



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARISSA

ELECTION PETITION NO. 1 OF 2017

ELECTION FOR MEMBER OF NATIONAL

ASSEMBLY FOR WAJIR EAST CONSTITUENCY

IN THE MATTER OF ARTICLES 1, 2, 38, 81, 84, 87 AND

165 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 3 AND 30(2) OF THE ELECTIONS ACT, 2011

AND

IN THE MATTER OF SECTIONS 10, 11, 13 AND 20(2)

OF THE ELECTIONS OFFENCE ACT 2016

AND

IN THE MATTER OF SECTIONS 4, 13 AND 27 OF THE INDEPENDENT

ELECTORAL AND BOUNDARIES COMMISSION ACT, 2011

AND

IN THE MATTER OF THE ELECTIONS (GENERAL REGULATIONS) 2012

AND

IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND

COUNTY ELECTIONS PETITION RULES, 2017

BETWEEN

MOHAMED MOHAMUD SHEIKH.....PETITIONER

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

ABDIKADIR SHEIKH ABDI.....2ND RESPONDENT

JUDGMENT

INTRODUCTION

1. This petition arose out of the outcome of the 2nd General Election, after the promulgation of the 2010 Constitution, held on 8th August, 2017, in which the following candidates obtained the votes indicated herein:-

<u>NAME</u>	<u>PARTY</u>	<u>VOTES</u>
AHMED MUHAMED ADAN	PNU	2744
RASHID KASSIM AMIN	WDMK	7815
BISHIR OMAR HUSSEIN	PDR	328
ALI MAALIM MOHAMED	MCCP	172
ABASS SHEIKH MOHAMMED	JUBILEE	7100
MOHAMED ALI MULSAL	ODM	1442

2. From the said result, Hon. Rashid Kassim Amin of WIPER DEMOCRATIC MOVEMENT – KENYA was declared the winner by the 2nd Respondent, being the Returning Officer for WAJIR EAST CONSTITUENCY and was duly gazetted as such by the 1st Respondent.

3. Being aggrieved by the said action, the Petitioner filed this Petition on 4th September, 2017, in which he described himself as a registered voter at Baraza park polling station and the lead Agent to ABBAS SHEIKH MUHAMED, then a candidate on a Jubilee party ticket and the runner up.

4. In the said Petition, the Petitioner's contention was that the National Assembly Election for Wajir East Constituency was marred with a multiplicity of electoral malpractices, violation of the Elections Act 2011 and Elections Amendment 2016, Elections (General) Regulations Act 2012, Election Offences Act 2016 or was not in accordance with the principles of common law. Commission of a variety of electoral offences and illegal practices the particulars of which were given as:-

a) Voter intimidation and violence

The 3rd Respondent through his agents impeded and or prevented his candidate of choice, representatives and party agents from gaining access to areas within Wajir East Constituency for purposes of canvassing, were denied access to polling stations in order to verify the transparency, validity and process of voting on Election Day.

- Petitioners (sic) voters were turned away and could not vote at various polling stations.

- Petitioners (sic) voters were threatened with violence and beaten up by goons hired by the 3rd Respondent.

b) Tallying

- The Returning Officer violated Regulation 76 of the Regulations by erroneously tallying the votes in favour of the 3rd Respondent contrary to Section 39(1A) of Elections Act.

- The Returning Officer violated the principles of transparency and accountability in tallying of votes and so grossly exaggerated the votes for the 3rd Respondent so as to represent a wholly erroneous tally in favour of the 3rd Respondent.

c) Electoral Offences, irregularities and malpractices

- The statutory documents and forms which the Presiding Officers and Returning Officer were supposed to keep were altered and number of votes changed without countersigning.

- That neither were the Agents of Abbas nor the Returning Officer availed Forms 35A for RIBA, DASHENGE EAST, WAJIR BOR, HODHAN PRIMARY SCHOOL and LIVESTOCK MARKET and results were announced without the Forms 35A.

5. It was therefore contended that the said election was in violation of the principles of a free, fair, credible and verifiable election and electoral process and in breach of the provisions of Articles 38, 81 and 86 of the Constitution with the effect that the candidate declared as the winner did not reflect the will of the voters in Wajir East Constituency. The Petitioner therefore sought the following orders:-

- a) A declaration that the 3rd Respondent was not validly elected.
- b) A declaration that Abass Sheikh Mohamed of Jubilee party be declared as the validly elected member of the National Assembly for Wajir East Constituency.
- c) An order for scrutiny, recount and re-tallying for the votes cast and/or in favour of all the candidates who contested for Wajir East Constituency during the 8th August, 2017, general election.
- d) An order that a fresh election be held.
- e) The 3rd Respondent has committed serious election offences and he be barred from participating in any election for a period of five (5) years or more.
- f) Cost of the suit.

6. The Petition was supported by affidavits sworn by the Petitioner, Mr. Abass Sheikh Mohamed who was his candidate of choice, Mr. Yussuf Mohammed Abdullahi, Rahoy Abdi Jimale and Abdi Billow Ibrahim.

7. On the 9th day of September, 2017, the 1st and 2nd Respondents filed their responses to the Petition in which they denied all the grounds set therein and supported the same with annexed replying affidavits and on the 20th day of September, 2017, the 3rd Respondent also filed his response to the Petition together with affidavits as required in law.

