



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ELECTION PETITION NO. 8 OF 2017**

**IN THE MATTER OF THE ELECTION ACT, NO. 24 OF 2011 LAWS OF KENYA AND THE ELECTIONS (GENERAL) REGULATIONS, 2012 AND ELECTIONS (PARLIAMENTARY AND COUNTY) PETITION RULES, 2017**

**AND**

**IN THE MATTER OF THE PARLIAMENTARY ELECTIONS FOR BOMACHOGE BORABU CONSTITUENCY, CONSTITUENCY NO 263, HELD ON 8<sup>TH</sup> AUGUST 2017**

**BETWEEN**

**THOMAS MATWETWE NYAMACHE.....PETITIONER**

**-VERSUS-**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT**

**RETURNING OFFICER BOMACHOGE BORABU CONSTITUENCY...2<sup>ND</sup> RESPONDENT**

**OGUTU ZADOC ABEL.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. On 8<sup>th</sup> August 2017 when the General Elections were held in Kenya, the residents of Bomachoge Borabu Constituency turned out to take part in voting for Member of the National Assembly which was contested by 14 candidates whose results were declared as follows:-

NAME OF CANDIDATE	TOTAL VOTES GARNERED
1. <b>MAAGA JOSIAH ONKUNDI KARORI</b>	5,686
2. <b>MBECHE SAMSON BOSIRE</b>	331
3. <b>MOGOI GERTRUDAH NYATICH</b>	808
4. <b>MOSINGI DOMINIC OMOKE</b>	65
5. <b>NYATANGI ADAMS NYABUTO</b>	363
6. <b>OBURE FERDINAND ONDABU</b>	680
7. <b>OGUTU ZADOC ABEL</b>	14,012
8. <b>OIGARA CREDIUS NYAMWANGE N</b>	74
9. <b>OMUGA GEOFFREY MOIMBO</b>	419
10. <b>ONDABU JASON</b>	261
11. <b>ONDIBA DUKE MAINGA</b>	1,338
12. <b>ONYANCHA HEZRON OICHOE</b>	248
13. <b>ONYANCHA OMAGWA JOEL</b>	11,246
14. <b>SIAMBE CHRISTOPHER AMIS</b>	119
<b>TOTAL VOTES DECLARED</b>	<b>35,771</b>

From the above results **OGUTU ZADOC ABEL** was declared the duly elected Member of the National Assembly for Bomachoge Borabu Constituency having garnered 14,012 votes. His closest rival was Onyancha Omwenga Joel with 11,246, a difference of 2,766 votes.

2. The petitioner, **THOMAS MATWETWE NYAMACHE** (a voter in **BOMACHOGE BORABU** Constituency) was not satisfied with the results and accordingly filed the present petition on 4<sup>th</sup> September 2017 and supported by his own affidavit and the affidavits of his witnesses.

3. The petitioner complained that that the Election for the Bomachoge Borabu Constituency was not conducted and carried out in accordance with the provisions of the Constitution, the Act or the Regulations nor in accordance with principles laid down.

4. Further that the counting of the votes cast at the Election was not accurate or correct nor was the tallying of the votes from polling centers in line with the result announced by the 2<sup>nd</sup> Respondent. To support his allegations the Petitioner took issue with the manner the elections were conducted as hereunder:-

**Voter manipulation**

a) That the 3<sup>rd</sup> Respondent went to **Magena** tallying center where the IEBC clerks were training, with the intention of coercing the officials to favour him. Furthermore, that the training conducted in rooms at the same venue was intended to train the clerks in a manner as to favour the 3<sup>rd</sup> Respondent.

b) That there was a replacement of 8 Presiding Officers and their deputies who had been interviewed and trained for the election exercise following a letter written by the 3<sup>rd</sup> Respondent to the Returning Officer claiming that the 8 officers shortlisted were not suitable for the job. It is the petitioner's contention that this affected the credibility of the said election and thus renders the results and outcome inauthentic. **(The petitioner attached a copy of the letter marked TMN-3)**

c) That there were some meetings hatched by the 1<sup>st</sup> Respondent with the help of the 2<sup>nd</sup> Respondent where several Presiding Officers, under instruction of the 2<sup>nd</sup> Respondent, were to compromise the integrity of the Elections by altering the Election Results in favor of the 3<sup>rd</sup> Respondent.

d) That the petitioner and his agents took the initiative of reporting all the acts of voter bribery, intimidation, rigging and personation with the 2<sup>nd</sup> Respondent, who dismissed their concerns and proceeded to unlawfully declare, certify and publish the 1<sup>st</sup> Respondent as the successful Candidate.

**(ii) Vote Counting and Tallying**

5. It was the petitioner's contention that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents /or persons under their authorities-conducted themselves in a manner that grossly and materially undermined, contravened or abrogated the mandatory requirements of elections by:-

(i) Allowing one clerk, at **Mosensema Polling Station**, who was under direct supervision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to have in his possession pre-marked extra ballot papers in favor of the 3<sup>rd</sup> Respondent. That in the polling station voters were caught with more than one polling paper for the candidates. This matter was reported to the Ogembo police station and recorded in the occurrence book under **O/B NO: OB/19/80/80/2017/2 at 20.30 HRS.**

(ii) Allowing manipulation of the tallied votes causing a difference of 100 votes declared and those recorded in form 35A thereby failing to secure the entire election process and materials from manipulation. **(He attached form 35A Mosensema primary school polling station stream 1 of 1 Bomachoge Borabu Constituency which was marked "TMN-5.")** Further, to bring out this anomaly by comparison the petitioner annexed form 35B and marked it as **TMN-6)**

6. The petitioner further complained that there were too many cancellations, alterations and over-writing of figures in Forms 35 which were not counter-signed. They included:-

<b>Station</b>	<b>Polling Station</b>	<b>Changes/Alterations/write-overs</b>	<b>001</b>	<b>Igorera primary school</b>	<b>crossings not counter-signed</b>
001	Igorera primary school	number registered voters not indicated			
005	Oroche primary school	form 35A not signed by P.O/DPO			
019	Ichuni primary school	form 35A not signed by P.O/DPO			
001	Kerongori primary school	cancelation of candidates' name without countersign.			

**(He annexed a bundle of the Form 35A for the said stations and marked it as TMN-7)**

(i) The petitioner further complained that at **Kenyenya Polling Station** stream 1 there were extra stray votes discovered, the same were allocated to the 3<sup>rd</sup> Respondent and this was a glaring act of favoritism.

(ii) The petitioner stated that marked ballot papers were disposed off inappropriately contrary to the provisions of the Elections Act and were picked at **Kenyenya road** near **Nyakorere polling station**. The said matter was reported at Kenyenya police station and recorded in OB10/1/9/2017/1239hrs. **(He annexed the bundle of the serial numbers of the ballot papers and marked it as TMN-9.)**

(iii) That at **Rianyanchabera polling station stream 3** there was a grave miscalculation of the total votes cast in form 35A as the total votes cast did not add up with the tabulation of each of the candidate's votes. **(He annexed form 35A of Rianyanchabera polling station stream 3 of 3 as TMN-10.)**

(iv) The petitioner on scrutinizing Form 34A and Form 35B noticed that there was a difference of the total Presidential and National Assembly votes in that there were extra votes in favor of the parliamentary elections. **(He annexed the bundle of forms 34B & 35B as TMN-11).**

(v) That Forms 35A from **Ichuni, & Oroche, Polling stations** supplied to the petitioner by the 2<sup>nd</sup> Respondent were not signed by his agents and no comment was indicated whatsoever **(He annexed a bundle of copies of form 35A from the said polling stations and marked them as TMN-8).**

(vi) That clerks at **Nyakorere** and **Mosensema** polling stations, assisted voters who needed assistance in the voting exercise without filling the oath of secrecy forms as was required of them by the Elections Act.

(vii) At Maiga, Ichuni & Oroche primary polling stations, voters were identified through the scanning of Identity cards but the Presiding Officer failed to fill form 32A as required by regulations and the Elections Act. **(He annexed the witness statements of the agents from the polling stations in the bundle marked TMN-12)**

(viii) The petitioner having gone through the returns in form 35B, came up with the following observations: -

a) That there are too many cancellations, alterations and write-overs of figures in statutory documents which were not counter-signed.

b) A number of documents are in-distinct and/or illegible.

c) In a number of instances votes from the 3<sup>rd</sup> Respondent were increased while those of other candidates especially those of the 1<sup>st</sup> runners up were decreased.

d) Candidates' names and scores were crammed together as if there was lack of stationery thereby making the returns grubby, unintelligible and unreadable.

e) Most of the forms are manufactured and do not represent the true state of the elections and therefore the will of the electorate.

(ix) The petitioner further summarized the anomalies in the affected polling stations and centers and the number of registered voters in the polling stations respectively in the table hereunder:-

	STATION	TOTAL NUMBER OF REGISTERED VOTERS
1	RIANYANCHABERA PRIMARY SCHOOL POLLING STATION STREAM 3 OF 3	488
2	MOSENSEMA PRIMARY SCHOOL PRIMARY STREAM 1 OF 1	580
3	ICHUNI PRIMARY POLLING STATION 3 OF 3	505
4	MONTONTERA PRIMARY SCHOOL POLLING STATION	373
5.	MAGENA PRIMARY SCHOOL POLLING STATION STREAM 3 OF 3	514
7	KERONGORORI TEA BUYING CENTER	490
8	MOTONTERA PRIMARY SCHOOL POLLING STATION STREAM 1 OF 1	553
9	OROCHE PRIMARY SCHOOL POLLING STATION	499
1	NYAKORERE PRIMARY SCHOOL POLLING STATION	536
1	ITONGO PRIMARY SCHOOL POLLING STATION	382

TOTAL NUMBER OF AFFECTED VOTES	4,920
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Because of the above aforesaid matters the petitioner prayed that:-

- (a) There be a scrutiny of votes recorded as having been cast in the aforesaid Parliamentary Election for Bomachoge Borabu Constituency in the Election held on the 8<sup>th</sup> of August, 2017;
- (b) There be a scrutiny of the rejected, void and spoilt ballot papers from all Polling Stations;
- (c) There be a scrutiny of the actual Voter's Registers used at all Polling Stations within Bomachoge Borabu Constituency
- (d) There be a re-count of all valid votes case at the said Election;
- (e) The said Parliamentary Elections held on the 8<sup>th</sup> August 2017 in Bomachoge Borabu Constituency be determined and 1<sup>st</sup> runners-up be declared as the true and valid winner;
- (f) It be determined that the 3<sup>rd</sup> Respondent has not been validly elected to the Member of the National Assembly for Bomachoge Borabu Constituency;
- (g) Such election offences and electoral malpractices on the part of the 1<sup>st</sup> Respondent and acts of omission and commission by the 3<sup>rd</sup> Respondent as disclosed and found by this Honorable Court be reported to the Director of Public Prosecutor for appropriate action;
- (h) The Court do find that the 3<sup>rd</sup> Respondent has committed serious electoral offences and order him barred from participating in subsequent elections for a period of at least five years or as the Court may deem just and expedient;
- (i) An order directing the 1<sup>st</sup> Respondent to organize and conduct a fresh Election in strict conformity with the Constitution and the Elections Act, 2011.
- (j) A determination that such election offences and electoral malpractices on the part of the 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Respondent occurred as disclosed and found by this Honorable Court.
- (k) The Respondents be condemned to pay your Petitioner's costs of this petition; and
- (l) Such further, other and consequential orders as this Honorable court may lawfully make.

#### **The response by 1<sup>st</sup> and 2<sup>nd</sup> Respondent**

7. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents contend that on 8<sup>th</sup> August 2017, they conducted free, fair, transparent, accurate and accountable general elections in line with their mandate under the Constitution of Kenya for various elective seats among them being the election of Member of Parliament for Bomachoge Borabu Constituency Code 263. They maintained that the declaration of the 3<sup>rd</sup> respondent as the lawfully and validly elected Member of Parliament for Bomachoge Borabu Constituency having garnered 14,012 votes was credible and verifiable. It was pointed out that the margin between the 3<sup>rd</sup> respondent and the next candidate was 2,766 votes and there is no minimum margin by which a candidate should attain in order to be declared the winner of the seat for Member of Parliament.

8. The respondents insist that the elections were conducted devoid of any malpractice or election offences and the results announced in all the 105 polling stations within Bomachoge Borabu Constituency were a true reflection of the will of the people in the said constituency.

9. In reference to the allegations made about the Presiding Officer at **Nyakorere Polling Station** failing to sign Form 35B, the 1<sup>st</sup> and 2<sup>nd</sup> respondents averred that the prerogative for signing form 35A is vested in the Returning Officer and not the Presiding Officer. However, the respondents confirmed that all Form 35As in relation to Nyakorere Polling Station were duly signed and stamped in accordance to the election regulations. In reference to allegations by the petitioner that at **Rianyanchabera** polling station stream 3 there was grave miscalculation of the total votes cast in Form 35A, the 1<sup>st</sup> and 2<sup>nd</sup> respondents averred that the calculation of each of the candidates votes was correct, it tallied with the total number of valid votes cast and the same was correctly reflected both in Form 35A and 35B.

10. As regards claims that at **Kemoreko** polling station stream 2, the Presiding officer was marking ballot papers against the will of the voters, the 1<sup>st</sup> and 2<sup>nd</sup> respondent averred that its officers are mandated to guide voters who need assistance in marking their ballot papers for their preferred candidate but denied allegations that their presiding officers influenced the will of the voters. In response to the petitioner's allegation that the polling station clerk for the 1<sup>st</sup> respondent at **Itongo Primary School** was assisting the voters to mark ballot papers in favor of the 3<sup>rd</sup> respondent, the 1<sup>st</sup> respondent averred that they were unaware of the said conduct as it was never reported to Police nor brought to the attention of the Presiding Officer.

