



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAMIRA**

**ELECTION PETITION NO. 3 OF 2017**

**IN THE MATTER OF: THE ELECTION ACT NO. 24 OF 2011**

**LAWS OF KENYA**

**AND THE ELECTIONS (GENERAL) REGULATIONS, 2012.**

**AND**

**IN THE MATTER OF: ELECTION (PARLIAMENTARY**

**AND COUNTY) PETITION RULES, 2017**

**AND**

**IN THE MATTER OF: THE ELECTION FOR MEMBER OF NATIONAL ASSEMBLY**

**KITUTU MASABA CONSTITUENCY, HELD ON 8<sup>TH</sup> AUGUST 2017**

**BETWEEN**

**JUSTUS MONG'UMBU OMITI.....PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL AND**

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

**HON. JOHN SHADRACK MOSE.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction and Background:-**

1. On 8<sup>th</sup> August 2017, Kenya held her second **General Election under the Constitution of Kenya 2010**, from 6.00 a.m. to 5.00 p.m., which election was conducted countrywide. That after results were declared and the successful winners declared and gazetted, most of the unsuccessful candidates either directly or indirectly, filed Petitions challenging the declared outcomes. That even the declaration of the **President of Kenya, H.E. Hon. Uhuru Muigai Kenyatta** was challenged at the **Supreme Court of Kenya through Election Petition No. 1 of 2017, Raila Amollo Odinga and Another V. IEBC and 2 Others.**

2. The decision by Supreme Court annulling the Presidential Elections held on 8<sup>th</sup> August 2017, was followed by filing of myriads of petitions, hence the instant petition, in which the Petitioner who was a voter in Kiogutwa Primary School, Mang' Ward, in Kitutu Masaba Constituency is contesting the National Assembly results of Kitutu Masaba Constituency in which the 2<sup>nd</sup> Respondent, Hon. Mose Shadrack John was declared winner by the 1<sup>st</sup> Respondent, and subsequently gazetted as duly elected Member of Parliament for Kitutu Masaba Constituency.

3. The Petitioner is an adult male, of sound mind and duly registered voter, in Kiogutwa Primary School, Mang' Ward, in Kitutu Masaba Constituency, who in his supporting affidavit dated 6<sup>th</sup> September 2017, stated, he was duly nominated by the ODM Party to contest the general election on the 8<sup>th</sup> August 2017, for the position of Member of Parliament for Kitutu Masaba Constituency, however, upon perusal of the list of the candidates his name do not appear amongst the eight (8) candidates, who contested the Parliamentary seat for Kitutu Masaba Constituency.

4. The 1<sup>st</sup> Respondent, IEBC, is an Independent Commission established under **Article 88 as read with Article 248 and 249 of the Constitution of Kenya, 2010 and the IEBC Act No. 9 of 2011**, which is Constitutionally charged with the sole mandate and responsibility of conducting and/or supervising referenda and elections to any election body or office established by the Constitution, as well as any other elections as prescribed by the **Elections Act**.

5. The 2<sup>nd</sup> Respondent is the Member of Parliament for Kitutu Masaba Constituency, who was one of the eight (8) candidates in the Election for Member of Parliament, Kitutu Masaba Constituency seat and who was declared on 10<sup>th</sup> August 2017, to be the duly elected Member of Parliament, for Kitutu Masaba Constituency and was subsequently issued with a certificate by the 1<sup>st</sup> Respondent's Constituency Returning Officer.

6. In this petition, filed by Justus Mong'umbu Omiti, on 7<sup>th</sup> September 2017, dated 6<sup>th</sup> September 2017, contends the return of Hon. Mose Shadrack John, as the Member of Parliament for Kitutu Masaba Constituency, following the general election, held on 8<sup>th</sup> August 2017.

7. I have already pointed out, that it should be noted that the Petitioner was not one of the candidates during the Parliamentary contest in Kitutu Masaba Constituency, but from the Petition eight (8) persons wrestled it out on 8<sup>th</sup> August 2017 for Parliamentary seat of Kitutu Masaba Constituency.

8. According to the Petitioner's Petition the results as declared by the Kitutu Masaba Returning Officer were as follows:-

<u>NO.</u>	<u>NAME</u>	<u>VOTES</u>
1.	Mose Shadrack John	33,386
2.	Bosire Timothy Moseti E.	19,262
3.	Ogeto Victor Swanya	11,293
4.	Obwocha Edward Kaso	3,896
5.	Kengere Samson Atati Mose	1,296
6.	Nyaigot John Mwanga	251
7.	Momanyi Thomson Nyakongo	166
8.	Moreka John Ratemo	159
	Total .....	69,682

9. From the above figures the difference in votes between the 2<sup>nd</sup> Respondent and his closest rival, Bosire Timothy Moseti E. was 14124 votes.

10. The contention in the Petitioner's Petition dated 6<sup>th</sup> September 2017, is that he does not accept the counting and tallying of the votes of the election as correct, transparent, credible and accurate as required by the constitution and by law. He further contends the Parliamentary Elections in Kitutu Masaba, were not free and fair contrary to the principles outlined in **Article 81 of the Constitution of Kenya, 2010**, as read with **Section 39 of the Elections Act, 2011** and the Regulations made thereunder.

11. The Petitioner's case is founded on five broad grounds as specifically set out under Part B of the petition (from paragraphs 11 – 37 of the petition). The grounds are as follows:-

**a) Results Transmission System and incorrect tallying,**

**b) Lack of Transparency in conducting the elections.**

*c) Making of false entries.*

*d) Failure to secure the election.*

*e) Improper influence and manipulation and other electoral offences.*

12. The 1<sup>st</sup> Respondent filed a response to the petition dated 16<sup>th</sup> September 2017, in which she denied the allegations against her by the Petitioner (for easy of reference I shall refer to the 1<sup>st</sup> Respondent as IEBC). The IEBC contended that it was not in any breach and did not contravene the provisions of the Constitution, the Election Act or any other Statute, adding that the election for Member of National Assembly for Kitutu Masaba, was conducted in accordance with the **Constitution, Elections Act** and all other relevant statutes and a valid declaration of the outcome of the election made. The IEBC further averred the 2<sup>nd</sup> Respondent was validly elected as the Member of National Assembly for Kitutu Masaba Constituency, urging the Petition lacks merits and prayed for its dismissal.

13. The 2<sup>nd</sup> Respondent in his answer, to the petition, dated 17<sup>th</sup> September 2017, denied all the allegations levelled against him by the Petitioner and urged the counting and tallying of votes from all 187 polling stations within Kitutu Masaba Constituency was transparent, credible, verifiable and an accurate reflection of the will of the majority of the registered voters in Kitutu Masaba Constituency and that the entire process complied with the Constitution of Kenya, in particular **Article 81 and 86 as well as the Elections (General) Regulations, 2012**. He denied the election was marred by grave errors, flaws, fraud, illegalities and irregularities, further averring the elections were free, fair, credible and that it complied with the Constitution and Election Laws and that all votes cast in all the 187 polling stations within Kitutu Masaba Constituency in the Parliamentary Elections were counted, tabulated and accurately collated as per **Article 86 (b) and (c) of the Constitution** as read together with the **Elections Act**. He denied all the Petitioner's allegation in the petition, stating the same are not supported by any evidence.

14. Before commencement of the hearing of the petition, this court made a ruling dated 31.10.2017 under **Order (c)** allowing the petitioner to have access to information stored in Kiems Kits before commencement of the hearing of the petition and IEBC to present printouts and SD Cards to Deputy Registrar of this Court. The Court under **Order (d)** granted the Petitioner access to certified copies of Forms 35A prepared at and obtained from polling stations in Kitutu Masaba Constituency and used to generate the final tallying of the result for Member of National Assembly, Kitutu Masaba Constituency and certified copies of Forms 35Bs, used to tally results from polling stations, in Kitutu Masaba Constituency. The said Forms 35As and Forms 35Bs were to be availed to the Deputy Registrar of this Court. The Court under **Order (e)** declined to grant leave to the Petitioner and any other party to the petition to file a supplementary affidavit/report from scrutiny exercise and under **Order (f)** the Petitioner was further denied leave to file an amended further affidavit of Dr. Noah Akala Oduwo in support of the petition.

#### **The Petitioner's Case:**

15. The Petitioner's case substantially rests on the evidence of PW1, Dr. Noah Akala Oduwo, as the Petitioner in this case though he had filed and served a supporting affidavit dated 6<sup>th</sup> September 2017, to which no annexure was attached, he further filed what he referred to as "Petitioner's list of documents," which he listed as follows:-

- 1. Kitutu Masaba list of MP Station with 0 turn out.**
- 2. Kitutu Masaba list of MP Stations with invalid turnout.**
- 3. Kitutu Masaba list of MP Station with mismatch.**
- 4. Affidavit of Dr. Noah Akala Oduwo.**
- 5. Form 35B.**

The Petitioner opted not to give evidence and subject himself to cross-examination for no apparent reason as the Counsel representing the Petitioner and even the Petitioner never bothered to inform the Court, why the Petitioner was not willing to take the witness stand, adopt or confirm the affidavit as his, and urge the Court to adopt the affidavit as his own evidence-in-Chief in accordance with **Rule 12 (12) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**. This failure denied the Respondents an opportunity under **Rule 12(13) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, an opportunity to cross examine him, neither did the parties record a consent, in which the Respondents accepted not to cross-examine, the Petitioner as the maker of the affidavit in support of the petition dated 6<sup>th</sup> September 2017. I nevertheless find that the Petitioner's affidavit, dated 6<sup>th</sup> September 2017, form part of the record and shall deal with the effects of the Petitioner's failure or refusal to take the witness stand, be sworn, adopt the affidavit as his evidence in-Chief and subject himself to cross-examination.

16. The Petitioner in support of his petition mainly relied on the averments in the affidavit of Dr. Noah Akala Oduwo dated 6<sup>th</sup> September 2017, which Dr. Noah Akala Oduwo adopted as his evidence-in-Chief and the same was marked exhibit P 1. In his evidence, he testified that he is the Deputy Director of campaigns and elections in ODM party, that during the Presidential Petition No. 1 of 2017, he was among the people involved in the read only access and scrutiny of the KIEMS, in which they were allowed to copy the information without any alteration. He stated that he analyzed the information and from his analysis for Kitutu Masaba, there were no Forms 35A or 35B from the logs obtained, he noted that 34 polling stations out of 187 had no data entered for the position of MP, that once polling station had a voter turnout higher than the number of the registered voters, that out of 187 polling stations, 170 polling stations, there was a mismatch in the total number of votes cast for each of the 6 elections and averred that the server was receiving data from elsewhere. He gave evidence that some of the forms used in Kitutu Masaba did not have security features including instances where the forms were filled in pencil, that there were registers for other counties that were used during voting in Kitutu Masaba and that voting was done outside the legally prescribed hours. He

also averred that on 15<sup>th</sup> August 2017, the user [ngeny@iebc.org.ke](mailto:ngeny@iebc.org.ke) uploaded Form 35A which was strange as results had been declared on the 10<sup>th</sup> August 2017, alleging uploads were done using IP addresses located in Nairobi. On cross-examination he stated that he had not attached any documents to show his expertise nor the Supreme Court order allowing him access. He also acknowledged that he was not in any of the polling station in Kitutu Masaba on the Election Day. He admitted the documents he referred to as NA 1, 2 and 3 are not marked nor sealed or commissioned and are not part of his annexures. He also admitted that in his affidavit he does not disclose the crimes he talked about during his testimony nor did he talk of the issue of marking by pencil.

#### The 1<sup>st</sup> Respondent's Case:-

17. The 1<sup>st</sup> Respondent, IEBC through RW1, Robert Kiplangat Ngeny relied on the 1<sup>st</sup> Respondent's affidavit dated 16<sup>th</sup> September 2017, which RW1, prayed be adopted as his evidence-in-chief, which the Court accordingly adopted as the 1<sup>st</sup> Respondent's evidence-in-Chief and marked it exhibit R1. The IEBC denied the Petitioner's allegation and averred that the polling stations opened at 6.00 a.m. and closed at 5.00 p.m., that voting was duly undertaken in presence of Agents for Parties/Candidates, that voting process went on smoothly with no complaints or any incident at any of the polling stations, that on conclusion of voting, Presiding Officers counted, tallied the results in presence of Party/Candidate's Agents, filled Forms 35A and shared the same to Party Agents, who confirmed the authenticity of elections Results and signed the respective parts and Agents were supplied with copies of the forms, that the RO used Forms 35As to announce each candidate's results, in presence of agents after which the forms would be handed over to data entry clerks to transfer the same to the Form 35B, that RO did not receive any complaint from any of the agents and/or candidates, who were present at the tallying centre on the entries on Form 35B, that after completion of all results from Form 35A to 35B, the R.O. handed over the form to Agents for verification and signing, who upon verification, confirmed the results were authentic as received from all 187 polling stations, that after the exercise was completed the R.O. announced the results and declared the 2<sup>nd</sup> Respondent as the winner of Kitutu Masaba Constituency, Member of Parliament (as per attached copy of Form 35B annexure NRK – 1)

18. On various other allegations raised by PW1, Dr. Noah Akala Oduwo, he stated that there was no form that was filled in pencil and that he did not upload any Form 35A as that was duty of the presiding officers. On allegation of voters from neighboring counties voting in Kitutu Masaba, he stated that there was no one from the neighboring counties who voted in Kitutu Masaba. On errors he acknowledged that there were a few stations, that had errors but they were insignificant, as they would not affect the position of each candidates. He attributed the errors to fatigue as the clerks had worked for long hours approximately 50 to 60 hours without a rest, adding that the petitioner did not identify the errors to enable him reply to them. On the issue of use of his user account, he stated that he was the only person who had access to that account and that he had no network problem in uploading of the forms, pointing out that there was no affidavit specifying the specific polling stations that had fraud and further that he did not receive any complaint on fraud during elections. He concluded by stating that he had declared Mose Shadrack John as the winner as he had garnered 33,386 votes and the 2<sup>nd</sup> candidate was Bosire Timothy Mosei E. with 19,262 votes, stating that he received and checked all the original physical Form 35A and that is what he used to tally the results.