8. At the Pre-trial Conference, the court granted the following orders to the Petitioner:-

- a) Access to read and copy the data in the KIEMS Kits used in the General Election in the presence of all the parties under the supervision of the Returning Officer.
- b) The following issues were agreed upon for determination by the court:-
 - i) Whether the Election of Member of the National Assembly for Wajir East Constituency held on 8th August, 2017, was conducted in compliance with the Constitution and other written laws.
 - ii) Whether the result declared on 9th August, 2017, represented the will of the voters from Wajir East Constituency.
 - iii) Whether the 3rd Respondent was validly declared the winner of the seat for the Member of the National Assembly for Wajir East Constituency.
 - iv) Whether there should be scrutiny and or recount of all the votes cast in the entire Wajir East Constituency.
 - v) Whether there is sufficient evidence to invalidate the election of the 3rd Respondent as the Member of the National Assembly for Wajir East Constituency.
 - vi) Whether there is any party or person that committed any electoral malpractices or offences.
 - vii) Who shall bear the cost of the Petition.

9. In the course of the Petition and in realization of the order of the court herein on the reading of the SD cards from the KIEMS Kits, the parties proceeded with the said reading before the Deputy Registrar of this court and each party filed their respective findings by way of affidavits sworn by BILDAD NAMAWA URANDU for the Petitioner, MARTIN WACHIRA NYAGAH for the 1st and 2nd Respondents and JAMAA M. ABDILLE for the 3rd Respondent.

10. By an Application dated 6th December, 2017, the Petitioner sought an order for scrutiny, recount and re-tally of the votes cast and or in favour of all the candidates who contested for Wajir East Constituency seat of Member of National Assembly and on 23rd January, 2018, the court in its ruling dismissed that said Application thereby disposing of the issue of scrutiny, recount and re-tally of the votes.

HEARING

11. At the hearing herein, the Petitioner called a total of five (5) witnesses in support of his case including ABBAS SHEIKH MOHAMED, his candidates of choice, while the 1st and 2nd Respondents called four (4) and the 3rd Respondent nine (9), whose evidence will be analyzed while determining the agreed issues herein.

SUBMISSIONS

12. At the close of the Respondents' case, the parties filed written submissions which were highlighted in court and where on behalf of the Petitioner it was submitted that pursuant to **Section 83** of the **Elections Act 2011**, where an election is not conducted in accordance with the

Constitution and the written laws then that Election must be invalidated notwithstanding the fact that the results may not be affected as per the holding in **RAILA AMOLO ODINGA AND ANOTHER VS. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND 2 OTHERS, PETITION NO. 1 OF 2017**.

13. It was submitted that the burden of proof in election petitions is higher than a balance of probabilities but lower than beyond reasonable doubt save for where there are allegations of criminal or quasi criminal nature where proof ought to be beyond reasonable doubt as per **RAILA ODINGA & ANOTHER VS. IEBC & OTHERS, ELECTION PETITION NO. 5 OF 2013**. It was stated further that whereas the legal burden was upon the Petitioner, evidentiary burden of proof keeps on shifting. It was therefore submitted that the Petition had succeeded in proving all the allegations contained in the Petition.

14. It was submitted that the 1st and 2nd Respondents failed to present vital witnesses for cross examination so that the veracity of their statements filed in court could be tested. It was therefore submitted that the evidence of those uncalled witnesses is not to be considered by the court as it is likely to prejudice the adverse parties and should therefore be rejected.

15. It was further submitted that the technology used during the election of August, 2017, in compliance with Section 4(m) Regulation 3 of the Election (Technology) Regulations 2017, Regulation 29 Section 44 (3) and Article 86(a) of the Constitution of Kenya 2010, did not work and therefore did not fulfill its purpose which was to enhance integrity, efficiency and transparency of the election process and therefore the election did not meet the constitutional principles, so the court was invited to invalidate the declaration of the 3rd Respondent as the winner with costs to the Petitioner.

16. On behalf of the 1st and 2nd Respondents, it was submitted that the Petitioner did not succeed in discharging his evidentiary burden and or illustrate how there was an effect on the outcome of the election. It was submitted that the result of an election is only affected when the cumulative effect of the irregularities reverses it. The case of **JOHN KIARIE WAWERU VS. BETH WAMBUI MUGO & ANOTHER [2008] eKLR** was submitted.

17. It was submitted that the Petitioner's case ought to be confirmed within the four corners of the Petition and any evidence that falls outside those confined must be disregarded by the court. It was stated further that the election was fundamentally conducted in accordance with the provisions of the Constitution of Kenya and all other written provisions of the law governing elections and that the evidence availed was not sufficient to invalidate the election.

18. On behalf of the 3rd Respondent, it was submitted that the Petitioner had to prove that the conduct substantially violated the principles laid down in the Constitution and written law which he failed to do. It was stated that the court is enjoined as its primary objection of the election law, to respect and uphold the will of the people expressed through the vote where breaches of election law does not affect the result.

19. It was submitted that the cardinal principle of law is that parties in litigation are bound by their pleadings and to prove the allegations contained therein by adducing cogent evidence from which the cases of **ARIKALA NASARA PEDDY VS. VENKATA RAM PEDDY & ANOTHER** and **JACKTON NYANUNGO RANGUMA VS. IEBC & 2 OTHERS [2018] eKLR**, were submitted.

20. It was submitted that the Petitioner had misconstrued the principle of the shifting evidential burden which only shift to the Respondents upon the Petitioner fully discharging his initial burden to the satisfaction of the court for which the cases of **BRADY (INSPECTOR OF TAXES) VS. GROUP LOTUS CAR CLOS PLC & ANOTHER [1987] 3 ALLER 1050**, **AHMED ABDULLAH MOHAMAD & ANOTHER VS. MOHAMED ABDI MUHAMED & 2 OTHERS [2018] eKLR**, were submitted.

