riding on an ‘amended Petition’ through the back door. That will be prejudicial to the other parties.

202. In this case the Petitioner sought for and was granted copies of all Forms 35A, 35B, 35C, Polling Station Diaries and Forms 33 vide the ruling of this Court delivered on 23/10/2017. Whereas in making the orders I remarked in paragraph 30 of the said ruling that 'the second issue is that Form 35B is an aggregate of the contents of all Form 35As. That means for one to authenticate or verify the contents of Form 35B there is need to access all Form 35As as well as Form 33s. The third issue relates to the contents of polling station diaries under Regulation 73 of the Regulations. The contents thereof have a direct bearing on the contents of Form 35As, Form 35B and Form 33s' it remains that the relevance of any of the said documents goes to whether the issue sought to be proved is already part of the Petition and not otherwise. It must also be understood that the grant of the documents is not in itself an open cheque to use any of their contents at will. The relevant contents are only those which touch on the disputed issues already before Court. A party must always remain alive to the foregone legal confines. As opposed to not granting the order for supply of the documents when made by a party, I take the position that it is fair and just to avail the documents since they can assist in the general preparation of the matter unless it is rationally and reasonably demonstrated otherwise. As also said the documents may assist the Court in its inquisitorial jurisdiction.

203. It seems that the Petitioner did not act with that caution in mind on receipt of the documents. He spent a considerable period in venturing into new 'revelations in the documents'. Such an exercise, despite its magnitude and revelations, did not aid the Petitioner's case or at all. That is the reason why this Court only limited itself to the documents which touched on matters which were pleaded in the Petition and deponed to in the affidavits while considering the grounds in support of the Petition. As such the Court concurs with the submission by the Counsel for Didmas.'

15. I will as well deal with this Petition based on the foregone discussion.

(c) The agreed issues for determination: -

16. The parties agreed on 6 issues for determination in this matter. They are: -

(i) Whether the election of the Member of National Assembly of Sirisia Constituency was marred with violence during the campaigns and the election day;

(ii) Whether the election was affected by bribery and treating of voters;

(iii) Whether the election for the Member of National Assembly of Sirisia Constituency was held in compliance to the relevant applicable laws;

(iv) Whether the declared results at the polling stations are consistent with the results declared by the 2nd Respondent who is the Returning Officer;

(v) Which orders to be given by the Court;

(vi) Who should pay costs.

17. I will deal with each issue separately.

(i) Whether the election of the Member of National Assembly of Sirisia Constituency was marred with violence during the campaigns and the election day: -

18. Relating to the ground of violence, it was generally pleaded in **paragraphs 13 and 26** of the **Petition** as follows: -

"13. The 3rd Respondent and its officers, staff and other persons who had duties and functions to perform during the said elections held on the 8th August 2017 committed criminal offences under Section 59 (a) (b) (d) (f) (j) (k) (l) and (m) of the Elections Act for doing acts and things

that they are prohibited from doing.”

26. By further reason of illegalities, irregularities and malpractices states herein, the 1st Respondent is guilty of election offences which include but are not limited to illegal campaigns and meetings, bribery, treating, assault and physical violence and voter manipulation.”

19. In **paragraph 19** of his affidavit the **Petitioner** deponed that *‘its within my knowledge and I have information from several eye witnesses and which information I verily believe to be true that the first Respondent on a massive and widespread scale engaged in acts of intimidation, violence, threats and harassment of my supporters and Ford Kenya agents either directly by himself or his agents and/or servants;’*

20. While cross-examined by **Mr. Katwa Kigen** Counsel who jointly appeared with **Miss Antonina Muyoka** Counsel for **Waluke**, the **Petitioner** stated that *‘Paragraph 18 to 25 of my affidavit has all the grounds in my Petition. The basis of my contention was on what I was told by my party agents or other people. There are instances where I witnessed some irregularities...’* On further cross-examination by **Mr. Kenei** Counsel who jointly appeared with **Mr. Ogeta** Counsel for **IEBC** and the **Returning Officer**, the **Petitioner** stated that *‘On paragraph 18 and 19 of my Affidavit, I confirm that I did not witness any of the alleged incidents. I relied on my agents’ accounts but I did not mention their names....’* The **Petitioner** further stated that *‘On paragraph 24 of my Affidavit, I did not give the names of the Chiefs and Assistant Chiefs who were involved in distributing out cash and harassment of any voters.’*

21. It was **PW1** and **PW3** who led evidence on violence in respect of two separate incidents. **PW1** was the Presiding Officer at the Namawanga FYM Primary School Polling Station 1 of 1. It was his evidence that he conducted all the affairs pertaining to the station orderly up to closure and departure therefrom to the Constituency Tallying Centre which was at St. Antony Sirisia High School (hereinafter referred to as **‘the tallying centre’**). That, as he was in the polling station’s official vehicle together with the other **IEBC** staff and as they were just behind the tallying centre they were accosted by **Waluke**, his bodyguards and his supporters who alleged that they had rigged the results in favour of the **Petitioner**. That, they were harassed, threatened to be shot, sat on the ground while it had rained and the Deputy Presiding Officer one **Benson Wafula** was physically assaulted. That, **Waluke** sent his supports for petrol so that they be burnt together with the election materials which were in the vehicle. That, they were only saved by the **Returning Officer** who timeously arrived in company of security officers. That, he recorded the incident in the Polling Station Diary.

22. On cross-examination by **Miss Muyoka**, **PW1** stated that they took around 2 hours from the polling station to the tallying centre as it had rained, and the vehicle was driven slowly and further that they had to use a different route as they realized that the vehicle could not cross a certain culvert on a road they had initially used. He further stated that *‘.....it is true the 1st Respondent did not attack us. He was present with his supporters and the 1st Respondent was issuing very harsh threats to us. It is not true that the 1st Respondent came to the scene with security detail. It is only the Returning Officer who was accompanied by the OCPD and other security officers.....’*

23. During cross-examination by **Mr. Kenei**, **PW1** confirmed that they were ably protected by the two security officers who were armed and that the election materials were not damaged or in any way interfered with. That, he did not lodge any report to the police or the Director of Public Prosecutions but to the **Returning Officer**. He confirmed that the incident did not affect the results from the polling station.

24. The **Returning Officer** responded to the issue in detail both in the Response and in his affidavit. His version of the incident was that as he was announcing the results from the polling stations at the tallying centre at around 05:00am on 09/08/2017 he was informed by the Presiding Officer in-charge of communications that there was an incident just behind the tallying centre. That, he had also just received a phone call from **PW1** on the issue. That, he adjourned the announcement of the results and in the company of the OCPD, his body guard and about 20 police officers rushed to the scene which was visible from the tallying centre. That, on arrival he saw the vehicle attached to the polling station with its door

open and the two-armed security officers guarding it. That, he saw the **IEBC** officials seated next to the ballot boxes and the other election materials and entered. That, he confirmed that all the election materials were intact and stepped out. He then saw **Waluke** whom he had left inside the tallying centre. Since all was well the vehicle was escorted to the tallying centre and the official business resumed. On further cross-examination by **Mr. Makokha** Counsel for the **Petitioner**, the **Returning Officer** stated that he was not aware how and when **PW1** made the entries in the Polling Station Diary.