19. RW1, the R.O. Kitutu Masaba Constituency further deponed all the information in Form 35A and 35B with respect to Kitutu Masaba Constituency for elections of Member of Parliament are correct and corresponding, that all the 187 Polling Stations had data for the Parliamentary seat in respect to the relevant forms, (attaching annexure 'NRK 2'), that there was no polling station which had a higher voter turnout than the number of the registered voters (attaching 'NRK 3 (a) and (b) copies of Form 35As for polling station (No. 079 stream 1 and 2), that there was no mismatch in the total number of votes in the case for Parliamentary Seat for Kitutu Masaba Constituency seat, that there were no nil (0) results tallied and/or announced for Parliamentary seat election, that the election for Kitutu Masaba Constituency was conducted in an open, transparent, free, fair and credible manner, thus reflecting the true will of the people of Kitutu Masaba Constituency, that there was no collusion and/or acting in cohort with any candidate, the 2<sup>nd</sup> Respondent included, that no election offence was committed and/or, reported, that all Forms 35As for all 187 polling stations were filled correctly and accurately, stamped, signed by Agents and Presiding Officers, their Deputies and were all legible, that all forms had requisite security features, that the election were devoid of arithmetic and/or clerical errors and summation of all the results was accurate, that there were no elections malpractices, voter bribery and/or intimidation of electoral officials and that no information was passed to Returning Officer on any malpractice by the Petitioner or anyone, that the Parliamentary Election of Kitutu Masaba Constituency was free, fair, verifiable, credible and accountable in line with the Constitutional principles and reflected the free will of the electorate of Kitutu Masaba Constituency, that on annexure marked NA – 1, NA – 2 and NA – 3, he stated that it does not exist amongst the 1<sup>st</sup> Respondent's statutory forms used in the Parliamentary elections held on 8<sup>th</sup> August 2017 and their authenticity is not proved, that Dr. Noah Akala Oduwo did not participate in the election for Member of National Assembly for Kitutu Masaba Constituency and that the elections for Kitutu Masaba Constituency for the National Assembly was conducted in accordance with the Constitution, Independent Electoral and Boundaries Commission Act, the Elections Act, the Regulations thereunder and all other relevant provisions of the law.

#### The 2<sup>nd</sup> Respondent's Case:-

20. RW2, Hon. Shadrack John Mose, prayed that his affidavit sworn on 17<sup>th</sup> September 2017, be adopted as his evidence-in-chief. The same was adopted as RW2's evidence in Chief and marked exhibit R2. In his evidence he contends, that the elections were free, fair, credible, accurate, transparent and was held in accordance with the spirit and intent of **Article 86 of the Constitution of Kenya 2010, the Elections Act 2011, and Elections (General) Regulations, 2012**, that the elections results were true reflection of the will of the voters of Kitutu Masaba Constituency and that the difference between the valid votes cast in the 2<sup>nd</sup> Respondent's favour and those in favour of the closest candidate was 14124, that the 2<sup>nd</sup> Respondent garnered 47% of the votes while runners-up candidate had 27%, that the provisions of the relevant laws relating to polling, tallying/counting and subsequent declarations of the results were complied with and adhered to, that the election was not marred by any irregularities and/or illegalities as alleged by the Petitioner, which allegation he averred are not substantiated, that counting, tallying and collation of votes and subsequent declaration of results both at the Polling Stations and Constituency Tallying Centre was done on the basis of the actual votes cast at all the 187 polling stations, as captured in Form 35Bs, that at no time did his Agents, Servants, Employees, Supporters engage in acts that contravened the **Constitution, the Elections Act, the rule of law, the Elections Code of Conduct or the principles of conduct** of a free and fair election through operating and/or working in cohorts with the 1<sup>st</sup> Respondent or improperly influencing, compromising or intimidating voters as alleged by the Petitioner in his supporting affidavit, that there is no polling station whereby the number of votes cast exceeded the number of registered voters, that the entries in statutory forms properly reflected the election results, that the allegations in the petition are vague, nebulous and general and lack particularities and as such incapable of direct

rejoinder due to their generality and vagueness, that the Petitioner has sought to rely on strange, unauthenticated, unintelligible and unverifiable documents in support of the petition which the Court should disregard, that the election was conducted in accordance with the Constitution and applicable Electoral Laws and Rules, as the voting process was simple, accurate, verifiable, secure, accountable and transparent, that the votes were properly counted, tabulated and the results from the polling stations were openly, accurately collated and announced, that Dr. Noah Akala Oduwo has sought to base his entire affidavit on documents of unknown origin, purportedly to be server logs and self-styled “analysis” arising therefrom in a façade and that there is no nexus between the alleged server logs and the Petition, which logs are stated as relating to the Presidential Petition.

21. RW2, further stated that he did not know how the results were relayed as he had not engaged the services of an ICT expert to read the logs. He stated that he was not aware of any people who voted out of time and that the purpose of electronic transmission was to verify the results, confirming that he had agents in all the 187 polling stations and was personally present at the tallying centre where there was a big screen mounted on a wall for everyone in the hall to see and on his part he confirmed the results being displayed with what his agents had sent him.

He gave evidence that there were other candidates in the Tallying Centre and he expected them to also confirm the results as each had agents at the polling stations; that none of the candidates complained of the results as they were being displayed at the Tallying Centre nor did he receive any information that any of the candidates challenged the results at the Polling Stations. In conclusion he contends that it is the presidential votes that should be transmitted electronically, confirming that all the 187 polling stations had results and the forms were signed by presiding officers, deputy presiding officers and agents.

#### **The Law Applicable:-**

22. It is admittedly settled law that the principles set out in the **Constitution of Kenya 2010, the Elections Act No. 24 of 2011** and subsidiary Regulation thereunder, constitute the substantive and procedural law for conduct of elections.

#### **(a) Burden of Proof:-**

23. In **Raila Amolo Odinga and Another V IEBC and 2 Others, Supreme Court Petition No. 1 of 2017**, the Supreme Court of Kenya held thus:-

*[130] The law places the common law principle of onus probandi on the person who asserts a fact to prove it. Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya, legislates this principle in the words: “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.” In election disputes, as was stated by the Canadian Supreme Court in the case of Opitz v. Wrzesnewskij [48], an applicant who seeks to annul an election bears the legal burden of proof throughout. This Court reiterated that position in the 2013 Raila Odinga case, thus:*

*[195] There is, apparently, a common thread in ... comparative jurisprudence on burden of proof in election cases ... that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner .....*

*[196] This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse acta; all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the law.”*

*[131] Thus a petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduced cogent and credible evidence to prove those grounds [49] to the satisfaction of the court. “[50] That is fixed at the onset of the trial and unless circumstances change, it remains unchanged [51] In this case therefore, it is common ground that it is the petitioners who bear the burden of proving to the required standard that, on account of non-conformity with the law or on the basis of commission of irregularities which affected the result of this election, the 3<sup>rd</sup> respondent’s election as President of Kenya should be nullified.”*

#### **Standard of Proof:-**

24. In **Raila Amolo Odinga and Another V IEBC and 2 Others**, (*supra*) it was held thus:-

*“[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.”*

25. The electoral process is a realization of the principle of the sovereignty of the people of Kenya as enshrined under **Article 1 of the Constitution. Article 38 (2)** clearly sets out the political rights underpinning this sovereignty. It is provided as follows:-

*“38.(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.”*

The key operative words under **Article 38 (2) of the Constitution** is the right to free, fair and regular election based on universal suffrage, and free express of the will of the electors.

26. **Article 81 of the Constitution of Kenya 2010**, deals with the general principles for the electoral system and provides:-

*“81. The electoral system shall comply with the following principles—*

*(a) freedom of citizens to exercise their political rights under*

*Article 38;*

*(b) .....*

*(c) .....*

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

*(e) free 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.”*

27. **Article 86 of the Constitution of Kenya 2010**, dealing with voting provides:-

*“(86). At every election, the Independent Electoral and Boundaries Commission shall 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.”*

28. **Article 87 of the Constitution of Kenya 2010** dealing with electoral disputes provides:-

*“87. (1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.*

*(2) Petitions concerning an election, other than a presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.*

*(3) Service of a petition may be direct or by advertisement in a newspaper with national circulation.”*

29. **Section 76 (a) of the Elections Act** provides:-

*“(76) (a) to question the validity of an election shall be filed within twenty eight days after the date of publication of the results of the election in the Gazette and served within fifteen days of presentation;”*

30. That as the election is the ultimate expression of the sovereignty either directly or through democratically elected representatives, the electoral system is therefore designed to ascertain and implement the free expression of the will of the people. The key principle of an election dispute resolution is to ascertain the intent of the voters and give it full effect without compromising with the principles that underscore the right to free, fair, verifiable, simple, transparent and accountable election.

31. **Section 80 of the Elections Act** sets out the powers of an Election Court in exercise of its jurisdiction to hear and determine election petitions, while **Section 83** provides as follows on non-compliance with the law:-

***“83. 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.”***

32. **Section 84 of the Act** deals with costs that Court may award in an election petition and provides:-

***“84. An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.”***

33. The **Elections (Parliamentary and County Elections) Petitions Rules, 2017**, under **Rules 8, 12 and 19**, provides:-

***“8 (1) An election petition shall state-***

- (a) The name and address of the petitioner;***
- (b) The results of the election, if any, and however declared;***
- (c) The results of the election, if any, and however declared;***
- (d) The date of the declaration of the results of the election;***
- (e) The grounds on which the petition is presented; and***
- (f) The name and address of the advocate, if any, for the Petitioner which shall be the address for service.”***

On **Rule 12 of the Petitions Rules** provides:-

***“12. (1) A petition shall be supported by an affidavit which shall:-***

- (a) Set out facts and grounds relied on in the petition; and***
  - (b) Be sworn personally by the petitioner or by at least one of the petitioners, if there is more than one petitioner.***
- (2) An affidavit in support of a petition under sub-rule (1) shall state:-***
- (a) the name and address of the deponent;***
  - (b) the date when the election in dispute was conducted;***
  - (c) the results of the election, if any, however declared;***
  - (d) the date of the declaration of the results of the election;***
  - (e) the grounds on which the petition is presented; and***
  - (f) the name and address of the advocate, if any, Acting for the petitioner which shall be the address for service.***
- (3) Each person who the petitioner intends to call as a witness at the hearing, shall swear an affidavit.***
  - (4) A petitioner shall, at the time of filing the petition, file the affidavits sworn under sub-rule (3).***
  - (5) A response to the petition under rule 11 shall be supported by an affidavit sworn by the respondent.***
  - (6) Each person who the respondent intends to call as a witness at the hearing, shall swear an affidavit.***
  - (7) A respondent shall, at the time of filing the response to a petition, file the affidavits sworn under sun-rule (6).***

*(8) Except with the leave of the election court and for sufficient cause, a witness shall not give evidence unless an affidavit sworn by the witness is filed as required under these Rules.*

*(9) The election court may, on its own motion or on the application by any party to the petition, direct a party or witness to file a supplementary affidavit.*

*(10) An affidavit shall –*

*(11) Each affidavit shall be served to all parties to the petition.*

*(12) An affidavit shall form part of the record of the hearing and may be deemed to be the deponent's evidence for the purposes of an examination-in-chief.*

*(13) Every deponent shall, subject to the election court's direction, be examined-in-chief and cross-examined.*

*Provided that the parties may, by consent, accept not to cross-examine the deponents but shall have the deponent's evidence admitted as presented in the affidavits.*

*(14) The Oaths and Statutory Declarations Act and Order 19 of the Civil Procedure Rules, 2010 shall apply to affidavits under these Rules."*

34. On **Rule 19 of the Petitions Rules** it is provided:-

*"19. (1) Where any act or omission is to be done within such time as may be prescribed in these Rules or ordered by an elections court, the election court may, for the purposes of ensuring that injustice is not done to any party, extend or limit the time within which the act or omission shall be done with such conditions as may be necessary even where the period prescribed or ordered by the Court may have expired.*

*(2) Sub-rule (1) shall not apply in relation to the period a petition is required to be filed, heard or determined."*

#### **The submissions by the Advocates:**

35. Each of the Advocate representing the parties in this petition filed detailed submissions on behalf of their respective clients. Mr. Ligunya, Learned Advocates, appearing jointly with Mr. Awele, Learned Advocate, from the firm of M/s. Rachier and Amollo Advocates filed their written submission dated 27<sup>th</sup> December 2017 supported by relevant Petitioner's list of bundle of authorities in volume I, II, III and IV, Mr. Mogaka, Learned Advocate, jointly with Mr. Mobagi, Mr. Omoke and M/s. Omwenga Learned Advocates, from the firm of M/s. Ogeto, Otachi and Company Advocates, filed the 2<sup>nd</sup> Respondent's written submission dated 8<sup>th</sup> January, 2018, supported by the 2<sup>nd</sup> Respondent's list of authorities dated 8<sup>th</sup> January 2018, Learned Advocate for the 1<sup>st</sup> Respondent, IEBC, Mr. Paul Lilan filed his submissions on 29<sup>th</sup> December, 2017, together with the 1<sup>st</sup> Respondent's list of authorities. All the Advocates in their rival submissions have clearly outlined the law as regards the issues in controversy in this petition and which I shall deal with in the respective issues for determination, which issues I shall be setting out in this petition. I shall similarly deal with various cited relevant authorities in support of counsel opposing positions. I have at this point, to point out that I have had the opportunity of reading counsel opposing submissions and authorities and I am grateful and appreciative of the counsel commitment in this petition, their industry and depth of research exhibited in this regard.

#### **Issues for Determination:**

36. The Petitioner filed list of what he referred to as list of agreed issues, whereas the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents filed their rival issues which they referred to as consented list of agreed issues. In view of the above, I find that the parties in this petition did not agree on the issues for determination, however, I think the issues for determination having considered the pleadings, evidence and submissions can be summed up as follows:-

*(a) Whether failure of the Petitioner to give evidence is fatal to the Petition and whether the Petitioner's document meets the requisite provisions of the law for their admission?*

*(b) Whether Petitioner's Petition was particularized and/or whether there was lack of specificity in the Petitioner's pleadings and what are the consequences, if, particulars and specificity were lacking?*

*(c) Whether there were any breaches in the electronic transmission of the results and whether it affected the outcome of the election?*

*(d) Whether Dr. Noah Akala Oduwo is an expert witness?*

*(e) Whether there were other irregularities and if so to what effect do they have on results of the election?*

37. In order to support the grounds in the Petition, the Petitioner called 1 witness and opted not to give any evidence, whereas the 1<sup>st</sup> Respondent called 1 witness and the 2<sup>nd</sup> Respondent called 1 witness. The parties filed written submissions as directed by Court in support

of their rival positions supported by authorities. I shall therefore proceed to consider the above issues in light of the evidence adduced before Court, pleadings and submissions on record.