11. While acknowledging the entry relating to **Mosensema** polling station in form 35A showing 436 as the number of valid votes cast while at the constituency tallying center under form 35B 336 votes were recorded, the 1<sup>st</sup> respondent stated that this was an inadvertent clerical error, but the total number of votes cast for each candidate was not affected hence the will of the people was achieved.

12. The 1<sup>st</sup> respondent confirmed that there was only one incident where a voter was arrested but on further investigation, he was found to have in his possession 4 ballot papers meant for different elective seats having already cast two. Further, that neither the said voter nor any official of the 1<sup>st</sup> respondent has been charged before any court of law. Intimidation and harassment of Jubilee agent at **Magena polling station stream 3** was denied. In response to the petitioner's allegation that at **Ritembu station stream 1**, the presiding officer was authorizing voters without filling form 32A, the respondents averred that the results for **Ritembu Stream 1 were 384** valid votes which were inadvertently interchanged with those of **Ritembu Stream 2 which were 382** valid votes. As a result, votes for each candidate were also interchanged for both streams but it was the respondents' contention that the final result remained unaffected.

13. As regards **Matonera** polling station stream 1, the respondents averred that the results contained in form 35A for the said polling station are in tandem with those in Form 35B. Furthermore, that the said results were collated and tallied accurately and correctly. In response to the allegation by the petitioner that at **Ichuni Primary School** polling center stream 2, Form 35A was not signed nor any comments given because there was an altercation between the agent and a police officer at the station, the respondents denied such an altercation and averred that the police officers assigned to the polling centers were only meant to keep peace and orderly conduct of the electoral process. The respondents also stated that no such incident was ever reported. As for inflation of votes at **Ichuni Primary School**, the respondents denied the said allegation saying the total number of valid votes cast was in tandem with the number of votes each candidate got. As regards **Oroche Primary School** polling station, form 35A was not signed by the respective agents, nor the presiding officer or his deputy hence whatever was recorded form was in favor of the 3<sup>rd</sup> Respondent, the respondents denied the said allegation and averred that form 35A was duly signed by the Presiding officer and the agents present at the time of announcing the results.

14. Concerning claims about crossings and discrepancy in Form 35A at **Igorera Primary School** polling station the respondents denied the said allegation. In response to the allegation by the petitioner that at **Endereti Primary School** polling station, the **KIEMS** could not transmit results from the station thereby affecting the final tallied result, the respondents averred that upon the failure of the **KIEMS** to transmit the results to the tallying center, the Presiding Officer indicated the same on Form 35A and all agents signed on the same. The respondents however confirmed that this did not affect the results for any candidate as reflected in Form 35B. The Respondents denied that at Rianyanchabera polling station stream 1 the Presiding officer assisting a voter to vote; took advantage and marked the ballot paper against the will of the voter.

15. The respondents confirmed that at **Magena** tallying center while the 1<sup>st</sup> respondent's officials were being trained, a meeting was convened between the 2<sup>nd</sup> respondent and the candidates to oversee the breaking of the ballot box pellets and all aspirants and their agents were called to oversee the process. The respondents also confirmed that the training manuals for the respondents polling clerks and other election staff is universal and applicable countrywide hence, the said training cannot be skewed in favor of any candidate.

16. The respondents stated that the procedure for appointment and hiring of presiding officers was elaborate and participatory in nature where interested candidates made applications were shortlisted, interviewed and if successful, appointed and trained. The respondents further stated that stakeholders were invited to tender their reservations about particular shortlisted persons and if the said reservations were merited, the shortlisted candidates could be withdrawn from the list and replaced. The respondents thus averred that in this case, the said persons were unsuccessful and had been appointed as Presiding Officers. That they were in turn replaced by impartial and well vetted persons who were trained in the conduct of elections matters. As a result, they performed their obligations satisfactorily and in accordance with constitutional dictates. Lastly in response to the allegation by the petitioner that ballot boxes were disposed off inappropriately contrary to the provisions of the Elections Act, the respondents denied the said allegation and averred that election materials including ballot papers are safely kept in the respondents' warehouse.

17. The 2<sup>nd</sup> respondent (**ODUL BERNARD ARGWINGS**) the Returning Officer for **BOMACHOGE BORABU** Constituency termed the allegations by the petitioner in his supporting affidavit about fraud, illegalities and irregularities committed by the respondents as false and baseless. He further stated that the Elections Act does not envisage a situation where a voter has agents and neither have the said agents been named nor any of them given sworn evidence. He denied that the 3<sup>rd</sup> respondent met any trainees during the trainings of clerks and that on 6<sup>th</sup> of August 2017, stating that he invited all the candidates to witness the breaking of ballot paper pellets within the tallying center.

18. In response to the supporting affidavit of **ONESMUS NYAUNO MISESI** (who had apparently been shortlisted as a Presiding Officer for the 1<sup>st</sup> respondent) and had contended that he was thrown out of training due to his association with **JOEL ONYANCHA** (the 3<sup>rd</sup> respondent's closest rival), he confirmed that Onesmus had indeed applied and was interviewed but he was neither shortlisted nor trained due to an expression of concern from the 3<sup>rd</sup> respondent against the integrity of Onesmus. This led to expelling Onesmus from the training and upon the information being communicated to him, he took offence and alleged that he was chased. He further denied ever making plans to compromise elections nor receiving any report of alleged voter bribery, intimidation, rigging and personation.

19. In response to the allegations of cancellations and alterations on Form 35B's of **IGORERA, OROCHE, ICHUNI** and **KERONGORI** as alleged by the petitioner he explained that in Igorera Polling Station and Kerongori the clerk wrote on top of an unused carbonated form hence, the information was transferred inadvertently to the carbon copy thus, this was not a cancellation of candidates name but a consequence of using carbon papers. He further averred that forms 35A from **Oroche** and **Ichuni Primary School** polling station were signed by the presiding officer and that no stray votes at Kenyeny Polling Station Stream 1 were allocated to the 3<sup>rd</sup> respondent. He denied manipulating the election results in favour of the 3<sup>rd</sup> respondent and termed the petitioners allegation as hear say.

Thus it was the respondents' prayer that this court should find and hold that:-

- They were not in breach of their constitutional and statutory mandate.
- The 3<sup>rd</sup> Respondent was validly declared the winner of the seat for the Member of National Assembly Bomachoge Borabu Constituency in the 8th August 2017 Elections.
- The people of Bomachoge Borabu Constituency exercised their sovereign right to vote and that right should be respected and upheld.

- The petition lacks merit and should be dismissed with costs.

### **Response by 3<sup>rd</sup> Respondent**

20. It was the 3<sup>rd</sup> respondent's contention that the petition together with the affidavits by witnesses did not support the allegations contained in the therein, rendering it incompetent and suitable for striking out. He denied that the agents of the 1<sup>st</sup> respondent performed any acts to favour him and maintained he was legitimately and lawfully elected as a Member of Parliament for **Bomachoge Borabu Constituency** its outcome reflected the true and sovereign will of the electors in the said constituency.

21. At the hearing witnesses adopted their affidavits/statements as evidence in chief then each witness was subjected to cross examination. Mr. Ombati Omwanza, Mr. Begi and Mr. Onyancha appeared for the Petitioner, Mr. Theuri and Mr. Mokenye were for the 1<sup>st</sup> and 2<sup>nd</sup> respondents while Mr. Nyakundi assisted by Mr. Mireri and Mr. Ochako acted for the 3<sup>rd</sup> respondent.

22. **THOMAS MATWETWE NYAMACHE (PW1)** testified that prior to the elections, the 3<sup>rd</sup> respondent went to Magena Tallying Centre (where polling clerks were being trained) with 1<sup>st</sup> respondents officials, intending to interfere with poll preparations, although he did not witness this but was informed by his friends who were at Magena. Furthermore, that the allegation about the training of clerks being done to favour the 3<sup>rd</sup> respondent was information given to him by his 'undercover person' whose identity he refused to disclose for purported security reasons.

23. He also stated that his 'undercover person' was not going to be a witness and that he did not report the matter to the police. He was unaware that a list of proposed presiding officers/deputies/clerks was shared with all political parties for their approval. [He however conceded that there was a letter written by the 3<sup>rd</sup> respondent complaining about partisan election officials.]

24. In reference to 'his agents', he stated that what he meant was his friends and not agents. He also confirmed that **Isaac Nyauno Nyamache** was his brother who was interviewed and qualified for the position of a presiding officer with the 1<sup>st</sup> respondent but was however not trained (this seems to have irked him). On the allegation that one clerk at Monsensema Polling Station had a pre-marked ballot paper, he got this from his informer whose identity he again refused to disclose. In reference to manipulation of tallied votes at **Monsensema Primary School polling station**, he insisted that 100 votes had not been accounted for, i.e. that the total number of valid votes cast was said to be 436 but in reality, the total should have been 336. It was his case that this was a tallying problem which directly affected the electoral process and invariably affected the candidates' final vote leading to the election process not being fair or credible.

25. As regards his claims that at **Igorera II** the number of registered voters was not indicated, on being shown the document the Petitioner confirmed that the number of registered voters was indicated. Also the on the allegation at Oroche Primary stream 2 and Ichuni Primary School stream 2 the form was not signed by the presiding officer, the Petitioner on being shown the 1<sup>st</sup> respondents copy of results from Ichuni Primary school confirmed that the same had been stamped. He maintained that at Rianyanchabera Polling Station, there were grave miscalculations in the total votes cast in Form 35A and referred to his annexure marked **TMN-10**. He conceded that he was not supplied with any documents by the 1<sup>st</sup> respondent but rather he was sitting next to a chief agent of **Jubilee** political party who was being supplied with documents.

26. He maintained that electoral offences were demonstrated as hereunder:-

- Clerks at **MONSENSEMA** were arrested.
- At **NYAKORERE** a Presiding Officer looked like he was kind of sick and never controlled the exercise; and handing over was done by the Deputy Presiding Officer.
- At **RIANYANGITA** the Presiding Officer influenced voters to vote around his area. However, he did not report the matter to police and also the tallying of votes did not agree with the Kiems.
- At **ENDERETI** Primary polling centre, the Kiems Kits were not registering results thus he questioned where results came from.
- At **MOTONTERA** Primary School, the results (i.e counter foils) were even married with the results of Kiems. However, he was quick to state that he had no witness.

27. On cross examination by Mr. Nyakundi, he confirmed that **ERIC KINARO NYAUNDI** was one of his witnesses, pointing out that his affidavit attests that **HON. JOASH MAANGI (Kisii Deputy Governor)** urged people to vote for ODM after which he would reward handsomely. He thus contended that this supported his notion that some Presiding Officers were taken somewhere.

28. He confirmed that he did not have any identification credentials issued by the 1<sup>st</sup> respondent and that he only went to the training centre when he was called by a person who was denied access. He also confirmed that a lot of the allegations contained in the petition were relayed to him by his informers, and he did not take an oath secrecy and he did not know whether the poll clerks had taken such oath. He also confirmed that some of the paragraphs in his affidavit did not have witnesses supporting either by way of affidavit or statement.

29. On re-examination by Mr. Ombati, he reiterated that he filed this petition because he noticed so many malpractices taking place during the election exercise. He also confirmed that he obtained form 34A and 35Bs from the tallying center as he was seated next to the Chief Agents of each party. He also maintained that at **Ichuni Primary School stream 3** the form was not signed, although for **Oroche Primary School** the form was signed by the Presiding officer but stamped. That at **Rianyanchobera** he was not able to make out what each candidate got as the tabulations are illegible i.e. the total in form was 194 yet the total number of votes cast is 366, at **Igorera Primary School** the form presented in response to the petition were illegible and at **Kenyanya Polling Station**, the ballot papers were inappropriately placed.

30. PW2 (**MARY NYABONYI ASUGA**) was a polling clerk of the 1<sup>st</sup> respondent at **Rianyagita Primary School polling station stream 1** and her main assignment was to ensure that the voters who needed assistance to vote did so in the right ballot box. She reported to the station by 5.00 a.m and the voting exercise proceeded smoothly until 9.30a.m when she started witnessing large crowds of voters seeking assistance to vote. It was her evidence that a **Jubilee** party agent (**HENRY NYABUTO ONDITI**) was kicked out of the polling station after complaining to the Presiding Officer about constant interference of voters by some clerks. However, the agent was later allowed back into the polling station but was not allowed by the Presiding Officer to carry on with his duties.

31. It was her evidence that **PHIGREY OGWOKA JOMO** (a Presiding Officer) kept picking on specific clerks to assist voters despite their protest that some clerks were campaigning in the polling station. She alleged that the said **Phigery** told voters who needed assistance to vote for the person from **Nyakorere** which meant the 3<sup>rd</sup> respondent. She alleged that Phigrey's conduct caused disorganization in the voting process and people were intimidated to vote for the 3<sup>rd</sup> respondent.

32. PW2 accused the presiding officer of not showing the ballot paper to the agents to confirm the candidate who had been voted for. She claimed that the deputy presiding officer recorded the total tallying of votes without the agents being allowed to confirm or sign the same and that when tallying ended, the presiding officer failed to announce the results of each candidate at the polling station but instead announce the said results at **Magena High School** (the constituency tallying centre).

33. On cross examination by Mr. Theuri, PW2 clarified that during voting, there was an agent (whose name she did not know nor the party he was representing) and not the Presiding Officer who kept on telling voters 'hapo weka Nyakorere.' It was her evidence that the process was flawed, and she informed the Presiding officer about the incident but not the Returning Officer. Later, a stranger called her to ask whether the poll had any issues, she agreed to meet him and brief him on what she saw.

34. On cross examination by Mr. Nyakundi, she revealed that she was a student at Mt. Kenya University and had received bursary from CDF in 2017 but denied knowledge that the petitioner was the secretary of CDF or that she is married in the Petitioner's home. She maintained that the petitioner called her on phone and she told him the problems she witnessed at the poll station. She also confirmed that at the 1<sup>st</sup> respondent's training, they had been told to report any inappropriate thing to the Returning Officer but she could not reach him on phone.