25. **Waluke** admitted going to the scene but denied either taking part in the alleged act or being in the company of the **Returning Officer**. That, when the announcement of the results was stopped, and the **Returning Officer** left in the company of a detailed security team, he was left inside the tallying centre and as he was an interested party in the election he also went to the scene to see what was happening. That, when he reached there he saw **the Returning Officer** inside the vehicle and when the **Returning Officer** alighted he did not tell him what **PW1** was complaining about. That, they returned into the tallying centre and the announcements of the results resumed.

26. The foregoing is the evidence on the incident. But what does the law say in the circumstances of this case? **Section 13 (i)** of the **Elections Offences Act** states that '*a person who obstructs or hinders any elections officer, candidate or agent in the execution of their lawful duties.....commits an offence and is liable, on conviction, to a fine not exceeding Kshs. 500,000/= or to imprisonment for a term not exceeding five years or to both*'.

27. As the allegation complained of is therefore in the nature of a criminal offence, its standard of proof is beyond any reasonable doubt. The allegation is supported by the evidence of **PW1** only. The incident took place at the early hours of 09/08/2017. It is not clear from the evidence how lit the scene was. Further, **PW1** did not state how he recognized **Waluke** in such circumstances. Was it out of acquaintance or dressing or by the aid of the other people who were at the scene or otherwise. In addition, the evidence of **PW1** is not corroborated in any way. Despite the presence of several people in the vehicle none came up to add weight to what **PW1** stated. Not even the said **Benson Wafula** who was allegedly injured or the security officers who were escorting the vehicle. There was also no explanation at all given why none of the other people testified.

28. Neither the **Petitioner** nor **PW1** reported the matter to the police or the Office of the Director of Public Prosecutions. Had that happened investigations would have been carried out and those culpable unveiled. **PW1** was also not consistent in his evidence. In his affidavit he alleges that **Waluke** accosted them in the company of his security detail and on cross-examination he states that **Waluke** was not accompanied by his security detail but his supporters. His evidence was hence at variance with the affidavit. I must say that a witness should not have varying versions of an incident he or she alleges to have witnessed otherwise doubts are irresistibly created. As I stated in the **Bungoma Petition** '*a witness should not create an impression in the mind of a Court that he or she is not straight-forward for that greatly injures the credibility of the witness and renders the evidence highly doubtful.*'

29. On the other side, both incidences of violence and obstruction are denied. The **Returning Officer** stated that when he reached the scene there was a crowd of people who had obstructed the vehicle and they were chanting to the effect that they were protecting the votes of one of the Presidential candidates from being stolen. That, to ease the tension the **Returning Officer** directed that the election materials be taken to the tallying centre where he prioritized the announcement of those results.

30. With such state of evidence, I cannot find that the allegation was proved as required in law. The evidence by **PW1** falls far below the required standard. It is riddled with several loopholes and loose ends that cannot sustain a conviction in law. It is highly doubtful as opposed to the evidence of the **Returning Officer** and **Waluke** which is straight-forward, corroborative and believable. The allegation by **PW1** therefore fail.

31. There was also the other incident involving **PW3**. He deposed that on 05/08/2017 he hosted one **Erick Francis Wafula** who was an independent candidate aspiring for the seat of the Member of County Assembly of an unnamed Ward. That the reception was at his home where some voters including his

brother had gathered to be addressed by the candidate. That, at around 04:00pm and as the said **Erick Francis Wafula** was addressing the attendees, suddenly a vehicle with Jubilee Party supporters who wore T-Shirts with the portrait of **Waluke** emerged. That, the supporters alighted from the vehicle and followed **PW3** who was the host. That, they attacked **PW3** and hit him severally on the head, he bled and was unconscious. That, **PW3** was rushed to Sirisia Sub-District Hospital where he received treatment and on discharge he reported the matter at Sirisia Police Station vide OB No. 11/07. That, he was issued with a P3 Form which was filled in by a Doctor. He annexed photographs showing how he was injured as well as a copy of the P3 Form.

32. While cross-examined by **Miss Muyoka**, **PW3** stated that it was **Waluke** who assaulted him. But on further cross-examination **PW3** stated that **Waluke** did not go to his home on 05/08/2017 but his supporters who wore Red T-shirts with Jubilee Party symbols. He also stated that the T-shirts worn by the said supporters did not have the portrait of **Waluke**. That, he knew three of those who assaulted him, and they were related to **Waluke**. **PW3** however did not disclose their names in his affidavit. That, it was instead the vehicle which had posters with portraits of **Waluke**. That, the distance between his home and the home of **Waluke** was very wide.

33. On further cross-examination **PW3** stated that there were Jubilee candidates in all the elective positions in Bungoma County and that they all campaigned in the ward. To him the attackers were supporters of **Waluke** as the vehicle they were using had posters with the portraits of **Waluke**. He admitted that he did not have any of the posters in Court. That, he had recorded a statement with the police and gave the names of the assailants, but no arrests have been made so far as the police advised him to wait for the election period to pass.

34. **IEBC** and the **Returning Officer** denied the allegation of violence. That, none was reported to any of them. Likewise, **Waluke** denied either taking part in the alleged attack and further denied that he instructed his supporters to engage in any form of violence.

35. On the photographs, **PW3** admitted that he was not the one who took the photographs and that he did not know the said **Billy Opar** who allegedly produced and enlarged the photographs. I will deal with the legality of the photographic evidence alongside a like discussion when looking at the video evidence by **PW6**.

36. **Section 11** of the **Elections Offences Act** has the following on the use of force or violence during the election period: -

“A person who, directly or indirectly in person or by any other person on his behalf, inflicts or threatens to inflict injury, damage, harm or loss on or against a person –

(a) so as to induce or compel that person to support a particular candidate or political party;

(b) on account of such person having voted or refrained from voting; or

(c) in order to induce or compel that person to vote in a particular way or refrain from voting, Commits an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both”

37. The foregone allegation is a criminal offence and its standard of proof is beyond any reasonable doubt. Again, the allegation is supported by the evidence of a single witness, that is **PW3**. Apart from **PW3** shifting from the position that it was **Waluke** who attacked him to that it was instead his supporters who did so, **PW3** as well deponed that those who attacked him wore T-shirts with the portrait of **Waluke**. However, during cross-examination **PW3** stated that the T-shirts bore no portrait of **Waluke**, but that it was the vehicle which had posters with **Waluke's** portraits. That evidence was clearly wavy. Further, none of the posters were produced in Court.

38. **PW3** did not also testify on how he knew **Waluke** given that he came from a distant village from his

more so in view of his evidence that it was **Waluke** who initially attacked him. Could **PW3** have mistaken **Waluke** with another candidate? What of the alleged **Waluke's** supporters? Are they known to this Court? No! Is there any nexus between the three individuals whose names are with the police, and not before Court, and **Waluke**? No! Is there evidence that indeed the unknown three individuals were supporters of **Waluke**? No! Why did the other people who were allegedly at the home of **PW3** including **PW3's** brother and the said aspirant one **Erick Francis Wafula** not testified? What of the investigating officer? Any explanation given? No! And the questions seem to be endless.

