



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**ELECTION PETITION NO 10 OF 2017**  
**IN THE MATTER OF THE CONSTITUTION OF KENYA**  
**ELECTIONS (Parliamentary & County Elections)**

**PETITION**

HASSAN OMAR HASSAN... .....1<sup>ST</sup> PETITIONER

LINDA MARIWA SHUMA. ....2<sup>ND</sup> PETITIONER

**AND**

**INDEPENDENT ELECTORAL &**

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

**NANCY WANJIKU KARIUKI.....2<sup>ND</sup> RESPONDENT**

**HASSAN ALI JOHO.....3<sup>RD</sup> RESPONDENT/APPLICANT**

**J U D G M E N T**

**Introduction and background:**

1. This petition was filed by Hassan Omar Hassan and Linda Mariwa Shuma, contesting the election of Hassan Ali Joho as the Governor in Mombasa County following the general elections held on 8<sup>th</sup> August 2017. The results of the contested election were as follows:

a) Hezron Awiti Bolo	-	4,709
b) Hassan Omar Hassan	-	43,787
c) Hassan Ali Joho	-	221,177
d) Daniel Kitsao Munga	-	1,670
e) Suleiman Shahbal	-	69,515

2. The crux of the petition dated 8<sup>th</sup> September 2017, is that the Gubernatorial election for Mombasa County was Contrary to the concise provisions of the Constitution particularly **Articles 38, 81, 86 and 88 (5)** thereof, **the Elections Act, 2011 and Regulations** made thereunder. That it was tainted with a number of illegalities, irregularities and or malpractices rendering the election invalid

3. The petitioners' case is premised on ten (10) grounds set out in Paragraphs 20-64 of the petition to wit: irregularities in Forms 37As, irregularities in counting and tallying of votes cast, tampering with Forms 37As, issuance of multiple ballot papers or pre-marked ballot papers to voters, turning away of registered voters from voting on account of not being identified by the KIEMS machine, removal of agents from polling and tallying centres, ballot stuffing, bribery and other election offences, use of public resources in the campaigns, violation of

4. The Petitioners sought the following prayers in the Petition:

- i. This Honourable Court to order the 1<sup>st</sup> Respondent to avail all materials used in the electoral process, including but not limited to all the Kenya Integrated Electronic Machine System (KIEMS) and the extracts of their record, print registers used in the elections, the copies of form 37As, the Polling Station Diaries for preservation and safe custody;
- ii. The Honourable Court be pleased to issue an order directed at the 1<sup>st</sup> Respondent to provide and grant the Petitioners access to the servers used for the election for Mombasa County Governor;
- iii. The Honourable Court be pleased to order the scrutiny and vote recount of all the votes cast, the Polling Station Diary, the KIEMS Kit, the copy of print/manual registers used in the Elections, the copies of Forms 37As, Forms 32A and packets of spoilt ballot papers in all polling stations in Mombasa County, and in particular the Polling Stations mentioned in paragraphs 18, 20, 22, 23, 25, 26, 27, 29, 37, 38, 40, 44, 47 and 53 hereinabove.
- iv. Upon the results of the scrutiny and recount of votes as sought in prayer (iii) above, the Honourable Court be pleased to order the 1<sup>st</sup> Respondent to organize, arrange and conduct a fresh election for the Mombasa County Governor in strict compliance and in conformity with the provisions of the Constitution, the Elections Act and the Regulations made there under.
- v. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents violated Articles 81 and 86 of the Constitution of Kenya, 2010.
- vi. A declaration that there were massive irregularities in the conduct of the election of Mombasa County Governor;
- vii. A declaration that the non-compliance, irregularities and improprieties in the election for Mombasa County Governor were substantial, significant and affected the result thereof;
- viii. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's return and declaration of the 3<sup>rd</sup> Respondent as the validly elected Mombasa County Governor as invalid, null and void;
- ix. The Honourable Court be pleased to declare that the acts and/or omissions of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents amount to electoral malpractices of a criminal nature;
- x. Costs of the Petition; and,
- xi. Any other orders that the Honourable Court may deem fit and just to grant.

5. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their Response on 20<sup>th</sup> September, 2017, denying all the allegations in the Petition and put the Petitioner to strict proof. The 3<sup>rd</sup> Respondent also filed his Response on 19<sup>th</sup> September, 2017, wherein he denied any fault in the outcome of the election and stated that the said election was free and fair.

6. In support of the issues raised the Petitioner called fifteen (15) witnesses, whereas the Respondents called nineteen (19) witnesses in total.

**Issues for Determination**

7. The parties herein filed their statements of issues for consideration, which in my view can be condensed from the ten (10) grounds contained in the Petition, as follows:

- (a) Whether the process of relay and transmission of results from polling stations was transparent, and was administered in an impartial, neutral, efficient, accurate and accountable manner in accordance with **Article 81** of the Constitution.
- (b) Whether the Petitioners have discharged the Burden of proof as required of them in the instant Petition against the Respondents.
- (c) Whether the Petitioners are entitled to the prayers sought
- (d) Who is to bear the costs of the suit.

**Analysis of the Evidence**

**Irregularities in Forms 37A**

8. The irregularities complained of concerning Form 37As included:

- a. Unstamped Form 37As;

b. Unsigned Form 37As by the Presiding Officer and or Deputy Presiding Officers;

c. Discrepancies in the results declared in Form 37As and Form 37Bs;

d. Forms 37As bearing no names or signature of the party Agents, and without reasons thereof from the Presiding Officer contrary to **Regulation 79 (1) of the Elections (General) Regulations, 2012.**

9. The Petition listed a myriad polling stations said to be affected by the alleged irregularities. However, by an application made by the 3<sup>rd</sup> Respondent's counsel, the Petitioner's bundle of documents attached to the Petition were expunged from the record for non-compliance with section 106B of the Evidence Act by an order of the Court made on 30<sup>th</sup> November, 2017. The Forms 37A, 37B and 37C were thus not available to the Petitioners' witnesses and as such it can be said that no evidence was led in this regard by the Petitioners and their witnesses, on those forms.