38. As regards the burden of proof the Petitioner is bound to prove the case he/she has pleaded. A Petitioner is not permitted to make a case outside the pleadings and his own affidavits and testimony must be in conformity and consistent with and in support of the case pleaded. In **Raila Amolo Odinga and Another V IEBC and 2 Others Supreme Court of Kenya Presidential Election Petition No. 1 of 2017 [2017] eKLR**, the Supreme Court quoted with approval the Supreme Court of India in **Arikala Narasa Reddy V Verikala Ram Reddy Reddygari and Another Civil Appeal No. 5710 – 5711 of 2012 [2014] 2 SCR** where it stated thus:-

*“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also 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 their 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.”*

39. I shall therefore in this judgment hint my consideration to what has been pleaded in the petition and supported by testimony and other relevant evidence, neither would this Court strain itself by considering submissions made in respect of matters that had not been specifically pleaded in the petition, as it is trite law, that a decision rendered by Court of law shall only be on the basis of the pleadings, that has been filed by party seeking relief from the Court. In my view it would not be proper for a Court of law to engage itself in rendering judgment on unpleaded matters, nor render any opinion on the same inspite of the Party having labored so much to adduced evidence not supported by the pleadings which he had filed in the Court, particularly on an election petition.

**(A) Whether failure of the Petitioner to give evidence is fatal to the Petition and whether the Petitioner’s document meets the requisite provisions of the law for their admission?**

40. In this petition, the Respondents have raised the issue on Petitioner’s failure to give evidence in support of his petition and opting to rely on his supportive affidavit attached to the petition.

41. Mr. Ligunya, Learned Advocate, teaming up with Mr. Awele, Learned Advocate, for the Petitioner opted not to call the Petitioner to give evidence and offered no reason why the Petitioner, though available throughout the trial, was not taking up witness stand, adopt contents of his affidavit, urge Court to adopt it as his evidence-in-chief and offer himself for cross-examination. In their submission, they submitted that it is now settled, that evidence in support of a petition is rendered by way of affidavits and for that very reason, the Petitioner’s affidavit is admissible and relevant a fortiori and independent of whether or not he will testify. That there is no legal pre-requisite that a petitioner must testify rather what is required is that he must prove his case and in doing so he must file such affidavit of persons he intends to call as a witness alongside his petition to prove the allegations. That would discharge his burden of proof in the petition. That the petitioner having called Dr. Noah Akala Oduwo, as his primary witness on the key issue in the petition, he did not deem it necessary to testify as the said witness had already sufficiently dealt with the necessary issues and that the Petitioner is not obliged to call a superfluity of witness including himself to prove his case but only such witnesses as are sufficient to establish the issues in the petition required urging under **Section 143 of the Evidence Act**, it is provided:-

*“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.”*

42. Mr. Paul Lilan, Learned Advocate, for the IEBC, the 1<sup>st</sup> Respondent, submitted that though the Petitioner filed the Petition together with the supporting affidavit and list of documents, he chose not to testify hence he did not tender any evidence-in-chief, neither was he cross-examined nor re-examined, on the contents of his affidavit and documents and that the supporting affidavit and the list of documents on record were neither adopted nor produced or exhibited in evidence and thus they ought to be struck out. He urged further the Petitioner’s list of documents attached are not marked, nor do they bear any heading, nor date, nor indication as to who authorized or generated them, the three documents appear to be computer printouts and have no certificate as contemplated under **Section 65(8) of the Evidence Act**, which provides:-

*“65(8) In any proceedings under this Act where it is desired to give a computer print-out or statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say—*

*(a) identifying a document containing a print-out or statement and describing the manner in which it was produced;*

*(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;*

*(c) dealing with any of the matters to which conditions mentioned in the subsection (6) relate, which is certified by a person holding a responsible position in relation to the operation of the relevant device or the management of the activities to which the document relates in the ordinary course of business shall be admissible in evidence”.*

43. Mr. Paul Lilan, Learned Advocate, for IEBC, further submitted that to the extent the 3 documents were intended as well to be annexures (exhibits) to the affidavit of Dr. Noah Akala Oduwo they lack mandatory requirement of marking, sealing and signing for their production as exhibits. That the same, have neither been securely sealed under the seal of commission of Oaths nor have they been marked with serial letters of identification nor signed thus running a foul of mandatory provisions of **Rule 9 of the Oaths and Statutory Declarations Rules** which provides:-

***“All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.”***

44. On the part of Mr. William Mogaka, Learned Advocate, for the 2<sup>nd</sup> Respondent, he submitted that full hearing commenced on 17 November 2017 and all parties cases closed by 15<sup>th</sup> December 2017, without the Petitioner as deponent of the supporting affidavit, offering himself to testify, adopt the contents of his affidavit and produce to the Court as an exhibit the documents in his list and bundle filed on 7<sup>th</sup> September 2017. He urged under **the Elections (Parliamentary and County Elections) Petitions Rules, 2017, under Rule 8 (4), 12 (1) (a), (b), (10) (a), (c), (11), (12) and (13)** all read together, where petition is supported by an affidavit sworn by the Petitioner and witnesses affidavits settling at the facts and grounds relied on, substance of the evidence, contain exhibits and copy of documents intended to be relied on, that unless there is contrary direction and/or consent of the parties, all deponents of affidavits should be examined-in-chief and be cross-examined.

45. In this petition there is no dispute that the Petitioner, filed his petition on 7.9.2017 together with his supporting affidavit dated 6<sup>th</sup> September 2017. Further there is no dispute that the Petitioner did not give evidence though present throughout the trial and no reason was given for his failure to testify, but his Advocates stated, he won't testify though during the pre-trial conference, the Court had directed that the trial shall be by way of affidavits and **viva voce** evidence.

46. Therefore there is no dispute that matters of Electoral Disputes are tried in accordance with the provision of the **Elections Act** and the **Elections (Parliamentary and County Elections) Petitions Rules, 2017** and thus by way of affidavit evidence and oral evidence. The relevant provisions, or the relevant rules are **Rules 8 (4) (a), (b), 12 (1), (a), (b), (3), (4), (6), (10), (a), (c), (11), (12) and (13)** which provides:

*“The Petition shall:-*

***“8 (4) (a) be signed by the Petitioner or by a person authorised by the Petitioner;***

***(b) be supported by an affidavit sworn by the Petitioner containing the particulars set out under rule 12; and***

***(c) .....*”**

***“12. (1) A petition shall be supported by an affidavit which shall:-***

***(a) set out facts and grounds relied on in the petition; and***

***(b) be sworn personally by the petitioner or by at least one of the petitioners, if there is more than one petitioner.***

***(3) Each person who the petitioner intends to call as a witness at the hearing, shall swear an affidavit.***

***(4) A petitioner shall, at the time of filing the petition, file the affidavits sworn under sub-rule (3).***

***(6) Each person who the respondent intends to call as a witness at the hearing, shall swear an affidavit.***

***(10) An affidavit shall-***

***(a) state the substance of the evidence;***

***(c) contain a list of exhibits and copies of any documents which the deponent intends to rely on.***

***(11) Each affidavit shall be served to all parties to the petition.***

***(12) An affidavit shall form part of the record of the hearing and may be deemed to be the deponent's evidence for the purposes of an examination-in- chief.***

***(13) Every deponent shall, subject to the election courts direction, be examined-in-chief and cross-examined:***

***Provided that the parties may, by consent, accept not to cross-examine the deponents but shall have the deponent's evidence admitted as presented in the affidavits.*** (underlining is mine).

47. The courts in myriads of decisions have had an opportunity to address themselves on the issues raised by the Respondents thus, in **Albeity Hassan Abdala v IEBC and 3 Others E. P. No. 8 of 2017** at Malindi, Hon Lady Justice Asenath Ongeri, J. rendered herself thus:

***“In the current case, no certificate has been attached and I find that the electronic print outs, the CD and photocopies of the photographs are NOT admissible in the absence of a certificate that conforms to section 106 B (4) of the evidence Act.”***

48. In **Francis A. Mbalanya v Cecilia W. Waema (2017) eKLR**, Hon. Justice Oscar A. Angote, J. held:

*“In the instant case, the law has provided in mandatory terms the manner in which evidence by way of annexures can be received by the court. The failure to comply with that law, like in the instant case, can only lead to one thing, the striking out of the offending documents.”*

49. In **Abraham Mwangi v S.O. Omboo and Other (HCC No. 511 of 2002) (2003) eKLR** Hon. Justice A. I. Hayanga, J. as he then was, held:-

*“The rules envisage marking on the very document and that is to safeguard certainty, Exhibits should never be identified by fly papers attached to the document. The exhibit must be marked. We do not have detailed rules on this in Kenya but the Practice Rules in the English Order 41 of RSC that deals with the forms of affidavits and exhibits are common sense rules which should be adopted. It divides exhibits into documents and non documents. Fly papers are misleading and is fraught with uncertainty. Exhibits to affidavit which are loose flysheets for identification attached to them and do not bear Exhibit mark on them directly must be rejected. The danger is so great.”*

50. In **Moses Wanjala Lukoye v. Bernard Wekesa Sambu & 3 Others (2013) eKLR**, Hon. Justice F.G. Gikonyo, J. held:-

*“I have delivered enough rulings on this matter in other petitions. Their gist is that the affidavit evidence of a witness who has not been called for cross-examination is worthless and remains on record as a dead appendage of the record of the trial process, except where parties by consent accept not to cross-examine the witness and to have the evidence admitted as presented in the affidavits.”*

51. Similarly in **Josiah Taraiyo Kipelian Ole Kores v. Dr. David Ole Nkediye and 3 Others (2013) eKLR**, Hon. Justice H. Mabeya, J. Para 78, held:-

*“I find fault with the petitioner’s argument that there is no rule in law or evidence that requires verbal evidence for affidavits to be deemed credible. In my opinion, an election petition is no ordinary suit and the facts deponed therein must be interrogated. Such interrogation can only be done by testing the evidence through cross-examination of the deponent. Failure to attend Court for the testing of such allegations in such a disposition makes the affidavit to be just that, mere allegations. It is evidence without any probative value. In my view therefore, it was Imperative for the petitioner to have testified during the hearing of the petition given that he was responsible for its institution and had made adverse claims against the respondents.”*

52. Further in **Dirie & Sons Company Limited v. Taita Ranching Company limited (2016) eKLR** and **Kenneth Nyaga Mwige v Austin Kiguta and 2 Others (2015) eKLR**, the Court of Appeal stated that a document not produced as an exhibit is of no evidential value and should not form the basis of a Court judgment. The failure to produce amounted to non-reception and legal exclusion of the document.

53. In **Jeremiah Nyangwara Matoke v IEBC & 2 Others (2017)** Hon. Lady Justice W. Okwany, J. held:

*“[27] In the instant case, the petitioner argued that the error or failure to mark and seal the annexures could be cured by the provisions of Articles 159(2)(d) of the Constitution. I disagree with this argument because annexures form a very critical part of an affidavit as it is the documentary evidence on which the petition is anchored for which the attestation and marking of exhibits are a mandatory statutory requirement and not as mere procedural technicality.”*

54. In view of the foregoing, an affidavit under the Rules of the **Elections (Parliamentary and County Elections) Petitions Rules**, though affidavits are not usually deemed to be pleadings, the affidavit in support of an election petition and any documents annexed thereto are deemed to be part of the petition and therefore part of the pleadings in the case. That all affidavits in support of the petition and witnesses affidavits used in an Election Dispute must comply with the provisions of the **Oaths and Statutory Declarations Act and Order 19 of the Civil Procedure Rules, 2010**. That once an affidavit is filed in an election petition, it forms part of the record of the Election Court and becomes the deposing witnesses respective evidence for the purposes of examination-in-chief. A witness who swears an affidavit is expected to appear before court and give evidence before court, adopt or own the contents of the affidavit, be liable to cross-examination by the adversaries of the party who calls him as a witness and any other party to the petition and may be re-examined by the party, who calls him/her as a witness. It therefore follows an affidavit being part of record, the election court is obliged to consider its contents in support of the election petition. Under **Rule 12 of the Elections Petitions Rules**, the affidavit form part of record and may be deemed to be deponent’s evidence for the purpose of examination-in-chief and cross-examination. This means that a party who has filed an affidavit in support of a case, once it is set down for hearing by way of *viva voce* evidence and not by way of interlocutory nature, in an Election Petition, he shall offer himself/herself, first for adoption of the contents of the affidavit and have it adopted as his evidence-in-chief, then be ready for cross-examination, followed by re-examination. That the affidavits being part of the record, it is part of the case of the party who has sworn it. It is by filing of the same, that makes it part of the court record and such affidavits are not supposed to be struck out or expunged. That as the truth of the contents or the veracity of the witness’s testimony is confirmed through cross-examination, failure of a party to avail himself to adopt the affidavit for cross-examination, by which the veracity of his evidence in the affidavit is tested, such conduct weakens the probative value of the affidavit’s evidence. The evidence in the affidavits remains on record as a mere allegation with little, if any, probative value. It is through adoption of the affidavit and cross-examination that the truth or otherwise of an allegation or the veracity thereof is gauged by the court. In an election petition in which there are several serious and even light allegations, the party against whom the allegations are made is entitled to interrogate and challenge the allegations through cross-examination. Denying to testify, in my view amounts to denying the other party, the right to cross-examine a witness, who has made allegations in an affidavit, and such denial amounts to denial of the other party right to fair trial.

55. That an affidavit evidence in an election petition challenging an election of a Member of Parliament without deponent testifying on the allegations, if allowed and given probative value, would breed a lot of injustice and prejudice to the parties. A Party who makes an affidavit and declines to give evidence without demonstrating good cause, such as having become deaf and dumb after filing the affidavit, or any other good cause may lead to drawing of an inference that he does not want to testify because he fears to be challenged on the veracity of his

testimony. The failure to give evidence on one's affidavit affects the weight to be attached to his affidavit. The only way a deponent in an election petition may opt not to give evidence over the contents of his affidavit and not be cross-examined is permitted under **Rule 12 (13) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017**, where the parties by consent can accept not to cross-examine the deponent, but have the deponent's evidence admitted as presented in the affidavit.

56. In view of the Petitioner's failure to testify on his supporting affidavit and the list of documents on record, failure to adopt or produce the documents, failure of the listed documents to bear any heading, date, indication as to who authored or generated them, and failure to attach certificate to the 3 computer print-outs as per **Section 65 (8) and 106 B of the Evidence Act**, failure to marking, sealing, signing and/or production of exhibits, lack of securing seal under the seal of Commissioner of Oaths, lack of serial letters of identification, the offending three documents listed as Petitioner's list of documents are struck out, however, the Petitioner's affidavit being part of record is not struck out. It would remain on record but as stated failure to have had the affidavit subjected to testing through cross-examination, affects the weight or credence of the contents of the affidavit, but such failure of the Petitioner to give evidence and subject himself to cross-examination is not fatal to the Petition. The same cannot be struck out on failure of the Petitioner to testify before an election Court, even where parties have not consented, or accepted not to cross-examine the deponent and the deponent's evidence to be admitted as presented in the affidavits.