21. On the issue of adverse inference due to the 1st Respondent's failure to include four (4) Form 35A's in its bundle of documents, it was submitted that the Petitioner had not laid any basis for the same and that the issue of missing forms was cured by their production in court and in support of this submission, reference was placed on the case of **PAUL MWANGI GATHONGO VS. REPUBLIC [2015] eKLR**.

22. On the issue of technology used during election, it was submitted that those issues had been raised in the Application for scrutiny which was dismissed by the court by 23rd January, 2018, and that the election results in favour of each candidate as indicated in Form 35B were similar and consistent with the results in the KIEMS Kit for each candidate in all polling stations where the SD Cards were read.

23. It was further submitted that though there were few Form 35A's with errors including failure to stamp the forms and lack of statutory comments, those do not perse vitrate or invalidate the form and cannot by itself be a basis for nullification of the results. It was submitted that the two (2) forms which were not signed by the Presiding Officers and Deputy Presiding Officers had been signed by the various political party agents and that even if the court was to exclude the said two (2) forms, it could not affect the result announced. The court was therefore urged to dismiss the Petition with costs.

ANALYSIS AND DETERMINATION

24. Before going into a detailed analysis and determination of the issues set by parties for court's determination, it is necessary to at this stage to state the law as regards elections. Elections in Kenya are highly contested and have been the subject of reforms and legislations so as to enable the people of Kenya achieve and attain electoral justice. So central has this been to the extent that Article 86 of the Constitution lays down the principles to safeguard free and fair election which requires IEBC to ensure that:-

- (i) The system of voting is simple, accurate, verifiable, secure, accountable and transparent.
- (ii) The votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station.
- (iii) The results from the polling stations are openly and accurately collated and promptly announced by the returning officer.

(iv) Appropriate structures and mechanisms to eliminate electoral malpractice are put in place including the safekeeping of election material. See **Balancing the Scales of Electoral Justice Resolving Disputes from the 2013 Election in Kenya and the Emerging Jurisprudence**, page 91.

25. These guidelines are captured in Article 86 of the Constitution of Kenya 2010 in a mandatory term, while Article 81 gives the principles for electoral system which shall comply with the following:-

- a) Freedom of citizens to exercise their political rights under Article 38.
- b) Not more than two-thirds of the members of elective public bodies shall be of the same gender.
- c) Fair representation of persons with disabilities.
- d) Universal suffrage based on the aspirations for fair representation and equality of vote and
- e) Free and fair election 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.

26. These constitutional principles are actualized in the Elections Act and the regulations enacted thereunder with the overriding objective of the Act being to functionalize and promote the rights to vote and as stated by the Supreme Court in **MOSES MASIKA WETANGULA VS. MUSIKARI NAZI KOMBO & 2 OTHERS, SUPREME COURT NO. 12 OF 2014**.

“[112] This requires a broad and liberal interpretation of the Act so as to provide the citizens with every opportunity to vote and to resolve any dispute emanating from the electioneering process. The primary duty is to give effect to the will of the electorate and consequently the court is to investigate the nature and extent of any election offence alleged in an election petition. Accordingly, the happening that touch on the due conduct of the election process come as a proper item of agenda in the task of an election court” (Emphasis added).

27. Once an election has been conducted, Article 87 of the Constitution provides that Parliament shall enact legislation to establish mechanisms for timely settlement of election dispute which must be filed within twenty eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission which must be determined within a period of six months as per the Elections Act.

28. Section 83 of the Elections Act provides that:-

“No election shall be declared to be void by reason of non-compliance with any written law relating to the election if it appears that the elections 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 elections.”

29. The correct interpretation of the above section was given by the Supreme Court of Kenya in the case of **RAILA AMOLO ODINGA & ANOTHER VS. INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS PETITION NO. 1 OF 2017** as follows:-

“[211] In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, the Petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a Petitioner who is able to prove that the conduct of the election substantially violated the principles laid down in our constitution as well as other written law on election, will on that ground alone void election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our constitution as well as other written law on election, it was fraught with irregularities or illegalities that affected the results of the election.

[121] Having analyzed the wording of Section 83 of the Election Act bearing in mind its legislative history in Kenya and the genesis from the Ballot Act and also in light of the need to keep in tune with Kenya’s transformative constitution, it is clear to us that the correct interpretation of the section is one that ensures that elections are a true reflection of the will of the Kenyan people, such election must be one that meets the constitutional standard. An election such as the one at hand, has to be one that is both quantitatively and qualitatively in accordance with the constitution..... In addition the election which gives rise to this result must be held in accordance with the principles of free and fair elections which are by secret ballot, free from intimidation, improper influence or corruption, administered by an independent body in an impartial, neutral, efficient, accurate and accountable manner as stipulated in Article 81. Besides the principle in the constitution which we have enumerated that govern

election, Section 83 of the Elections Act require that election be “conducted in accordance with the principles laid down in that written law”. The most important written law on election is of course the Elections Act itself....” (Emphasis added)

30. The position was adopted with approval by Justice Majanja in **JACKTON NYANUNGO RANGUMA VS. IEBC & 2 OTHERS [2017] eKLR**.

“23. What the Supreme Court recognized is that an election is a process where mistakes will be made and malpractices may occur but in order to succeed in annulling the election, the petition must establish either that there was non-compliance with the constitution and the law governing election or that election malpractices and irregularities that took place were of such magnitude that they substantially and materially affected the results of the election.”