10. Some of the irregularities pointed out were that Form 37B for Changamwe Constituency did not have the name of the tallying centre and the taking over-handing over section was blank. The same irregularities were noted in Likoni, Nyali, Jomvu and Kisauni. RW1, Nancy Wanjiku Kariuki, County Returning Officer Mombasa County admitted this fact and stated that the forms indicated that the Commission chairman was the person supposed to receive the Forms, which explains why they left the sections blank.

11. RW1 admitted that some Forms were unstamped, but pointed out that procedurally, it is not a requirement of the law for the forms to be stamped. That the forms are only stamped for value addition if and when it is done.

12. On the forms that were not signed at the handing over taking over section, RW1 in cross-examination, stated that the significance of this section is to confirm what is in the forms. From the evidence she did confirm that she received all Form 37As and that she used these to tally the results in Form 37B. She reiterated that Mombasa County elections were the most credible elections in the elections of 8<sup>th</sup> August, 2017.

13. The petitioners' witnesses, in particular PW 6, Lorraine Mbare Handa an agent for the Petitioner at Bokole Nursery school, PW8, Zubeda Wanjiru Wahome, the Chief Agent in the Nyali Constituency who replaced the Agent in Mlaleo who fell ill, PW10, Alhamisi Dlamini the Wiper Agent at the Fort Jesus Polling Station No. 4 and PW12, Victor Muse Owino the Polling Agent at Railway Station Polling Station at Miritini, stated that they were not provided with form 37As at the close of the polling and were thus unable to verify the results.

14. RW8 in rebuttal led evidence to the effect that it was not his duty to ensure that the boxes were not opened, or the voting was done only in the presence of all agents, or that all agents were present during the counting or sealing. This he said was the duty of the respective parties. He asserted that any agents who did not receive the forms complained of were not present at the polling station at the time of such being issued.

15. PW4 testified that a number of agents told him that they were not given Form 37A but he was not specific as to which agents made such claims to him. PW6, PW7, PW8, PW10 and PW12 who stated in their evidence that they were not supplied with the Forms 37A, did not deny the averment by the Respondent's witnesses, that these forms were pinned up at a conspicuous place at the various polling station, for all to see.

#### **Irregularities in counting and tallying of votes cast**

16. PW14, Beatrice Mbodze Gambo testified that she saw ballot boxes that had interchanged seals, while RW1 swore an affidavit in response and confirmed that there were indeed interchanged seals. She stated that when PW14 raised the issue with her, she explained how this came about. I observe from the evidence that the 1<sup>st</sup> Respondent did not have any specific seals for any position and that all that was required of the IEBC officials was to record the serial numbers of those seals and the ballot boxes on which they were used. This had been done. In any event sealing was done at the very end after the voting and the counting had been completed.

#### **Tampering with Forms 37A**

17. One of the grounds in the Petition is the contention that some Forms were tampered with without countersignatures. In the evidence however only the Petitioner raised this issue. He stated that he received information whose source he did not disclose or call to testify, that there was tampering with Forms. This was therefore hearsay evidence and of no value to the petition.

#### **Issuance of multiple ballot papers to voters**

18. PW6, Lorraine Mbare Handa stated in evidence that she saw a voter handed multiple ballot papers. She alerted the Presiding Officer, RW9. RW9 admitted that one voter was erroneously issued with two ballot papers in respect of the election of the Governor, but the same voter had not been issued with a ballot paper in respect of the election of the President.

19. RW9 testified that he immediately approached the said voter, and in the presence of the authorized agents present in the polling station, requested the voter to hand over one of the two ballot papers. RW9 canceled the spoiled ballot paper in accordance with Regulation 71 of the Elections (General) Regulations and issued the voter with a ballot paper in respect of the election of the President which had not been issued.

20. The court notes that PW6, stated in cross examination that she did not record any objection in the Form 37A as to the manner of counting at Bokole Nursery School Polling Station No. 3. In Form 37A annexed to the affidavit of Isaac Kara Wafula, the Respondents' witness affidavits is the evidence that PW6 signed the Form 37A indicating her satisfaction with the election in that polling station. No such complaint was reported to any presiding officer or to the police.

### Turning away registered voters on account of not being identified by the KIEMS machine

21. At paragraph 37 the Petitioner alleges that up-to 300 registered voters were denied their constitutional right to exercise their democratic will. No affidavit in this regard was filed by any voter who was so denied their constitutional right to vote. PW8 the Wiper Chief Constituency Agent for Nyali Constituency, stated that the KIEMS kits in Mlaleo Primary Polling Station No. 1 and 2 failed and as a result voters were unable to cast their votes.

22. RW 13 the Presiding Officer at Mlaleo Primary School Polling Station No. 1 averred in his affidavit that there was a 41 minute delay in opening the polling station. He explained that the delay was occasioned by the inability to locate the QR Code in respect of the polling station, so as to scan it to activate the KIEMS kit. It is in evidence however that this delay was factored in during polling and the polling was extended by 41 minutes so that the station was closed at 5.41pm. No voter testified to having been disenfranchised as a result of the delay in opening the polling station.

23. In the evidence of RW13, the Petitioners' agents, Irene Mathenge, was present at the Mlaleo Primary School polling station No. 2 at the start of polling and was present at all material times. She admitted that polling started at 6.35 a.m. and she factored in the 35 minute delay in opening the polling station and extended the polling by 35 minutes at the end. The Petitioners' agents at both polling stations signed the Form 37A, and recorded no complaint or reservations therein.