**(B) Whether Petitioner's petition was particularized and/or whether there were lack of specificity in the Petitioner's pleadings and what are the consequences, if, the particulars and specificity were lacking?**

57. This issue was passionately urged before this court by the Respondent's Counsel, Mr. Paul Lilan, Learned Advocate, for IEBC, who started his attack on the petition urging the petition as drawn lacked specificity and particulars, pointing out the law requires pleadings to be specific enough for the responding party to understand the case fully, so as to be in a position to respond. He urged the petitioner did not specify the polling stations in issue, throughout the petition and even in the supporting Affidavits, every allegation set out is significantly lacking in particulars and specificity, that paragraph 13 of the Petition, where it is alleged that **"votes cast in a significant number of polling stations were not counted, tabulated and accurately collated."** does not provide the particulars as to the polling stations in question nor does it provide other critical particulars as to the identity of the allegedly not counted votes amongst others.

58. That under paragraph 14, on a significant number of polling stations, the votes cast as captured in Form 35A differing from results as captured in Form 35B are not given. Similarly the allegations in paragraph 15 (a), (b), (c) and (d), are lacking. That the pleading, he urged are general in nature, lacking in specificity and particulars.

59. Mr. William Mogaka, Learned Advocate, associated himself with submissions by Mr. Lilan, Learned Advocate, for IEBC and added that parties are bound by their own pleadings and affidavits, quoting several authorities in support. He urged the Petitioner having failed to specifically plead certain particulars as per his Petition, he could not rely on oral evidence by PW1 which was not supported by pleadings.

60. The Petitioner's Counsel Position is that the petition was well drawn together with the affidavit in support and was particularized as required by law.

61. In **Jackton Nyanungo Ranguma v IEBC & Others E.P. No. 3 of 2017** at Kisumu, Hon. Justice D.S. Majanja, J. held:

***"[29] At first glance, the allegations I have set out above are imprecise to the extent that they do not identify the specific polling stations where the errors, malpractices and irregularities took place. This of course made it difficult for the respondents to answer those allegations with particularity. As I stated elsewhere it is the petitioner's duty to plead his case with specificity and this defect is not cured by having a detailed affidavit making broad allegations."***

62. In **Raila Amolo Odinga & Another v IEBC & 2 Others (2017) eKLR** Supreme Court of Kenya aligned itself with the holding in **Arikala Narasa Reddy v. Venkata Ram Reddygari & Another Civil Appeal Nos. 5710 – 5711 of 2012 (2014)** 2 of SCK where the Supreme Court of India held that:

***"[29] 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."***

63. I have very carefully perused the Petitioner's petition dated 6<sup>th</sup> September 2017, Indeed from paragraph 10 of the Petition, setting out the grounds of the petition, "under (a), Failure of the electronic results transmission system and incorrect tallying, paragraphs 11 – 19, (b), lack of transparency in conducting the elections, paragraphs 20 – 22, (c), making of false entries, paragraphs 23 – 25, (d), Failure to secure the Elections, Paragraphs Nos 26 – 30, (e), Improper influence and malicious and other electoral offences, paragraphs 31 – 37, the Petition does not disclose particulars of specific polling stations, names of the Presiding Officers or their deputies or observers who were present to adduce any cogent evidence in support of any of the contents of his petition or affidavit. That under paragraph 15 of the petition it is alleged out of the 187 polling station, 34 polling stations had no data entered for Parliamentary seat position, and 1 polling station had the voter turnout higher than the number of registered voters. The Petitioner did not as earlier on stated testify nor did he file any witness affidavit nor call any agent, or voter or candidate or security officer or give the particular names of the alleged various polling stations mentioned in various paragraph of the petition, so as to enable the Respondents at the time of filing their response to be in a position, to specifically respond. That without specifying the concerned polling stations, it would have been a miracle to expect the respondents to know which of the polling stations the Petitioner referred to. It is averred that out of 187 polling stations there was 170 polling stations where there was a mismatch in total number of votes cast for each of the six elections and in 34 polling stations there were Nil (0) results.

64. I have perused the affidavit of the Petitioner, dated 6<sup>th</sup> September 2017 and that of Dr. Noah Akala Oduwo, dated 6<sup>th</sup> September 2017, and have found that none of the two affidavits discloses necessary material facts and as such the Respondents were left in darkness as to the

stations in issue and were unable to specifically answer on the allegations. Having carefully perused the petition and the affidavits I have no doubt that the Respondents were deliberately left in total darkness as to the concerned polling stations, and as such they were prejudiced by failure of the petitioner to plead with specificity in the petition and the affidavit, in support, even the affidavit of Dr. Akala, failed to specifically identify or disclose the specific polling stations where the alleged irregularities or errors or malpractices occurred. It is the duty of the petitioner to plead his case with specificity and not to wait for Respondent to seek further and better particulars. The defects in this petition were carried out throughout the trial and are not curable through oral evidence as that goes against the pleadings. It is not proper for the Petitioner to urge that the Respondents are bound to answer on matters that are adduced orally and which are not part of the pleadings.

65. During the hearing Dr. Noah Akala Oduwo, PW1, in Cross-examination stated partly “The polling station are not listed in the body of the petition ..... NA – 1, NA – 2 and NA – 3, I am referring do not have identification marks. “The witness affidavit dated 6<sup>th</sup> September 2017, comprising of 11 paragraphs is specific, especially under paragraph 6 and 7 that the witness was dealing with Forms 37As and 37Bs and nowhere did he mention Forms 35As or 35Bs. He never produced Forms 37As nor 37Bs nor did he specifically put the particulars of the polling stations mentioned in paragraph 7 (a), (b), (c) and (d) of his affidavit.

66. In **IEBC & Anor v Stephen M. Mule & 3 Others 2014 eKLR** the Court of Appeal of Kenya with approval quoted the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) Limited Vs. Nigeria Breweries PLC SC 91/2002** where Pius Adereji, JSC expressed himself thus on the importance and place of pleadings:

**“ .... it is now a very trite principle of 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.”**

67. The Petitioner in his Petition and supporting affidavit has attempted resurrect the petition and averred that he had conferred authority to Dr. Noah Akala Oduwo to make depositions or adduce evidence on other matters raised in the petition other than those specifically pleaded as per paragraph 13, 14, 15 (c), (d), 16 (iv), and 31 and in the supporting affidavit under paragraph 8, 9, 10 (c), 11 (4), 13, and 28. PW1 in cross-examination stated that he is not the Petitioner and cannot vouch on the contents of the Petitioner’s petition and the affidavit. The Petitioner could not file a petition, swear an affidavit but hide himself behind Dr. Noah Akala Oduwo to vouch on the truth of the allegations in his affidavit. Dr. Noah Akala could only rely on the contents of his own affidavit and not on contents of the Petitioner’s petition and affidavit, which he himself had not deponed upon. PW1 could neither base his testimony on matters, that he had not sworn an affidavit on. In other words he would not be permitted to give evidence that is in variance with what he had deponed in his affidavit of 6<sup>th</sup> September 2017 and which is outside what he had specifically pleaded. The Petitioner could not in law authorize PW1, being his witness, to deal with what he had pleaded in the petition unless the witness had in his witness affidavit deponed on similar matters. That upon perusal of the affidavit of Dr. Noah Akala Oduwo, it is clear the averment contained therein is restricted on the process of electronic result transmission on the basis of information he purportedly obtained in the cause of proceedings in the presidential election petition **No. 1 of 2017, Raila Odinga & Another v IEBC & 2 Others (supra)**

68. The upshot of the above is that the Petitioner miserably failed in his duty as a Petitioner, by failing to plead his case with specificity in his pleadings. He made generalized allegations, which I find prejudicial, embarrassing, vague and confusing, leading to the respondents, finding themselves in dilemma on the kind of response and answer to file. This is not allowed in law, it is a defect that is irretrievably incurable.

### **(C) Electronic Transmissions of Election Results –**

#### **Whether there were any breaches in the electronic transmissions of the results and whether it affected the outcome of the election?**

69. Mr. Ligunya, Learned Advocate, teaming up with Mr. Awele, Learned Advocate, indicated that the gravament of the Petitioner’s case as expressed by Dr. Noah Akala Oduwo is mainly on electronic transmission of the results through the KIEMS Kits. They urged **Section 39 and 44 of the Elections Act** as amended by **the Elections Laws (Amendment) Act No. 36 of 2016** make provisions for the use of technology in Kenya’s Electoral Law.

70. In essence they urged Section 44 of Elections Act established an integrated **Electoral Elections Management System (IEMS)** to apply to the entire electoral systems in Kenya. That Kenya integrated Management Systems, popularly known as “KIEMS” is the infrastructure that implements IEMs in order to give effect to the Constitutional rights, values and principles of free, fair, transparent, verifiable and accountable elections, right from Presidential to the Member of County Assembly election and as such urges, the centrality of the IEMS in the entire electoral system in Kenya cannot therefore be gainsaid. The Counsel further submitted secure Electronic transmission of results is accordingly a critical object of **Articles 38, 81, 86 and 88 of the Constitution**. That the **Elections Act No. 24 of 2011** was enacted in such permissive and discretionary terms which was later to be confirmed by **Supreme Court in Raila Odinga v. IEBC & Others No. 5 of 2013**, which went further to hold that the law in fact contemplated a manual election.

71. That the **Election Laws (Amendment) Act 2016 at Section 39 and 44 (as amended)** establish an intergrated electronic electoral-system that enables biometric voter Register for electronic voter identification and electronic transmission of results, which made the application of technology mandatory to give effect to Articles 81 and 86 of the Constitution.

72. The Petitioner’s Counsel urged the amended provision obliged IEBC to ensure that the technology is simple, accurate, verifiable, secure, accountable and transparent. That in relation to all elections other than the Presidential Election, **Section 39 (2) and (3) of the Elections Act** as read together with **regulations 83 of the Elections (General) Regulations** requires the IEBC to transmit results electronically but is not for final results but provisional result. The Counsel further urged **Section 44 of the Elections Act** as amended, obligates the commission to electronically transmit, in the prescribed form, the tabulated results of an election for the president from a polling station to Constituency tallying Centre and the National tallying Centre.

73. The Petitioner’s Counsel urged a key aspect of electronic transmission of results was the need to ensure efficient, secure and verifiable

transmission of results to avert manipulation and/or interference with the results between a polling station and Constituency Tallying Centre, to buttress their argument they referred to **IEBC v. Maina Kiai & 5 Others Civil Appeal No. 105 of 2017** and shortly afterwards by Supreme Court in **Raila 2017**.

74. The Petitioner urges that the IEBC in flagrant violation of legitimate expectation, ignored the peremptory principles of the Constitution, the Elections Act and Regulations by failing to electronically transmit the Parliamentary results for Kitutu Masaba Constituency as set out in the affidavit of Dr. Noah Akala.

75. Mr. Paul Lilan, Learned Advocate, for IEBC, started by stating the Law on electronic transmission of results. He referred to **Section 39 (1) (c) of the Elections Act** which states:-

**“39. (1) The Commission shall determine, declare and publish the results of an election immediately after the close of polling**

**(1(c) For purposes of presidential election the Commission shall –**

**(a) Electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre; .....**”

He urged that there is no equivalent provision relating to election for other sets such as that for Governor, Senator, women Representative, Member of National Assembly and Members of County Assembly, referring to the case of **Jackton Nyanungo Raguma v IEBC and 2 Others EP No.3 of 2017** Kisumu where Hon. Justice D.S. Majanja, J. held thus:-

**“A reading of Section 39(1c) of the Act shows that electronic transmission and publication of polling result in a public portal is only a statutory requirement for the Presidential election. Further, except for voter registration and voter identification, voting, counting, tallying and transmission of results for the election of the other elective posts including that of the Governor are mainly manual. In all other cases, including the county Governor election, the transmission of results contemplated by Section 39(1A) and (19B) of the Act is that the votes at the Polling Station are counted and recorded in Form 37A. Each Form 37A is forwarded to the Constituency Tallying Centre. The Constituency Returning Officer tallies all the results from all the polling stations and records them in Form 37B. Forms 37B from all the Constituency Tallying Centres are forwarded to the County Tallying Centre where the County Returning Officer tallies all the results from the Forms 37B and announces the election results based on Form 37C”**

76. Mr. William Mogaka, Learned Advocate, in his response referred to the **Elections (General) Regulations, 2012, Regulation 5 (1A)** on the function of the Presiding Officer and also under **Regulation 5 (1A) (d)** which he submitted includes electronically transmitting presidential results to the constituencies, Counties and National Tallying Centres. The said Regulation provides:-

**“5(1A) The function of a presiding officer shall be:-**

**(D) Electronically transmitting presidential results to the constituency, counties and national tallying centres.”**

He urged further the declaration in respect of a Member of National Assembly is done in a prescribed form being Form 35A and Form 35B referring to the **Elections (General) Regulations, 2012, Regulation 79 (2) and 83 (1) (e)** which provides:-

**“79(2) For purposes of sub-regulation (1), the declaration for—**

**(a) presidential election results shall be in Form 34 set out in the Schedule;**

**(d) National Assembly, county women representatives, Senator, county governor and county assembly elections shall be in Form 35 set out in the Schedule.**

**(2) The presiding officer shall—**

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

**(b) request each of the candidates or agent then 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 other place convenient and accessible to the public at the polling station.”**

**“83 (1) Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present—**

**(a) .....**

(e) complete the relevant Form 35B and 36B for the respective elective position set out in the Schedule in which the returning officer shall declare, as the case may be, the-

- (i) name of the respective electoral area;
- (ii) total number of registered voters;
- (iii) votes cast for each candidate or referendum side in each polling station;
- (iv) number of rejected votes in each polling station;
- (v) aggregate number of votes cast in the respective electoral area; and
- (vi) aggregate number of rejected votes;”

77. Section 39 (1A) of the Elections Act provides:-

*“39(1A) The Commission shall appoint constituency returning officers to be responsible for:-*

*(i) Tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly.*

*(ii) Collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and County women representative to the National Assembly*

*and*

*(iii) Submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.”*

78. In **IEBC v Maina Kiai & 5 Others (2017) eKLR (C.A. No. 105/2017** the Court of Appeal stated that the lowest voting unit and first level of declaration of results is the polling station. The declaration form containing those results is a primary document and all other forms subsequent to it are only tallies of the original and final results are recorded at the polling station.