39. Whereas there is evidence that indeed **PW3** sustained the alleged injuries, there is no evidence to support the allegation that it was either **Waluke** or his supporters who attacked **PW3**. There is equally no evidence that the mandatory requirements of **Section 11** of the **Elections Offences Act** were proved. In view of the shaky and uncorroborated evidence of **PW3** further to the reasons why the photographic evidence is inadmissible, which reasons I will give later in this judgment, the allegation of violence is not proved as required in law. The same cannot stand and is dismissed.

40. When the two incidents are separately viewed, there is no evidence that any affected the results of the election in any way. **PW1** repeatedly admitted so. **PW3** did not demonstrate as such.

41. As I come to end of this discussion I wish to mention that as the **Petitioner** relied on a repealed **Section 59** of the **Act** in paragraph 13 of his affidavit, that was a sound ground to dismiss the entire contents of that paragraph. However, to administer substantive justice to the parties pursuant to **Article 159(2)(d)** of the **Constitution** and given that the offences are still contained in the **Election Offences Act** which repealed the section of the **Act** coupled with the legal position that criminal offences are indeed against the State, I nevertheless decided to venture into the heart of the matters complained of.

42. The first issue is hereby answered in the negative.

(ii) Whether the election was affected by bribery and treating of voters: -

43. Paragraphs 15 and 16 of the **Petition** are on this issue. They are tailored as follows: -

“15. The 1st Respondent personally and/or with his agents and servants heavily and with impunity engaged themselves in outright bribery and treating of voters prior to the polling day and on 8th August, 2017 particularly these instances were witnessed were in Malakisis Muslim Polling Station, Malakisi A. C. K. Polling station, Sirisia Township Polling Station, Namawang FYM Primary Polling Station, Chebukutum Primary Polling station, Lwandanyi Polytechnic, Mufungu Primary, Yabeko Primary School, Machakha Tulienge, Stabicha Primary School, hongoi Primary School, Bisunu Polling Station, Nambuya Polling Station, Lutaso Polling Station, Kasiamu Polling Stations.

16. Your Petitioner asserts and contends that the giving and distribution of the money at the said campaign and polling stations was not only illegal and irregular but that it was intended and did induce voters to cast their votes in favour of the 1st Respondent and to detriment of your petitioner.”

44. The allegations in support of the ground were further contained in the affidavits of the **Petitioner**, **PW2**, **PW3**, **PW4** and **PW5**. In **paragraph 18** of his affidavit the **Petitioner** generally deponed that ‘*I have information from several eye witnesses and other sources and which information I verily believe to be true that the 1st Respondent directly and indirectly through his agents heavily and unashamedly with impunity engaged in our right bribery and treating of voters prior to the election day and on the actual polling day in various polling stations in Sirisia Constituency.*’ and in **paragraph 24** that ‘*I have information from eye witnesses and which information I verily believe to be true that the 1st Respondent used the Provincial Administration especially the Chiefs and assistant Chiefs to dish out cash and harass my voters and agents during and after the campaigns and on the voting day especially at the Chebukutumi Polling station, Bisunu Primary School Polling Station, Mufungu Polling Station,*

Kisiam Primary Polling station. On cross-examination by **Mr. Kenei Counsel** the **Petitioner** admitted that he did not witness any of the alleged incidents of bribery and treating of voters and that he did not give the names of the Chiefs and Assistant Chiefs who were allegedly involved in distributing out cash to voters.

45. **PW2** deponed in **paragraph 5** of his affidavit that *'voting went on well and smoothly until at around 10:00am when the 1st Respondent arrived at the station and started dishing out money to the voters in order to vote for him.'* During cross-examination **PW2** stated that he personally witnessed **Waluke** giving money to a voter who had been given ballot papers and when he verbally protested **Waluke** said he was only giving him fare. That, the incident was also witnessed by the other agents and the Presiding Officer. That, he did not however report the incident to the police but informed his party although he had no evidence to that effect. **PW2** further stated that he also witnessed voters, whom he could name, being given money at the Malakisi CPK Primary Polling Station in the denomination of Kshs. 100/=.

46. **PW3** deponed in **paragraph 12** of his affidavit that *'on 8th August 2017 I saw Koyi John Waluke at the gate of Yabeko Primary School bribing voters by giving them money.'* On cross-examination **PW3** reiterated that he witnessed **Waluke** bribing voters, but he did not report the matter to the police or IEBC although he remained aware that bribery is a criminal offence. That, he knew those who were bribed but did not name them neither did he state how much they were bribed.

47. **PW4** deponed in **paragraph 3** of his affidavit that *'while I was at the Polling entre on the queue Koyi John Waluke aspiring on Jubilee Party came with a group of people and stated dishing out money of Kshs. 200/= to the people who were on the queue and stating that 'kula zangu na mkatae kunipigia kura mtaona' and immediately he went inside the Polling room.'* On cross-examination **PW4** stated that he truly witnessed **Waluke** who was in the company of his body guard bribing voters at the Malakisi Muslim Primary School Polling Station 1 of 2 and left him at the polling station after he voted. That, he did not report the acts of bribery to any one as he was not aware that bribery is an offence neither did he take photographs of the acts. That, he heard **Waluke** talking to the voters on the queue and was indeed threatening them that they cannot take his money and not vote for him. That, he was on the queue in Malakisi Muslim Primary School Polling Station 2 of 2 which was about 10 metres from Malakisi Muslim Primary School Polling Station 1 of 2 where the bribery took place.

48. **PW5** deponed in **paragraphs 5, 6 and 7** of his affidavit that while discharging his duties as a party agent at Mufungu Primary School Polling Station 1 of 1 with his colleague one **Joseph Kisasati** he saw **Waluke** at the station at around 09:30am who was dishing out money to the voters who were on the queue in the denominations of Kshs. 200/=. That, he complained to the Police Officer at the station, but the Police Officer was also given Kshs. 1,000/= and that the Presiding Officer was given Kshs. 5,000/= inside the polling station. That, he informed the Chief agent of the bribery.

49. On cross-examination by **Miss Muyoka**, **PW5** stated that he stood at the entrance to the station and saw the Presiding Officer receiving the money. That, he did not name those who were bribed and did not witness what happened inside the polling station. Whereas he was not aware of the votes garnered by the **Petitioner** and **Waluke** in that station, and whether the results were agreed upon by the agents, he nevertheless believed that the bribery influenced the voting. He did not lodge any complaint to the police. On further cross-examination by **Mr. Kenei**, **PW5** stated that the polling station was in his village and he knew most of those who were bribed but did not give their names. To him, a Presiding Officer is the same as a Presiding Clerk and he restated that he was not inside the polling station but outside.

50. **IEBC** and the **Returning Officer** denied witnessing or receiving any reports on the alleged bribery allegations neither were they aware if any reports had been made to the police. **Waluke** as well denied the allegations and stated that after he voted at Yabeko Primary School Polling Station with his family he went back home and did not visit any polling station. That, he was not mad to bribe and treat voters openly as he remained aware of what happened to Hon. Wetangula when his election was challenged some years back on similar grounds.

51. As stated earlier, this discussion will only deal with the polling stations or instances which were

pleaded in the Petition and supported by affidavit evidence. For avoidance of doubt, the polling stations are those stated in **paragraph 15** of the Petition.