### Removal of agents from polling and tallying centres

24. At paragraph 22, 38, 39, 40 & 41 of his affidavit, the 1<sup>st</sup> Petitioner avers that his agents were chased away from the polling stations mentioned therein. PW15 led evidence to the effect that he was denied entry into Daru Ulum Polling Station No. 9 because he was informed that there was another agent inside the polling station. In response, the Presiding Officer in that polling station, RW5 in his affidavit, stated that only one agent for each candidate or political party, was admitted into the polling station at a given time.

25. It was not denied that Omar Abdalla Salim was denied admission into Daru ulum Polling Station No. 9 because there was another Wiper Democratic Movement (Wiper) agent, one Mohamed Nyanza, already in the polling station. The complaints that agents were ejected from the polling stations have no basis since those agents actually signed the Forms 37A for their respective stations and raised no complaints of this nature in the said form 37A.

### Ballot stuffing

26. At paragraph 45 of the Petition, the Petitioners allege that there was ballot stuffing at Daru Ulum Polling Station No. 9 and Likoni Primary School Polling Centre. The Petitioner did not call any agent who was present at Daru Ulum Polling Station No. 9 to testify on the issue of ballot stuffing. However, RW5 who was the presiding officer at Daru Ulum Polling Station No. 9 deposed in his affidavit that no such incident took place and no such report was made to him. Further, the agents present at the polling station indicated their satisfaction with the result by signing the Form 37A.

27. The evidence of PW5 was that he witnessed marking of ballot papers at Likoni School for the Blind. The 1<sup>st</sup> Petitioner on his own admission stated that Likoni School for the Blind was a tallying centre and not a polling station. Results had therefore already been declared in the polling centre before form 37A and 37B were brought to the tallying centre.

28. PW12 stated that he saw ballot papers left at a window but he could not state how many they were, nor the colour of the ballot papers. He also could not remember the number of votes cast at the polling station. RW18 confirmed that the polling station was a tent and as such, she could observe what was going on in other polling stations within the tent and she did not see any ballots left at any window. Her testimony was corroborated by RW12 who testified that the said PW12 was not an agent in that polling station. He confirmed that the polling centre was a tent with one open side and no windows. No pre marked ballot papers were brought to his attention in the polling station. In any case, by the witness' own account, even if these ballots existed, they were never counted in favour of any candidate. Furthermore, no other agent was called to corroborate the evidence by PW12.

### Bribery and other electoral offences

29. PW5, Philip Odhiambo Ayira, an agent at Lango Primary School in his evidence stated that he witnessed a woman allegedly affiliated to the 3<sup>rd</sup> Respondent's party (ODM), bribing voters to vote for ODM candidates at Lango Primary School Polling Station No. 2. PW12 also alleged that bribery took place at Railway Station Polling Station No. 5. This evidence was however vague and lacking in specificity. None of the witnesses could state the amount of bribe, to whom it was given, the person issuing the bribe or on whose behalf the alleged bribe was given. Further the alleged incidents of bribery were never reported to the IEBC officials or to the police who were present at all polling centres.

### Use of public resources in campaigns and breach of Chapter Six

30. The Petitioners did not lead any evidence on the ground of the use of public resources in the campaign. They also did not lead any evidence on the alleged breach of Chapter six by forgery.

### Applicability of the decision in Raila Odinga & Another v IEBC & 2 Others, Supreme Court Election Petition No. 1 of 2017

This was an issue for submission and not for evidence.

### Petitioners Submissions:

31. Written submissions were filed by the parties at the close of the trial. Learned counsel Mr. Aboubakar who appeared for the Petitioner, submitted that they had legitimate expectation that the elections would be conducted in accordance with **Article 38, 81, 86 and 88(5)** of the **Constitution of Kenya** 2010, section 39 of the Elections Act 2011 and section 25 of the Independent Electoral and Boundaries Commission Act, 2011.

32. That the Petitioners facts in their affidavits are that they saw 85 Forms 37As without an IEBC stamp, 16 were not signed by both the Presiding officer and his or her deputy and 29 had alterations made without countersignatures.

33. Counsel submitted that the Petitioners established these facts in the Petition and the evidence and the Respondents did not disprove them. He cited the decision in **Presidential Election Petition No. 5 of 2013, Raila Odinga V IEBC and Others** to buttress this position.

34. Counsel submitted that the contents of the Forms 37A is within the knowledge of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents firstly by virtue of Article 86(d) of the Constitution which obligates the 1<sup>st</sup> Respondent to safely keep election materials, secondly, Regulation 93 of the Elections (General) Regulations, 2012 as amended in 2017 requires that all documents relating to an election shall be retained in safe custody by the Returning Officer for a period of three (3) years after the results of the elections have been declared.

35. That it was incumbent upon the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to bring to Court all Forms 37As in order to disprove the facts established by the Petitioners.

36. On issuance of multiple ballot papers he submitted that PW6 one Lorraine Mbare Handa an agent at Bokole Nursery School polling station No. 3 saw the 1<sup>st</sup> Respondent's clerk issue two ballot papers in respect of the election for governor.

37. On ballot stuffing he urged that the Petitioners' chief agent in Changamwe Constituency, PW1, witnessed some ballot boxes taken to the constituency Tallying Centre without seals. Further that the Presiding Officer who transported the ballot box to the Constituency Tallying Centre was in breach of Regulation 81(2)(a).

38. On the violation of Article 38, 81 and 86 of the Constitution and section 39 of the Elections Act, 2011, counsel reiterated the various breaches set out in the petition and some which though not pleaded he said came out in evidence. He prayed that the Court would find that there were breaches and proceed to find in favour of the Petitioners.