79. The evidence on record of PW1, RW1 and RW2, which is undisputed, is that majority of the voters were biometrically identified, and they had been registered biometrically. The only complaint in the petition is failure of electronic results transmission system and incorrect tallying. That the results were not electronically transmitted from the polling station to Constituency and County Tallying Centres. Notwithstanding standing my agreement with the petitioner, that technology was meant to be central in the elections of 8<sup>th</sup> August 2017, nevertheless it cannot be said that was the only mode of transmission of the 6 elections results. **Regulation 5 (1A) (d) of the Elections (General) Regulation and 82**, clearly indicates that the Presiding Officer is only mandated to electronically transmit Presidential results and as such he has option not to electronically transmit the other 5 elections results and though such an option may sometimes be abused, the results to be transmitted should be noted are only provisional. In view of the above it should not be taken, that IEBC should remain contented with the situation as of now but it should push in the future elections to fully operationalize **Section 44 of the Elections Act**. Electronic transmission of results is a positive step towards achieving key aspects of electronic transmission of results ensuring efficient, save and verifiable transmission of results and avert manipulation and/or interference with votes between the polling station, and the Constituency Tallying Centre and the National Tallying Centre, hence the need to carry out the necessary operationalization of **Section 44 of the Elections Act**. In this regard it is imperative for IEBC in order to meet the Constitutional standard of accountability, credibility, transparency and verifiability under **Article 81 and 86 of the Constitution of Kenya 2010** to embrace technology fully in all elections as is the case in the Presidential Election under **Section 39 (1) (C) of the Elections Act** and further consider amendment to **Elections (General) Regulation, 5(1A) and 82**.

80. In the instant case the Petitioner did not give evidence nor did he call any voter, agent or candidate from Kitutu Masaba Constituency to give evidence on the alleged failure of the Electronic Results Transmission System and incorrect tallying. The Petitioner’s affidavit has not been adopted as evidence-in-Chief and having not given evidence and subjected himself to cross-examination on the allegations deponed upon, I find his averments remains mere allegations to which no weight can be attached to it. PW1 Dr. Noah Akala was not at any of the 187 polling stations nor at any of the Constituency Tallying Centre or County Tallying Centre. There is evidence from RW1 and RW2, that the Kitutu Masaba election in all 187 polling stations was conducted through the use of technology. The evidence on record from RW1 and RW2 reveal that majority of the voters were identified biometrically and had been registered biometrically. RW1 testified that the results were transmitted electronically. RW2 testified that he was personally at the Constituency Tallying Centre where there were screen mounted in a hall at Nyambaria Secondary School for everyone to see and from where everyone was allowed to see the results being relayed electronically. He saw the results streaming in and at the same time he had his agents, who had delivered Forms 35As with which he was able to compare them with the results being electronically relayed on the screen. There were also other candidates, candidate’s agents and observers. The Petitioner’s witness PW1 was not at any of the Kitutu Masaba polling stations or at the Constituency or County Tallying Centre. In his affidavit under paragraph 6 he talks of logs he obtained from the 3<sup>rd</sup> Respondent, in respect of the results transmission system forming part of the integrated Electronic Management System in which he averred there were no Forms 37As and 37B uploaded for Kitutu Masaba Constituency and which forms formed the basis of his analysis as per paragraph 7 of his affidavit and to which he purportedly annexed and marked NA 1, NA – 2 and NA – 3.

81. From the above it is clear that Dr. Noah Akala, PW1, could not vouch on the alleged failure of the electronic Results transmission System and in correct tallying as he was not at any of the polling stations or at the Constituency Tallying Centre. The Petitioner as a voter and not being an agent and having not called any candidate's agent or candidate or party agent and having failed to give evidence has failed to demonstrate there was failure of elections Results transmission System and incorrect tallying. His averments in the Petition and the affidavit remains as a mere allegations to which this court cannot place any weight. Secondly, PW1's affidavit is of no help as he has not demonstrated the connection of the so called 3<sup>rd</sup> Respondent, and what is his connection with the Petition, in respect of alleged annexures NA 1, NA2 and NA 3. The documents referred to having not been, marked, sealed and attached to the PW1's affidavit and having been struck out, the PW1's affidavit falls short of supporting the allegation on non-transmission of the election results electronically. On considering the Respondent's evidence and the use of technology and transmission of the results in Kitutu Masaba Constituency electronically, I find RW1's and RW2's evidence credible and I am satisfied the elections in Kitutu Masaba were conducted in accordance with the law and that the results of the Member of the National Assembly were electronically transmitted, though the law do not make it mandatory for results of Member of Parliament to be electronically transmitted. That as Form 35A in case of an election, of a member of National Assembly, is the primary and final document, and as there was no dispute as to the results entered in any of the 187 Forms 35As, and considering PW1 evidence on electronic transmission and publication in the IEBC Public portal, which by virtue of Regulation 82, dealt only with provisional results, I find that cannot be urged to invalidate undisputed results in Forms 35A.

82. In my view and upon consideration of the evidence on record, I find the Petitioner failed to adduce evidence to the required standard of proof to demonstrate that there was failure of Electronic Results transmission system and that there was incorrect tallying. The Respondents demonstrated there was no failure as alleged and that results were electronically transmitted without any delay to both Constituency and County Tallying Centres in respect of all 187 polling stations at Kitutu Masaba Constituency. I find that allegation fails.

**(D) Whether PW1 Dr. Noah Akala Oduwo is an expert witness?**

83. Dr. Noah Akala Oduwo, in his affidavit dated 6<sup>th</sup> September 2017, under paragraph 1, he deponed that he is the Deputy Director of the Campaigns and Elections for the Orange Democratic Movement Party, a qualified statistician by profession having done Bachelor degree in Medicine and surgery (**MB.Ch.B**), Masters degree in Business Administration (M.B.A.), Second Masters degree in Political Science and Public Administration (M.P.A.) and third Masters degree in Public Health (M.P.H.).

84. What is an expert?: - From "**Black's Law Dictionary free online legal Dictionary 2<sup>nd</sup> Ed.**" Defines an expert as a person that had "**knowledge and skills learned over years of experience in a subject. Their opinion can be helpful in problem solving.**"

**Expert evidence:** is defined as follows "**Testimony related to a professional or scientific subject. It is based on training and experience in a subject area. The expert must give their opinion to aid the court in a decision or judgment. They are questioned before being allowed to testify.**"

85. Mr. William Mogaka, Learned Advocate, submitted that Dr. Noah Akala Oduwo, being fully aware that he was swearing a witness affidavit and was to testify purportedly as an expert, he did not at all annex certificate on his professional qualification nor did he ever avail them to court during the hearing so as to verify his qualification as such an expert.

86. Mr. Paul Lilan, Learned Advocate, for the IEBC, submitted PW1, Presented himself as an expert, claiming he is a statistician but did not produce any documentary evidence or any other proof of his alleged expertise and the only basis of his claim is a thesis he wrote while studying for his master's degree in Public Health which he did not produce. He stated that he did not belong to any professional body regulating statistician. On IT, he submitted PW1 did not produce any documentary evidence or other professional proof of his expertise in that field nor did he demonstrate to the court he was an expert either in the field of statistics or IT.

87. Mr. Awele, Learned Advocate, appearing for the Petitioner submitted that the submission that Dr. Noah Akala Oduwo is not an expert in IT, is, irrelevant as he had not come to Court to testify as an expert witness nor on a Report but came to testify on a publically available information, being a decision from a previous decision of the Supreme Court, whose proceedings are acceptable to the Court under **Section 34 of the Evidence Act**. He urged therefore Dr. Noah Akala Oduwo was not an expert and there was no legal requirement for him to carry his certificate.

88. Dr. Noah Akala Oduwo, in his affidavit dated 6<sup>th</sup> September 2017 under paragraph 1, describes himself as a qualified statistician by profession, he has further deponed that he was part of the Petitioner's team in the Presidential E. P. No. 1 of 2017, in the scrutiny of the electronic results transmission system and he obtained varied data on the results transmission system of general elections held on 8<sup>th</sup> "August 2017. In cross-examination he stated he was appearing in his capacity as an expert and admitted he had not attached any degree, or anything else to support that he is an expert.

89. In **Shah and Another v Shah and Others (2003) I EA 290**, the Court held:

***"One of the special circumstances when witnesses may be called to give evidence of opinion is where the situation involves evidence of expert witness and this is an exception to the general rule that oral evidence must be direct ... The expert opinion is however limited to foreign law, science or art; including all subjects on which a course of study or experience is necessary to the formation of an opinion and handwriting is one such field ... However as a rule of practice, a witness should always be qualified in court before giving his evidence and this is done by asking questions to determine and failure to properly qualify as expert may result in exclusion of his testimony ... The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so ... If there is a conflict of expert opinion, with experts appearing for both parties, resolution of conflicting evidence or the acceptance of the evidence of the expert in preference to the opinion of the other, is the responsibility of the court ... Properly grounded expert evidence of scientific conclusion will be extremely persuasive in assisting the court to reach its own opinion."***

90. Section 48 (1) and (2) of the Evidence Act provides:

**“48. Opinions of experts:-**

*(1) When the court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting or finger or other impressions, opinions upon that point are admissible if made by persons specially skilled in such foreign law, science or art, or in questions as to identity, or genuineness of handwriting or fingerprint or other impressions.*

*(2) Such persons are called experts. ”*

91. In **Dickson Omondi Ndiewo T/A Ditech Engineering Service cellcare electronics Nairobi (2015) eKLR**, Hon. Lady Justice Lucy Njuguna, J, held:-

***“The fact of whether somebody is an expert witness does not have to be proved by way of documents it is enough for a witness to tell the court his qualification and the fact that DW1 did not have his papers in court does not mean that he is not qualified technician. In this regard, the court takes judicial notice of the fact that when professionals attend court to testify, they do not carry along with them their certificates of their academic qualifications.”***

92. Having considered the opposing submissions and the contents of the affidavit of Dr. Noah Akala Oduwo, as well as his evidence, I note no documentary evidence has been produced either from any professional body as regards his professional qualifications but he has deposed and orally asserted before the Court that he is an expert in statistics but not a forensic expert. He further stated that he is an expert in IT. Under **Section 48 of the Evidence Act** and authorities relied upon by both sides as well as the definition of who an expert is, a person claiming to be an expert has to demonstrate that he has had knowledge and skills learned over years of experience in a subject. He must have had a course study and gained skill and experience in a specialized field. He should demonstrate in his testimony that his expertise is based on training in the subject and has acquired the knowledge and experience in subject area and one has to be led on evidence on his knowledge and skill in a particular field before giving evidence as an expert.

93. The witness in this case did not demonstrate having had course of study, knowledge and skill in statistics nor IT over a number of years. He did not give evidence on his experience nor did he disclose his training and experience in the fields. His advocates stated he was not called to give evidence as an expert but to produce a decision of a Supreme Court. He was not in possession of any professional certificate or licence in the field. His allegation that he is an expert has not been proved. He has not demonstrated that he has special skills and knowledge learned over years as well as training on the alleged fields of specialization.

94. In the instant case, I heard Dr. Noah Akala Oduwo, give evidence and answer questions and I have noted he has not attached any professional documents and as per Petitioner’s Advocate submissions who urged he had not called him as an expert witness, I find that PW1, has failed to demonstrate that he is an expert in statistics, IT and handwriting. He is not an expert witness, so I find, but an ordinary witness in this petition and his evidence shall be treated as such.

**(E) Whether there were other irregularities and what effect do they have on the results of the elections?**

**(i) Failure of electronic results Transmission System and incorrect tallying.**

95. The Petitioner alleges votes cast in a significant number of polling stations were not counted, tabulated and accurately collated as required under **Article 86 (b) and 86 (c) of the Constitution** as read with the **Elections Act** and further results captured in Form 35A differ with results captured in Form 35B as displayed in the 1<sup>st</sup> Respondent’s Public portal. That the 1<sup>st</sup> Respondent relied on invalid and unauthenticated results from various polling stations to declare the 2<sup>nd</sup> Respondent as a winner of the impugned election and that in particular:

***(a) out of the 187, 34 polling stations, had no data entered for Parliamentary seat position, affecting a total number of registered voters from the polling stations numbering 15696 voters.***

***(b) 1 polling station had the voter turnout higher than the number of registered voters resulting in total of 864 votes while total number of registered voters for the polling station is 493.***

***(c) Out of the 187 polling stations, in 170 polling stations there was a mismatch in the total number of votes cast for each of the six-elections. The total number of registered voters affected from these polling stations is 84442 voters. In proof of this fact I intend to rely on the affidavit of Dr. Noah Akala Oduwo.***

***(d) In 34 polling stations there were Nil (0) results tallied and announced for the position of MP whereas all the other positions including senator, president, Governor, Member of County Assembly and Women Representative had results. In proof of this allegation I intend to rely on the Sworn Affidavit of Dr. Noah Akala Oduwo.***

96. The Petitioner in support of the above allegations averred that he relies on the affidavit sworn by Dr. Noah Akala Oduwo, dated 6<sup>th</sup> September 2017. The Petitioner’s supporting affidavit has no annexures, but relied on his list and bundle of documents, which I struck out for being not marked, sealed, commissioned and produced as exhibit as required under the **Oaths and Statutory Declarations Act**. Those are the same documents referred to under paragraph 7 (d) of PW1’s affidavit as NA – 1, NA – 2 and NA – 3. The affidavit of PW1 has only one annexure, being Form 35B, which similarly is not marked and sealed. PW1 in cross-examination admitted none of the documents NA -

1, NA – 2 and NA – 3 was attached to his affidavit. That the PW1's purported own excel spreads analysis mentioned under paragraph 7 (d) of his affidavit was not annexed to his affidavit nor marked by a Commissioner **of Oaths as required by Oaths and Statutory Declarations Act**. The failure to annex and mark the documents intended to be relied upon by PW1 and the same having been struck out, means PW1's affidavit, has no supportive document, it is a naked document and has no evidential probative value.

97. The pleadings under paragraphs 13 – 14 of the Petition and the supporting affidavit of the Petitioner are couched in a generalized manner without specificity as regards the particulars as to the polling stations. No disclosure of the critical particulars as to the identify of the votes allegedly not counted, tabulated and accurately collated. I have carefully considered the PW1's affidavit, which lacks specificity of the polling stations and which talk of Forms 37A and 37B which deal with gubernatorial election and not National Assembly and noted further that no attachment were made to the affidavit. I find the evidence which the Petitioner sought to rely on is of no evidential probative value and disregard the same. On paragraphs 13 – 19 of the petition I find the same, has not been proved to the required standard. Indeed the Respondents produced Forms 35As and 35Bs and the results were not shown to differ. No Candidate, Agent or Party Agent or Candidate agent, or an Observer was shown to have challenged the results either on the ground of how they were counted, tabulated or collated, or on there being difference between Forms 35A and 35B. PW1's evidence contradicted Petitioner's Petition in that the Petition under paragraph 15 talked of Forms 35As and 35B but PW1 dealt with Forms 37As and 37Bs which are not relevant to this Petitions. PW1 in his evidence could not identify or show the 34 polling stations which had no data entered, after being supplied with Forms 35As and 35Bs, nor any Polling Station which had voter turnout higher than the number of registered voters or 170 Polling Stations where there was a mismatch, in the total number of votes cast for each of the six elections or 34 polling stations where there were nil (0) results for Member of Parliament.