52. That being so, a look at the law first. **Bribery** is one of the election offences provided for in the **Election Offences Act No. 37 of 2016. Section 9** of the **Election Offences Act** creates the offence as follows: -

(1) A person who, during an election period –

(a) directly or indirectly offers a bribe to influence a voter to –

(i) vote or refrain from voting for a particular candidate or political party;

(ii) attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending support to or for a political party or candidate;

(b) in any manner unlawfully influences the result of an election;

(c) directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates.

(2) A person who, during an election period, accepts or agrees to accept a bribe that is offered in the circumstances described in subsection (1) commits an offence.

(3) A person who commits an offence under this section shall be liable, on conviction, to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both.”

53. Bribery is therefore a criminal offence. As discussed earlier the standard of proof in relation to such a ground is beyond any reasonable doubt. The **Petitioner** admittedly did not witness any of the alleged acts of bribery and treating of voters. **PW2** deponed that he was a Ford-Kenya Party agent at Malakisi CPK Primary School Polling Station. He annexed copies of a Letter of Appointment from the Party and an Oath of Secrecy to his affidavit. He was the only witness on the allegations of bribery and treating of voters at the Malakisi CPK Primary School Polling Station. His evidence was not corroborated in any way. None of the agents who were at the station with him testified. The incidents were not reported to the Police or the Office of the Director of Public Prosecutions for further investigations. As **Waluke** denied visiting the polling station on the day of the election, it was incumbent upon **PW2** to testify on how he knew **Waluke** and to endeavor to place him at the said scene. Further, as **PW2** stated to have been outside the polling station while the bribery on the Presiding Officer took place inside the polling station and that he stood at the door and witnessed the act, it was incumbent upon **PW2** to state how far he was from the Presiding Officer and how he knew that the money was Kshs. 5,000/-. That did not happen. What remains is the sole uncorroborated evidence of **PW2**. In totality of the evidence, the allegation of bribery and treating of voters at Malakisi CPK Primary School Polling Station was not proved.

54. **PW3** was the only witness who testified on the allegation of bribery at Yabeko Primary School Polling Station. His evidence was purely superficial to amount to any meaningful testimony. He just deponed that he saw Waluke bribing voters at the polling station. That was all. There was no mention of the time the alleged offences were committed, whether the bribery took place inside or outside of the polling station, how the bribery took place, whether there were any people in the company of **PW3** or **Waluke**, whether **PW3** knew any of those who allegedly received the money and in what denominations, why **PW3** did not disclose the names of those he saw receiving the bribes, why he did not report the incidents to the authorities accordingly, among many other unanswered issues. The issue of identification was also not settled given that it was the same **PW3** who appeared not to know **Waluke** when he stated that it was him who assaulted him but kept on changing the position. The allegation was hence not proved.

55. **PW4** was at Malakisi Muslim Primary School Polling Station 2 of 2 and allegedly saw the **Waluke** bribing voters on the queue at Malakisi Muslim Primary School Polling Station 1 of 2. He was the only witness on the allegations of bribery and treating of voters at that station. His evidence was also not corroborated in any way. No one else who was allegedly at the scene testified. The incidents were not reported to the Police or the Office of the Director of Public Prosecutions for further investigations. Despite knowing them, **PW4** did not bother to at least name those who allegedly received the bribes. Since **Waluke** stated that he never went to the station at all on the day of the election, it was incumbent upon **PW4** to endeavor to place him at the said scene at 04:00pm. All those crucial areas among many others were not properly illuminated by evidence. The net effect of the evidence of **PW4** is that it falls short of attaining the legal bar to sustain such a serious allegation and the allegation fails.

56. **PW5** was also the only witness to the allegations at the Mufungu Primary School Polling Station 1 of 1. His evidence was as well not corroborated. No any other witness testified including the said **Joseph Kisasati** whom they were allegedly serving together as agents. The incidents were not reported to the Police or the Office of the Director of Public Prosecutions for further investigations. As **Waluke** denied visiting the polling station on the day of the election, it was incumbent upon **PW5** to testify on how he knew **Waluke** and to endeavor to place him at the said scene. That did not happen.

57. I am aware of the evidence of **RW1** and **RW2** touching on **Waluke** in respect to this allegation. Even before venturing into that evidence it must always be remembered that the evidential burden of proof has, in the first instance, to be discharged by a Petitioner before it passes to the Respondents. That only happens when sufficient evidence attaining the requisite standard of proof is adduced. From the foregone analysis the **Petitioner** fell short of discharging that burden of proof and as such he cannot take refuge in the evidence of **RW1** and **RW2**. That aside, even when the evidence of **RW1** and **RW2** is considered nothing comes out to salvage the situation. The averment by **RW1** that Waluke '*is a very good and generous man*' who usually assists people and even did so during the campaigns period cannot in itself raise any eye brows. I say so because the nature of the assistance was not disclosed and how that affected the election. After all, **Waluke** was the then representative of the people of Sirisia Constituency and it was expected of him to extend some assistance accordingly. Likewise, nothing much turns out of the evidence of **RW2**.

58. The upshot is that there are so many gray and unsettled areas and loose ends that makes the whole piece of evidence by the **Petitioner** and his witnesses unbelievable and as such it falls far too low the expected standard of proof to sustain such serious allegations of criminal nature of bribery and treating of voters. The allegation stands not proved.

59. As none of the four separate allegations of bribery and treating of voters was proved in law I return the finding that the second issue is also answered in the negative.

(iii) Whether the election for the Member of National Assembly of Sirisia Constituency was held in compliance to the relevant applicable laws: -

60. I have already set out the legal framework in electoral matters herein above. The starting point is the **Constitution**, the **Act** and the **Regulations** made thereunder. An election must be carried out in strict compliance with the dictates of the **Constitution** and the applicable laws. For a Petitioner to impugn an election on this head, there must be evidence to show that specific provisions of the **Constitution** and/or the other relevant laws were breached and a demonstration on how they were infringed and how the infringement affected the result of the election. It is a matter which must transcend the borders of clear pleadings into the realm of adducing admissible evidence to the required standard of proof. In this case the standard is beyond balance of probabilities but below proof beyond reasonable doubt unless it is proved that such non-compliance was criminal in nature.

61. The Petitioner pleaded in **paragraphs 11** and **12** of the **Petition** that the **Constitution** and the other electoral laws were flouted in conducting the election as **IEBC** failed to establish electoral systems which were accurate, secure, verifiable, accountable and/or transparent. That, the systems adopted were opaque and intended to manipulate the results of the election in favour of **Waluke**. The **Petitioner** did not depone

to the issue in his affidavit neither did any witness do so. The Respondents denied the averment. **IEBC** and the **Returning Officer** contended that they put in place an electoral system which was accurate, secure, verifiable, accountable, transparent and which was in total compliance with the law. **Waluke** denied that the electoral system favored him in any way and contended that he fairly won the election.

62. Apart from the aspects of **illegalities** and **irregularities** which are dealt with elsewhere in this judgment the **Petitioner** did not demonstrate with specificity and clarity how the electoral system was not accurate, secure, verifiable, accountable or transparent and how it was manipulated in favour of **Waluke**. Such general averment cannot be a basis of making a finding that the electoral system used did not meet the constitutional threshold. There is therefore only one way left for this Court to follow and it is to dismiss the issue, which I hereby do, for want of proof.