40. They cite the case of **Justus Mugumbu Omiti Vs Walter Enock Nyamati Osebeand & 2 others Election Petition No. 1 of 2008** (Kisii) which was cited with approval in **Phillip Mukwe Wasike Vs James Lusweti Mukwe & 2 Others (2013)**, where the Court stated that any matters raised in the petition whether pleaded or not and which have the potential to adversely affect the final result must be interrogated by the Court.

41. On the importance of the process of voting and counting at the polling station Counsel cited the case of **Maina Kiai & 5 Other Civil Appeal No. 105 of 2017**.

42. On declaration of results Counsel submitted that the use of unprescribed forms invalidated the outcome thereof. He cited **Petition No. 10 of 2013 Hassan Ali Joho & Another Vs Suleiman Said Shabal & 2 Others** to buttress this position.

#### **1<sup>st</sup> and 2<sup>nd</sup> Respondents' submissions**

43. Learned counsels Mr. Nyamodi and M/s. Ndong appeared for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Mr. Nyamodi submitted that in a Ruling dated 14<sup>th</sup> December, 2017, the Court made the following findings –

***(a) The documents contained in pages 59 to 188 of the Petition are improperly filed, do not comply with Section 106B of the Evidence Act and are thus inadmissible into evidence.***

***(b) The Petitioners' and the Petitioners' witness affidavits annexures are improperly marked and are thus inadmissible as evidence.***

Counsel submitted that the import of the above finding by the Court is that the Petition was supported only by bare averments contained in the affidavits of the Petitioners and the witnesses. No evidence having been adduced in support of the allegations contained in the affidavits those allegations therefore remain unproved.

44. Mr. Nyamodi further urged that the Petitioners have not discharged the burden of proof as required in election petitions. That the common law principle of *onus probandi* lies on the Petitioner. The principle is enshrined in **Section 107 of the Evidence Act, Cap. 80 of the Laws of Kenya** which provides 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.***

Counsel argued that in the instant Petition, the burden of proof did not at any time shift to the Respondents. That the evidential burden shifts only when the Petitioner produces the necessary evidence in support of the Petition.

45. Counsel asserted that the Petitioners have not established their case to the required standard and referred to the holding of **Majanja J. in Jackton Nyanungo Ranguma -v- The Independent Electoral and Boundaries Commission Election Petition No. 3 of 2017.**
46. The Petitioners' evidence in Mr. Nyamodi's view on what they alleged to be a "calculated plan, scheme and/or strategy to favor, help or give unfair advantage to the 3<sup>rd</sup> Respondent against the Petitioners" is at best hearsay evidence. The Petitioners in this case did not see or hear any of the alleged malpractices, illegalities or irregularities. The 1<sup>st</sup> Petitioner stated that he did not witness the electoral malpractices himself. As a result, the entirety of the Petitioners' evidence on record, to the extent that it amounts to hearsay evidence, cannot be relied on by the Honourable Court.
47. On irregularities in Forms 37A Counsel submitted that paragraphs 16, 17, 18, 19, 20, 24, 25 & 29 of the 1<sup>st</sup> Petitioner's Affidavit sets out the manner in which he accessed the Forms 37A and the irregularities thereof. That as participants in the election, it was incumbent upon the Petitioners to ensure they had agents in all polling station, who were at liberty to obtain copies of the Forms 37A to add weight to the petition and evidence.
48. Counsel urged that the Petitioners did not lead any evidence that the alleged irregularities in the Forms 37A, which was denied, affected the outcome of the election. Further, that the Petitioners did not challenge the results that were tallied and declared at those polling stations. It is their position that it is not enough for the Petitioners to merely allege that the forms contained irregularities, but it was also essential for them to demonstrate to this Court the irregularities complained of and that such irregularities affected the result of the election.
49. On Irregularities in counting and tallying of votes cast, Counsel submitted that PW6 – Lorraine Handa stated in cross examination that she did not record any objection in the Form 37A as to the manner of counting at Bokole Nursery School Polling Station No. 3. The Form 37A annexed to the affidavit of Isaac Kara Wafula at Vol. 4 Page 346 of the Respondents' witness affidavits is evidence that PW6 signed the Form 37A indicating her satisfaction with the election in that polling station. No complaint was reported to any presiding officer or to the police on this issue.
50. **Counsel submitted that Regulation 79(2)(2)(b) Elections(General) Regulations** requires the Presiding Officer to request each candidate or agent present to append their signature to Form 37A. That there is no evidence on record, either by the Petitioner or his witnesses; that the Petitioner and/or his agents were not allowed to verify the results in Forms 37A from any polling station. Furthermore **Regulation 79(6) Elections (General) Regulations** provides that the refusal or failure of a candidate or agent to sign a declaration form or to record the reasons for their refusal to sign shall not by itself invalidate the results announced.
51. On tampering with form 37As Counsel submitted that such allegations are election offences, which, by dint of the decision in **Raila 2013**, must be proved beyond reasonable doubt. That the Petitioner has made no attempt at proving these allegations and this ground fails in its entirety.
52. On issuance of multiple ballot papers Counsel submitted that that was an isolated incident which RW9 the presiding officer at Bokole Nursery School Polling Station No. 3 dealt with accordingly when it was brought to his attention.
53. On the complaint of turning away of 300 registered voters from voting on account of not being identified by the KIEMS machine, Mr. Nyamodi submitted that no evidence was led to prove the allegation.
54. On removal of agents from polling and tallying centres, Counsel urged that all the Petitioner's witnesses who alleged that they were agents never presented their letters of appointment and oath of secrecy and it would therefore be difficult for the court to determine whether they were authorized agents or not. No evidence of ejection was produced.
55. Where the Petitioners' agents were absent it was submitted that the absence of their agents during counting and declaration of results is a burden for their parties and should not be placed upon the Respondents.
56. On Ballot stuffing Counsel submitted that the Petitioners allege that there was ballot stuffing at Daru Ulum Polling Station No. 9 and Likoni Primary School Polling Centre. That the Petitioner did not call any agent who was present at Daru Ulum Polling Station No. 9 to testify on whether there was any ballot stuffing. However, RW5 – Mohamed Mwaraenye who was the presiding officer at Daru Ulum Polling Station No. 9 stated in his affidavit that no such incident took place and none was reported to him. Counsel averred that the number of valid votes was 362 against 665 voters. This was within the range of valid votes cast in all the elections held on 8/8/17 as indicated in the polling station diary thereby negating the likelihood of ballot stuffing.
57. Counsel submitted that the testimony of PW12 – Victor Owino who was allegedly at Railway Station Polling Station No. 5 cannot be relied on. The witness could not describe with particularity the number of ballot papers he found at the window, nor could he remember the number of votes cast at the polling station. In response that RW18 – Bendeta Simiyu the Presiding officer at the named station, confirmed that the polling station was a tent and as such, she could observe what was going on in other polling stations and she did not notice any such incident as alleged.
58. On Bribery and other electoral offences Counsel submitted that the standard of proof of an offence of bribery is proof beyond reasonable doubt. Further that it was incumbent upon the Petitioner to prove the alleged offences by adducing cogent, consistent and credible evidence, which he did not do.
59. Counsel contended that the complaint of misuse of public resources is an election offence which was not established to the required standard while the violation of chapter 6 through forgery is a blanket allegation which was not proved.
60. On **Applicability of the decision in Raila Odinga & Another v IEBC & 2 Others, Supreme Court Election Petition No. 1 of 2017.**