98. During the hearing PW1 purported to deviate from the contents of his affidavit and gave evidence beyond what was contained in his affidavit of 6<sup>th</sup> September 2017, contrary to the Court's order of 17<sup>th</sup> November 2017, by seeking to include Forms 35As and 35Bs not pleaded in his affidavit. This was Contrary to the holding in **Raila Amolo Odinga & Another v IEBC & 2 Others (2017) eKLR (Supra)** in which it was made clear that a Party should not be permitted to travel beyond his pleadings. It is trite law now, that parties are bound by their pleadings and that any evidence led by any of the parties and which is at variance with the averments of the pleading whether objected to or not by the other party and whether it is put on record by consent, goes to no issue and in the interest of fair play and administration of justice such evidence must be disregarded.

99. In the instant petition, PW1, Dr. Noah Akala Oduwo, inspite of the Court having rejected the Petitioner's Notice of motion dated 5<sup>th</sup> October 2017 supported by PW1's affidavit, the witness in his evidence purported to tender the contents of the rejected affidavit. That is not tenable as it is contrary to the Court's order. The evidence is a deviation from the contents of PW1's affidavit and to the extent of that variance with his affidavit on record, the same stands disregarded as this was an attempt to introduce the rejected evidence through a window. That if the Court allows the rejected evidence it would amount to introduction of new evidence and change of the nature of the petition to the detriment of the Respondents, who would have been deprived the right to respond to the unpleaded evidence. In view of the above the ground fails.

#### **(ii) Lack of Transparency in conducting the elections:**

100. The Petitioner alleges that IEBC failed, refused and/or ignored to openly and accurately and promptly announce results and that the tallying of votes at the Tallying Centre was done in an opaque and clandestine manner with the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents operating and/or working in cohorts to the disadvantage of other candidates and that the number of votes cast far exceeded the number of voters in particular Polling Stations and number of votes cast for some positions sharply differed for the different elective positions. That the results were incredible and that affected the purity and integrity of the entire election process in Kitutu Masaba Constituency.

101. As regards the issue on lack of transparency in conducting the elections and the allegations by the Petitioner under paragraphs 20 – 22 apart from the same being generalized allegations, no evidence was adduced in support of the allegations, as the Petitioner did not give evidence nor has it in the petition been pleaded with specificity on how the elections lacked transparency. PW1 did not give evidence on this ground either. The Respondents denied the allegation and gave evidence to the effect that the election was transparent, free and fair and denied having operated or having worked together with the IEBC to the disadvantage of the other candidates. No evidence was adduced through agents, candidates or observers to demonstrate there was no transparency in the election conducted at Kitutu Masaba Constituency on 8.8.2017. The Petitioner failed to prove this allegation and the same remains as a mere unproven allegation. I believe the Respondents evidence and I find that this ground must fail.

#### **(iii) Making false entries:**

102. The Petitioner under this ground alleges that from the foregoing data, it is logical to deduce the 1<sup>st</sup> Respondent's Officers/Agents engaged in fraud and greatly compromised the integrity of the election by making false entries in statutory forms in various polling stations. The Petitioner pleaded that false entry by virtue of **Section 6 (c) of the Election Offences Act No. 37 of 2016**, in statutory form by the officers of IEBC is an election offence and that the commission of that offence undermines the credibility of the entire election exercise for Member of National Assembly in Kitutu Masaba Constituency.

103. The Petitioner in his Petition under paragraphs 11, 23 and 24 pleaded fraud, paragraph 31 and 32 intimidation, improper influence, manipulation and corruption, which are criminal activities, in which the standard of proof required to prove the same in an election petition is that of beyond reasonable doubt. The Petitioner in his Petition did not give the particulars of fraud, intimidation, improper influence, manipulation and corruption. He did not give the particulars or names of the IEBC Agents/Officials alleged in his petition. This allegation was not specific and no one would have expected the IEBC to specifically respond to the same save to deny it generally. The Petitioner having failed to give evidence and having not called anyone in support of this ground, I find the same to be malicious and without any iota of the truth. The ground must fail.

#### **(iv) Failure to secure the Election:**

104. The Petitioner further alleges, IEBC failed to secure the election as required by **Article 81 of the Constitution** and therefore put the

entire credibility of the said election in question. It is alleged that the process was tainted with a number of irregularities and illegalities, for example there were several Forms 35As which were un-stamped, unsigned by the Political Party Agents and Presiding Officers, whereas some Form 35As were illegible. That unstamped Forms 35As were used to declare results which rendered them invalid and void for failure to meet the Constitutional test of accuracy and verifiability. That some Form 35As used to declare results for Kitutu Masaba Constituency did not bear security features as stipulated in a contract entered into between the 1<sup>st</sup> Respondent herein and Al Ghurair Printing and Publishing LLC for the supply of ballot papers, statutory Election Declaration Forms, the Registers of voters and General Elections. That there are arithmetic anomalies in Forms 35As used to declare the final results at various polling stations in Kitutu Masaba Constituency in which certain votes were deliberately omitted and/or excluded from the actual summation of results.

105. On the number of irregularities and illegalities where Petition alleges several Forms 35As were unstamped, unsigned by Political Party Agents and Presiding Officers and were used to announce results, the Petitioner did not give the particulars of the alleged Forms 35As, failure whereof prejudiced the Respondents, as they could not effectively respond, to the allegation, however, when PW1 was giving evidence and while in possession of all 187 Forms 35As, he did not identify to the Court the alleged unstamped forms 35As, used to announce the results nor any Forms 35As which did not bear the signature of the Political Party Agents and Presiding Officers.

106. In **IEBC and Another v Stephen Mutinda Mule & Others C.A. 219 of 2013, Nairobi (2014)** eKLR the Court of Appeal held:

***“There is no stamping requirement in the case of the Form 35. All that is required with regard to Form 35 as provided for in Regulation 79 is the signature of the presiding officer and the agents of the candidates***

***We agree with submission on behalf of the appellant that it is the signatures of the presiding officers and the agents that authenticate the Form 35. If any such forms were stamped, it was a gratuitous and superfluous discretionary or administrative act incapable of creating a statutory obligation, less still the invalidation of the Forms 35 that did not contain the stamp. On this score too, the appeal succeeds.”***

107. In view of the above and there being no evidence to show that Forms 35As were not signed by Presiding Officers and Agents, I find no merits on the ground of Forms 35As being unstamped and unsigned.

108. PW1 in his evidence, he identified a number of Forms 35A and 35B which he claimed lacked some security features, he however, during cross-examination confirmed that Forms 35A used in the election conformed to the Prescribed form as set out in the Regulations, he also confirmed the same for form 35Bs, thus they conformed to the prescribed statutory form as per the Regulations. The IEBC contended that in the pleadings, it is not specifically pleaded and particularized in the petition nor set out in the affidavit the issues raised by PW1, in his evidence to have enable IEBC to understand and respond to the same but contended the nature and specific allegation only surfaced during PW1's testimony in Court. The IEBC urged that there is no statutory requirement for Forms 35A and 35B to bear any security features.

109. Under the **Elections (General) Regulations 2012, Regulation 79 (2)** the schedule for Form 35A and **Regulation 83(1) (e)** Schedule for Form 35B is specifically set out and the only requirement is that the Forms be informed with the prescribed Form as set out in the above Regulations and schedule for form 35A and schedule for form 35B.

110. Under **Regulation 79 (2) (b)** and **83 (1) (e)** of the **Elections (General) Regulations 2012** provides:-

***”79 (2) For purposes of sub-regulation (1), the declaration for:-***

***(b) National Assembly, County women representatives, Senator, Governor and County Assembly elections shall be in Forms 35A, 36A, 37A, 38A and 39A set out in the Schedule.”***

***“83(1) Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present:-***

***(e) complete the relevant Form 35B and 36B for the respective elective position set out in the Schedule in which the returning officer shall declare, as the case may be, the:-***

***(i) name of the respective electoral area;***

***(ii) total number of registered voters;***

***(iii) votes cast for each candidate or referendum side in each polling station;***

***(iv) number of rejected votes in each polling station.***

***(v) aggregate number of votes cast in the respective electoral area; and***

***(vi) aggregate number of rejected votes;”***

111. From the aforesaid Regulations the only material required to have security features is under **Regulation 77 (1) (a) (e)** this being ballot papers. The Regulation provides:-

**“77 (1) At the counting of votes at an election, any ballot paper:-**

- (a) which does not bear the security features determined by the Commission;**
- (b) on which votes are marked, or appears to be marked against the name of, more than one candidate;**
- (c) on which anything is written or so marked as to be uncertain for whom the vote has been cast;**
- (d) which bears a serial number different from the serial number of the respective polling station and which cannot be verified from the counterfoil of ballot papers used at that polling station; or**
- (e) is unmarked,”**

112. PW1 in his evidence testified that he had security features Report, on how security features are supposed to be but had not annexed it to his affidavit. He further stated he had seen the contract between IEBC and the supplier on what were to be security features in the statutory forms, a month before the election but did not exhibit it in his affidavit. The Court was left in darkness as to what were the required security features, and as to the nature of the contract between IEBC and the Al Ghurair Printing and Publishing LLC, if any agreement, was made regarding the security features.

113. All Forms 35A used in the election of Kitutu Masaba for all 187 Polling Stations were signed by all respective Presiding Officers, their Deputies, Agents of Parties and/or candidates, who were present at the polling stations. Similarly Forms 35B were duly signed by the Returning Officer, his Deputy and all Candidates and Party Agents. That though not all form bore the same watermarks and other marks, as alluded to by PW1, since all statutory forms were duly signed, and met the requisite legal threshold, I find the same were valid as none of them was challenged by any of the candidates or candidates agents and/or party Agents. In view of the above, my finding is that any security features on Forms 35A or 35B were merely administrative as determined by IEBC and/or gratuitous and superfluous discretion and in absence of any legal provision or a legal force behind it capable of creating any mandatory statutory obligation, the allegation by Petitioner cannot in view of the above be a good ground for invalidating Forms 35A and 35B. I find the failure of all forms to have similar features though, such failure may cause uncertainties, however in a situation where the outcome of the results in the Forms are not challenged, as is the case in this Petition, I find that is not a good basis to render Form 35As invalid and void. I find the irregularities were not massive, systemic, systematic and did not compromise the integrity and credibility of the entire Parliamentary Elections for Kitutu Masaba Constituency.

114. On the arithmetic anomaly, it emerged during the hearing that there were some posting errors at the Constituency Tallying Centre when posting results from Forms 35As to 35B was on going . This affected six (6) polling stations as follows:-

- a)The results in Kenyerere DOK Primary School (NA000235) and Kenyerere PAG Primary School (NA001333) were interchanged. The outcome of these errors is nil.**
- b) Results in Form 35A from Girango DOK, Primary (NA000589) were mistakenly interchanged with the results form Girango Farmers Cooperative Society (NA000691). The outcome of these errors is zero.**
- c) The results in Form 35A for Girango Farmers Co-operative Society (NA000691) were mistakenly posted to Girango DOK Primary School (NA000583); The outcome of this mistake is zero.**
- d) The results in Form 35A for Girango DOK Primary School (NA000583), were mistakenly posted to Girango DOK Primary School (NA000589). The net effect of these errors is zero.**
- e) In Itongo Sengera (NA000409) polling station, while posting, the 2<sup>nd</sup> Respondent’s votes were reduced in Form 35B by 89, whereas another candidate’s were increased by 124 votes.**
- f) In Ritibo DEB Primary School (NA00891), the 2<sup>nd</sup> Respondent’s votes were increased by 13.**
- g) There were no posting errors in Kiendege DEB Primary School (NA000895) polling station. This is contrary to PW1’s testimony.”**

115. On explanation given by RW1, he urged the posting errors stated above (a) – (d), the net effect was that no candidate gained or lost. That the errors were not deliberate but he attributed the same due to fatigue and exhaustion or due to human error. RW1 explained how the elections officials and staff worked consecutively for over 60 hours without break and sleep, resulting in minimal negligible human arithmetic errors and swapping/interchanging results in some polling stations due to similarity in names of some of the above polling stations under (a) – (d) above and due to confusion on closeness of the names.

116. RW1, further testified the errors under (a) – (d) above were very minimal, affected all the candidates and most significantly final outcome of the election was not affected. The net effect is that the 2<sup>nd</sup> Respondent lost 76 votes, whereas one Mr. Victor Ogeto Swanya gained the most of 153 votes. Mr. Momanyi T. Nyagaka and Mr. Moreko lost nothing, Nyaiogoti lost 1, Mr. Kengere lost 2, Obwocha lost 8, Bosire lost 99 votes. All the above notwithstanding the margin between the winner and the closest candidate, taking into account the errors of 99 votes lost by Bosire, who had been declared runner-up, his new total comes to 19361 and adding 76, to the winner to the total declared as 34462 the difference margin between the two reduces to 14101 from 14124. The errors reveal that the gap between the winner, and the closest candidate remain wide. The errors are so negligible that they would not in anyway affect the outcome of the result for the winner of

the seat of Member of National Assembly for Kitutu Masaba Constituency.

117. In **John Harun Mwau & 2 Others v IEBC & 2 Others [2017] eKLR**, the Supreme Court of Kenya established the judicial path when it held that irregularities which do not affect result of an election cannot be a basis for nullification of an election.

The Supreme Court observed as follows at paragraph 373:-

*“This Court has already pronounced itself in unequivocal terms, on the effect of irregularities upon an election. The legal position remains as stated in the majority decision of the Court in Raila 2017 ..... This may be simply restated; not every irregularity or procedural infraction is enough to invalidate an election. The irregularities must be of such profound nature as to affect the actual result, or the integrity of an election, for a Court of law to nullify the same.”*

118. In view of the minimal arithmetic errors and posting errors, in the election for Kitutu Masaba Constituency which was not systemic, systematic and deliberate but was caused by human error as explained by RW1, which I find reasonable and believable, I find the irregularities, arithmetic errors and posting errors are not of such profound nature or magnitude so as to affect the actual outcome of the results or integrity of the election. This Court is alive to the fact that there is no perfect election anywhere at any time but where irregularities and errors are not deliberately committed but occur due to human error, the errors or irregularities which do not affect the result of the election cannot be a basis for nullification of an election.

**(v) Improper, influence and manipulation and other electoral offences:**

119. The Petitioner alleges that the election of Kitutu Masaba Constituency was marred and significantly compromised by intimidation, improper influence or corruption on part of the 2<sup>nd</sup> Respondent, his agents, servants, employees and/or supporters contrary to **Articles 81 (e) (ii) of the Constitution** as read together with the **Elections Act and Regulations** and the resultant declaration of the 2<sup>nd</sup> Respondent as a winner of the Election subverted the will and intentions of the people of Kitutu Masaba Constituency. He averred the cumulative number of votes affected by the violation and contravention by the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents is well over 20,000. He averred also in his petition that he believed the 2<sup>nd</sup> Respondent spent millions treating voters in effort to influence their voting decision on 8<sup>th</sup> August 2017. That the election was so badly conducted, administered and managed by **IEBC** and it violated **Articles 38, 81, and 86 of the Constitution** and that would have resulted in as totally different outcome, if the Kitutu Masaba Parliamentary Election 2017, was conducted in compliance with the Constitution and the law.