35. On re-examination, she insisted that she was a beneficiary of CDF having applied like any other student and no mischief should be read in this. She also maintained that she did not know the petitioner before elections and he only called her a week after elections, although she did not know how he got her telephone number.

36. On cross examination by the court, she explained that in her view form 35A ought to have all the 7 names of the polling clerks and blamed the Presiding Officer for not allowing the agents to sign the forms though the agents did not complain. That she did not report anyone because the presiding officer brushed her off.

37. **VINCENT MAINA NYACHIO (PW3)** was also a clerk of the 1<sup>st</sup> respondent deployed at Itongo Primary School within Bomachoge Borabu constituency and his duties included verification and identification of voters through identity card and finger prints using KIEMS Kits. He stated that in the verification of voters, most old people were not being captured by KIEMS Kit hence he was forced to scan their identity cards and verify the details of the voters before they could vote.

38. He further stated that around 30% of the voters were not identified through fingerprints at the polling station but were identified through scanned identity cards. That each time he identified a person using a scanned identity card, he referred the voters to the presiding officer for other processes and particularly for filing the required form 32A. He further stated that he did not recall the presiding officer filling any form 32A for voters identified using scanned identity cards at the polling station and he could not confirm if indeed he filled the required forms.

39. He claimed to have encountered a high number of assisted voters, and while it was the responsibility of the Deputy Presiding officer and clerks to assist such voters, he did not recall seeing the people assisting voters fill in forms of secrecy as required. He stated that after closing of the polling station, counting of votes commenced and after counting and tabulation of votes for candidates, the **KIEMS Kit** failed to send results fed on the system and the presiding officer decided to physically take the results to **Magena High School** which was the constituency tallying center.

40. On cross examination by Mr. Theuri, confirmed that the Presiding officer was **JOSAM ONYANCHA** and Deputy was **ANYONA DAVID** who signed the Form 35A plus six party agents. He maintained that the Presiding Officer did not note down the voters who were identified using the **KIEMS** which was wrong, saying he was supposed to report the omission to the Presiding Officer but he said '**hakuna haja**'. He explained they were trained to be submissive to their bosses and not to report them. He also revealed that he got to know the petitioner two weeks after elections in a meeting at Center and he became interested in becoming his witness as he did not like the manner in which the polls were carried out.

41. On re-examination, he admitted the Presiding Officer initially recorded the voters who could not be identified by **KIEMS** but claimed that he later stopped.

42. PW4 (**ZABLON OTARA OMUGA**) a registered voter at **Getenga Primary School in Bomachoge Borabu Ward** stated that he voted in the elections of 8/8/17, and on 1<sup>st</sup> September 2017 while driving in the company of **FRED ONDUSO** and **ELIJAH NYANGWETA** along **Kenyenya-Nyagancha** road, his car got a puncture and upon taking a halt, he and Fred got out of the car and went to look for a sizeable stone to lift the car and replace the tyre. Fred stumbled upon a black polythene bag, which he brought to them and on opening it, they found that it contained the IEBC ballot papers for the National Assembly elections of Bomachoge Borabu.

43. They then proceeded to call the **OCS Kenyenya Polling Station** but since they took time to get to the scene, so they decided to drive to Kenyenya and deliver it. Upon arrival at Kenyenya, they made a report which was recorded in the occurrence book and the DCIO

accompanied them to the scene where they found the paper bag. That the police upon arrival at the scene took photographs at the scene. That the DCIO and OCS also confirmed in their presence that the paper bag had 91 ballot papers all marked for National Assembly elections Bomachoge Borabu Constituency.

44. On cross examination by Mr. Theuri, he stated that he had known the Petitioner for about 5 years, that the petitioner approached him after he got to learn of his report to the police but at the time, he was not aware that petitioner was filing a petition.

45. PW5 was **JEFF YOPHES OKEMWA** a registered voter at **Gesabakwa** Primary School was on his way to Magena Boys High School on 9/8/2017 when he met a crowd of drunk youth who had barricaded the entrance to the school compound. Since he could not access the school, he instead went to **Magena Homeland hotel** and was later joined by **PAUL ONCHIEKU** who had served as a presiding officer at Ichuni Primary School. On seeing Paul, he noticed that his left arm was swollen and upon inquiring from him, the latter said he had been assaulted by the crowd at the entrance of Magena High School.

46. Upon leaving the hotel at about midnight, they noticed somebody on the opposite side of the road beckoning them for assistance, and upon approaching the person, they noticed that he was bare footed and soaked with water. That the person informed them he was the presiding officer of Nyakorere Primary School polling station and he had been assaulted by the crowd of youth at Magena Boys High School before he presented results from Nyakorere Primary School polling station. That the said youth beat him and robbed him hence, he was unable to present the results.

47. On cross examination stated that he had not interacted with the petitioner before this case but when he heard that the present petition was to be filed, he approached the petitioner's advocate, told him what he knew and was then told to prepare an affidavit. He further claimed that when he met Paul with an injury, they did not go to hospital because he said it was not a serious injury.

48. PW6 (**ELDER AMOS JUMA NYAGOTUGA**) was an agent for the Jubilee party stationed at **Kenyenya Primary School** who testified that on the polling day he found a large number of voters were turned away including **NYACHOKO ONDARA** and **BERNARD RIOGI** because they could not be identified by KIEMS. However, one unnamed old woman insisted that she had to vote and the presiding officer allowed her to do so after using an alternative method of identification. He further alleged that throughout the voting exercise, he noted that the Presiding Officer one **KENNEDY NYANDIEKA** was biased and failed to assist persons who showed preference for Jubilee candidates, that the presiding officer also colluded with clerks 3, 4 & 5 to issue extra ballot papers and at one time when he raised alarm, one voter was found having been issued with two National Assembly election ballot papers. That the Presiding Officer then directed that the extra ballot be returned and issued to the next voter.

49. He further alleged that after completion of counting of votes and tabulations of candidates the Presiding officer claimed that the KIEMS machine had jammed and he could not send results electronically. He contended that during vote counting, it was discovered that a number of unmarked ballots had been found in the National Assembly ballot box, thus confirming his suspicions that voters were being issued with extra ballot papers.

50. On cross examination by Mr. Nyakundi, he conceded that the two people who were turned away from the polling station did not have identity cards. He further confirmed that as a Jubilee Party agent in stream 1, he signed form 35 and 34, where the Jubilee candidate (Joel Onyancha) led in all the three streams of Kenyenya. He also confirmed that the petitioner was an old time friend.

51. PW 7 (**ONESMUS NYAUNDO MISESI**) claimed that he successfully applied to be a Presiding Officer and was selected as a presiding officer in Bomachoge Borabu Ward. On 23<sup>rd</sup> July 2017, he was informed through sms that he was to attend a non residential training at Magena High School for 4 days. However on arrival at the training, the Returning Officer informed that the 3<sup>rd</sup> respondent had complained about him being actively involved in campaigning for Joel Onyancha. He further stated that despite his assurances that had never been involved in politics, the returning officer denied him the chance to train and instead told him that he had found a replacement.

52. On cross examination by Mr. Nyakundi, he acknowledged that the Returning Officer was not the final authority at the national level but that he did not raise concerns about the returning officer's decision because a replacement had already been found and the training had begun. He however denied actively campaigning for Jubilee.

53. PW8 (**ERICK KINARO NYAUNDI**) the Presiding Officer of **Magenche Ward (Mosobeti Primary School polling station)** recalled that after he was trained as a presiding officer by the 1<sup>st</sup> respondent but before elections, a friend of his one **WALTER ONTWEKA** requested him to go to **Nyakoe** for a meeting. Upon arrival at **Nyakoe Hotel**, they found the meeting in progress with the people in attendance being some of his fellow presiding officers (who are also teachers by profession) such as **JOSEPH ABINCHA, EZEKIEL NYANGENA, and WALTER ONTWEKA AND ERICK ORWARU**. That also in attendance was **JOASH MAANGI** (the Deputy Governor) who was pleading with the group telling that they should assist his group win the elections by all means after which he would reward them handsomely. Upon hearing what the Deputy Governor had said, he left the room immediately.

54. On cross examination by Mr. Theuri, he conceded that at **Mosobeti polling station stream 1** elections were conducted in a free and fair manner. He also confirmed that he did not know whether any inducement was given in the said meeting, the Deputy Governor who contested the elections on an Orange Democratic Movement ticket which was part of the **National Super Alliance (NASA)** while the 3<sup>rd</sup> respondent was an independent candidate. He neither reported to the police or the 1<sup>st</sup> respondent on the illegality that took place at Nyakoe Hotel. He had known the petitioner for the last 17 years.

55. He also confirmed that in the meeting he did not hear any mention of Bomachoge Borabu. On re-examination by Mr. Begi he conceded the Deputy Governor did not say Bomachoge Borabu but our people.

56. PW9 (**DOROTHY GESARE BOTA**) a customer to the petitioner at his **Magena Agrovot** shop and also party agent for the Jubilee Party at **Ichuni Primary School stream 2**, alleged that during voting the Presiding Officer assisted illiterate voters to vote without involving

party agents and this according to her created room for the presiding officer to mislead voters to make choices they did not intend to. She further alleged that the presiding officer did not disclose to the agents the numbers of votes cast, rejected and valid votes. According to her, this created room for the presiding officer to manipulate figures.

57. She claimed that the Presiding Officer gave agents blank results forms to sign and told them that he would fill details later after finalizing his work hence they were not able to authenticate results in the statutory documents. Furthermore, the said officer did not allow agents to verify results before transmitting them through the **KIEMS Kit** thus rendering the electoral process at **Ichuni Primary School (stream 2)** faulty for not being transparent, verifiable and accountable.

58. On cross examination by Mr. Theuri and upon being shown Form 35A she acknowledged that she had actually signed the said form. However, she maintained that all party agents were not allowed to witness assistance being given to voters but no voter complained to her that they were forced to vote for a candidate not of their choice.

59. PW10 (**EVANS OBIRI OMWAMBA**) also a Jubilee Party agent stationed at **Mosensema Primary School**, stated that on the voting day at around 3.00 p.m, he heard a noise inside the polling stream and upon going inside the room, he found a voter holding ballot papers in his hand. On probing he was informed that the voter had been discovered with more than one ballot paper for MP, Women Rep, Governor and Senator. Shortly thereafter, the returning officer accompanied by CID officers arrived and arrested the voter and clerks involved.

60. On cross examination by Mr. Theuri, he stated that he could not tell the positions for the ballot papers the voter was holding. He also stated that he knew the petitioner but he did not tell him about this incident. However upon cross examination by Mr. Nyakundi, he revised the answer saying the ballot papers the voter was found with were for Women representative, Member of Parliament, Governor and Senator.

61. **DANIEL OICHOE NYAMACHE** (PW11) a registered voter at **BOKIMONGE WARD** of Bomachoge Borabu, worked as a clerk for IEBC during the General Elections at **Kerongorori Tea Buying Centre** where the Presiding Officer assigned him the duty of placing indelible ink on the index finger of voters once they had completed the voting process. During voting, he noticed that clerk No. 2 was busy talking to voters in low tones as they streamed in to vote. He then moved closer to the said clerk and advised him to stop interrupting voters but the said clerk continued urging voters to vote for the 3<sup>rd</sup> respondent. He claimed that at one time, a voter who needed assistance requested to vote for **JOEL ONYANCHA** but the said clerk 2 marked for the 3<sup>rd</sup> respondent. That on raising his concerns to the Presiding Officer, the latter did not do anything nor write a report about it. He concluded that the voting exercise at **Kerongorori** was marred with a lot of interference and irregularities.

62. On cross examination by Mr. Theuri he revealed that clerk No. 2's work was to ensure the queue was properly followed with no commotion, that he heard the said clerk telling voters to vote for the 3<sup>rd</sup> respondent. That despite a specific voter informing clerk No. 2 that he wanted to vote for **UHURU KENYATTA AND JOEL ONYANCHA**, the clerk marked for **UHURU KENYATTA** and 3<sup>rd</sup> respondent. He also stated that the candidate who led in that polling station was **JOEL ONYANCHA** and that the petitioner was his brother.

63. **ELIJAH NTENGA NYANGWETA** (PW12) corroborated PW4's evidence about finding a black polythene bag along Kenyena-Nyagancha road

64. **SAMWEL KARIOKI NYOUGO** (PW13) a clerk contracted by the 1<sup>st</sup> respondent testified that on the day of voting at around 8.30 a.m, there appeared to be a confusion at **Maiga Primary School polling station** between clerks 3, 4 & 5 regarding the issuance of ballots papers after a voter realized that he had been issued with two (2) senatorial ballot papers. The presiding officer intervened and asked the three clerks to check on the counterfoils of used ballots to confirm the difficulty. After the audit, it was noted that there was a mismatch on the ballot papers issued. However, this forced the presiding officer to interrupt the voting process and examine the **KIEMS kits** to determine the voter turnout at that hour so as to account for the issued ballot papers. On examination, of the **KIEMS kits** it was discovered that the **KIEMS Kits** had recorded a lower voter turnout than the number of ballots issued as audited through the ballot counterfoils.

65. The Presiding Officer then directed clerk 2 to sit and work closely with clerk No.1 using the KIEMS Kits. The voting process was also interrupted for a while and in the meantime, he called for a meeting of the clerks and party agents where he sought to confirm the identity of the persons who had voted without being keyed into the KIEMS Kits. That this was done through guess work based on the identity of persons who had voted at the station before 7.00am and on voluntary information from party agents. However, only 2 persons were traced out of a large number that had been identified. He estimated that by that time about 100 persons had voted. That to balance the voter turnout with the ballot papers issued, the presiding officer then directed clerk Nos.1 and 2 to ensure that the numbers of persons matching the already issued ballot papers be identified through the KIEMS Kit but not be issued with ballot papers. It was his case that people were allowed to vote at **Maiga Primary School polling station** without being identified as required by law and that the regulations requiring use of technology were floated.