Counsel contended that the fact that the presidential election held on 8<sup>th</sup> August, 2017 was nullified is inconsequential to the election of the Governor Mombasa County, as the facts are totally different from the instant case.

61. On reliance of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent's evidence by the Petitioner counsel urged that the evidence led did not conform to the pleadings. Counsel fall back on the rationale articulated by Jessel MR in the case of **Thorp V. Holds worth, (1876) 3 Ch. D, 637 at 639**, cited with approval by the Court in **Mary Emaase Otucho v Geoffrey Omuse & another [2018] eKLR** at paragraph 29 as follows:

*“The whole object of pleadings is to bring the parties to an issue and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to the definite issues, and thereby to diminish expense and delay, especially as regards to the amount of testimony required on either side at the hearing.”*

62. The Respondents submit that the Petitioners case has not been established and the Petition should be dismissed with costs to the Respondents.

63. Counsel contended that to open the door to reliance on Respondents' pleadings only would increase the rate of fishing expeditions by Petitioners, as in the instant case, resulting in a flood of frivolous Petitions. In **Raila 2017**, the Supreme Court quoted with approval the Supreme Court of India in **Arikala Narasa Reddy v Venkata Ram Reddy Reddygari and Another Civil Appeal Nos. 5710 -5711 of 2012[2014] 2 SCR** where it stated 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.*

64. All in all Mr. Nyamodi asserted that the petitioners' case had not been established and thus the Petition should be dismissed with costs to the Respondents.

### **3<sup>rd</sup> Respondent's Submissions**

65. Learned counsels Mr. Buti and Mr. Balala appeared for the 3<sup>rd</sup> Respondent and submitted that a perusal of the Petition herein will show that the averments in the Supporting Affidavit of the 1<sup>st</sup> Petitioner, which are echoed by the 2<sup>nd</sup> Petitioner, are: word for word, dot and comma, a *replica* of the averments contained in the Petition. It is submitted that the error of replicating the Supporting Affidavit to conform in every respect to the main Petition invariably means that the Petitioners have not adduced any evidence on any matters of fact to prove the allegations contained in the Petition.

66. Secondly, Mr. Buti urged that the Petitioners have not discharged the relevant burden of proof cast upon them by law. That the legal burden of proof in this Petition, lies on the Petitioners in conformity with the provisions of **Section 107** and **Section 108** of the Evidence Act.

67. Mr. Buti argued that during Cross-examination of the 1<sup>st</sup> Petitioner admitted that matters contained in paragraphs 5-11 of the Petition were not of his personal knowledge, but were based on information he received. This Mr. Buti submitted is contrary to section 63 of the Evidence Act, which under the “best evidence Rule” requires that all evidence must be direct evidence. That the Paragraphs in the Petition which are predicated upon hearsay evidence in similar Paragraphs in the supporting affidavit, must fall together with the inadmissible evidence in the supporting affidavit as they cannot separately sustain the Petition without the evidence adduced in proof thereof.

68. Mr. Buti averred that, by virtue of the Ruling delivered by the Court on the 30<sup>th</sup> November 2017, the exclusion of Forms 37A at page 59 to page 188 of the Petition left all the averments contained in the respective Paragraphs, wholly unproven by any other evidence.

69. On absence of agents and unstamped forms, Mr. Buti cited Regulation 97 (2), Regulation 62(3) and Regulation 79(7) of the **Elections (General) Regulations, 2012** and submitted that, the absence of an agent, without any complaint of proven irregularities arising from that absence, cannot of itself invalidate the outcome of an otherwise properly conducted election. That the Petitioners have not called evidence from any witness from the Wiper Democratic Party who was denied access into a Polling Station or Centre and as such this allegation remains unproved.

70. On the stamping of documents, Mr. Buti referred to **Regulation 69**, which provides that:

**69(1) Before issuing a ballot paper to a voter, an election official shall:**

**(f) stamp the counterfoil of the ballot paper on the face with the official mark of the commission, and**

**(g) stamp the ballot paper at the back with the official mark of the Commission.**

He asserted that these are the only documents to be stamped with the official seal of the commission and no such stamping requirement exists with regard to Form 37A or any other such Form.