120. The Petitioner’s allegations under (v) above are criminal in nature and ought to be proved beyond any reasonable doubt. The Petitioner did not adduce any evidence in support of the above allegations nor did Dr. Akala, PW1. The 2<sup>nd</sup> Respondent denied all the allegations levelled against him. The Petitioner failed to discharge the burden of proof. He alleged but did not bother to prove his allegations. I find that there is no weight that can be attached to his affidavit for his failure to give evidence and offer himself for cross-examination for determination of the truth of his averments. I find no merits in these grounds and the same fails.

121. During the hearing of the petition other issues arose and to which Counsel have submitted on and I shall proceed to consider the same.

**(a) Alleged use of pencil in making entries on some statutory forms.**

122. PW1, in his evidence alleged, that pencil was used by some Presiding Officers in entering data on Forms 35As in three Polling Stations namely, Girango Farmers Co-operative Society 2/2, Nyariacho DEB Primary School and Moitunya SDA Primary School 2/3. He claimed that compromised issue of security and integrity of the election.

123. RW1, for the IEBC in his evidence denied that there were Forms 35As filled using pencil, urging IEBC provides pens and no single Form 35A was filled using pencil as the stationary supplied to IEBC do not include pencils.

124. PW1, on being cross-examined, he admitted that he is not a handwriting expert. It therefore follows that, admittedly he has no expertise in document examination, and further as he was looking at the supplied Forms 35As, being photocopies and not the original Forms in question, he could for surely state with certainty, that the three Forms 35As he had identified were completed using a pencil. PW1 had not in his sworn affidavit deponed, that there were forms filled with pencil nor did the Petitioner in his affidavit, or in the petition. This ground was therefore not pleaded. I heard RW1, who impressed the Court as a sincere witness and I accept his testimony that no pencil were used at any stage to fill any of the alleged three Forms 35As or any other. This allegation fails.

**(b) Illegal voting and non-availability of 6 SD cards:**

125. PW1 at the time of the reading of the contents of 187 SD Cards, it emerged that six (6) SD cards were missing which were in relation to 6 polling stations, contrary to the Petitioner’s submission that they related to 34 polling stations, for the position of Member of National Assembly. The IEBC did not print out the product of the SD cards as per Court’s order. PW1 upon the access of 181 SD Cards, averred that register belonging to polling stations in Migori County, Kisii County, training and Prison were found in the SD cards belonging to polling stations in Kitutu Masaba Constituency and urged in that event, it was possible that persons other than those registered were infact allowed to vote. He further averred the Returning Officer’s email address was used to unlawfully access the KIEMS Kits and that he uploaded some Forms 35As from Nairobi.

126. RW1, in his evidence, explained that the non-availability of the SD cards in respect of the 6 polling stations was due to the fact, that they could not be traced, due to what he referred to as logistical challenges in that, in the course of the proceedings, all KIEMS Kits across the country were returned to Nairobi after the 8<sup>th</sup> August 2017, General Election, as they were to be used in the fresh presidential election of 26<sup>th</sup> October 2017, that the SD cards used in August were accordingly extracted and the kits configured in readiness for fresh presidential

elections. He further explained that it will be noted by then many Courts across the country issued similar orders to the one issued in this court requiring production of SD cards. That in view of the logistical aspects of such exercise being undertaken by humans, omissions or inadvertence are bound to occur.

127. I have considered the explanation given by RW1, the Returning Officer Kitutu Masaba Constituency, and find that it cannot be said to be unreasonable and unbelievable. I have considered his explanation and in light of the situation then, which is not challenged, I do accept the Returning Officer's explanation concerning the non-availability of the 6 SD cards out of 187 SD cards. I find failure to avail the same was not deliberate nor intended to hide the truth from the court nor can it be said to be contemptuous, though the IEBC is obliged to keep in safe custody of all election materials for 3 years and produce them once demanded by Court's dealing with election petitions.

128. On RW1, email address being used to unlawfully access KIEMS Kits and uploading Forms 35As, RW1 denied knowledge of the allegation and/or allowing anyone to use his email address or upload any Form 35As, urging that Returning Officers do not deal with uploading of Forms 35A. This matter had not been pleaded in the petition or in any of the affidavits, so as to enable IEBC Respond on the same, it is an ambush to IEBC, however, I find that the Petitioner failed to prove that the Returning Officer's email address was used to access KIEMS Kits and that he uploaded Forms 35As.

129. On registers belonging to polling station in Migori County, Kisii County, Trainings, and Prisons being found in the SD cards belonging to polling stations in Kitutu Masaba Constituency, RW1, testified that nobody voted from outside Kitutu Masaba Constituency. He stated that in Kitutu Masaba Constituency there is no polling station for prison. That there was no voter from code 049 for Prison and Code 088 for training. He explained further that they trained on use of KIEMS Kit to their poll officials and it is possible the training information was captured and that what is captured in the KIEMS Kit cannot be deleted. The alleged voting from neighbouring constituencies was not pleaded in the petition nor in any of the affidavits of the Petitioner and PW1. Had that been done the Respondents would have had opportunity to respond. Secondly no single voter or agent or candidate filed a complaint or affidavit to show that voters from neighbouring constituencies were allowed to vote. I accept the explanation given by the RW1, as reasonable and credible. I find no merits in the Petitioner's allegations on the grounds mentioned herein above.

130. On the unavailed six (6) SD cards, the following scenario obtains, that there is no dispute that they related to 6 polling stations namely:-

1. ***Ekerubo DOK Primary School 1/1 with 620 registered voters out of which 415 voted.***
2. ***Sirete Primary School 1/1 with 421 registered voters out of which 339 voted.***
3. ***Tombe Primary School 1/2 with 543 registered voters out of which 384 voted.***
4. ***Mosobeti DOK Primary School 1/1 with 493 registered voters out of 387 voted.***
5. ***Machururiati Primary School 1/1 with 394 registered voters out of 291 voted.***
6. ***Nyakongo DEB Primary School 1/2 with 362 registered voters out of which 292 voted.***

131. The total registered voters for the 6 polling stations are 2833 and those who voted were 2108. The statutory Forms, 35As which IEBC produced, none of the entries therein was challenged as incorrect. Forms 35A are the primary document in an election. RW1 confirmed the registered voters in aggregate for the 6 polling station to be 2833 and total cast votes in these polling station to be 2108. The Petitioner does not dispute that fact. The content of margin between the winner of the election and the candidate who came second, the difference is magnificent. That if all votes cast in the 6 polling stations in respect of the 6 SD (which were correctly captured in Forms 35A and revealed votes allocated to the respective candidates) were to be awarded to the 2<sup>nd</sup> Respondent's closest opponent, they would make no difference or even if the same were to be deducted from the votes of the winner, the difference would remain wide. There is no way these votes can make difference between the winner and the 2<sup>nd</sup> closest candidate. That notwithstanding non-availability of 6 SD Cards, would in my view not affect the results, given the primacy of Form 35A and Form 35B and the results in the same having not been challenged as incorrect by the Petitioner or by a voter or by an agent. Secondly, given that the allegation was not specifically pleaded in the petition and/or particularized, it is in my view outside the matter for consideration by the court in this petition.

132. In **Jackton Nyanungo Raguma v IEBC & 2 Others E. P. No. 3 of 2017**, Kisumu (supra) Hon. Justice D.S. Majanja, J. held thus:-

***“[43] At the end of the day, the failure to record the results of the 5 polling stations within Kisumu East Constituency on Form 37B and Form 37C would not in any way affect the results as the petitioner was the winner of the election even assuming that the petitioner would have garnered all the votes in those stations. Applying the provisions of section 83 of the Act, I find that these irregularities would not have affected the ultimate result given the margin of votes and the fact that the irregularity occurred in only 5 out of over 1000 polling stations in the County.”***

133. In view of the above and at the end of the exercise, I find that failure to avail the 6 SD Cards and the results in respect of the 6 polling stations having been taken into account from Forms 35A which were available, in counting, tabulating and collating, the results of all the respective candidates at Kitutu Masaba Constituency, that failure did not in any way affect the result and further the minimal postings errors that occurred at the constituency Tallying Centre, when posting results from Forms 35A to 35B in respect of the 6 polling stations, as the 2<sup>nd</sup> Respondent was the winner of election, even assuming the 2<sup>nd</sup> closest candidate to the 2<sup>nd</sup> Respondent would have garnered all the votes in respect of the polling stations in the 6 missing 6 SD cards, the difference between the winner and runner-up will remain wide. Applying the provisions of **Section 83 of the Elections Act**, I find that the irregularities would not affect the ultimate results given the margin of votes and the fact the irregularities occurred in only 6 out of 187 polling stations in Kitutu Masaba Constituency.

**(e) Voting outside the official time:**

134. PW1, while giving evidence arising out of access of information from the KIEMS Kits, he stated that he noted that voting in Kitutu Masaba Constituency started before the official time and extended beyond the closing time. He urged under Regulation 66 of the Elections (General) Regulations, 2012 voting is required to commence at 6.00 a.m. and close at 5.00 p.m. **Regulation 66 of the Elections (General) Regulations 2012** Provides:-

*“(1) Subject to regulation 64, voting shall commence at 6 O’clock in the morning and end at 5 O’clock in the afternoon on the polling day.*

*“(2) Notwithstanding sub-regulation (1), a person who is on a queue for the purposes of voting before 5 O’clock in the afternoon shall be allowed to vote despite the fact that the voting time may extend to after 5 O’clock.*

*“(3) The voting by Kenyan citizens residing outside Kenya shall be carried out during the Kenyan time specified in sub-regulation (1).”*

135. PW1, testified that Matangi DOK Primary School Polling Stations opened at 03:03:32 a.m. voting started at 03:10:42 a.m. and a total number of 85 voters were identified and voted by 6.00 a.m. At Kebirigo DEB Primary Polling Station 1/1 opened at 03:02:44 a.m. voting started at 03:05:21 and total of 64 voters were identified and voted by 6.00 a.m. On cross-examination PW1 testified the KIEMS Kits, document has two timings and that he had not filed an affidavit raising the issue of opening of the polling stations. That the time between France and Kenya is 1 – 2 hours difference and keeps changing, but he does not know what was the time difference between Kenya and France on 8.8.2017, adding he does not have an explanation why KIEMS Kits were showing 3.00 a.m. and 6.00 a.m. at the same time and that as he had not deponed on the issue of timing the 2<sup>nd</sup> Respondent could not have responded to the same.

136. RW1, testified that, on the allegation, the stations opened before official time, that was not true, as all polling stations opened at 6.00 a.m. and closed at 5.00 p.m. He stated the KIEMS Kits had two different times at the opening and closing, one for France and another for Kenya as per its configuration. He stated the difference of time between Kenya and France is 3 hours hence 3.00 a.m. in France would be 6.00 a.m. in Kenya and that 17 p.m. in France, in Kenya is 5.00 p.m. He stated voting was not conducted before 6.00 a.m. nor after 5.00 p.m.

137. The Petitioner took issue with only two polling stations, out of 187 polling stations on the time of voting, urging that voting started at 3.00 a.m. and continued upto 8.00 p.m. RW1 in his evidence explained the KIEMS Kits had two timings, which PW1 had also agreed on, but could not explain anything regarding the timings. RW1 explained that the two timings at the opening and closing were due to a configuration in which the system had been configured according to the French time. The KIEMS Kits on opening would show France and Kenya time at same time and so was upon closing. The Petitioner had not pleaded this issue in his petition nor deponed on it in his affidavit nor that of PW1. Had that been done IEBC would have been in a better position to respond on the issue and may be send an IT expert to give evidence. This non-explanation by an IT expert cannot be taken against the Respondents as this ground was not pleaded and secondly I am not satisfied that the Petitioner proved that voting started before time and went beyond the official time. No single voter or agent or candidate gave evidence on when voting in Kitutu Masaba constituency started and ended. The Petitioner did not check from the polling station Diary (PSD) which records the opening time and closing time, while being witnessed by agents and who are required to sign. I have considered the evidence of PW1 and RW1 and I find the explanation given by RW1 to be plausible and find the Petitioner failed to prove that voting in Kitutu Masaba started before 6.00 a.m. and continued beyond 5.00 p.m. This allegation fails.

**(f) Admissibility of the Report arising from Scrutiny of SD card provided by the 1<sup>st</sup> Respondent:**

138. The Petitioner by Notice of Motion dated 5<sup>th</sup> October 2017 applied for several orders and after hearing of the application the Court granted prayer (c) thereto being as follows:-

*“(c) The Petitioner to have access to information stored in KIEMS kits before commencement of the hearing of the Petition. IEBC to present printouts and SD cards to the Deputy Registrar of this Court before commencement of the hearing of this case.”*

139. The Court directed the Petitioner was entitled to refer to the document in conducting the evidence by PW1, Dr. Akala, but the Court did not in so directing allow the Petitioner to use the document to introduce new evidence or matters not pleaded. The reference, if any would have been limited to the pleadings and only on matters pleaded. That as far as Petitioner thought he would amend his pleadings or introduce new matters to the Petition by virtue of having been granted access of information by the Court was and is contrary to the law. The Court therefore do not agree with the Petitioner’s submissions, that the Statutory Forms, and CD and its contents which were not relevant to the pleadings became relevant and admissible, by virtue of the court’s ruling granting access to the information, otherwise if that would have been the case, any party would derail proceedings by bringing forth all sorts of unpleaded evidence and use the Court for the purpose of fishing expedition.

**(g) Locus standi of the Petitioner:**

140. This issue the Court recalls was not raised on the Petitioner’s locus standi in this petition but his failure to give evidence, however as the Petitioner has raised the same, the Court is obliged to deal with the same, noting none of the respondents Counsel submitted on the same. The Petitioner’s Counsel urges under the **Constitution of Kenya 2010, the Elections Act and Elections (Parliamentary and County Elections) Petitions Rules, 2017**, any person may file Petition challenging the election of a Member of National Assembly. He further urges **Article 87 of the Constitution** do not bar anyone from filing a petition nor doesn’t place any Conditions for a petitioner wishing to file a petition.