(iv) Whether the declared results at the polling stations are consistent with the results declared by the 2nd Respondent who is the Returning Officer: -

63. This issue also touches on the transposition of the results from the declaration forms used at the polling stations which are the **Forms 35A** to the **Form 35B** at the tallying centre which paved way to the declaration of the winner of the election. I must however address two issues before I proceed on. The first one is that during the hearing of the Petition and after the **Petitioner** had been availed with copies of the Forms 35A the **Petitioner** went into a spree of unearthing irregularities in the said Forms 35A which issues were not specifically pleaded in the Petition. That is evident both in the proceedings as well as the written submissions and the oral highlights. In such cases any evidence ‘unearthed’ in the course of such proceedings or submissions cannot be used to support the Petition. Second, in the polling stations where there was either an issue concerning the entries in the Forms 35A or where Forms 35A were not availed to the **Petitioner** this Court ordered a scrutiny and recount of the votes and other election materials vide its ruling delivered on 22/12/2017.

64. From the reading of this Court’s ruling dated 22/12/2017 this Court ordered the scrutiny and recount to settle the issues which it found worth of venturing into. It is not in doubt that as the exercise went on parties came across many other issues on the documents of which are variously enumerated in the **Petitioner’s** submissions. A Report was prepared and filed by the Deputy Registrar of this Court (**‘the Report’**). The position remains that despite the revelations of the exercise as contained in the Report this Court can only be aided by the evidence in support of the issues specifically pleaded in the Petition so that the adverse parties do not stand prejudiced.

65. There is no doubt that Forms 35A were the primary documents in the election. The scrutiny revealed that 98 out of 99 Forms 35A availed were signed by agents. An allegation that the results announced at the polling stations are not like those announced at a tallying centre brings the contents of Forms 35A into sharp focus. For such an argument to be sustained the specific polling stations where the Forms 35A are impugned must first be disclosed in the Petition. Further, the forms must be successfully challenged to confirm that indeed what is contained therein cannot be said to express the will of the voters in a certain polling station. Unless that happens or in cases where there are wrong transpositions the allegation that the results at the polling stations are at variance with those at the tallying centre cannot stand.

66. I have perused the 98 out of 99 Forms 35A availed by **IEBC** in this matter. None of them was successfully impugned by the **Petitioner**. I have as well perused the contents of the Form 35B availed by **IEBC** and have not come across any alarming instances of wrong transpositions. That is also confirmed by the Report of the Deputy Registrar of this Court on the scrutiny and recount. What comes out from the Report are cases where some rejected votes were redeemed but in such cases the redemption cut across all the candidates and cannot be said to have favored any candidate.

67. The exercise as well settled all the other issues raised on the Form 35B. For instance, the issue of the codes was settled by the Schedule of the Polling Station Codes ordered in **(e)(i)** of the ruling (I say so because there was no contention that the Schedule was not availed as ordered), the issue of the total number of votes garnered by the **Petitioner** and **Waluke**, the issue of who was to be declared as the rightful winner of the election, the issue of whether the winner was rightly declared and issued with the

Form 35C among others.

68. Since I am dealing with the scrutiny and recount exercise and the Report let me also deal with the issue of Forms 32 (**Declaration of Secrecy made by a Person assisting a voter**) and Forms 32A (**Voter Identification & Verification Form**). The starting point is the Petition. Unlike the Forms 35A, Form 35B and Form 35C, the **Petitioner** did not specifically plead on Forms 32 and Forms 32A in the Petition. As such the Respondents did not specifically respond to any issue on the said forms. Had the **Petitioner** clearly pleaded the issues and named the polling stations which were in contention then that would have been responded to by the Respondents and thereby crystallizing into an issue(s) for determination. That would have also called for an order by this Court to avail the said forms well before the hearing just like in the case of Forms 35A, Form 35B and Form 35C so as to give an opportunity to the parties to interrogate the forms and to subject the appropriate parties or witnesses to examination during the hearing. Therefore, all the issues which came up during the hearing or the scrutiny and recount exercise touching on the Forms 32 and Forms 32A, including the failure to avail the forms, cannot be a basis to determine this Petition. That was the reason I declined to allow the Respondents to file further affidavits to explain what they stated to be *'issues on Forms 32 and 32A which arose during the scrutiny and recount exercise'* in my ruling of the 19th day of January 2018.

69. The issue of assisted voters was however deponed to by the **Petitioner** and **PW2**. Strict application of the rules will call for the outright dismissal of the allegation as it has no basis in the Petition. However, given that the issue was part of the affidavits of the **Petitioner** and **PW2** which affidavits were served together with the Petition and whose contents were fully responded to by the Respondents and were further tested in evidence, the cry for substantive justice under **Article 159(2)(d)** of the **Constitution** calls for an interrogation of the allegation and I will do proceed to do so.

70. The **Petitioner** in paragraph 21 of his affidavit deponed, without naming any polling station, that *'... where assisted voters were manipulated to cast ballot papers in his favour'* (meaning Waluke's favour). **PW2** in paragraph 6 of his affidavit deponed that *'the Presiding officer did not allow the agents to witness and observe what was going on in respect of the assisted voters.'* **PW2** was allegedly a registered voter at Malakisi CPK Primary School Polling Station 1 of 1 as well as a Ford-Kenya agent in that polling station.

71. There was no evidence to confirm any manipulation of any assisted voter as alleged by the **Petitioner**. As to the allegation by **PW2**, apart from the above contents, which were denied by the Respondents, the **Petitioner** and/or **PW2** did not adduce any other evidence. Having been an agent in the impugned polling station **PW2** did not state the action he took when the injustice was visited to the agents including himself. No assisted person was also called to demonstrate how he or she voted and how the agents were treated during the voting. There was neither any such entry made in the Polling Station Diary nor was there any report made to the **Returning Officer**, the police or the Director of Public Prosecutions on the conduct of the Presiding Officer which amounted to an election offence under **Section 13(i)** of the **Election Offences Act**. Further, there was no evidence to confirm that in the first instance there were assisted voters in Malakisi CPK Primary School Polling Station 1 of 1. As said, had the request for the Forms 32 been timeously made may be the matter would have been investigated substantively.

72. The allegations by the **Petitioner** and **PW2** on how the assisted voters and the agents were allegedly handled amounts to election offences. As such the standard of proof is beyond any reasonable doubt. From the foregone evidence none of the twin allegations was proved as required in law. Since the evidential burden of proof was not discharged by the **Petitioner**, the failure by the Presiding Officer of Malakisi CPK Primary School Polling Station 1 of 1 to swear an affidavit or to testify cannot aid the **Petitioner** in any way. For avoidance of doubt, the **Petitioner's** position would have been a sound argument had the **Petitioner** discharged his initial evidential burden whereof the said burden would have shifted to the Respondents. That being the case the allegations stand unproved and are dismissed.

73. From the above discussion, it comes out clearly that the results announced at the polling stations were substantially the same as those announced at the tallying centre by the Returning Officer. The tallying confirmed the figures used by the **Returning Officer** in declaring the winner of the election. I need to say

that the few discrepancies noted during the scrutiny and recount exercise were of such minor nature and did not vitiate the result of the election. The issue is hence answered in the negative.