66. On cross examination he stated that whereas counterfoil showed that 100 voters had voted, KIEMS showed 73 so there was a difference of 100 persons. That about 25 voters were turned away without voting but none had sworn an affidavit and he gave this information to his advocate but never reported the matter to the Returning Officer or Deputy Returning Officer nor the Police. One week after elections the Petitioner who was known to him called him seeking information about the incident at the polling station.

67. On cross examination by the court he stated that he was aware of instances where a voter could be issued with ballot papers upto 3 times if they made an error on their papers but that did not happen because whenever that happens, the agents would be informed and they would take note.

68. This court issued summons for the attendance of the **Officer Commanding Station Kenyena and DCIO Kenyena**. Both officers availed themselves on 12<sup>th</sup> October 2017 to give evidence on the 91 ballot papers found by PW5 and PW12. They were court's witnesses hence the reference CW.

69. CW1 was **NO. 235738 CIP JOSEPH KIRIGA MWAMBURI** who told the court that ballot papers were handed over to him by **CIP SIMON TOO** who was then acting as OCS Kenyenyia as he had not arrived at the station at the time. He just took over the ballot papers in the state they had been presented to him. That **CIP SIMON TOO** had been transferred to **Bura Police Station** as Officer Commanding Station (OCS), and he did not recall the date the papers were handed over to him. He produced the 91 ballot papers and black paper-bag they had been found in together with a list which was serialized relating to the Member of National Assembly elections held on 8<sup>th</sup> August 2017 for Bomachoge Borabu Constituency.

70. CW 2 (**TOBIAS AKUMU**) the DCIO **Kenyenyia Sub- County** recounted that on 1<sup>st</sup> September 2017 at about noon, he was called by **CIP Simon Too** who was then Acting OCS Kenyenyia over the phone. He told him that some three people had telephoned while at **Nyagancha** saying they had found some election material disposed off on the roadside. The recovered material was brought at about 12.20 p.m to the police station, and he observed that all the papers were duly marked in favour of one of the candidates who is the sitting MP i.e the 3<sup>rd</sup> respondent.

71. He then called the Returning Officer of Bomachoge Borabu Constituency **MR. ODUL** as he wanted him to verify the authenticity of the documents and also to know whether they had been issued by his office or any Presiding Officer.

The Returning Officer doubted their authenticity as they did not have security features but confirmed that the rubber stamp on the back of each of the 91 papers came from IEBC.

72. In the course of their chat with the Returning Officer he demanded to know whether the Presiding Officers when collecting the ballot papers from him recorded their serial numbers and was informed that all Presiding Officers were issued with the polling station diary where each was supposed to indicate the serial number of each ballot paper issued to them. He instructed him to go and bring all the diaries issued to all the Presiding Officers in Kenyenyia and he indeed brought all the diaries.

73. They jointly went through the diaries i.e himself, CIP Too, the Returning Officer and his deputy and they realized that some of the Presiding Officers had not entered details of the ballot papers in their diaries. Their efforts reached a dead end because they could not know where the material came from, whether they were issued by 1<sup>st</sup> respondent, coupled with the fact that these papers had no security features. They left their investigations pending but they retained the ballot papers, and the matter is still pending under investigations. The recovered ballot papers produced in court all had the 3<sup>rd</sup> respondents stamp at the back, and all are marked for 3<sup>rd</sup> respondent using a tick against his name.

74. On cross examination by Mr. Mukonyi, he confirmed that when they were going through the ballot papers the Returning Officer kept on saying that they lacked 'security features.

Upon the Petitioner's counsel's request this court ordered that all the 91 ballot papers be photocopied after which they said copies were to be in the safe custody of the Deputy Registrar of this court and the originals be released to the OCS Kenyenyia Police for safe custody.

75. RW1 (**ODUL BERNARD ARGWINGS**) the Returning Officer for Bomachoge Borabu told the court that he had a personal interaction with the clerks during the period of training and in his briefing, he gave ALL election officers including the clerks his telephone number. He contended that if the clerks did not turn up for training then obviously they never met him.

76. He confirmed that the forms from **Oroche Primary School 005 stream 2** were not signed by the Presiding Officer or the Deputy but it bore the 1<sup>st</sup> respondents stamp. Further neither the name of the Presiding Officer nor that of the Deputy Presiding Officer was legible on the form from Ichuni Primary School stream 3, and 1st respondents stamp was not affixed.

77. In response to the 91 ballot papers found by PW5 and PW11, he stated that they had a stamp SIMILAR to that of 1<sup>st</sup> respondent, they bore the marks for Member of National Assembly but he was not be able to verify whether the recovered papers belonged to 1<sup>st</sup> respondent He further stated that ballot papers did not have a record of which polling station they had been issued to. However, he acknowledged that Form 26 indicates that a ballot paper ought to have a polling station. I note that the recovered ballot papers presented to this court did not have a polling station, but the witness indicated that generally Ballot papers do not have pre-printed polling station number or name for the whole country. He also conceded that the ballot papers recovered, if authentic fell within **Nyakorere 2 stream** which showed it had 536 registered voters, and total valid votes cast were 384. He agreed that 91 was a significant number though according to him, the Presiding Officer stated that his ballot papers were in the ballot box.

78. He could not rule out the possibility that recovered ballot papers were manipulated, giving a scenario that if they found interference with the content in that box then:-

- It would be possible that the Presiding Officer did not put them in the ballot box, after completion of form 35A because the ballot papers are packed in the box after filling and signing the form or
- The other possibility is that the box was broken into after it was sealed and the papers retrieved.

79. He explained that since there were supposed to be 4 seals – it is not possible to extract the materials from the box unless the above two scenarios occur. He further explained the rationale for the alleged recovered marked papers in favour of one candidate all being in one bundle is that ballot papers are sorted as per each candidate and put in a bundle – so all the papers in favour of one candidate are in one bundle then counted and the total votes for that candidate recorded then the bundle is noted with the tallying sheets and tied with a rubber band. Then the subsequent bundles for each candidate are treated in like manner.

80. Further that all these bundles are put inside the transparent ballot box. In the event that someone broke a seal and accessed the paper and

picked that bundle, then the bundle would have only papers in favour of one candidate. If the 91 papers were authentic, then it calls for investigations and it suggests that someone who interfered intended to harm the candidate in whose favour the papers were marked.

81. He acknowledged that there was an incident of alleged mishandling of ballot papers at **Monsensema** regarding an extra ballot paper given to a voter. He explained that he went there accompanied by the DCIO and they found a voter who had ballot papers in his hands and the agents had held him hostage and were baying for his blood and accusing his clerks of colluding with him.

82. He and the DCIO decided to take the voter, the ballot papers and the three clerks issuing the ballot papers to record statements with police. He stated that from his observations, the voter was in possession of 4 ballot papers for different positions –this was confirmed by the record with the police, the voter and the clerks. Later, when he followed the matter with the police, they told him they could not prosecute the case as they did not find any extra ballot papers on the voter.

83. He testified that statutory declaration forms are usually packaged with ballot papers, so when they issued the ballot papers, the Presiding Officer signed for them alongside the results declaration forms in their diaries. He said it was unlikely that a form for one polling station would be in the package for a different station unless there was a mismatch.

84. So if that is the position, then what explanation did he have for **Rianyangita stream 2** which was signed by **PHIGREY OGWOKA JOMO** who was the Presiding Officer for **stream 1**? He explained that there was a mismatch in the packaging i.e. forms for **stream 1** were sent to **Rianyangita stream 2** and for **stream 2** sent to **Rianyangita 1** and the Presiding Officer actually indicated this on the forms. With regard to claims that at **Rianyangita** the Presiding Officer was marking ballot papers for the voter, he stated that the same was not reported to him.

85. He confirmed that PW13 was a clerk with the 1<sup>st</sup> respondent and on the allegation that at some point they were not using KIEMS system, he explained that where KIEMS failed, the voters would be identified using the manual register which was a complementary identification recognized in law. However, it was never brought to his attention that 100 voters voted using complementary register or that the KIEMS kit had recorded lower voter turnout or that some voters were turned away at **Kenya Primary School polling station stream 1**. He explained that although he had not brought the polling diary; the record of the elections was entered in Form 35A and the polling station diary.

86. Were results not relayed electronically? The witness stated it was untrue as all results in the 105 polling stations including Kenya were transmitted electronically. (though he had not attached anything to prove the same).As for **Itongo Primary School stream 2** that about 30% of the voters could not be identified using their finger prints, he explained that in such a situation that voter would have his/her Identity keyed in the KIEMS and if that voter is in the register his/her details will pop up and the voter be asked to authenticate the finger prints. If that failed, then the clerk would call all the agents to come and witness that the portrait and the details relate to that voter's details in the KIEMS. Once the agents confirm then the Presiding Officer authenticates the voter and the voter is allowed to vote. In that event the Presiding Officer then fills Form 32D. However, in this case the Presiding Officer told him no such thing happened.

87. With regard to **Nyakorere polling station**, he clarified that **PAUL ONCHIEKU** was not one of the Presiding Officers in any of the **Nyakorere** polling streams but he was a Presiding Officer at **Ichuni**. He denied receiving any report that one of his officers had been assaulted either at **Nyakorere** or **Magena**.

88. On cross examination by Mr. Nyakundi, he reiterated that ballot papers from polling stations to **Magena** were transported enclosed, in a transparent ballot box in a vehicle with the Returning Officer and police escort. That if there was any assault on the way, then those in the vehicle would have known. He added that this mode of transport was designed to ensure security and transparency.

89. He further stated that the Petitioner being a voter could not have had agents to check and verify as the electoral laws do not allow for voters to recruit agents to check for electoral materials.

90. On allegations of voter bribery and intimidation, he stated that the Petitioner did not bring complaints to him as they had instructed the agents to file written complaints whenever they had issues. He was surprised that agents deigned to disclose details regarding what was going on in the polling station to the petitioner, yet they had taken an oath of secrecy.

91. On re-examination he clarified the voter identification process as follows:-

- The voter gives his identity to clerk No. 1 who verifies the identity against the person presenting it, then asks the voter to put his finger print of the **KIEMS** for identification. Once that voter is identified, (i.e details have popped up in the **KIEMS**), the clerk validates that voter in the **KIEMS** so the voter proceeds to vote.
- Where the finger print fails three times, the **KIEMS** automatically moves to alphanumeric identification so the clerk keys in the identity card number of the voter. If the person is registered, the details will pop up, if the person is not registered, no results will be found and the voter will be turned away at that point.
- If the voter turned up and were not identified it meant they were not on the register and would be turned away. He was not aware that the identification system failed.

92. If the electronic identification failed, then the alternative method of identification was the manual register – however, this was not resorted to in any of the stations and all the registers were returned unopened. He explained that at Rianyangita there was a swop at the point of packaging that the Presiding Officer Phygrey Ogwocha brought it to his attention at the time of filling in the form i.e after voting and he indicated under the name of the school that this was stream 1 and not 2, and when he posted the entry on Form 35B, the same did not carry the error in the swapping of the forms. He also clarified that the error was only corrected in Form 35B.

93. He pointed out that during training, he gave all his clerks his phone numbers and none of the complaints raised were ever brought to his attention. The witness described the election process as free and fair and that the entire Bomachoge Borabu constituency had 105 polling stations and only 10 polling stations experienced problems which accounted for less than 10%.

94. **PHYGREY OGWOKA JUMA** (RW2) was the Presiding Officer for the 1<sup>st</sup> respondent in **Rianyangita Primary School Polling station 1** testified that every voter who came to the station was accorded a chance to vote. However, those who needed assistance were a bit slow but nevertheless, he and the Deputy Presiding Officer assisted them to vote for the candidate of their choice. Thereafter, sorting and tallying of votes was in full glare of all candidates and their agents who signed on the Form 35A on being satisfied with the results. That the results were then sent through KIEMS kits to the tallying centre and afterwards Form 35A was delivered to the tallying centre.

95. On cross examination by Mr. Ombati, he confirmed that **HENRY NYABUTO ONDITI** was an agent but he did not send him out of the polling station at any stage. On the testimony of **PW2 Mary Nyabonyi Asuga** he stated that he was unaware of it and had just learnt about it in court.

96. With regard to **Rianyangita stream 2** he noted that the forms belonged to station 2 as he was recording results so he wrote station 1 at the polling station in the presence of all agents. That on arrival at the tallying centre, he informed RW 1 that the results belonged to stream 1 and not 2.

97. He confirmed that he was assisting voters who needed help in voting, and PW2 who was his clerk never raised any complaint about the elections. Further if she had raised complaints with him and felt he was not handling it properly, she was at liberty to contact the Returning Officer because everyone who was involved in the poll process was given the Returning Officer's telephone number. He further confirmed that he did not know **Henry Nyabuto Onditi** personally but recognized his name as one of the clerks. That if he had treated him unfairly he too would have reported him to police officers at the polling station and also to RW1.

98. He further confirmed that he did not witness any candidate being intimidated to vote for a particular candidate and that voting was not messy as everything went smoothly. He also insisted that he did not force anyone to sign any blank form, not even **Mary Nyabonyi Asuga** PW2. He stated that results were announced at the polling station once counting of votes was done at the polling station for all elective positions, they then recorded the results in form 35A with all the agents who witnessing and signed as he also signed.

99. He also explained that he would open the KIEMS machine and insert the results in form 35A into the machines with all agents witnessing. Thereafter he would then scan forms 35A and transmit the results electronically to the Tallying Centre, the ballot box would be closed using 4 seals given by 1<sup>st</sup> respondent and the hard copy delivered by a vehicle escorted by a police officer that is himself, DPO and security.