71. Counsel cited the Court of Appeal case of **IEBC & Another -v- Stephen Mutinda Mule 2014 eKLR** which dealt with a similar issue, which was framed as follows:

***(iii) whether there is a legal requirement that Form 35 used for the declaration of results at Polling stations should bear the IEBC stamp.***

The Court referred to **regulation 69** cited above and held that “**There is no stamping requirement in the case of form 35;**” and proceeded to comment thus:

***“If any such Forms were stamped, it was a gratuitous and superfluous discretionary or administrative act incapable of creating statutory obligation, less still, the invalidation of the Form 35 that did not contain the stamp. On this score alone, the appeal succeeds.”***

72. On the complaint of bribery Counsel argued, that this is an election offence, set out in Section 9 of the Election Offences Act (No 37 of 2016). Such an allegation must be proved “beyond reasonable doubt” which was not done in this petition. He referred to **Karanja Kabage -v- Joseph Kiuna & Others, (2014) eKLR**, the Court of Appeal stated that:

***“Where the allegations amount to commission of election offences, they must be proved beyond reasonable doubt.***

73. On the allegations of Multiple Voting & Ballot stuffing the Petitioners refer to charges preferred against clerks who issued multiple ballot papers and voters caught in possession of multiple ballot papers. Mr. Buti submitted that this allegation fails on three accounts: First the exhibit “**HOH4**” referred to in Paragraph 33 of the Petitioner’s supporting affidavit was expunged from Court records in the Ruling of 30<sup>th</sup> November 2017. Accordingly its not available to support the allegation.

74. Secondly, the particular ballot referred to was intercepted before being cast through the vigilance of the 2<sup>nd</sup> Respondent in the conduct of the election. Thirdly, the persons charged are deemed innocent until proven guilty.

75. On the allegation of ballot stuffing stated at *Paragraph 29*, of the Petition and repeated at *Paragraph 24* of the supporting affidavit. The allegation that the Form 37As from the 14 Polling Stations therein enumerated “*were all filled by the same person as evidenced by similar handwritings, was said*” fall short of the requirements set out in Sections 48, 49 and 50 of the Evidence Act on opinion Evidence. It is not open to the Petitioners to conclude, as they do, that certain Form 37s were filled by the same person.

76. Counsel maintained that the evidence of PW12, that a box of ballots was allegedly discovered at a window at the Railway Polling Station does not prove ballot stuffing for the reason that from this witness’s own account, even if these ballots existed, they were never counted in favour of any candidate. Secondly, no other agent was called to corroborate this version by PW12.

77. Counsel submitted that it is trite law that a Petitioner in an Election Petition cannot go outside the scope of the Pleadings contained in the Petition. That in the entire Petition herein, the only place where the Petitioner mentions Polling Station Diaries is in their *Prayer (i)*, in which they sought to have them produced “for preservation and safe custody” and nothing more. They cannot in any manner expand their Petition to seek for evidence from these Poling Station Diaries.

78. The second category of irregularities raised by the Petitioners relate to the following:

- (a) Form 37As not signed by their agents.*
- (b) Form 37As not signed by both the presiding officers and their deputies.*
- (c) The lack of similarity in Forms 37B from various Stations.*

Counsel averred that the evidence on record shows that the Forms were signed. That even where they were not signed, **Regulation 79(6)** of the **Election General Regulations** absolves the election officials of any wrong doing where, as in this Petition, no other complaint or illegality arose or was committed by reason of absence of agents.

79. There is no requirement that both the presiding officer and the Deputy must sign each Form 37A at the same time. This he said is the essence of **Regulation 3(5)** which provides that:

***(5) A deputy returning officer shall, subject to the general direction and control of the returning officer to whom he or she is deputy, have all the power, and may perform all the duties of the returning officer under these regulations.***

By the provisions of Regulation 5(4), similar powers are bestowed upon a deputy presiding officer.

80. Mr. Buti asserted that lack of similarity is not an anomaly that vitiates the validity of an election as stated in the Court of Appeal decision in **Kakuta Mai Mai Hamisi -v- Peris Pesi Tobiko (2014) eKLR**, where the Court said:

***the learned judge found as a fact that the returning officer conceded that she announced the results using handwritten Forms 35 and 36...., that this notwithstanding, the results announced were correct...***

*We affirm the learned trial Judge's findings that no prejudice or miscarriage of justice was occasioned to the appellant by that kind of action.*

81. Finally, it is submitted that the 3<sup>rd</sup> Respondent garnered a total of 221,177 votes, while the Petitioner managed a total of 43,787 votes. That the vote difference of 177,390 votes between the two candidates represents the will of the electorate in the County of Mombasa and thus the Court should uphold his election. He prayed for the Petition to be dismissed with costs.

### **Disposition**

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

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

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

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

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

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

*“An election petition is not do-over of the just concluded election. It is not an opportunity to conduct another election through the court as every election conducted in accordance with the law is presumed valid unless it is set aside by the court. The burden of establishing the allegations of non-compliance with the Constitution and the law, electoral malpractice and misconduct which would result in the election being declared invalid rests on the petitioner. The court will not interfere with the results of the elections unless it is established to the required standard of proof that such non-compliance with the Constitution and the law, the irregularities and electoral malpractices complained of render the said elections invalid.”*

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

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

88. The court further observed that Section 83 of the Elections Act, 2011 lays down the standard of proof required in election petitions in Kenya. Section 83 stipulates:

*No election shall be declared to be void by reason of noncompliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the*

*non-compliance did not affect the result of the election.*

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

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

89. Having regard to the evidence in total on the irregularities complained of, the question that arises is whether it had a substantial effect on the result. To answer this question, I have considered the issues framed herein in light of the principles I have highlighted above. On the process of relay and transmission of results the Petitioners gave a myriad of complaints in the Petition on the irregularities in the Forms. They however did not produce evidence to confirm the irregularities alleged. Some of the irregularities complained of were admitted during cross examination by the Respondents' witnesses but were shown to be of no substantial effect. They would not affect the results of the election as declared. The Petitioners' witnesses also admitted variously that they had no dispute with the tally of votes at the polling centres as entered in the forms 37A.