Other issues for consideration: -

74. Before I deal with issues (v) and (vi) there are other salient issues worth consideration. They are as follows: -

(a) Access to polling stations and the tallying centre and access to inter alia statutory forms: -

75. The **Petitioner** pleaded in **paragraph 20** of the **Petition** that *‘the 3rd Respondent’s officer at various polling stations in Sirisia Constituency failed and/or refused to allow the Petitioner’s lawfully appointed and accredited agents access to the said polling stations and further denied the said agents access to statutory forms and other crucial information relating to and core the manner and way the National Assembly elections were being conducted and instead, the said officers became hostile to the agents and ordered security officers to eject the said agents from the polling stations and tallying centre. In particular, St. Antony Tallying centre, Mufungu Primary Polling Station, Malakisi Muslim, Sirisia Township.’*

76. In **paragraph 23** of his affidavit the **Petitioner** deponed that he had information from eye witnesses that there was a conspiracy between **Waluke** and the **IEBC** officials to deny Ford-Kenya agents access to polling stations, the tallying centre among other areas. Apart from that deposition, which is clearly hearsay evidence, there was no single witness who deponed on the issues of denial of access to any polling station or the tallying centre. None of the eye witnesses who were privy to the conspiracy testified.

77. The issue was picked up during hearing of the **Petition**. In such a scenario the evidence so unearthed cannot aid the **Petitioner** as the Respondents were not given notice adequate evidence in the affidavits to be able to specifically respond to the issues and may be avail witnesses. Allowing such evidence to form a basis of the decision in the matter will be prejudicial to the Respondents. That aside the issue was specifically disproved by the various Ford-Kenya Party agents who took part in the election including **PW2**, **PW5** and **PW6** (the Chief Agent) who deponed to and testified on events which they allegedly witnessed at their respective stations. Further, Forms 35A and Form 35 B were signed by Party agents including those of the Ford-Kenya. Therefore, despite having not been pleaded the allegation stands not proved.

78. On the issue of denial of the statutory forms and the other undisclosed documents referred to as *‘other crucial information relating to and core the manner and way the National Assembly elections were being conducted...’* the same was also generally and by way of hearsay deponed to only by the **Petitioner**. There was no evidence that the **Petitioner** or any of his agents or the eye witnesses who were privy to the conspiracy requested for the said documents including the undisclosed ones and that they were denied. The issue was therefore not proved.

(b) The interference by the Deputy County Commissioner at the tallying centre: -

79. Contrary to the settled rules of the game that an issue must be specifically pleaded in the **Petition** and proved by way of evidence, this allegation was not part of the **Petition**. Likewise, the **Petitioner** did not depon to the allegation. It was **PW6** who deponed to the allegation. As I said hereinabove strict application of the rules will call for the outright dismissal of the allegation. However, given that the issue was part of the affidavit of **PW6** which affidavit was served together with the **Petition** and whose contents were fully responded to by the Respondents and were further tested in evidence, the cry for substantive justice under **Article 159(2)(d)** of the **Constitution** calls for an interrogation of the allegation and on which basis I proceed to deal with the issue.

80. The allegation was contained in **paragraphs 7 to 15** inclusive of the affidavit of **PW6** which I will reproduce verbatim: -

“7. THAT during the tallying at the constituency tallying centre at St. Antony Sirisia High School on 9th August 2017 at around 2:00 p.m the Deputy County Commissioner of Bungoma West came to the centre and sat at the security desk.

8. THAT around 3:00 p.m 1st Respondent came to the Tallying centre and called the said Deputy County Commissioner out for a talk.

9. THAT they were out for about 15 Minutes and thereafter came to the Tally hall and proceeded to the podium and started working on the podium and started working on the IEBC laptops.

10. THAT the said Deputy county commissioner was directing the ICT Officer to type on the laptops.

11. THAT became concerned and raised the issue with the Returning Officer.

12. THAT the Returning Officer told me that the Deputy County Commissioner was working with them and there was nothing he could do.

13. THAT I started taking video footage of what was going on. Annexed herewith and marked EBW 8 is a CD to that effect.

14. THAT the security officers when they realized was taking videos, they arrested me and locked me up in a Land cruiser.

15. THAT they detained me for about one hour and released me only when the Deputy County commissioner had finished his work.

81. When **PW6** was cross-examined by **Mr. Katwa Kigen** he stated that ‘... there were two laptops at the tallying centre. I am not aware what was keyed into the laptops. Tallying was done for MCAs, Governor, Senator, Women Representative, National Assembly and the President.....I was not where the Deputy County Commissioner was working on the laptop. I cannot say which election the Commissioner dealt with in the laptop. There was only one ICT officer who worked on both laptops. The Commissioner was only directing the ICT officer on what to do in the laptops. The Commissioner also keyed in the laptops on several instances. The Commissioner and the ICT officer were together while working on the laptops...’

82. On cross-examination by **Mr. Kenei, PW6** confirmed that the Commissioner was indeed interfering with the election process and that such a conduct amounts to a criminal offence but nevertheless he did not lodge any report to the police but protested to the Returning Officer. When **PW6** was re-examined by **Mr. Makokha** he stated that when the Commissioner went into the tallying centre at around 02:00pm he first had a discussion with **Waluke** before he interfered with the tallying process.

83. The Respondents denied the allegation. In cross-examination by **Mr. Katwa Kigen**, the **Returning Officer** stated that ‘.....the tallying centre had 7 official laptops in compliance with the ICT regulations. I had a ‘Thoraya’ mobile satellite gadget. three Nokia 1021 standard model gadgets, a state-of-the-art Cannon photocopier and a public-address system model Casio. The photocopier was at the podium’s far end.....I had three (3) Data Entry Clerks, 2 Constituency ICT Clerks and 1 ICT Presiding Officer. There were usually 4 functional laptops at any time....I am the only one who authorized anyone to the podium....I only allowed the DCC to the podium after the declaration of the results and the issuance of Form 35C...He raised the issue of the security of all the ballot boxes and I explained that all was well. He also wanted a copy of the results of all the elective positions....I am the one who gave the DCC the forms. The DCC did nothing with the laptops and had no contact with any ICT officer as he only came to me directly. I directed my ICT officer to photocopy the forms and the DCC followed the officer there. The forms were brought to me and I am the one who gave the forms to the DCC. It is possible Edward Barasa mistook the photocopier with a laptop.....’

84. On re-examination the **Returning Officer** stated that ‘...*The Deputy County Commissioner came to the podium after I had declared the results and even issued Form 35C. I had finished my service and he enquired about the security of the ballot boxes. He is the Chairman of the Security Committee hence he had the right to know of the arrangement. The DCC asked for copies of the ‘B’ Forms and I issued him with. He had a constitutional right to those documents. I only became aware of the allegations after service of the Petition. Form 35B gives the final results of the election of Member of National Assembly which I prepared.....The results in Form 35B is a replica of the results of Forms 35A from the whole constituency*’

85. From the way the evidence unfolded two offences come to the fore. The first one is under **Section 13(i)** of the **Election Offences Act** as **PW6** was allegedly obstructed from discharging his duties as a Chief Agent for Ford-Kenya Party when he was arrested and confined elsewhere, and the second offence is in respect to **Section 13(k) (iii)** of the **Election Offences Act** on the allegation that the Commissioner otherwise unlawfully influenced the process or outcome of the election. That being so the standard of proof in both cases is beyond reasonable doubt.