100. RW 3 (**ERIC ORWARU**) the Presiding officer at **Maiga Polling Station** termed the allegations by **PW13 Samuel Karioki** that there was a confusion between clerks 3, 4 and 5 during the issuance of ballot papers as untrue, saying the voting process continued smoothly without any interruptions and no voter was issued two ballot papers for any of the seats that were being contested. He further stated that the **KIEMS** worked well with voters being lawfully identified as required by law before voting, the numbers reflected by the **KIEMS** kits was a true reflection of the voters in the polling stations and at no point did he collude with anyone to balance out the number of alleged voters who had been left out in the **KIEMS**. It was his contention that everyone in the polling station was given a chance to vote for their preferred candidate and no one was ejected unlawfully from the polling station.

101. On cross examination by Mr. Ombati, he maintained that he did a clean and accurate election, and the total number of votes cast was 366 and he recorded the same. He described PW13's evidence as false saying the KIEMS worked well throughout and that there was no situation where a voter was given more than one ballot paper. He denied allegations that he directed two clerks to sit and work with one clerk at the KIEMS kit and that he interrupted the voting due to problem with the KIEMS. He also revealed that clerks were not allowed to use phones during voting but if a clerk had an issue and needed to inform the authorities, then they could inform RW1 who had given them his number when they were being trained. He also stated that he did not know one **MARK ONDARA** and that only two agents remained until they finished counting the votes.

102. On cross examination by Mr. Nyakundi he maintained that if a clerk had complaints about the conduct of the Presiding Officer a report would be made to the Returning Officer either by phone, in writing or make oral physical appearance; and PW13 never raised any issues with him concerning conduct of elections at Maiga Primary School.

103. RW 4 (**ELIZABETH MOGIRE**) the Presiding officer at Mosensema Primary School Polling Station confirmed that around 3.00 p.m there was a commotion with agents alleging that one of the voters had more than one ballot paper for MP, Woman Rep, Governor and Senator. Thereafter, police were called and the said voter was taken to the police station with the said ballot papers. However, the said voter only had 4 ballot papers in his possession having already cast 2 ballots and the rest were for different elective posts hence he was never prosecuted.

104. On cross examination by Mr. Begi she maintained that, she investigated the claim and found no evidence to confirm the allegations as the voter had cast for President and MCA and was left with the one for MP, Governor, Senator and Women Rep. However the agents refused to listen to her, so she got police, meanwhile the voter was placed at a corner while voting was on going until about 5.00 p.m when he was picked and taken by police.

105. In reference to Form 35A from Monsensema, she confirmed that there were 12 agents but some agents left before they finished counting, so only one remained and that is the one who signed. She admitted that the number of valid votes shown in the form did not reflect the correct position as there was a mistake in the addition i.e it should have added up to 336 as worked out in court but the figure in the form is 436 – it is more by 100 however she did not allocate the said vote to any candidate which meant that no candidate benefitted from this mathematical human error.

106. RW5 (**IBRAHIM ONKWARE**) the Presiding Officer at **Itongo Primary Polling Station** stated that the **KIEMS** kit for the polling station worked well and that the few people who could not be identified through **KIEMS** were identified through their identity cards which were scanned before they were allowed to vote.

107. On cross examination by Mr. Begi, he confirmed that **PW3 Vincent Maina Nyachio** was one of his polling clerks, and that some voters could not be identified by **KIEMS** and, he had to scan their identification cards and verify their details before they voted. However, he stated that for voters who voted after scanning their identification cards, he had to fill in Form 32A. On being asked "Did you hand over the Form 32A's to the Deputy Returning Officer at Magena he replied" "I handed over all the forms". This court noted that the witness was not specific about Form 32A and was evasive on it. He also confirmed that the **KIEMS** kit failed to send results hence, results were taken physically to the tallying centre.

108. On cross examination by Mr. Nyakundi, he denied that he was assisting voters to mark ballot papers in favour of the 3<sup>rd</sup> respondent.

109. RW 6 (**LAMECH MORARA OGECHI**) the Presiding Officer at **Magena Primary School**, stated that the voting process proceeded on smoothly, at the conclusion of the voting process, counting and tallying also proceeded smoothly and after declaration of results, all agents signed the statutory forms and the same was relayed to the tallying centre via **KIEMS**.

110. On cross examination by Mr. Ombati, he confirmed that during the counting of votes for Member of National assembly he gave the clerks a health break of about 5 to 10 minutes and Kennedy Nyabuto Omuro did not protest about the break.

111. RW 7 (**ONCHIEKU PAUL NYABAYO**) the Presiding officer at **Ichuni Primary School Stream 2** stated that voting went on smoothly, every voter was given a chance to exercise their democratic right. There were instances where the voters required assistance to enable them vote their preferred candidate and the said assistance was given to the satisfaction of the agents. That upon counting and tabulating results, he filled Forms 35As and gave agents to sign after which the results were sent through **KIEMS** to the tallying centre.

112. On cross examination by Mr. Ombati, he confirmed that he knew **JEFF YOBESH OKEMWA (PW5)** as they studied together at Kenyatta University. That he met PW5 at **Magena Shopping Centre** after delivering election materials at the tallying centre and took drinks with him for about an hour. He also stated that when he met PW5, his hand had not suffered any injury. He also met **JOASH ONYINKWA** the Presiding Officer at Nyakorere and they spoke as he was going home and confirmed that the said Joash was in a normal state. He denied claims that he gave **Dorothy (PW 9)** a blank form to fill.

113. On cross examination by Mr. Nyakundi he stated that allegations about Form 35A not being signed were untrue or that he failed to disclose to agents the number of votes cast and rejected and allegations on giving agents blank results to sign.

114. Independent candidate RW8 (**ZADOC ABEL OGUTU**) the 3<sup>rd</sup> respondent is the current **Member of Parliament for Bomachoge Borabu Constituency** having been elected on 8/8/2017 during the General Elections. He confirmed on cross examination by Mr. Begi that he had agents at the polling stations and indeed his agents did not sign forms at **Riribe Primary School, Rinyachabera Primary School Stream 1 and 2, at Magena Primary School stream 2, Kemoreko Primary School and Oroche Primary School, Gesabakwa Primary School and Igorera Primary School** but the results were verifiable.

115. In reference to (**PW8**) **Eric Kinaro Nyakundi** about the meeting at Nyakoe he stated that the Deputy Governor could not have been referring to him to be assisted since he was an independent candidate and the Deputy Governor was in the **ODM** party. As regards the discovery of the 91 ballot papers he confirmed that he went to the police to inquire about the ballot papers after it was announced by **EGESA FM** station and he was shown a polythene bag but not the papers. That he eventually saw the papers produced in court which bore his photographs among other candidates.

116. On cross examination by Mr. Mukonyi, he confirmed that he was called to a meeting at the Tallying Centre where all candidates were invited to witness breaking of the pellets (seals) on the boxes. That he did not give any IEBC official any incentive to cause them to interfere in his favour, that he had agents in the polling stations who reported results to the chief agent and then the results were reported to him. It was his evidence that before elections all candidates had a meeting with officials of 1<sup>st</sup> respondent, where they were asked to raise concerns, so he wrote a letter to RW1 seeking withdrawal of some of the trainees (who were to facilitate the voting process) because he noted that some trainees had either actively participated in campaigns or were members of the CDF fund. Mr. Miombo also a candidate also raised his concerns and as a result, the Presiding Officers were withdrawn. According to him, the Returning Officer was fair and impartial. He also stated that it is not practical for all 14 agents to sign the forms and that the agents vote for candidates of their choice and not necessarily a party they are affiliated to. He stated that the petition did not disclose the date he was declared so it is incompetent.

117. RW 9 (**VINCENT OKEROMI NYANGIGE**) a registered voter at Nyakorere polling station within Bomachoge Borabu Constituency and an agent of the 3<sup>rd</sup> respondent, stated that during the voting process at Nyakorere, whenever a voter wanted to be assisted to vote, the presiding officer called two agents to witness, and he did not hear nor see any incident of inflation or reduction of any votes belonging to the candidates. He stated that after the result was announced, the two presiding officers in stream 1 and 2 boarded a vehicle of 1<sup>st</sup> respondent to Magena tallying centre and the election exercise held at Nyakorere polling station was peaceful, free and fair.

118. RW 10 (**ELIZABETH MONGARE OCHARO**) a registered voter at Nyakorere Polling Station within Bomachoge Borabu stated that on 8/8/17 she arrived at Nyakorere Polling Station at about 9:00 am and cast her vote without any incident. She corroborated RW9'S averment that there was no incident of inflation or reduction of any candidate's votes.

119. **ALFRED KARIOKI OMWAMBA (PW11)** a registered voter at Monsensema Primary School within Bomachoge Borabu and also an agent for the 3<sup>rd</sup> respondent corroborated RW4'S averments that the voting exercise went on smoothly till about 12.00pm when some commotion started about a voter suspected to have extra ballot papers. This is the voter who was found with 4 ballot papers and initially handed over to police.

120. RW12 (OCHEGO OMBASO) also an agent to the 3<sup>rd</sup> respondent testified that the voting exercise was without any irregularities, the deputy presiding officer was in charge of assisting voters in the presence of two agents after which he filled form 32A, vote counting started at 7.00 p.m. and ended early morning when results were announced after which, he signed Form 35A and witnessed the results being transmitted to the tallying centre as per Form 35A.

### ISSUES OF DETERMINATION

1. Whether there was inaccurate counting and tallying of votes and the effect
2. Whether the 1st respondent by acts or omissions committed electoral offences and whether the same rendered the results incredible. Was there proof of voter bribery and intimidation by the 3rd respondent?
3. The results of scrutiny exercise
4. Was the 3rd respondent validly declared the winner of the seat for Member of the National Assembly Bomachoge Borabu Constituency?
5. Who bears the costs of this petition?

121. The burden of proof lies with the Petitioner as provided by the Evidence Act section 107 which states:-

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

122. The Supreme Court reiterated that position in the **RAILA ODINGA AND OTHERS –VS- IEBC & OTHERS EP NO.5 OF 2013**[2013] eKLR 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.*”

123. The Standard of Proof in Election Petitions is lower than Reasonable Doubt but higher than Balance of Probabilities as was reiterated in **RAILA AMOLO ODINGA AND ANOTHER –VS- IEBC AND OTHERS ECLR (2017)** where the Supreme Court, pronounced itself as the standard of proof that has been applied in literally all election petitions in this country-I need not re-invent the wheel on these two standards which is what will be used to determine whether the Petitioner has met the bar in the issues raised.

### Whether Inaccurate Counting and Tallying Affected the Results

124. The Petitioner’s Counsel submitted that in Mosensema Form 35A indicated the total valid votes cast as 336; that there was an addition of 100 votes which gave a total of 436 votes. That Form 35A for Igorera Primary school had alterations that were not countersigned, forms for Ichuni Primary School and Oroche primary school were not signed and that Form 35A for Rianyanchabera was not clear on votes garnered by several candidates. Counsel relied on the Nigerian case of **KUNDU SWEM –V- DZUNGWE [1966] CLR 2(a) (SC)** where it was held:-

**“Once a petitioner establishes non-compliance and the court or other tribunal cannot say whether or not the results of the election could have been affected by such non-compliance, the election will be avoided. It follows therefore that at that stage, the onus shifts to the respondent to show that the non-compliance on which the petitioner relies did not affect the results of the election.”**

125. Counsel further relied on the case of **WILLIAM KABOGO GITAU - V- GEORGE THUO & 2 OTHERS, [2010] e KLR** where one of the issues was that the petitioner had listed thirty seven (37) polling stations where the presiding officers had not provided statutory comments as required by the law and further failed to allow the agents of the candidates to authenticate the results by signing on the Form 16As. That in all these polling stations, the presiding officers did not give statutory comments in the Form 16As, neither did they give reasons for the failure or refusal by the candidates or their agents to sign Form 16As. The trial court held: -

**“...requires the presiding officer.... to record the reasons for such failure or refusal by a candidate or his agent to sign the Form.... with a view to promoting transparency and accountability in the electoral ....and in the event that a candidate or his agent refuses or declines to participate in the electoral process, a mechanism has been put in place for the presiding officer to give reasons for such failure or refusal by a candidate to participate. This court is of the view that failure by the presiding officer to state reasons why a candidate or his agent failed or refused to sign.... or failure to record the absence of such candidate renders the results contained ....invalid...”**

126. Counsel also relied on Musinga J in **SIMON NYAUNDI OGARI & ANOTHER –V- JOEL OMAGWA ONYANCHA & 2 OTHERS [2008] e KLR** where it was held:-

**“A Presiding Officer who, without reasonable cause, refuses and or fails to comply with the requirements of Regulation 35A in so far as performance of any of the duties spelt out therein commits an offence and is liable to be prosecuted and imprisoned ....**

*Presiding Officers....he must be guided by the given Regulations.... Some simply said that they did not see the importance of filling the statistical part of Form 16A, that is, stating:*

- i) the total number of registered voters;*
- ii) the total number of valid votes cast;*
- iii) the total number of rejected votes;*
- iv) the number of disputed votes;*
- v) the number of valid votes cast in favour of each candidate.*

*Some Presiding Officers did not sign their part in Forms 16A; others did not even request the candidates or their agents to sign the required declaration, etc....From the foregoing, I find and hold that there was breach of mandatory provisions of Regulation 35A by the second and third respondents”*

127. Counsel thus submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents had a statutory duty to correctly fill the forms containing the results of elections. Counsel also cited **Regulation 83 (1) (e) of the Election Regulations Rules 2017** which provides:

**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 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 -**

- (a) name of the respective electoral area;**
- (b) total number of registered voters;**
- (c) votes cast for each candidate or referendum side in each polling station;**
- (d) number of rejected votes in each polling station;**
- (e) aggregate number of votes cast in the respective electoral area; and**
- (f) aggregate number of rejected votes;**

128. The respondents argued that the inaccuracy at Monsesema was an inadvertent calculation mistake and a calculation of all the candidates tallied and declared results, done in court showed that the total votes cast was 336 and not 436-emphasis being made to the fact that no candidate benefitted from the extra 100 votes.