31. The other issue that is now well settled is the burden and standard of proof in an election petition which the Petitioner and the Respondents are all in agreement with, which was set up in the **RAILA ODINGA & OTHERS VS. IEBC & 3 OTHERS, SCK PETITION NO. 5 OF 2013 [2013]** and reinstated by Majanja J in **JACKTON NYANUNGO RANGUMA (supra)**

15. The Supreme Court held that the Petitioner bears the burden of proof. It observed that:

[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 be 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.

16. As regards the standard of proof, the court went further and held that:-

[203] The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond- reasonable-doubt - save that this would not affect the normal standards where criminal charges linked to an election, are in question.

17. Related to the burden of proof is that fact that the petitioner is bound to prove the case it has pleaded. A petitioner is not permitted to make a case outside the pleadings and his affidavits and testimony must be consistent with and support the case pleaded. In RAILA AMOLO ODINGA & ANOTHER VS. IEBC & 2 OTHERS SCK Presidential Petition No. 1 of 2017 [2017] eKLR, the supreme court quoted with approval the supreme court of India in ARIKALA NARASA REDDY VS. VENKATA RAM REDDY REDDYGARI & ANOTHER CIVIL APPEAL NOS. 5710 - 5711 of 2012 [2014] 2SCR where it stated that:-

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

32. On the issue of proof, I approve the approach given by the Supreme Court in the case of **GATIRAU PETER MUNYA VS. DICKSON MWENDE KITHINJI & OTHERS, SC PETITION NO. 23 OF 2014** thus:-

[247] Constitutional provisions are by themselves not enough. The duty bearers, be they individual voters, political parties agent, the media, IEBC, the Registrar of political parties, the constitutional commissions, the arms of the State must all invest in emancipating and protecting the votes. Once the constitution gives citizens the right, the freedom to choose and conditions created for realization of that right, it is not the business of the court to aid the indolent....

[249] It is therefore time for us to develop our election petition litigation, we must depart from the current practice in which a Petitioner pleads 30 grounds for challenging an election but only proffers cogent evidence for 3

33. Having set out the legal principles on election and being alive to the fact that the Petitioner has the burden of proof of non-compliance with the Constitution and law as to election or irregularities that substantially affects the results of the election, I will now turn to the issues set out by the parties for determination based on evidence tendered before the court.

Whether the elections were conducted in compliance with the Constitution and other written law as to elections:

34. It is not disputed that the election for Wajir East Constituency was conducted by secret ballot, the registered voters identified and casted their ballots at the polling stations which were subsequently counted at the close of the polling, results declared and transmitted to the constituency tallying centre where they were tallied, results announced and a declaration as to the winner made which the Petitioner was not satisfied with hence this Petition.

35. The Petitioner’s contention is that the results were declared in the absence of six (6) Form 35A’s which was in breach of Section 39(1A) of the Elections Act 24 of 2011, Regulation 5 of the Elections [General] Regulations Act 2012 and Article 86 of the Constitution, all which provide that the constituency Returning Officer is responsible for tallying, announcement and declaration in the prescribed form of the final results for each polling station in a constituency for election of a Member of the National Assembly and County Assembly. It was the Petitioner’s contention that the said missing forms were never produced by the 1st and 2nd Respondents in their reply to the Petition.

36. At the hearing of the Petition, it was the Petitioner’s evidence that they raised the said issue with the Returning Officer who then called

the Presiding Officers who explained that the said forms had been locked in the ballot boxes. In reply, the 2nd Respondent testified that he conducted the election in strict compliance with the Constitution and Election Rules and that at the time of declaration of the results, he had all Form 35A's which he later handed over to the 1st Respondent at the Bomas of Kenya, National Tallying Centre and was given a clearance to that effect. He testified that it was an oversight for Form 35A of Hodhan Primary School to be missing from the record.

37. It was further contended by the Petitioner that the declaration of the results were made on the basis of unsigned, unstamped and altered Form 35A's without countersigning contrary to Regulation 79 of the Elections [General] Regulations Act 2012 and that without the signing of statutory forms by the Presiding Officers, the said forms cannot be accepted in computing the final results and as such were worthless pieces of paper. It was contended that one polling station, Makoror Primary School, was shifted to Makoror Dispensary thereby disenfranchising voters contrary to Regulation 7.

38. The Petitioner further testified that there was violence and voter intimidation, triggering the throwing out of Jubilee Party agents at the polling stations and the constituency tallying centre contrary to Article 86(2) of the Constitution and Section 6 of the Elections Act.

39. It was the Petitioner's further claim that the assisted voters were misled contrary to Regulation 72 of the General Regulations and that despite high voter literacy levels in North Eastern part of Kenya, no Form 32A was produced to confirm the number of the assisted voters who according to the Petitioner were assisted by the Deputy Presiding Officers to vote and would deliberately mark the ballot paper in favour of the 3rd Respondent.

40. The Petitioner contended that there was failure of technology used during the said election contrary to Section 44(3) of the Elections Act. It was stated that the said technology was not understood by its users and in particular, it was contended that for Township Primary School, the KIEMS Kit used, during the opening of the poll, was in training mode and that there were an excess number of votes cast than individuals identified by KIEMS Kit, therefore the election cannot be said to have been verifiable, accountable and transparent. Reliance was placed on the outcome of the reading of the SD Cards as ordered by the court.

41. Finally the Petitioner stated that since the 1st and 2nd Respondents closed their case without calling some of the witnesses for cross examination, the affidavits of the said witnesses are inconsequential and devoid of probative value. The court was further invited to make an adverse inference against the 1st Respondent.