86. However, before I proceed with the analysis of the evidence and the law, it is important I deal with the issue of the electronic evidence. This aspect is also two-fold in this judgment. There was the **Compact Disk** which **PW6** relied on in his affidavit and on which I declined to admit vide **Ruling No. 3** and reserved the reasons to be contained in this judgment and there is the **photograph** which **PW3** relied on. I decided to deal with these issues together since they are governed by the same legal provisions and are contained in the same Certificate.

87. The admissibility of electronic evidence is provided for in **Sections 106A to 106I** of the **Evidence Act**, Cap. 80 of the Laws of Kenya. **Section 106B (1)** states as follows: -

“Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible. ”

88. **Section 106B (2)** gives the attendant conditions as follows: -

“(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer.

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content: and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.”

89. Where a party wishes to rely on electronic evidence under the foregoing provisions, the one who undertook the actual work of processing that electronic evidence must prepare a Certificate whose contents are provided for in **Section 106B (4)** as follows: -

“(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particular of any device involved in the production of that electronic record as may be appropriate for the purposes of showing that the electronic record was produced by a computer.

(c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it.”

90. In this case the Certificate was prepared by one **Kelvin Billy Wakwabubi Opar** (hereinafter referred to as **‘Billy’**) on 05/09/2017. For ease of this discussion I will reproduce the contents of the Certificate in paragraphs 1, 2 and 3 thereof: -

“1. On the 5th of September 2017 I received Phone with IMEI Nos. 359973076933303 and 359973076933311 and another phone with IMEI No. 358073074906723 and 358073074906731 from Erick Wafula of ID No. 25014747 requesting that I should process the said contents of the phones which were videos and pictures, print photos and transfer the video to a compact disk.

2. In pursuant to the said request I processed the said videos and pictures from the said phones and I printed photos and transferred the videos to a compact disk. I have prepared and signed and now attach thereto as an annexure marked KBWO 1 (a), (b), (c), (d), (e) and (f) are disks and 2 bundles of photos.

3. That the photographic print and or enlargement and the video to the compact disk hereto annexed are marked KBWO 1 (a), (b), (c), (d), (e), and (f) are disks and 2 bundles of photos, as merely as may be as aforesaid and I have in no way been retouched, altered or otherwise interfered with in the process of preparation.

91. The need to strictly comply with the law when dealing with electronic evidence in this era of technological advancement cannot be overemphasized. I take judicial notice of the fact that through technology one can easily come up with anything ‘real’ be it a still or live photograph or a video more so even a fictitious one. It is just that easy. That is why for such evidence to be admissible the Certificate must strictly pass the test laid in the law.

92. A look at the evidence of **PW6** and the contents of the Certificate is of essence. **Billy** states that he received two phones from one **Erick Wafula** with instructions to process some videos and photographs therein by printing the photograph and transferring the videos to a compact disk. He gave the IMEI numbers of the phones. That he discharged the assignment.

93. But it is **PW6** who alleged to have taken a video footage at the tallying centre on 09/08/2017 at around 03:00pm. using his phone. **PW6** did not state that he gave his phone to **Erick Wafula** at any time to take to **Billy** for processing neither did he give the IMEI numbers of his phone as to ascertain whether his phone was one of the two phones given to **Billy** by **Erick Wafula**. **Billy** did not testify in respect to the Certificate. **Erick Wafula** neither swore any affidavit nor was he a witness in this matter. There is therefore no nexus between **PW6** and his phone, if at all he had one, and the two phones which **Erick Wafula** allegedly gave **Billy**. It cannot therefore be said beyond any peradventure that the Certificate prepared by **Billy** was in respect of the video footage allegedly taken by **PW6** at the tallying centre.

94. Even if I am to assume that the Certificate related to the video footage allegedly taken by **PW6**, the question which begs an answer is whether the Certificate complied with the law. The Certificate does not

disclose whether it was **Erick Wafula** who took the photographs and videos and if so where. The ownership of the two phones is also unsettled. That aside, **Billy** does not state how he undertook the printing of the photographs and the transferring of the videos into the Compact Disk. **Billy** only states that he was so requested, and he did so. It remains unknown what device **Billy** used in the process. We are equally left to guess the status of the device used and whether it attained the standard required in law. Further, **Billy** failed to demonstrate that he is possessed of the requisite qualifications to undertake the assignment. We are now left to wonder whether **Billy** was a photographer or a Cyber Operator or a computer expert or a movie maker.... and the list continues.

95. It is for the foregone reasons that I declined the request to admit the electronic evidence by **PW6** and that even the electronic evidence by **PW3** remains inadmissible and any reliance thereto cannot be a basis of any finding in this judgment.

96. Turning back to the allegations of interference by the Commissioner which we have seen to be yielding to two election offences, it is to be noted that despite the serious nature of the allegations it was only the evidence of **PW6** which was adduced in support thereof. No other witness testified, and no reasons were given for such absence of any other witnesses. No report was made to the Police or the Director of Public Prosecutions and as such no investigations at all were undertaken. With the exclusion of the electronic evidence there remains no corroborative evidence at all. It is hence that single-witness evidence of **PW6** which is to be tested to ascertain whether the evidential burden of proof passed to the Respondents. Given the unique set of circumstances in this matter the answer is in the negative.

97. However, even by looking outside the window of the burden of proof and venturing into the evidence of the **Returning Officer** the evidence of the **Returning Officer** appears credible and believable. It is not in doubt that the Commissioner was the Chairman of the Sirisia Sub-County Security Committee whose mandate was *inter alia* to ensure the safety not only of the ballot boxes but all the people and property in the sub-county. The presence of the Commissioner and or any of his members at the tallying centre was therefore expected and not suspect since there was even a special place set-aside for the Security Committee members. Equally, the request by the Commissioner for copies of the Form 'B's remains in order. There was need for him to be properly abreast of the outcome of the elections within the sub-county being the senior most National Government official. Further, the **Returning Officer** giving out the requested documents was an act that enhanced transparency and instilled public confidence into the process that anyone could be availed with the documents upon request. The **Returning Officer** also gave a sound sequence of the events as they unfolded at the tallying centre up to when the Commissioner was availed with the documents which was after the declaration of the results. It is also worth noting that **PW6** confirmed that he did not see what the Commissioner was doing at the podium and he did not state how far he was from the podium to be able to hear the instructions the Commissioner was allegedly giving to the ICT Officer.

98. Another important aspect of this matter relates to what happens at a constituency tallying centre. At the tallying centre in issue the **Returning Officer** was to collate the Forms 35A and transpose the entries therein into Form 35B and then tally the entries and declare the winner of the election. Had there been any wrong transposition of the entries because of the '*interference*' by the Commissioner then the scrutiny and retallying which was ordered by this Court would have revealed so. Since it was not alleged or proved that the Commissioner tampered with the entries in Form 35B as to be different from those in Forms 35A, there was therefore nothing the Commissioner could do to influence the result of the election at the tallying centre. Be that as it may, I reiterate that the allegation was not proved as required in law.

c. Inability of the IEBC staff to operate and manage the KIEMS system: -

99. This allegation was made in **paragraph 21** of the **Petition** in relation to Wamono Polling Centre where it was alleged that the KIEMS machines failed but the Presiding Officer allowed people to vote without proper identification. There was however no one who deponed to the allegation or adduced any evidence to that end. The upshot is that the allegation was not proved and is hereby dismissed.

d. Failure to reconcile the results from the polling stations: -

100. The Petitioner pleaded in **paragraph 22** of the **Petition** as follows: -

“The 3rd respondent and its electoral officers failed and / or refused to reconcile the results from the various polling stations to the extent that it was not possible to tell which results were the correct and true reflection of the voting held for the Sirisia for National assembly elections.”