129. The inaccuracy noted and acknowledged is with regard to the total number of votes cast at Monsensema as recorded in the form 35A. In submissions, the Petitioners’ counsel merged the issue of inaccurate counting and tallying; and acts and omissions of the 1<sup>st</sup> respondent regarding un-countersigned alterations in the forms 35A, so I will give my analysis and findings in the next sub-heading.

**Whether the acts and omissions committed by the 1<sup>st</sup> respondent rendered the results inaccurate and unverifiable**

130. **MONSENSEMA:** The petitioner insisted that one voter was caught with extra ballot papers at Mosensema. The petitioner’s counsel submitted that each witness gave varied evidence as to which elective posts they related to; and the fact that RW 11 was also categorical that he saw his co-agent, **Daniel Rabura**, sign Form 35A at Mosensema only to realize upon being shown the form attached by IEBC that it was not signed as alleged, then these contradictions made it impossible to validate the process from voting to tallying and the process was not free and fair.

131. Counsel also wondered who assisted the Presiding Officer in counting and tallying since the three clerks assisting the presiding officer were arrested upon close of voting and before counting of the results.

132. Counsel relied on sentiments expressed by Lenaola (J) [as he then was] in **BERNARD SHIMALO MASAKA -VS- BONI KHALWALE & 2 OTHERS (2011) CKLR. Page 39** where it was held:-

***“An election court.... confronted with a situation where the process, from voting to tallying, cannot be validated, then it would be abduction of duty for that court to say that the process was fair and the will of the electorate should be left to stand”***

133. **RIANYANGITA stream I:** The issues affecting this stream were stated by PW2, (an IEBC polling clerk at Rianyangita stream 1) that the Presiding Officer (RW2) openly campaigned for the person from the area, that the said RW2 did not give agents forms to sign and that he ejected the **JUBILEE** agent, **HENRY NYABUTO ONDITI** from the station. When PW2 was shown form 35A for Rianyangita Polling station attached to the 1<sup>st</sup> respondent’s response, she noted that the form for her stream was signed by a different presiding officer and that

her Presiding Officer had instead signed the form 35A for Rianyangita stream 2. This assertion was confirmed by the said Presiding officer who admitted signing the wrong form and that PW2 was her clerk.

134. **ICHUNI:** PW9 indicated she was given a blank form 35A which she signed as an agent at **Ichuni Polling station stream 1** and the petitioner's counsel submitted that this evidence was not rebutted. He referred to **Regulation 83 (1) (e)** of the **Election Regulations Rules, 2017** and Counsel also cited **Writ No. J1/6/2013 NANA ADDO DANKWA AKUFO-ADDO & OTHERS –VS- JOHN DRAMANI MAHAMA & OTHERS** (supra) where the Court expressed itself as follows:-

**“It is clear from the constitutional and statutory regulations that the ..... A counting agent is required to sign the Declaration of Results form. Polling agents should obtain copies of the signed copy of the results for their candidates. If a polling agent refuses to sign the results he must give reasons to the Presiding Officer or a superior election official.**

135. This position was reiterated in **REUBEN NYANG'INJA NDOLO –VS- DICKSON WATHIKA MWANGI & 2 OTHERS** where the Court stated that:-

**“The participation of the candidates or their agents is not incidental or cosmetic to the process but is an important component of the electoral process and that is the reason why the election regulations provide that at each stage of the electoral process the candidates or their agents participate in the process.... a mechanism has been put into place for the presiding officer to give reasons for failure or refusal by the candidate to participate in the electoral process.”**

136. **OROCHE:** The petitioner maintains that the Returning officer also conceded that Form 35 for Oroche Primary School which had 499 registered voters was not signed by the Presiding officer or his Deputy. He quoted **MANSON OYONGO NYAMWEYA –VS- JAMES OMINGO MAGARA & 2 OTHERS, KISII ELECTION PETITION NO. 3 OF 2008**, where the issue of failure to sign Form 16A by the presiding officer and/or agents was considered. In the said case the trial court expressed itself as follows:-

**“The refusal or failure of a candidate or agent to sign Form 16A or to record the reasons for not doing so as required cannot by itself invalidate the results as announced by a presiding officer. Failure by a presiding officer to comply is a serious breach which requires appropriate explanation by the officer concerned. It is an election offence for a presiding officer, without a reasonable cause, to fail and/or refuse to sign the form...and state the reasons for refusal and/or failure of a candidate and/or his agent to sign the form and any necessary statutory comments. Where a presiding officer presents to a returning officer a Form 16A which is neither signed by that presiding officer and/or any of the candidates, that declaration is of no value and cannot be used or authenticate any declared results.”**

137. In the case of **BERNARD SHIMONI MASAKA –VS- BONI KHALWALE & 2 OTHERS (2011) CKLR I. Lenaola**, cited with approval decision of Rawal J. in **REUBEN NDOLO –VS- DICK WATHIKA & 2 OTHERS E.P 11/2008 (Nbi)**, when she stated:-

**“Where in the same circumstances as in this case the form 17A had arithmetical errors, the form 16A's were not signed by the presiding officers, their candidates and/or their agents, the court must nullify) the election of the 1st respondent. The... upshot of all the above is that (where evidence of) serious and admitted or undisputable anomalies and non-compliance of important and mandatory provisions of the electoral law by the electoral officials are placed before the court (then) this court in all fairness has no option but to come to the conclusion that the Parliamentary election of Makadara Constituency was not free, fair and transparent and that the 1st respondent was not validly elected as the member of parliament of the said constituency.”**

138. **Kimaru (J) in WILLIAM KABOGO GITAU -V- GEORGE THUO & 2 OTHERS, {2010} eKLR** held:-

**“the situation concerned failure to include the results of the seven polling stations in the Form 17A, the 3rd respondent attributed it to human error. In the present petition, it was apparent that the 3rd respondent failed to verify or confirm that the results filled in the Form 17A were the true and accurate results of all the 231 polling stations in Juja Constituency. It was evident that the 3rd respondent, if at all, filled the Form 17A in the absence of the candidates. That was the reason why the candidates, including the 1st respondent, failed to append their signatures on the said Form 17A. The said form 17A cannot therefore be said to be a valid legal instrument or statutory form containing the declared results of Juja constituency... The cancellations and alterations in the Form 16As produced in this court raised questions regarding the veracity and authenticity of the said results. The said Form 16As cannot in the circumstances be said to contain the valid results of the polling stations in question. The fact that the 1st respondent won the elections by more than 19,000 votes cannot be reason why the irregularities and malpractices should be condoned.”**

139. **ITONGO:** It was the petitioner's contention that the Presiding Officer of Itongo Primary school was not clear regarding filling of form 32A in cases where identity cards of voters were scanned and remained silent when asked if it was possible to have the forms availed to confirm his assertion

140. The 1<sup>st</sup> and 2<sup>nd</sup> respondents counsel submitted as follows:-

- **Mosensema Polling Centre:** Respondents' counsel argued that the indication of 436 votes instead of 336 was an inadvertent human mistake arising from a mathematical error. That the 100 votes were not allocated to any of the candidates thus a calculation of all the candidates tallied and declared results showing that the total is 336 and not 436.
- **Oroche Polling Station:** In as much as Form 35A was not signed, it was stamped. That the results were announced at the polling station, no issue was ever raised by the Petitioner regarding this polling station, no witness was called to question

- the validity of the results contained in the form hence the results were authentic and verifiable.
- **Ichuni Primary Polling Station stream 3:** Form 35A was a carbon copy and as highlighted by the Returning Officer in his testimony, the original form might have ended up in one of the distribution points i.e. that it might have been inadvertently put inside the ballot box and the carbon copy was not stamped. Counsel argued that there was no legal requirement for the form to be stamped as the same was an administrative action to which failure does not invalidate the results declared at the polling station.
- **Igorera Polling stations:** There were no alterations and/or discrepancies as alleged in the petition-the results contained in form 35A are verifiable and have been acknowledged by the agents.

141. In referring to **Regulation 79** of the **Elections (General Regulations) 2012 [Rev.2016]**, counsel stated the same is clear on the processes to be undertaken when the candidates or agents refuse to sign the statutory forms or are absent from the polling station. It states:

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

**(4) Where a candidate or an agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form.**

**(5) Where any candidate or agent of a candidate is absent, the Presiding Officer shall record the fact of their absence.**

**(6) The refusal or failure of a candidate or an agent to sign a declaration form under sub regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub regulation (2)(a).**

**(7) The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under sub regulation (2) shall not by itself invalidate the results announced.**

142. Counsel cited **GATIRAU PETER MUNYA –VS- DICKSON MWENDA KITHINJI & OTHERS S.C PETITION NO 2B OF 2014 (2014) eKLR**, where the Supreme Court abhorred the indolent nature and acts of the petitioner in finding that an agent who is not present at the polling station can now not raise an issue that the forms weren't signed. If no evidence was adduced in court to challenge the said result, then the result as declared is uncontested.

143. It was the respondents counsel's contention that the Petitioner has not brought forth evidence to show that there was a different result or that there was malpractice in the polling station.

144. He stated that in **Rianyanchabera** figures were well indicated by the Presiding Officer and attested to by the agents.

It was contended that that the results contained in all forms provided for by the respondents were accurate and verifiable pointing out that the **PETER MUNYA case** (supra) held :-

*“...it is not the business of the court to aid the indolent. If party agents were required to be present, sign statutory forms and undertake any other legitimate duty that is imposed on them as part of the political process in an election, then they are under an obligation to do it. To fail to do so is not only to fail ones party but also to fail our democracy. The court must frown upon any such inaction, reluctance or delay.”*

145. Counsel urged this court to consider the above Supreme Court decision in evaluating the Form 35A for **Oroche Primary Polling Station and Ichuni Polling Station stream 2** and find that the court should not assist the indolent.

146. There are several factual issues I have noted and I have also perused the impugned forms and find that:

- **Igorera Primary School stream 1** had a figure appearing as 428 next to the more legible figure of 672 under the registered voter's column. This raises eyebrows regarding the net result as the number of valid votes cast was recorded as 479. However the Presiding Officer signed the same as did the agents for ODM and Jubilee-signifying their acceptance of the record
- **Oroche Primary School stream I** form 35A was signed by the Presiding Officer as well as 5 party agents including the Jubilee agent.
- **Oroche Primary School stream II** form 35A bore the names of the Presiding Officer and his Deputy the document was very faint and their signatures were not visible and the returning officer conceded it would be fair to infer that it was not signed); and none of the party agents signed. I hold that the form was not signed by the Presiding officer.
- **Oroche Primary School stream III** the Presiding Officer signed the form 35a and only the Jubilee party agent signed
- **Ichuni Primary School stream I and II** forms 35A were signed by both the Presiding Officers and the party agents (including the Jubilee agent). However **Ichuni stream III** form 35A was so faint it was difficult to decipher the Presiding Officer's names but there the court noted ad hue of writing suggesting it was signed. However the form was not stamped. The failure to append the IEBC stamp is not a legal requirement but an administrative one-see the case of **OPITZ –VS- WRZESNEWSKI, 2012 SCC (2012) 2 S.C.R** as well as **MORGAN -VS- SIMPSON (1974) 3 All ER**. Consequently the omission was not fatal.

Indeed despite claims by PW9 that she was among the agents who were given a blank form 35A to sign by the Presiding Officer, on cross examination by Mr. Theuri, she confirmed that indeed the Jubilee candidate got 86 votes while the 3rd Respondent got 131 votes, and the same figures she indicated to court are the ones in the Form she purportedly said she was given blank.

PW9's claims that she never saw or signed the form 35A were dented by her own admission upon being shown the signed form with all the relevant details, with the exclamation "Oh yes I recall signing the document". She also confirmed that the results entered therein particularly for the Jubilee candidate and the 3rd respondent were correct. This was a witness who was inclined to a lot of theatrics even in court and I question her credibility and bona fides.

- **Kerongorori** Primary School stream I form 35A did not have any cancellations and was signed by both the Presiding Officer and the party agents.
  - **Rianyanchabera** stream III had an unclear entry on the votes garnered by **Maaga Onkundi Karori** which appeared as either 100 or 150, but it did not affect the votes for the 3<sup>rd</sup> respondent or the first runners-up. The form 35A was signed by the Presiding Officer and the Jubilee agent-other agents' names were listed but they did not sign.
  - **Riayangita Primary School streams I and II** form 35A was signed by the Presiding Officer and 5 party agents including the Jubilee agent.

The forms for **Riayangita stream I and II** were interchanged and **PHYGREY OGWOKA** gave a satisfactory explanation regarding the mix-up.

- **Itongo:** The Presiding Officer (RW3) did not produce the Form 32A to confirm how many voters used the alphanumeric verification process. Despite this, no tangible evidence was presented to show that the 3<sup>rd</sup> respondent benefitted from this—all there is suspicion, which is not the recognized standard of proof.

147. **Monsensema** form 35A was signed by the Presiding Officer and the Jubilee party agent. There was an arithmetical error when adding up the total number of votes cast at Monsensema to read 436 instead of 336 and this was satisfactorily explained by Elizabeth Mogire (the Presiding officer). I note that none of the candidates benefitted from this error.

148. With regard to Mosensema polling station the respondents referred to the decision by Maraga J in **JOHO V. NYANGE & ANOTHER** (No. 4) that:-

***“Errors are to human. Some errors in an election like this conducted under a frenetic schedule are nothing more than what is always likely in the conduct of any human activity. If they are not fundamental they should always be excused and ignored. But where deliberate irregularities or forgeries are committed different considerations come into play. In their case, however, serious consideration should be given as to what effect if any, that those errors whether innocent or deliberate, have on an election before the same is vitiated.”***

149. It was thus their contention that the said error did not affect any of the candidates' votes and were not in any way intended to favour any of the candidates.