42. To support the above contention, the Petitioner in his evidence stated that he was the Chief Agent for Jubilee party at Baraza Park polling station and that he was denied access to the polling station. It was his evidence that they had agents in all the polling stations who were present at the said polling stations when the results were announced and further, that once their agents were thrown out of the polling stations, they would be attacked by goons. In cross examination he stated that he could not identify any voter who had been turned away. He further stated that the Returning Officer at the tallying centre allocated votes contrary to what was announced at the polling stations. He further stated that the Presiding Officers did not sign Forms 32A in regard to assisted voters.

43. **PW2 JIBRIL ABDULAI** stated that he was a Jubilee agent at Adult Education Centre where polling went on after the official closing hours and that he was forced to sign Form 35A and that after counting closed, he was given a form which he signed. **PW3 RAHOY ABDI JIMALE** stated that he was a mobile agent and that voters were turned away at Livestock Market and Township Primary School but he could not identify any voter who was turned away. **PW4 YUSSUF MOHAMED ABDULLAHI** stated that the majority of voters who came to vote were assisted and that ninety one (91) people voted without being identified through KIEMS Kit. It was his evidence that there was no violence at the polling station where he was stationed but that there were goons both outside and inside the tallying centre which he could not identify.

44. **PW5 ABBAS SHEIKH MOHAMED** testified that he was the Jubilee candidate and that before the release of the results, the Returning Officer requested him and the 3rd Respondent that they re-open the ballot boxes but he declined. It was his evidence that voting started late in his strongholds but declined to name those strongholds. On the change of polling stations, he stated that there were two polling stations at Makoror Primary School one for Wajir West and one for Wajir East which was moved to Makoror Dispensary about 700 meters away from where it was initially supposed to be. It was his evidence that he received a report that an independent agent had picked a ballot paper in the street and that two Somali houses had been burned during voting. In cross examination he stated that he did not have any evidence of the change of polling station at Makoror Primary School.

45. **1RW1 HASSAN ABDULLAH HUSSEIN**, the Presiding Officer for Khorof Harar polling station confirmed that there was an alteration in Form 35A which he had not countersigned and that Jubilee agent refused to sign the said form, further, there was no violence at the said polling station. **1RW2 AHMED RONE**, the Presiding Officer for Elimi Primary School stated that he did not change any figures on Form 35A and all the voters were identified through KIEMS Kit with some voters being assisted to vote but not in favour of any candidate since the candidates' agents were present. **1RW3 OMAR SHALE**, the Presiding Officer at Got Ade Primary school confirmed that voting started while the KIEMS Kit was on training mode but was able to identify votes up to the time it was rectified by the 1st Respondent's ICT officer.

46. **1RW4** and the 2nd Respondent, **ABDIKADIR SHEIKH ABDI**, the Returning Officer, testified that he announced the 3rd Respondent as the winner based on Form 35B upon receipt of all Form 35A's from sixty five (65) polling stations, including form 35A for Livestock Market 2 from the Presiding Officer **ABDI HOSMAN**. He explained that though Form 35B in respect of Wajir East was headed "Member of County Assembly", from the serial numbers he explained that it was misprinted by the printers but all had county code 008 and constituency code 034 confirming that it was in respect of Wajir East.

47. **3RW1 MOHAMED HALAL ABDULLAHI**, represented his party Wiper Democratic Movement of Kenya at the tallying centre having visited all the polling stations between 6.00 a.m. and 6.00 p.m. and stated that the election was free and fair. **3RW2 MUHAMUD ABBAS AMIN**, voted at Baraza Park Primary School and later on took up his duty as an agent at the tallying centre and did not have any knowledge of the missing KIEMS Kits. **3RW3 ADAN MUSSA WARSAME**, voted at Halane Adult Centre where voting started at 6.40 a.m. and closed at 5.40 p.m. and was present when the results were announced. **3RW4 YUSSUF UGAS DAUD**, a registered voter at Riba polling

station confirmed that he was an agent of Wiper Democratic Movement of Kenya and that there were no goons at the station when votes were counted.

48. **3RW5 AHMED JIRKE MOHAMED**, confirmed that the KIEMS Kit was on training mode from the time voting started up to 8.30 a.m. when it was rectified but was able to identify voters. **3RW6 ABDIRAHMAN BULLE**, an agent of the 3rd Respondent at Livestock Market Stream 1, confirmed that the Presiding Officer recorded all the results in Form 35A which was signed by all party agents and copies given to them.

49. The 3rd Respondent, **RASHID KASSIM AMIN**, testified (as 3RW7) that he voted at Wagberi Primary School and as a candidate, he visited twenty seven (27) out of the sixty five (65) polling stations. He stated that the elections were conducted in free and fair manner. On the missing KIEMS Kits, he stated that the OB was signed on 15/8/2017 and not during the voting. He stated that Wajir East is an urban centre and that none of the Presiding Officers and polling clerks were his relatives.

50. **3RW8 YUSSUF SABDOW MOHAMED**, was 3rd Respondent's agent at Baraza Park polling station and he confirmed that there was a technical issue with KIEMS Kit which was later on rectified and voting continued up to 7.00 p.m. He confirmed having signed Form 35A. **3RW9 IBRAHIM KHMED OSMAN**, an agent at Volunteer Primary School confirmed having signed Form 35A and that the figures stated therein were correct.

51. At this stage of my analysis, I must point out that the question is whether or not the evidence tendered on behalf of the Petitioner is sufficient even to surmount the threshold to prove that the election was not conducted in compliance with the Constitution and other written laws as to election. I have set out herein the general constitutional principles on election in Kenya and the general running thread is that the election must be fair and free to reflect the will of the voters. Justice Njoki Ndungu in her dissenting opinion in the **RAILA AMOLO ODINGA PETITION NO. 1 OF 2017**, had this to say on the issue of fair and free elections.