90. In *Kithinji Kiragu v Martin Nyaga Wambora & 2 Others, Election Petition (Embu) No. 1 of 2013*, the court adopted the following definition of the phrase “*affect the result of the election*” for purposes of section 83 of the Elections Act, 2011:

“the word result means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proven irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules.

91. The 1<sup>st</sup> Petitioner in cross examination admitted that the vote margin between himself and the candidate declared the winner was some 177,000 votes. No evidence was led to demonstrate how the irregularities complained of and testified to would have affected this margin. I find that the irregularities though admitted by the 1<sup>st</sup> petitioner and Respondent's witnesses were of a very minor nature and did not affect the outcome of the election.

92. As submitted by Mr. Nyamodi **Regulation 79(2)(2)(b) Elections(General) Regulations** requires the Presiding Officer to request each candidate or agent present at the declaration of results to append their signature to Form 37A. This is done after the Presiding Officer has announced the results at the polling station. The purpose of the signature is to verify the results as recorded in the Forms. By appending their signatures the Petitioner's witnesses signified their acquiescence to the results therein. For the Petitioners to turn around and allege that there were irregularities in those results that should form a basis for nullification of the election of the 3<sup>rd</sup> Respondent, therefore would be to approbate and reprobate at the same time.

93. Even where Form 37A is not signed by the agent, or it is signed in their absence, the results therein will not be invalidated on that account alone. **Regulation 79(7) Elections (General) Regulations 2012** provides that the absence of a candidate or agent at the signing of the declaration form, or announcement of results shall not by itself invalidate the results announced.

94. Under **Regulation 79(6) Elections (General) Regulations** the refusal or failure of a candidate or agent to sign a declaration form, or to record the reasons for their refusal to sign shall not by itself, invalidate the results announced. In the present petition there was no evidence led by any of the agents to indicate that they were present and were denied the opportunity to sign the form 37A.

95. In the case of *John Kiarie Waweru vs Beth Mugo & 2 others* [2008] eKLR the Court faced with a similar issue stated that:

***“The Petitioner appears to take issue with the fact that most of the Form 16As that were produced in evidence by the 2<sup>nd</sup> Respondent were not duly signed by agents of the candidates. The failure by a candidate or his agent to sign the Form 16As cannot invalidate the results contained in the said Form 16As..... The fact that the said Form 36As were not signed by the agents does not render any of the results from the various polling centres invalid”.***

With the foregoing in mind I find that the irregularities in the Forms complained of were not substantial and did not alter the outcome of election to warrant interference by this Court.

96. On the stamping of documents, the petitioners variously complain that Form 37s were not stamped with the official IEBC stamp. Regulation 69, provides that:

**69(1) Before issuing a ballot paper to a voter, an election official shall:**

**(f) stamp the counterfoil of the ballot paper on the face with the official mark of the commission, and**

**(g) stamp the ballot paper at the back with the official mark of the Commission.**

The law therefore sets out these as the only documents which require to be stamped with the official seal of the commission during the election process. No such stamping requirement is demanded therefore with regard to Form 37A or any other such Form.

97. In the case of *IEBC & Another – v- Stephen Mutinda Mule 2014 eKLR* adverted to by Mr. Buti; the Court of Appeal dealt with a

similar issue. which was framed as follows:

***(iii) whether there is a legal requirement that Form 35 used for the declaration of results at Polling stations should bear the IEBC stamp.***

The Court referred to regulation 69 and observed thus:

***“If any such Forms were stamped, it was a gratuitous and superfluous discretionary or administrative act incapable of creating statutory obligation, less still, the invalidation of the Form 35 that did not contain the stamp. On this score alone, the appeal succeeds.”***

98. On the absence of agents at the polling station raised in paragraph 23 of the Petition, **Regulation 79 (2A) of the Elections (General) Regulations** is instructive on the signing of the declaration. It provides as follows –

***(2A) The presiding officer shall—***

***(a) immediately announce the results of the voting at the polling station before communicating the results to the returning officer;***

***(b) request each of the candidates or agents present to append his or her signature;***

***(c) provide each political party, candidate, or their agent with a copy of the declaration of the results; and***

***(d) affix a copy of the declaration of the results at the public entrance to the polling station or at any place convenient and accessible to the public at the polling station.***

***(3) Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.***

99. The Petitioners’ witnesses testified that they were not supplied with Forms 37A at the polling stations. The Respondent’s witnesses however confirmed that they displayed a copy of the Forms 37A at a place accessible to the public. On this issue I align myself with the dictum of Ong’udi J in **Kithinji Kiragu vs Martin Nyaga Wambora & 2 Others [2013] eKLR**, where the judge held thus concerning the process of declaring results:

***“The first one is at the polling station where either the candidate or the agent signs the form 35. The results are then publicly announced at the polling station before they are communicated to the Constituency Returning Officer. Each party/candidate/agent is presented with a copy of the declared results i.e Form 35. One such copy is affixed at the public entrance to the polling station or any other public place accessible to the polling station. From these arrangements it is clear that an absentee candidate/agent will not personally get a copy of the Form 35. Secondly, the absentee candidate/agent will easily access information from the copy affixed at the public place.....”***