150. Indeed the situation in the instant case can be easily distinguished from the **Simon Ogari** case (supra) as the statistical information in all the forms 35A were entered. Were there alterations and cancellations in the present case? Were they of the scale and magnitude witnessed in the Kabogo case? The unsigned forms and alterations/cancellations which were not countersigned are of such a miniscule proportion that they have no significant impact on the declared results.

151. **What happens where party agents fail to sign the form 35A?** Certainly Regulation 79 (1) requires the Presiding Officer to record the refusal or failure but there is refuge offered under Regulation 79 (6) that the refusal or failure of an agent to sign a form, does not by itself invalidate the announced election. This is buttressed by the **Peter Gatirau Munya** case (supra). As for the instances where the Deputy Presiding Officer signed the forms instead of the Presiding Officer, I find a clear answer in that although regulation 79 (1) of the Election (general) Regulations 2012 provides that the signing of the form shall be done by the presiding officer but regulation 5 (4) of the same allows the Deputy Presiding Officer to perform any act which the Presiding Officer can perform.

152. There were about 5 forms not signed by the Presiding Officer or the Deputy but I note that the results from those stations as recorded were not contested.

#### **Whether the acts or Omissions by 1<sup>st</sup> Respondent rendered the results incredible and unverifiable**

153. Counsel urged the court to consider the testimony of PW6 (an agent at **Kenyenya Primary School**) that several people were not allowed to vote and gave examples of **Nyachako Ondara** as well as **Bernard Riogi** as among those sent away. Furthermore, that one woman was sent away 4 times from the polling station and was only allowed to vote at the fifth attempt. It is to be noted that these named individuals did not testify to confirm the allegation nor is there any evidence showing they were registered voters within the area.

154. Counsel was emphatic that PW5's version about the Presiding officer who appeared to have been beaten up coupled with PW8's testimony about an illegal meeting of Presiding Officers with the Deputy Governor a few days before they would conduct elections and that the said meeting was attended by several Presiding Officers was not rebutted.

155. He pointed out that there was evidence about a voter who was purportedly caught with two ballot papers for Senatorial elections, and that a clerk had allowed several voters to vote without proper verification through the KIEMS kit, plus claims that counterfoils indicated 100 people had voted yet the kit had only captured 73 voters thus, established a disparity of 27 votes. He urged the court not to ignore the evidence and to find that the process was flawed. It is to be noted that these named individuals did not testify to confirm the allegation nor is there any evidence showing they were registered voters within the area.

156. He termed being turned away without voting as voter disenfranchisement contrary to Article 38 of the constitution. He pointed out that **Stephenson L.J expressed this point in the case of Morgan –vs- Simpson (1974) 3 All ER 722 at P 731.**

**“For an election to be conducted substantially in accordance with that law there must be a real election by ballot and no such substantial departure from the procedure laid down by parliament as to make the ordinary man condemn the election as a sham or a travesty of an election by ballot. Instances of such substantial departure would be allowing voters to vote for a person who is not in fact a candidate or refusing a qualified candidate on some illegal ground or disenfranchising a substantial proposition of qualified voters.”**

157. Counsel further submitted that the agents could not have reached the Returning officer to complain about any incidents as his clerk PW2 and a Presiding Officer (RW3) stated that they were not allowed to use their phones during the voting process. That PW11 (an agent at Kerongorori Primary School) witnessed an incident of voter manipulation regarding assisted voters to vote for Prof. Zadoc Ogotu. I take note that no assisted voter testified to confirm this. Counsel cited **Regulation 72(7) of the Elections General Regulations** which provides that:-

**“No person other than a person acting under this regulation shall be present in a compartment of a polling station while a voter is in the compartment for the purpose of marking his or her ballot paper and any person who contravenes this sub regulation commits an offence.”**

158. He also relied on **Mahmud Muhumed Sirat vs. Ali Hassan Abdirahman** (supra) where it was held:-

**“The right to vote for a person of your choice in a secret ballot is a basic human right. It is a fundamental human right that is recognized by international conventions and by our Constitution and electoral law.”**

159. Counsel faulted RW6, (a presiding officer at Magena Primary school) who gave clerks a break during counting of votes contrary to **Regulation 75 (3)** which stipulates that the presiding officer shall, **SO FAR AS PRACTICABLE**, proceed continuously with the counting of votes and **Regulation 75 (4)** states that the presiding officer shall not commence the counting or recount of votes unless the presiding officer is of the opinion that the count or recount, as the case may be, can conveniently be completed without a break.

160. The allegation that clerks issued extra ballot papers was termed as false since the evidence showed that at no point was any voter caught with more than one ballot paper for an elective seat, the voter was apprehended when he was in the casting area and Form 35A was signed by all the agents and that the results declared can be verified. Furthermore, the claims that an agent was improperly thrown out at Rianyangita Polling Station Stream 2 was not proved.

161. Counsel pointed out that **ONESMUS NYAUNO MISESI** was removed from persons shortlisted for training as Presiding Officer, as candidates raised issues with his impartiality and he was replaced before the elections begun. That this never affected the election process and neither did it affect the outcome, and there was no impropriety occasioned by any of the Respondents. I find that indeed it was not demonstrated how the 3<sup>rd</sup> respondent's action affected the electoral process and it appears this particular complaint was aimed at settling scores for a spurned relative.

162. What emerges from the evidence is that despite claims made that people were not allowed to vote at Kenya, not a single person-not even the named individuals such as **NYACHAKO ONDARA** and **BERNARD RIOKI** testified to confirm:

- their existence;
- that they were registered voters at Kenya
- that they were unreasonably turned away

163. The claims about a Presiding Officer who was beaten up were false as he testified and denied ever being assaulted on the material date. As for the voter who was alleged to have had extra ballot papers, I find that the petitioner was simply splitting hairs in an alarmist reaction- indeed the incident was grossly exaggerated and blown out of mind-boggling proportions. Whether the witnesses ended up referring to different ballot papers is not fatal-the bottom line is there was no proof that he had an extra ballot paper for any of the elective seats-when it was checked he only had 4 different ballot papers, having cast the other two. This was sheer harassment which resulted in the voter not casting his other papers!!

164. **Regulation 72** of the **Elections General Regulations** provides that: -

**“On the application of a voter who is, by reason of a disability or being unable to read or write, and therefore unable to vote in the manner prescribed in these Regulations, the presiding officer shall permit the voter to be assisted or supported by a person of the voter's own free choice, and who shall not be a candidate or an agent.**

**(2) Where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the**

**presiding officer shall assist such voter, in the presence of the agents.**

165. Indeed the Presiding Officer is mandated to assist a challenged voter in the presence of the agents and during the conduct of this trial, no witnesses stated that the agents were the ones assisting voters-agents only witness the sort of assistance being accorded to ensure there was no foul play.

166. As for **Itongo Polling Station** where the Petitioner stated that the clerk was assisting voters to mark ballot papers in favour of the 3<sup>rd</sup> respondent, counsel has submitted that the form 35A for the polling station was signed by all the agents present signaling that the entire process was accountable, the results accurate and verifiable.

167. That if there was a meeting of the Presiding Officers with the Deputy Governor who asked them to help his people win, then PW8 never reported this alleged incident to any law enforcement agency nor to the IEBC officials, and this court was urged not to believe that testimony as there was no proof of impropriety.

168. I take judicial notice that the Deputy Governor was a running mate for the candidate of the **Orange Democratic Movement (ODM)** whereas the 3<sup>rd</sup> Respondent was an independent candidate not affiliated to any party. Quite apart from that PW8 in his own words stated: "I do not know whether any inducements were given". That alone speaks volumes and I need not belabor the point-the allegation has no leg on which to stand!

169. There was a break at **Magenia Primary School**, but as Counsel submitted that calls of nature are not something to assign a time and the election process is overseen by humans who get tired and have bodily needs from time to time. The clerks had sat in the Polling station the whole day and the results were not contested by the Petitioner. I agree that the operative phrase in the regulations is that 'as far as is reasonably practicable'-is it practicable for normal human beings to sit from slightly before 6.00am when voting begun to well past 6 hours later before the counting started without a health break? The answer is in the negative. I think the crucial issue is whether as a result of the health break there was evidence that it gave an opportunity to manipulate the results in favour of a particular candidate. There was no evidence to support such suspicion.

170. I also note that **HENRY NYABUTO ONDITI** (the Jubilee agent) who was purportedly thrown out of the polling centre never testified to confirm the allegations. I hold that an election official appearing sickly may raise issues of moral concern but it is not classified as an election offence.

#### **Whether the election materials and ballot boxes were tampered with and the effect on the elections**

171. Evidence was presented concerning the trio that stumbled upon the ballot papers in a black polythene bag and the Returning Officer's inability to confirm where the ballot papers were from. The Petitioner's position is that this rendered the procedure unverifiable- drawing from **WILLIAM ODHIAMBO ODUOL –VS- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS [2013] e KLR** where Justice Muchelule held;

**“Having looked at all these decisions, the jurisprudence that emerges from them is that, the votes in the ballot boxes following an election contain the best, primary and controlling evidence of the votes cast by the electorate. The Commission has, therefore, the responsibility to safeguard those votes by making sure that the ballot boxes in which they are contained are scrupulously secured until any litigation on them is concluded. The results as declared in the election forms should agree with the votes in the ballot boxes, and when they don't agree the Commission has to explain the discrepancy. ”**

172. Counsel further submitted that there was evidence showing several specified officers who marked ballot papers against the will of the voter as the evidence in Kerongorori polling centre was uncontroverted as neither the presiding officer at the station nor any other witness was called in rebuttal to this grave allegation.

173. Who were the voters who marked the ballot papers against their will? None testified. The trite principle in law is that he who alleges must prove, a witness cannot just make sweeping statements no matter how many times and by how many people it is repeated, and expect the adverse party to be condemned for not rebutting it when it just remains an allegation without proof!

174. The issue regarding 91 recovered ballot papers will be addressed under scrutiny.

#### **The results of the scrutiny exercise (referred to by counsel as: The effect of scrutiny on the electoral process)**

175. There was evidence presented that 3 weeks after the elections had been conducted and concluded, ballot papers were recovered along **Kenyanya-Nyagancha** road near Nyakorera polling station and this informed the order made on 8<sup>th</sup> November 2017 for scrutiny. On 8<sup>th</sup> November 2017 the Senior Deputy Registrar, her team of court officials, parties' representatives, and security officers proceeded to **OGEMGO IEBC** offices where the ballot boxes were stored for purposes of scrutinizing the physical condition of the ballot boxes and each party affixed their own seal. The Senior Deputy Registrar noted that the ballot box **serial number 106904** was intact and the seals, aperture and two short sides were intact. However the two long sides had no seals and there was a carbon copy of form 35A was attached on one side of the box. Photographs capturing all dimensions of the ballot box were taken by the respective parties.

176. The scrutiny exercise was conducted on 15<sup>th</sup> November 2017 by the Senior Deputy Registrar of the High Court at Kisii at the IEBC warehouse (**GUDKA**) in the presence of court officials, security officers and counsel for the respective litigants, nominees of respective litigants., scope of the scrutiny was to establish the numbers, nature, state and integrity or otherwise of the documents and materials in the ballot box with specific reference to the used ballot papers, counterfoils and spoilt ballot papers; and ascertain whether there were 91 ballot papers missing from the ballot box. The report by the **Senior Deputy Registrar** on scrutiny which had been ordered by the court upon

successful application by the petitioner stated:

- At the time of scrutiny the ballot box was intact with no breakages though it was missing two seals on the sides.
- The unused ballot papers were contained in a sealed envelope.
- The envelope containing the used ballot papers was tampered with and the security seal on the envelope was open.
- The result declaration form was missing.
- More than 100 votes belonging to the 3<sup>rd</sup> respondent were missing.

177. The petitioner's counsel relied on **JOHO -VS- NYANJE (2005) eKLR** where the court held:-

**“... Access was gained into those ballot boxes and their contents were tampered with. What I am however unable to say: who exactly it is that tampered with the ballot boxes and their content; Whoever it is, he or she cannot have been serving the interests of the second respondent. This is because the interference tended, in the manner to reduce the second respondent's votes while increasing those of the petitioner....In the circumstances I agree with the second respondent's advocates' assertion that the missing votes were in favour of their client...”**

**With all these clear interferences with the ballot boxes and the election materials I need not bother myself with the examination of the oft disputed votes which in any case were less than 100 and could not have made much difference if there were no missing votes. All I need to determine is whether those interferences render the election void...”**

178. The converse applies here as the interference only went along to deplete the 3<sup>rd</sup> Respondent's votes and going by the paper trail this obviously happened after, counting, tallying and announcement of the results - the desired effect was defeated.

179. Counsel further submitted that the scrutiny exercise revealed inaccurate counting and tallying in that whereas the total number of votes cast on Form 35A was indicated as 384, the court tallying showed votes cast as being 281 and over 111 votes declared in form 35A could not be accounted for. Moreover that the Returning officer had indicated before scrutiny that the results declaration form was among the documents that ought to be found in the ballot box, but the said form 35 was not traced in the box. Counsel relied on **MANSON OYONGO NYAMWEYA -VS- JAMES OMINGO MAGARA & 2 OTHERS, KISII ELECTION PETITION NO. 3 OF 2008**, where it was held:-

**“Without the ballot paper counterfoil, the ballots in a box are unverifiable. If scrutiny showed that the documents in the ballot boxes were substantially non-compliant or that certain statutory documents were not contained therein, a recount of the ballots per se cannot cure the inherent defect. The presence of a ballot paper in a ballot box is validated by the counterfoil thereof and the marked voter's register. Without the two, there is no telling how it found its way into the ballot box. This means that the principle of transparent, free and fair election was compromised.”**

180. The respondents' Counsel contended that even in the scrutiny exercise there was no significant discovery; one or two forms that were not signed could be attributed to human error as no election can be even free of those. That if there were any proved errors they were of small value, insignificant to disturb the resounding expression of the people of Bomachoge Borabu who gave the 3<sup>rd</sup> respondent a clear mandate to be their Member of National Assembly.