“58]. Despite not having a universally acceptable definition of free and fair election, there are certain common attributes to that description. They were aptly expressed by the constitutional court of South Africa in the case of KHAN & ANOTHER VS. ELECTORAL COMMISSION & ANOTHER (CCT 6415) [2015] ZACC 37 2016 (2) BCCL 157 (CC) 2016 (2) SOT 3381(CC).

34. There is no internationally accepted definition of the term free and fair election. Whether any election can be so characterized must always be assessed in context. Ultimately it involves a value judgment. The following elements can be distilled as being of fundamental importance in the conduct of free and fair election. First, every person who is entitled to vote should if possible be registered to do so. Second, no one who is not entitled to vote should be permitted to do so. Third, in so far as elections have a territorial component, as is the case with municipal elections where candidates are in the first instance elected to represent a particular ward, the registration of voters must be conducted in such a way as to ensure that only voters in that particular area (ward) are registered and permitted to vote. Fourth, the constitution protects not only the act of voting and the outcome of elections but also the right to participate in an election as a candidate and seek public office.”

52. In the old English case of **WOODWARD VS. SARSONS [1874-80] ALLER 262**, Brett J. defined parameters by which a court should be guided in voiding the result of an election at page 266 which I find useful for purposes of this judgment:-

“We are of the opinion that the true statement is that an election is to be declared void by the common law application to parliamentary electing either if it was so conducted that the tribunal which is asked to avoid it is satisfied as a matter of fact either that there was no real electing at all or that the election was not really conducted under the subsisting laws. The tribunal should be satisfied i.e. that there was no real electing by the constituency at all, if it were proved to its satisfaction that the constituency had not in fact had fair and free opportunity of electing the candidate which the majority might prefer. This could certainly be so if a majority of the electors were prevented from recording the votes effectively by general corruption or general intimidation or by being prevented from voting by want of machinery necessary for so voting as by polling stations being demolished or not opened or by other of the means of voting according to the law not being supplied or supplied with such error as to render the voting by means of them void or by fraudulent counting of votes or by false declaration of numbers by the returning officer or by such acts or mishaps.....”

53. In the Petition as stated herein, the Petitioner alleged that the results were declared without six (6) Form 35A's but this was countered by the evidence of the 2nd Respondent, the Returning Officer, who in his evidence in court gave the names of the Presiding Officers in the said disputed polling stations. There is no evidence tendered by the Petitioner to prove that the records captured in Form 35B were different from those which were announced at the said polling stations. When the parties were granted an order to access and read the SD cards wherein the data in respect to this election was stored, the reports by each of the parties herein confirms that the said Form 35A's were actually captured in the SD Cards.

54. When the court ordered the Returning Officer to produce the original Form 35A's which were pleaded to had been missing and not attached to the 1st Respondent's response to the Petition in fulfilling the overriding objectives under Rule 4 of the Elections (Parliamentary and County Elections) Petition Rules 2013, the Petitioner's response to the said forms was that they were fake or a forgery but was shy in providing evidence to support the said allegations. Having taken the evidence of the Petitioner's witnesses separately and assessing it against the evidence tendered by the Respondents, I find that the Petition failed to prove that the election results were declared in the absence of six (6) Form 35 A's and further, that the results from those six (6) polling stations were not disputed or contested by the Petitioner.

55. Though not pleaded specifically, in the course of trial, two (2) Form 35A's were identified which though signed by the agents of the candidates had not been signed by the Presiding Officers nor their deputies. In line of several authorities, the court should have ignored this line of claim but I am alive to the fact that Article 159 of the Constitution requires the court to determine issues without undue regard to procedural technicalities. It must be stated for record purposes that when the court ordered the Presiding Officers in respect of the said two (2) polling stations to offer an explanation, the Petitioner through his Advocate on record raised an objection to the admission of the said

affidavits once again defeating the overriding objectives to do justice to parties in the Petition.

56. It was therefore submitted by the Petitioner that it was in violation of Regulation 79 and as such the said forms are null and void and without any value for which the following cases were submitted in support:- **MANSON OYONGO NYAMWEYA VS. JAMES OMINGO MAGARA & OTHERS [2009] eKLR** – the result should be excluded.

RAILA AMOLO ODINGA NO. 1 OF 2017, AHMED ABDULLAHI MOHAMAD & OTHERS VS. HON. MOHAMED ABDI MOHAMED & 2 OTHERS ELECTION, PETITON NO. 14 OF 2017 – they are worthless pieces of paper whose content would not count in the final tally of results.

57. The 1st and 2nd Respondents submitted that all the forms were signed by the agents of the Petitioner's party hence he cannot challenge what the agents had agreed to. It was submitted that the only forms that required stamping were the ballot papers and Form 35B as per Section 109(1)(h) of the Elections Act as read together with Regulations 79(1) 83(10)(f) and (g), 87(2)(c) and (3)(f); it was submitted that failure to sign any Form 35A did not affect the outcome of the result declared at the polling stations or aggregated at the constituency tallying centre and in support thereof the case of **NATHIF JAMA ADAN VS. MOHAMED & 3 OTHERS [2014] 3EA 177** when the court held at page 202 as follows was submitted:-

“From the foregoing passage and from the record, we find that the authenticity of the result on the unsigned and unstamped Form 35 had not been the subject of challenge. But there had been irregularity in the handling of the statutory forms from the polling stations. There was no explanation on how that irregularity affected the results of the election.”(Emphasis added)

58. The 3rd Respondent submitted that failure by the Presiding Officer to sign Form 35A should not be visited on innocent voters who queued for hours in order to exercise their guaranteed right under Article 38 of the Constitution. It was submitted that the Petitioner did not challenge the results that were tallied and declared at those polling stations.