141. He referred to a recent decision in an election petition in **David K Ole Nkedianye and 2 Others v Joseph Jama Ole Lenku & 4**

Others (2017) eKLR Hon Justice N.N. Onyiego, J. defined a Petitioner thus:

*“[22]. The key question is, who is a Petitioner? Rule 2 defines a Petitioner a person who files a petition to the election court under the constitution or under the Act in accordance with these rules. The word Petitioner, is derived from the word petition, which under section 2 of the elections Act means “an application to the election court under the constitution or under this Act.” Who then is eligible, to petition or be substituted as Petitioner in an election petition as contemplated under rule 24? Must one be a registered voter in an electoral area affected by the particular petition? To my knowledge, am not aware of any particular provision requiring one to have been registered or actually voted in a particular electoral area in an election exercise in order to qualify as a Petitioner.*

*[23]. The relevant law in the circumstances, is the constitution under articles 22 and 258 of the constitution which allows anybody to file public interest litigation either on his own or on behalf of others in case of a denial, violation or infringement of, or threat to a right or fundamental freedom in the bill of rights. Could anybody from outside Kajiado County who is not a registered voter or did not vote in Kajiado County, apply to take over the petition in case of a withdrawal by the Petitioner? The law is silent on the same issue thus leaving it open for any Kenyan adult of sound mind or who has capacity to sue to institute a suit for redress on any wrong committed in relation to an election exercise hence a Petitioner. If the constitution or parliament intended to limit election petitions to applicant(s) who are registered voters only in as given electoral area, it would have expressly stated so.”*

142. In view of the provisions of the elections laws and the constitution of Kenya it cannot purely be said there are no conditions set for anyone to be a Petitioner in an election petition as **Article 22 and 258** of the constitution is construed in a manner that implies the person who can file a petition should have capacity to act on his own, thus he/she must be a Kenyan adult of sound mind. The law is silent as to whether one should be registered voter of a particular electoral area or a Resident of a particular electoral area to which he may wish to file a petition. That if the Parliament intended to limit filing of election petition to the residents of an electoral area or where one is a resident or to the registered voters of an electoral area, nothing would have stopped parliament from stating so in the relevant Election laws. The Petitioner in this petition being an adult Kenyan citizen and a registered voter of Kitutu Masaba Constituency is more than qualified to have filed this petition. I therefore find and hold that he has *locus standi* to file this petition. As this issue was only raised by the Petitioner, I will leave the same at that point.

**(h) Whether the 2<sup>nd</sup> Respondent was validly elected as a Member of National Assembly Kitutu Masaba Constituency?**

143. The Petitioner at paragraph 38(h) pauses the question, whether the 2<sup>nd</sup> Respondent was validly declared as the winner of the election for Kitutu Masaba Constituency Parliamentary position and under, prayer (a) seeks a declaration that the 2<sup>nd</sup> Respondent was not validly elected to the position of Kitutu Masaba Constituency for Member of National Assembly and seeks the declaration that the results for the said position is invalid, null and void.

144. In view of the Court earlier findings, and without going to the details of my findings on the allegations I have to point out that the Petitioner who was a voter and who did not offer himself to give evidence and who offered no reason for such failure, in his pleadings admitted that he was not a candidate for position of Member of Parliament for Kitutu Masaba during the General Election held on the 8<sup>th</sup> August, 2017. That as a voter he had no agents and as he was not representing a particular party he had no party agents. He did not give evidence, he could not say whether or not any party agent or candidate agents or any of the unsuccessful candidates raised any complaint regarding the aforesaid elections. RW1 the Returning Officer for Kitutu Masaba Constituency, testified that after counting, tabulating and collating and tallying the results, the 2<sup>nd</sup> Respondent was confirmed to have garnered the highest votes, he proceeded to announce the results and declared him the winner after what he had described as a free, fair, transparent, accountable and credible election. He went on to state that none of the other unsuccessful candidates raised any complaint with him or the IEBC after the elections.

145. The evidence placed before the court by the petitioner and his witness does not support the petitioner’s allegation that the 2<sup>nd</sup> Respondent was not validly elected to the position of Kitutu Masaba Constituency as a Member of National Assembly and that the declaration of results was invalid, null and void. The Petitioner’s evidence through his own witness PW1, neither supports nor discloses such irregularities or illegalities on part of the IEBC, the 1<sup>st</sup> Respondent, as would render its conduct of the elections in Kitutu Masaba incredible.

146. In coming to my conclusion that the 2<sup>nd</sup> Respondent was validly elected as a Member of Parliament for Kitutu Masaba, I would refer to the following authorities:-

In **Moses Masika Wetang’ula v Musikari Nazi Kombo (2014) eKLR**, Hon Justice Maraga, J. as he then was, stated:

*“This was a reiteration of the globally established principle that the validity and integrity of any election is gauged upon the conduct of that election being in substantial compliance with the electoral law of that election. Lord Denning succinctly stated this principle in *Morgan v Simpson* [1974]3 All ER 722 at p. 728 thus; collating all these cases together, I suggest that the law can be stated in these propositions; If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result is affected, or not .... If the election is so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls ... But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless, if there was a breach of the rules or a mistake at the polls and it did affect the result, then the result is vitiated.”*

147. In **Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others (2014) eKLR**, the Supreme Court of Kenya held:-

*“The Election Act, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections ...*

**If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not be invalidated only on grounds of irregularities. Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election ... Where an election is conducted in such a manner as demonstrably violates the principles of the Constitution and the law, such an election stands to be invalidated.** [underlining mine].

148. In the case of **John Fitch v Tom Stephenson & 3 Others, QBD (2018) H.C. 501**, (as cited by Gatembu J.A.) In **Nichola Kiptoo Arap Korir Salat v IEBC & 7 Others Civil Appeal No. 228 of 2013 (2014) eKLR**, it was held that:-

**“ ..... the Courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of an election was unaffected by those breaches. This is because where possible, the Courts seek to give effect to the will of the people”**

149. In the instant petition, the 2<sup>nd</sup> Petitioner gave evidence on oath and denied all the allegations of irregularities and mistakes attributed to him. The 1<sup>st</sup> Respondent however admitted to some irregularities and mistakes committed by IEBC polling clerks and/or staff during the tallying at the Constituency Tallying Centre, attributing them to human errors as they had worked without break, meals and sleep for about 60 hours. In my view, I do not think that such irregularities and mistakes, which in the petition were minimal or of not such great magnitude, substantially or materially affected the result, in view of the fact that the Petitioner himself made allegation and failed to prove any of them, by failing and/or declining to give evidence, offer himself for cross-examination, to enable the veracity of his evidence gauged and prove the allegations. There is no weight that this court can attach to such allegations which remain as per affidavit though forming part of record. The Petitioner’s witness, PW1 in his evidence he deviated from the contents of his own affidavit and gave evidence on unpleaded and unparticularized allegations in the petition to warrant a finding by this court, that the election for Member of National Assembly Kitutu Masaba was not conducted in accordance with the provisions of the constitutions, the Elections Act and the Rules and Regulations made thereunder. In absence of such evidence, the Petitioner’s case has no basis to warrant the orders sought to be granted.

150. Did the Petitioner in this petition prove either any of the minor or substantive irregularities? The 1<sup>st</sup> Respondent admitted there were only 6 (six) minor administrative and procedural irregularities arising out of misposting of the results at the Constituency Tallying Centre from Form 35A to Form 35B. I dealt with the scenario arising from the said misposting earlier on in this judgment, in which I noted and held these errors, by or of themselves without any cogent evidence to the contrary from the petitioner pointing to specific polling stations, showing contravention of the Constitution and electoral laws, are not by themselves sufficient to invalidate the election of the 2<sup>nd</sup> Respondent as a Member of Parliament for Kitutu Masaba Constituency.

#### **Conclusion:**

151. Having considered, the pleadings and all the evidence placed on record, rival submissions by Counsel and authorities relied upon by the parties in support of their respective position, and the analysis I have come to, I find that the Petitioner has miserably failed to prove that there was massive, systemic, systematic and willful non-compliance with the Constitution and electoral laws by the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents. The Petitioner has failed to prove all the allegations he set out in his petition against the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents. He has further failed to prove that the 2<sup>nd</sup> Respondent was not validly elected as a Member of National Assembly for Kitutu Masaba Constituency during the elections held on 8<sup>th</sup> August 2017.

152. I am satisfied with the evidence on record that the 2<sup>nd</sup> Respondent won the elections by over 14000 votes over his closest rival. I accordingly, find the petition to be unmeritorious. The Petitioner under prayer (e) is seeking an order that, the 2<sup>nd</sup> Respondent do organize and conduct a fresh Election, in strict conformity with the Constitution and the Elections Act, 2011. The 2<sup>nd</sup> Respondent is not the Chairman of IEBC nor IEBC to organize and conduct a fresh election for a Member of National Assembly for Kitutu Masaba Constituency. This prayer displays Counsel lack of alertness, seriousness and commitment in drafting this petition. Otherwise such prayer, should not have been included among the prayers the Counsel sought had the Counsel handled the matter with the seriousness with which it deserves. I need not say much more on that prayer.

153. Accordingly Prayers (a), (b), (c), (d), (e) and (f) are hereby dismissed.

#### **Costs:**

154. On costs **Section 84 of the Elections Act** provides that **“An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.”** Costs, therefore follow the event and on the court jurisdiction to determine such costs, **Rule 30 (1) (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** provides as follows:

**“30. (1) The election court may, at the conclusion of a petition, make an order specifying -**

**(a) the total amount of costs payable;**

**(b) the maximum amount of costs payable;**

**(c) who shall pay the costs under paragraph (a) or (b);**

**and**

*(d) the person to whom the costs payable under paragraphs (a) and (b) shall be paid.*

*(2) When making an order under sub-rule (1), the election court may -*

*(a) disallow any prayer for costs which may, in the opinion of the election court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the petitioner or the respondent; and*

*(b) impose the burden of payment on the party who may have caused an unnecessary expense, whether that party is successful or not, in order to discourage any such expense.*

155. At the final submissions stage, I directed each counsel to submit on costs. The Petitioner's Counsel made no suggestion on a figure on costs. The Counsel for the 1<sup>st</sup> Respondent suggested KShs.3,000,000/= and lastly the Counsel for the 2<sup>nd</sup> Respondent suggested KShs.5,000,000/= for lead Counsel and KShs.2,000,000/= for every other Counsel.

156. In awarding costs, the Court should be guided by a number of issues, which include the complexity of the matter, public interest and time taken in preparing and hearing the matter. The Court should make an award which should be a fair estimate of costs and which would fairly and adequately compensate for the work done, but should at the same time, not award costs which are exorbitantly high to unjustifiably enrich parties or cause unwarranted injury to individual or public purse and hence undermine the principle of access to justice as enshrined under **Article 48 of the Constitution of Kenya 2010**.

157. I have considered that Petition and note that it was not complex as the issue were fairly simple and straight forward as manifested by the pleadings and submissions, as well as authorities tendered, the number of witnesses and the nature of the evidence tendered. In capping the costs, I have considered all that, as well as time, spent on research, preparation of the pleading, which are not bulkish, applications made, submissions, preparation of witnesses and the actual hearing of the case and the parties respective proposals. I have also taken time to consider several current authorities. In **Ahmed Abdullahi Mohamed and "Another V. Hon. Mohamed Abdi Mohamed & 2 Others H.E.P. No. 14 of 2017 (2018) eKLR**, the Court ordered the Respondents to jointly and severally pay the Petitioner's costs on instruction fees capped at KShs 2 million. In **Jackton Nyanungo Raguma v IEBC and 2 Others H.E.P. No. 3 of 2017 (2018) eKLR**, the Court ordered Petitioner to pay costs capped on instruction fees for 1<sup>st</sup> and 2<sup>nd</sup> Respondent at KShs.2,500,000/= and for 3<sup>rd</sup> Respondent capped at KShs.2,500,000/=. In **Hamzah Musuri Keronga v. IEBC & 3 Others H.E.P No. 11 of 2017 [2017] eKLR**, the Court capped costs for each set of the Respondent at KShs.3,000,000/=.

158. Taking all the factors I have outlined above into account, I shall cap the instructions fees as follows:-

**(i) KShs.2,500,000/= for the 1<sup>st</sup> Respondent**

**(ii) KShs.2,500,000/= for the 2<sup>nd</sup> Respondent.**

160. Finally, before I make final declaration in this matter, I have to comment on the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection, filed on 1<sup>st</sup> December 2017, immediately after the 2<sup>nd</sup> Respondent closed his case and case was set down for submissions. That at the time of filing the Preliminary Objection all evidence from all parties was already on record. The matter was awaiting parties filing of the final submissions, as there was nothing else pending hearing. A Preliminary Objection on my understanding can be filed at anytime before, during hearing and before close of the parties respective case. The Preliminary Objection filed by the 2<sup>nd</sup> Respondent in my view was and is misplaced and should not have been filed after the 2<sup>nd</sup> Respondent who was the final witness had closed his case. The 2<sup>nd</sup> Respondent did not file any written submission on the same nor did the 1<sup>st</sup> Respondent save the Petitioner. The issues raised in the 2<sup>nd</sup> Respondent's Preliminary Objection are issues which should have and were indeed raised in the final submissions and have been considered. Having said that much, I find and hold the Preliminary Objection ought not to have been filed at all, after the close of the petition, for there was no room for filing Preliminary Objection after the close of the case.

**Disposition:-**

**161. The final orders are therefore as follows:-**

**(a) The Petition be and is hereby dismissed.**

**(b) Hon. John Shadrack Mose, the 2<sup>nd</sup> Respondent in this petition was validly elected and gazetted as the Member of National Assembly for Kitutu Masaba Constituency.**

**(c) The election for a Member of National Assembly on 8<sup>th</sup> August, 2017 in Kitutu Masaba was constitutionally and validly held.**

**(d) The Respondents are awarded costs on the following terms:-**

**(i) Instruction, fees for the 1<sup>st</sup> Respondent are capped at KShs.2,500,000/=.**

**(ii) Instruction fees for the 2<sup>nd</sup> Respondent are capped at KShs.2,500,000/=.**

*(iii) The cost shall be taxed and total costs certified by the Deputy Registrar of this Court.*

*(iv) The certified costs awarded shall be paid out of the security deposit on a pro rata basis.*

**(e) A certificate of the determination in accordance with Section 86(1) of the Elections Act 2011, shall issue to the Independent Boundaries and Electoral Commission and the speaker of the National Assembly.**

**DATED, SIGNED AND DELIVERED at NYAMIRA THIS 22<sup>nd</sup> DAY OF FEBRUARY 2018.**

**HON. J. A. MAKAU**

**JUDGE**

**Delivered in Open Court**

**In the Presence of:**

**Mr. S. B. Ligunya for Petitioner**

**Mr. Langat H/B for Mr. Lilan for the 1<sup>st</sup> Respondent**

**Mr. W. Mogaka jointly with Mobagi**

**and Mr. Omoke for the 2<sup>nd</sup> Respondent**

**C.A.:**

**Mr. Karlbean Mobisa**

**Mourine Akinyi**

**HON. J. A. MAKAU**

**JUDGE**