101. Whereas there was no evidence in support of this allegation I was at a loss trying to understand what the **Petitioner** meant by the failure or refusal to reconcile the results from various polling stations. Could that failure have been on the part of the **Returning Officer**? As was rightly held in the case of **IEBC vs. MainaKiai, Khelef Khalifa & 3 others (2017) eKLR** that “...It is clear beyond peradventure that the polling station is the true focus for the free exercise of the voters' will.....” and in view of the provisions of **Article 86 (b) and (c) of the Constitution**, the **Returning Officer** can do no more than openly and accurately collating and promptly announcing the results from the polling stations. The only exception thereto is under **Regulation 83(1)(c) of the Regulations** whereif the number of the voters who cast their votes in a polling station exceeded the number of the registered voters in that polling station the **Returning Officer** must disregard the results from that polling station. The **Returning Officer** could not therefore ‘reconcile’ the results from the polling stations. Further, it is of essence to note that all issues on the transposition of the results from Forms 35A into Form 35B were settled by the scrutiny and retallying ordered by the Court. The allegation therefore fails.

e. Ballot stuffing and multiple voting: -

102. It was pleaded in **paragraph 14** of the **Petition** that the huge discrepancies in the total number of votes declared could only be explained by instances of ballot stuffing and multiple voting. Apart from so pleading, there was no evidence that was led to prove the allegation. The allegation equally fails.

f. Signing of Form 35B by the Chief Agent: -

103. PW6 contended that he did not sign the Form 35B as he had been arrested and confined at the tallying centre when he protested what the Commissioner was doing. I have by now settled the issue and found that there was no sufficient proof to support it. Having so found, the allegation that **PW6** did not sign the Form 35B has to weighed against the evidence of the **Returning Officer** and **Waluke**. The **Returning Officer** testified that he had worked with **PW6** well and he witnessed him sign the Form 35B and as such he was surprised that he had taken a contrary position. **Waluke** also testified that he knew **PW6** well as he had previously employed him as a CDF driver, but they parted ways unceremonially although there were no hard feelings. That, he personally witnessed **PW6** sign the Form 35B and that **PW6** was not honest before Court.

104. Whereas the evidence of the **Returning Officer** was corroborated by that of **Waluke**, the evidence of **PW6** remains uncorroborated. **PW6** did not lodge any complaint with either the police or the Director of Public Prosecutions that his signature was forged. Had he done so may be investigations would have shed some light on the allegation. He also did not avail any other person to support his allegation. I intently looked at the demeanors of all those who testified before me and I was satisfied that the **Returning Officer** and **Waluke** were truthful on this issue. I therefore find that it was **PW6** who signed the Form 35B as the Chief Agent for the Ford-Kenya Party in Sirisia Constituency.

v. Costs: -

105. As I stated in **the Bungoma Petition ‘Section 84 of the Act** has that costs follow the cause and an election Court can award such costs. The Court’s jurisdiction is further provided for under **Rule 30 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** where 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. The Court may also make orders on costs in respect to specific instances during the matter. Costs can also be taxed in the event the Court does not determine the issue. Costs ought to be adequate to compensate the work done on one hand and not to be so high as to unjustly enrich the parties or cause unwarranted dent on the public purse or injure the body politic by undermining the principle of access to

justice as enshrined in **Article 48 of the Constitution** on the other hand. (**Kalembe Ndile and Another vs. Patrick Musimba and Others (2013) eKLR**).

106. The Petitioner's Counsel prayed for an award of Kshs. 2,500,000/= either way the matter is determined. The Counsel for **Waluke** prayed for Kshs. 3,000,000/= whereas the Counsel for **IEBC** and the **Returning Officer** also prayed for Kshs. 3,000,000/= for each of the three Respondents. The Petition was relatively not complex but had several interlocutory applications both oral and written including an application for scrutiny and recount of the votes. Scrutiny and recount exercises were conducted. A total of 13 witnesses testified and their evidence is on record. I have noted the nature and quality of the submissions tendered and decisions relied on and there is no doubt that a lot of considerable time and research was employed in the preparation of the pleadings, the application and the submissions further to the preparation of the witnesses and the hearing as well as attending to the scrutiny and recount exercises.

107. I have also considered comparable decisions on costs including **Kisumu High Court Election Petition No. 1 of 2017** where an award of Kshs. 5,000,000/= was made to be shared between the Respondents; **Dickson Mwenda Kithinji vs. Gatirau Peter Munya & 2 others (2013) eKLR** where a total award of Kshs. 5,000,000/= was made and in **Kakamega High Court Election Petition No. 11 of 2017 Hamzah Musiri Kevogo vs. IEBC & 3 Others** where an award of Kshs. 3,000,000/= on each set of the Respondents was made. I have also considered the fact that I awarded costs of Kshs. 6,000,000/= in the **Bungoma** Petition in which matter there was only one interlocutory application and no application for scrutiny or recount. Although majority of the decisions I have relied on are on gubernatorial petitions I have read them and found that the matters were conducted in similar manner as this Petition. I therefore find that they serve as a good guide on the aspect of costs.

108. From the foregone and in consideration of this Petition I find that a total award of **Kshs. 6,000,000/=** on instruction fees is adequate.

vi. Which orders to be given by the Court: -

109. While appreciating the universal position that no election is carried out perfectly and that no election carried out in contravention of the **Constitution** and/or the law or one which is marred by illegalities and irregularities that affect the result of that election should be saved, I am satisfied that the election of the Member of National Assembly of Sirisia Constituency was conducted substantially within the dictates of the **Constitution** and the law and that the few irregularities in issue did not affect the result of the election.

110. I also wish to express my sincere and immense gratitude to all the Counsels who appeared in these proceedings for the courteous manner they conducted themselves in and the well-researched submissions, both oral and written, and the authorities referred to which I have found truly useful. If I have not expressly referred to any authority cited, that it is not out of disrespect or lack of appreciation for their industry.

111. Having patiently considered all the grounds in the Petition and found that none was proved as required in law, I now make the following final orders: -

- (a) The Petition be and is hereby dismissed with costs.**
- (b) The instruction fees for the 1st Respondents are capped at Kshs. 3,000,000/= as well as the instruction fees for the 2nd and 3rd Respondent which are capped at Kshs. 3,000,000/=.**
- (c) The total costs shall be taxed and certified by the Deputy Registrar of this Court.**
- (d) The Respondents shall equally share the security deposit upon the certification of the costs.**
- (e) A Certificate of the determination of this Petition in accordance with Section 86(1) of the**

Elections Act, 2011 shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly.

Those are the orders of this Court.

DELIVERED, DATED and SIGNED at KITALE this 22nd day of February 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Makokha Counsel for the Petitioner.

Mr. Katwa Kigen and **Miss Antonina Muyoka** Counsels for the first Respondent.

Mr. Kenei and **Mr. Ogetan** Counsels for the second and third Respondents.

Kirong– Court Assistant

Slyvia - Court Assistant