59. I am in agreement with the submissions by the Respondents that the court having identified the unsigned of the forms as an irregularity, the Petitioner was therefore required to prove that they substantially affected the outcome of the result which he failed to do. I further take the view that in the absence of any explanation by the said Presiding Officers, I will go by the explanation of the Returning Officer that they had scanned the said forms and transmitted them through KIEMS Kits when they discovered that they had not signed them and therefore, in line with the Court of Appeal judgment in **IEBC VS. MAINA KIAI & 5 OTHERS [2017] eKLR**, they could not make an addition thereto. It is also clear that the Petitioner did not dispute the figures therein and as can be seen from a look at the said forms, the Petitioner's candidate of choice was the actual winner at Handaki East polling station 1 of 1 and therefore find that the unsigned of the said forms did not affect the outcome of the elections.

60. Election Offences Act has also provided a cure under section 6(j) of the Act, that an officer who has not signed any statutory form commits a criminal offence but that in itself without any additional evidence cannot be used to invalidate an election since even if the two (2) polling stations were eliminated from the final tally, that could not have effect on the outcome of the elections.

61. The Petitioner also took issue with the forms which were allegedly altered by the Presiding Officers without counter signatures. The 3rd Respondent submitted that there was no regulatory requirement that alterations or overwriting must be countersigned and in support thereof referred to the case of **OSMAN MOHAMMED & ANOTHER VS. IEBC & 2 OTHERS [2014] eKLR** where the Supreme court held:-

“[90] From the foregoing and from the record, we find that the authenticity of the results on the unsigned and unstamped Form 35 had not been the subject of challenge. But there had been irregularity in the handling of statutory forms from the polling station. There was no explanation of how that irregularity affected the results of the election. This clearly is a curable condition. But in a dutiful resolution of a legal and electoral dispute, the fundamental question is the constitutional franchise – right of the people inhabiting the electoral area. It is this to be protected in circumstances such as those unfolding in this instance – the defect in view being, that of election presiding officers failing to have forms duly signed and stamped. In a similar situation in the NANA case from Ghana, the learned Judges had thus held:-

‘An election being a process as opposed to being an event where all stages have been gone through and therefore substantially held in accordance with regulation to nullify the result on this ground per se would amount to putting the power of some unscrupulous presiding officer in some polling station to nullify the solemn act of the whole constituency by an act of omission.

In my view, visiting the sins of some public official on innocent citizens who have expressed their choice freely would run counter to the principle of universal adult suffrage, one of the pillars of our democracy and perpetuate an injustice.

[91] The trial judge in the instance case quite properly arrived at his determination which we affirm as follows:-

[Paragraph 89]

‘In this regard, the petition did not lead any evidence that the lack of signature or stamp by the presiding officers in Form 35 for the above mentioned polling stations affected the outcome of the election. Further, the petitioner did not even challenge the results that were tallied and declared at those polling stations. It is not enough for the Petitioner to merely allege and indicate a failure on the part of the 1st and 2nd Respondents, but it was also essential for them to demonstrate that such failure affected the result of the elections.’

62. In the case of **ABDIRAHMAN IBRAHIM MOHAMUD VS. MOHAMED AHMED KILOSH & 2 OTHERS, ELECTION**

PETITION NO. 4 OF 2017, the court held at paragraph 26:-

“And while there is no regularity requirement that alterations or overwriting made on a Declaration of a Result be countersigned, it is a common sense issue and good practice. Countersigning authenticates any change and is a stamp of ownership by the person who makes that alteration and overwriting.”

In **RAILA AMOLO ODINGA PETITION NO. 1 OF 2017**, the Supreme Court as quoted by the Petitioner had this to say in paragraph 378:-

“[378] Where do all these inexplicable irregularities, which go to the very heart of the electoral integrity, leave this election. It is trite that where quantitative difference in numbers is negligible, the court, as we were urged should not disturb an election. But what if the numbers are themselves a product not of the expression of the free and sovereign will of the people but of the many unanswered questions with which we are faced.”

63. It is clear for the above decision that the irregularities must go to the root of the election and from the evidence tendered before me, I have reached a conclusion that the Petitioner failed to prove that the alleged irregularities substantially affected the outcome of the election and therefore find and hold that this allegation has not been proved to the required standard and therefore lacks merit.

64. On the issue of violence and intimidation of voters, the Petitioner only made general allegations without evidence in support thereof. The Petitioner should have produced evidence in support of this and not be allowed to make general allegations. On the motor vehicle that was allegedly destroyed by goons aligned to the 3rd Respondent, apart from the OB report, there was no evidence tendered to confirm the said violence had been as to cause substantial distortion or subversion of the process of free and fair elections. No evidence was tendered to support or confirm the alleged burning of Somali houses and to connect the 3rd Respondent with the alleged violence. This being an allegation of a criminal nature, the Petitioner was required to prove the same beyond reasonable doubt which he had failed to do. I am unable to use the finding of Mabeya J in the case of **AHMED ABDULLAHI MOHAMUD & ANOTHER VS. HON. MOHAMED ABDI MOHAMED & 2 OTHERS, ELECTION PETITION NO. 14 OF 2017** as submitted by the Petitioner since this being a court of record decisions can only be arrived at based on evidence on record and not by inference.

65. On the issue of KIEMS Kits which were for the purpose of voter identification and transmission of results, the only evidence tendered before the court was that in one polling station they were on training mode but no evidence was submitted to show that the voters were not identified and results transmitted using the same. From the reports on the outcome of the reading of SD cards as ordered by court, it is clear that the KIEMS Kits were able to identify registered voters, record the number of votes cast for each candidate and transmit the same to the constituency tallying centre with minor challenges as captured on the three (3) reports by each of the parties herein and am therefore unable to find merit on the allegation of failure of technology.