100. On the complaint of bribery and other election offences, the evidence was that some officials of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent had been charged with election offences but the outcome of the charges was not yet known. Those are criminal offences which must be proved beyond reasonable doubt. In **Thomas Malinda Musau & 2 Others vs The Independent Electoral and Boundaries Commission & 2 others [2013] eKLR**, at paragraph 87, the election court, while quoting the **Halsbury’s Laws of England 4<sup>th</sup> Edition Vol. 15**, gave an insight of the nature of evidence required to prove bribery. The court stated:-

***“One proof of a single act of bribery or with the knowledge of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate an election. The judges are not at liberty to weigh its importance nor can they allow any excuse. Whatever the circumstances may be, as such they can allow in certain conditions in cases of treating or undue influence by agents. For this reason clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient and the confession of the person alleged to have bribed is not conclusive.***

The Indian Supreme Court, in the case of **M. Narayan Rao V. G Venkata Reddy & Another, 1977 (AIR)(SC) 208**, also underscored the quasi-criminal nature of election petition proceedings, and the principles that an election court should take into account when conducting the hearings. The court held as follows:

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

The evidence brought before this court amounted to mere suspicion and cannot prove a charge of bribery or any other election offence.

101. The complaint of ballot stuffing found at *Paragraph 29*, of the Petition and *Paragraph 24* of the supporting affidavit was predicated on the assertion that the Form 37As from 14 Polling Stations enumerated therein *“were all filled by the same person as evidenced by similar handwritings.”* This assertion was not backed by expert opinion as required under sections 48, 49 and 50 of the Evidence Act on opinion

evidence and it therefore remains a bare allegation.

102. As to whether the burden of proof has been discharged to the required standard, to warrant a nullification of the election of the 3<sup>rd</sup> Respondent as the Governor of Mombasa County, I have considered the evidence in totality. The Petitioner's evidence was at best hearsay evidence. On his own admission, he stated that after voting he went to his office which was his command centre. He did not leave the office save for one occasion when he went to a first food restaurant to get food and in the evening when he went home to bid his little daughter good night. He did not visit any of the other polling stations or centres to witness the alleged irregularities nor did he witness any of the irregularities adverted to at the polling station where he voted.

103. **Section 107 of the Evidence Act, Cap. 80** of the **Laws of Kenya** places the burden of proof on whoever alleges the existence of a fact. It provides 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.*

104. This position was advanced in the Supreme Court case of **Raila Odinga & 2 others -vs- Independent Electoral & Boundaries Commission & 3 others (2013) eKLR**, where the court held at paragraph 195 that:

**“There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made.”**

The Supreme Court went on to state at paragraph 197 that:

**“The IEBC is a constitutional entity entrusted with specified obligations, to organize, manage and conduct elections, designed to give fulfillment to the people's political rights [Article 38 of Constitution]. The execution of such a mandate is underpinned by specified constitutional principles and mechanisms, and by detailed provisions of the statute law. While it is conceivable the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behoves the person who thus alleges, to produce the necessary evidence in the first place – and thereafter, the evidential burden shifts, and keeps shifting.”**

105. What this means is that the evidential burden of proof in election petitions initially lies upon the party bearing the legal burden (that is the petitioner). The evidential burden, however, may shift, and often shifts, between the parties as the weight of evidence given by either side during the trial varies. The evidential burden will shift to the respondent once the petitioner proves (i) the incidence of electoral irregularities or malpractices; and (ii) that the electoral irregularities or malpractices affected the result of the election.

106. In light of the above the Petitioner was bound to establish all his claims through his pleadings and the evidence adduced in Court, first before the burden shifted to the Respondents. The Petitioner's documentary evidence was expunged from the record for offending the provisions of Section 106B Evidence Act. It was not the place of the Respondents to establish the irregularities alleged in the Petition. The documents annexed to the Replying Affidavits in response to the issues raised in the petition and in support of the defence included the documents that had been expunged on the part of the Petitioner. The Petitioner used these to try and make his case but as can be seen in the analysis of the evidence above he did not establish his case to enable the shifting of the evidentiary burden to the Respondents.

107. Indeed, when the Petitioner adduces sufficient evidence in support of the Petition the evidential burden of proof shifts to the Respondent to dislodge the Petitioner's case. This was the holding in **Sammy Ndungu Waity v Independent Electoral and Boundaries Commission & 3 others [2018] eKLR** where the Court held at paragraph 80 that for the burden to shift to the other party, the party alleging it must first lead evidence of the existence of facts alleged.

108. From the analysis of the facts and the law applicable herein, I find that the Petitioner's did not discharge the burden of proof to the standard required of them, on any of the prayers sought. The irregularities complained of in each of the grounds are not so grave either by themselves or in totality as to lead to a conclusion that there was no election held for Governor of Mombasa County, or that the election was not transparent, free, fair and verifiable. Neither did the said irregularities have a substantial effect on the result

109. Reasons wherefore the Petition dated 8<sup>th</sup> September, 2017 and filed in court on 13<sup>th</sup> September, 2017 is dismissed in its entirety with costs to the Respondents.

**Cost:**

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

111. In reaching my decision on costs I am guided by the fact that the issues herein were not complex. I have also considered the number of witnesses called, the nature of the evidence adduced and the time required for research and preparation of pleadings in the main petition and

several applications which were filed and the submissions. With the above in mind, I cap the instructions fees at Kenya Shillings 4 Million to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and Kenya Shillings 4 Million to the 3<sup>rd</sup> Respondent.

I wish to thank all the Counsels for the parties herein for their spirited efforts in prosecuting and in defending this petition.

**DATED, SIGNED and DELIVERED at MOMBASA this 22<sup>nd</sup> DAY OF February, 2018.**

**L. A. ACHODE**

**JUDGE**

In the presence of: ..... for the 1<sup>st</sup> Petitioner

In the presence of: .....for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent

In the presence of: ..... for the 3<sup>rd</sup> Respondent