66. The Petitioner has invited the court to find adverse inference against the 1st Respondent for failure to make available Presiding Officers who were in charge of disputed polling stations. However, in the course of the trial the court made a finding that it cannot force a party to call a witness to testify on his behalf. I have also noted that the Petitioner had an opportunity to apply to court to summon the 1st Respondent witnesses which he intended to cross examine which he failed to do. I am in agreement with the submissions by the 3rd Respondent that the Petitioner has not laid any basis for an adverse inference being made against the Respondents.

67. Performing as I must which I have done an analysis of the evidence tendered, I have come to the conclusion that this Petition is full of general allegations on irregularities identified but that those that he was able to prove could not substantially affect the outcome of the election. I have further come to the conclusion and find that this election was conducted in compliance with the constitution and written law on election and persuaded by the holding of Justice Njoki Ndungu in her dissenting opinion in **RAILA ODINGA (SUPRA)** at paragraphs 17 and 19 as follows:-

“17. Elections cause is a right centric cause. At the heart of a petition challenging the result of presidential election is the right to vote in free and fair election. This right is the epicentre of Kenyan democratic character.....

19. Evidence is the Epicentre of any trial. The nature of a presidential election does not displace the basis of the law of evidence outlined in the law of Evidence Act Cap 80 Laws of Kenya.”

68. The Petitioner failed to prove that Makoror Primary School polling station was changed, on the face of the evidence by the 2nd Respondent to the effect that it had two (2) polling stations for Wajir West and Wajir East Constituencies respectively and the Petitioner’s candidate of choice evidence that they were some meters apart. There is no evidence that those who intended to vote at the said polling station were denied the right to vote, Mr. Abbas having confirmed that the voter turnout at that polling station was 70%. No independent evidence was tendered on alleged assisted voters who were misled as none was called to testify on the same. On the voting outside the polling time, almost all the Petitioner’s witnesses confirmed that where the voting started late at any polling station, time was extended as the voting continued as long as there were voters on the line as per the regulations. No evidence was tendered to confirm that the 3rd Respondent interfered or influenced the electoral process including employment of his relatives. The law is very clear that if you don’t prove it, you don’t get it.

69. As per the decisions of **MAINA KIAI (SUPRA)** confirmed by the Court of Appeal, the polling station now takes a central position in Kenyan electoral jurisprudence, the voter is identified at the polling station, he votes at the polling station and ballots are counted at the polling station. The agents, candidates and observers are allowed access into the polling station to verify the inner sanctum of the voice of the electorate – the alter of the voters choice. What happens there is what determines the perimeters of verification. Any doubt as to the credibility or irregularity of the election must be tested against various layers of verification including election materials in the custody of the Returning Officer. A single want of form in the electoral scheme of verification cannot be a basis for nullification of election. See **Njoki**

Ndungu (Supra) at paragraph 74.

70. Election is a process and therefore the quality of election is a comprehensive evaluation of all stages of elections and elections are hardly conducted without some irregularities no matter how well the regulatory authority conducts elections, there will be complaint – see **OKECHUKWU VS. INEC [2014] 17 NWLR CCP 1430 J** at page 309. The law in Kenya is now settled subject to the outcome of the Elections Amendment Act 2017 now pending in court; if there is violation of the Constitution and the law as at to election, the election will be voided but where there are irregularities then it must be shown that the same substantially affected the outcome of the returned election.

71. Doing the best I can based on the material placed before the court, I have come to the conclusion that the Petitioner failed to prove the cause to the required standard and therefore the Petition lacks merit as there is no sufficient material to justify nullifying the election of the 3rd Respondent. It therefore follows that the 3rd Respondent was validly elected and declared the winner as the result returned reflected the will of the people of Wajir East Constituency, majority of who voted for the 3rd Respondent.

72. On the issue of costs, the Election Act states that cost follows the cause and that court shall cap the same. The Petitioner submitted that cost of Kenya shillings five hundred thousand (Kshs. 500,000/=) would be appropriate taking into account the fact that the law requires a deposit of the same amount as security for costs. The Respondents submitted that a cost of Kenya shillings five million (Kshs.5,000,000/=) would be appropriate. I have taken into account the nature of this Petition and the issues raised therein and further, the fact that the same was filed by a voter in exercise of his democratic right to interrogate the outcome of the disputed election without any personal interest and gain and would therefore award cost of Kenya shillings one million (Ksh. 1,000,000/=) for both the 1st and 2nd Respondents and the same amount of Kenya shillings one million (Kshs.1,000,000/=) to the 3rd Respondent.

73. In the final analysis, I make the following orders:-

- a) The Petition herein lacks merit and is hereby dismissed.
- b) The 3rd Respondent was validly elected Member of National Assembly for Wajir East Constituency and a certificate to that effect to be duly issued under Section 86(1) of Elections Act.
- c) The Petitioner to pay costs of the Petition to the Respondent as follows:-
 - (i) Instruction fee for 1st and 2nd Respondents capped at Kshs.1,000,000/=.
 - (ii) Instruction fee for 3rd Respondent capped at Kshs.1,000,000/=.
 - (iii) Costs shall be taxed and part payment made out of the security deposit.

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

.....

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Omari for the Petitioner.

Mr. Ms. Nakili for the 1st and 2nd Respondent.

Mr. Gikonyo/Miss Mureithi for the 3rd Respondent.