181. Undeniably scrutiny revealed that the ballot box for Nyakorere stream II had been tampered with, the security seal for the envelope containing valid votes cast had been interfered with and ballot papers for some candidates were missing; including those of the 3<sup>rd</sup> respondent. Infact there were 100 missing ballot papers in respect of the 3<sup>rd</sup> respondent and the 91 recovered along the roadside were all marked in favour of the 3<sup>rd</sup> Respondent. The form 35A for that polling station was also missing and obviously the intention of whoever tampered with the materials was to distort them so as to cast aspersions on the conduct of the electoral process!! However this finding did not have any adverse earth-shattering effect on the 3<sup>rd</sup> respondent's results or the closest runner up-the net outcome of the electoral process and the results remained constant in so far as who the leading candidate was.

### **Overall net effect of irregularities**

182. Emphasis was laid on the ultimate question as to whether or not the illegalities and irregularities highlighted in the earlier paragraphs of this judgment warrant invalidation of the election by relying on the supreme court's decision in **RAILA AMOLO ODINGA -VS- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (supra)** as one that correctly interpreted section 80 of the Elections Act to be disjunctive. The court held that **proof that the conduct of the election in question substantially violated the principles laid down in the Constitution as well as other written law on elections, to demonstrate that it was fraught with irregularities or illegalities that affected the result of the election**

183. It was counsel's submission that the irregularities and illegalities demonstrated each on their own is enough to nullify the elections and several election offences were committed by various officials of the Respondents hence, they should bear the costs of the petition.

184. In urging the court to apply the qualitative test counsel cited the case of **MUSINGUZI GARUGA JAMES -VS- AMAMA MBABAZI & THE ELECTORAL COMMISSION ELECTION PETITION NO. HCT-05-CV-EPA-003 OF 2001**, where the first respondent was declared the winner with 25,433 votes while the petitioner garnered 12,977 votes and after considering various issues of non-compliance, the court applied the qualitative test and was satisfied that the non-compliance affected the final results notwithstanding the huge margin of votes between the petitioner and the 1st respondent.

185. It was his contention that in determining the issue whether non-compliance affected the results of an election in a substantial manner, both a quantitative and qualitative test are applicable being the nomenclature used by Musoke (J) in **WINNIE BABIHUGA -VS- MASIKO**

**WINNIE KOMUHANGI & OTHERS HCT-00-CV-EP.0004-2001** where it was held that the quantitative test is the most relevant where the numbers and figures are in question, whereas the qualitative test is most suitable where the quality of the entire election process is questioned and the court has to determine whether or not the election was free and fair while also considering the paper trail (See also **MANSON OYONGO NYAMWEYA – VS- JAMES OMINGO MAGARA & 2 OTHERS, KISII ELECTION PETITION NO. 3 OF 2008**).

186. Reference was also made to the Ugandan Supreme Court case of **JOY KABATSI KAFURA – VS- ANIFA KAWOOYA & ANOTHER (ELECTION PETITION NO. 25 OF 2005)** that held:-:

*“An election is a process encompassing several activities from nomination of candidates through to the final declaration of the duly elected candidate. If any one of the activities is flawed through failure to comply with the applicable law, it affects the quality of the electoral process and subject to the gravity of the flaw; it is bound to affect the election results. One such activity is the declaration of the results at every polling station. If any declaration is invalid by reason of non-compliance with the applicable law, it affects the quality and the result of the electoral process.”* – The emphasis is “subject to the gravity of the flaw.”

187. He also relied on the Supreme Court in **RAILA AMOLO ODINGA –VS- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS (PRESIDENTIAL ELECTION PETITION NO. 1 OF 2017)** that observed:-

*“[378] ....where do all these inexplicable irregularities, that go to the very heart of electoral integrity, leave this election? It is true that where the 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? In such a critical process as the election of the President, isn't quality just as important as quantity? In the face of all these troubling questions, would this Court, even in the absence of a finding of violations of the Constitution and the law, have confidence to lend legitimacy to this election? [379] In concluding this aspect of the petition, it is our finding that the illegalities and irregularities committed by the 1st respondent were of such a substantial nature that no Court properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by IEBC can, in good conscience, declare that they do not matter, and that the will of the people was expressed nonetheless. We have shown in this judgment that our electoral law was amended to ensure that in substance and form, the electoral process and results are simple, yet accurate and verifiable.”*

This court has been urged not to disagree with the wisdom of the Supreme Court.

188. I concur with the respondent's argument that a petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds “to the satisfaction of the court. The Petitioner had mostly relied on hearsay evidence that was utterly unsubstantiated and uncorroborated claiming that “I had friends and inquired from them how the polls were going on” whom he never called to testify. Indeed none of the people who allegedly gave the Petitioner the information ever reported the matter to IEBC officials hence there was no evidence regarding the following polling stations: -

1. Kemoreko Polling Station.
2. Rianyanchabera Polling Station.
3. Magena Polling Station.
4. Ritembu Polling station Stream 1
5. Matontera polling Station Stream 1
6. Endereti Polling Station

189. The Petitioner failed to show not only serious irregularities but also show how these irregularities affected the outcome of the electoral process. As was pointed out by the Supreme Court decision in **GATIRAU PETER MUNYA –VS- DICKSON MWENDA GITHINJI AND 2 OTHERS 2014 ECLR**, a decision upheld by the Supreme Court in **ZACHARA OKOTH OBADO VS EDWARD OKONGO OYUGI AND 2 OTHERS 2014 eCLR**:-

*“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.”*

190. Counsel also relied on the learned Judges in **OPITZ C –VS- WRZESNEWSKYJ (2012)3S.C.R. 76** case in which the Supreme Court of Canada thus observed:-

*“...Given the complexity of administering ..... election, the tens of thousands of election workers involved, many of whom have no on-the- job experience and the short time frame for hiring and training them, it is inevitable that administrative mistakes will be made. If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election”*

191. The integrity of the elections is addressed under Article 81(e) of the Constitution of Kenya as being *inter alia* free from violence, intimidation, improper influence or corruption. The allegations of violence by the petitioner were never proved as the alleged victim of the purported violence (**Paul Onchieku Nyabayo**) testified that he was indeed in good health and had not been assaulted as it was alleged. The claims that the Deputy Governor held a meeting with IEBC personnel with an intention to skew the results in favour of the 3<sup>rd</sup> respondent were simply hot air with no leg to stand on.

192. All the results for the Bomachoge Borabu Constituency were collated, tallied and recorded in Form 35A which were signed by the Presiding Officers and Party Agents Present. The results were accurate save for the human errors which did not affect the outcome of the election.

193. I pay heed to **Section 83** of the **Elections Act 2011** which provides inter alia that:-

***“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”***

194. I hold and find that that the election was conducted for the Member of Parliament for Bomachoge Borabu Constituency on 8th August 2017 was free of violence, bribery or intimidation. The upshot is that the petition lacks merit and is dismissed

### **Costs**

195. The petitioner prayed for costs without pegging a figure to the prayer, whilst the respondents urged this court award costs to be borne by the Petitioner to a tune of 10 million for each of the Respondents. **Section 84** of the **Elections Act 2011[Revised 2016]** provides:

***“An Election Court shall award the costs of and incidental to a Petition and such costs shall follow the cause.” This must be read alongside Rule 30 which provides that:-***

***“30 (1) the court shall at the conclusion of an election petition make an order specifying -***

- i. total amount of costs payable***
- ii. the maximum amount of costs payable***
- iii. the person who shall pay the costs...***
- iv. the person to whom costs... shall be paid.”***

196. Clearly **Section 84** of the **Elections Act** and **Rule 30 (1)** of the **Elections (P&C) Petition Rules** place an obligation upon an election court to award costs and cap costs of, and incidental to the petition. As discussed in the Bench Book on Electoral Disputes Resolution at pg. 101, the rationale for capping costs is to encourage genuine petitioners to challenge flawed elections without being unduly hindered by the fear of incurring huge costs. It also prevents the mischief of runaway costs witnessed in yester-years and must be viewed as a tool for promoting access to justice under **Article 48** of the **Constitution of Kenya**.

197. While I recognize that the phrase ‘costs follow the event’ implies that the successful party is to be compensated for the trouble taken in prosecuting or defending legal proceedings, I am also alive to the fact that an award of costs is not intended to punish the losing party. Yet at the same time I cannot ignore the provision under **rule 30 (2) (b)** to the effect that the court may impose the burden of payment on the party who may have caused an un-necessary expense as well as sentiments expressed in **DICKSON MWENDA KITHINJI –VS- GATIRAU PETER MUNYA (MERU) ELECTION PETITION NO 1 OF 2013** regarding surrogate litigation where the court pointed out that:

***“The Petitioner who agrees to bring a petition on behalf of an unsuccessful candidate should be ready to meet the consequences of a failed petition and cannot hide behind the fact of being a sponsored petitioner....The petitioner...should not be left unpunished for his actions as by failing to do so would encourage the unsuccessful candidates to use men of no means to file petitions with the hope of getting away without paying costs in case the Petitioner does not succeed”***

198. Whereas I concur with the sentiments expressed in the afore-cited case, I would be hesitant to use the word ‘punish’ when considering the award for costs because it connotes punitive action. I think it should only be a punitive measure where it is demonstrated that the petition was motivated by malice and ill will. A litigant may file a petition in the belief that there is merit in the grievance, and still lose the petition-in such an instance using costs to punish a petitioner would be to counter the constitutional ideals of access to justice.

199. In **JOHNSON MUTHAMA –VS- MINISTER FOR JUSTICE AND CONSTITUTIONAL AFFAIRS & ANOTHER [2012] eKLR** where the court observed that:

***“Provision for payment of costs by a party coming before the court .... Given the nature of elections, it serves a useful and rational purpose of ensuring that only those who have a serious interest in challenging the outcome of an election do so.”***

200. I will therefore endeavor to balance all the aforesaid considerations and also consider the energy and industry employed in pursuing and

canvassing the issues in this matter, the time and resources involved in taking instructions, preparing and compiling documents (including the volume), researching, preparing witnesses, the length of time the hearing took (including the number of witnesses called), extent and volume of relevant paper work (as opposed to flooding the record with repetitious volumes).

201. I take note that this petition was fraught with lies, half-truths and exaggerations intended to spin a web of intrigue about non-existent assaults, voters being unreasonably disenfranchised and a stab at the ballot box which to the petitioner's dismay ended up working in favour of the 3<sup>rd</sup> respondent-all which smirk of vengeance because of his brother being denied a chance to be a Presiding Officer, courtesy of the 3<sup>rd</sup> respondent's complaint. All these fit in with what is contemplated under rule **30 (2) (b)**. I also take note that Counsel for the respondents are not based in Kisii and had to travel from Nairobi.

202. In **MABLE MURULI –VS- WYCLIFFE AMBETSA OPARANYA & 3 OTHERS KAKAMEGA HC EP NO. 5 OF 2013 [2013] eKLR**, the court ordered the 4th respondent to pay costs which were capped at 5 million to be shared equally between the petitioner and the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

203. In **EDWARD AKONG'O OYUGI –VS- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS KISII HC EP PETITION NO. 3 OF 2013 [2013] eKLR** costs payable by the 1st respondent to the petitioner and the 3rd respondent were capped at Kshs. 1 million for each party. Costs payable by the 1<sup>st</sup> and 3<sup>rd</sup> respondents equally to the petitioner were capped at Kshs. 3 million in **WILLIAM ODHIAMBO ODUOL –VS- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 2 OTHERS KISUMU HC EP NO. 2 OF 2013 [2013] eKLR**.

204. In **DICKSON MWENDA KITHINJI -VS- GATIRAU PETER MUNYA & 2 OTHERS MERU HC EP NO. 1 OF 2013 [2013] eKLR** the costs awarded to the respondents and those for the 1<sup>st</sup> respondent were capped at Kshs. 2.8 million while the 2<sup>nd</sup> and 3<sup>rd</sup> respondents capped at Kshs. 2.2 million. The costs in **FERDINARD NDUNG'U WAITITU –VS- INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 8 OTHERS NAIROBI EP NO. 1 OF 2013 [2013] eKLR** the total costs were capped at Kshs. 5 million.

205. This matter was not complex nor was it protracted or fraught with multiple emotion draining applications-infact the pleadings, the nature of evidence and submissions were straightforward. I therefore cap the costs at Kshs. 1.5 million for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and Kshs. 2 million for the 3<sup>rd</sup> respondent.

The costs shall be taxed and the total costs certified by the Deputy Registrar of this court.

#### **FINAL ORDERS**

1. The petition filed herein be and is hereby dismissed.
2. I make a declaration that the elections conducted on 8<sup>th</sup> August 2017 for Member of Parliament for Bomachoge Borabu Constituency was conducted in accordance with the Constitution and laws of Kenya and were free and fair.
3. The declared results reflected the will of the people of Bomachoge Borabu Constituency.
4. I declare that the 3<sup>rd</sup> Respondent **OGUTU ZADOC ABEL** was validly elected as Member of National assembly for Bomachoge Borabu Constituency.
5. A certificate of this determination declaring the election of **PROFESSOR OGUTU ZADOC ABEL** as validly elected **Member of Parliament for Bomachoge Borabu Constituency in the 8<sup>th</sup> August 2017 general elections** 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 shall be notified.

**Delivered and dated this 22<sup>nd</sup> day of February 2018 at Kisii**

**H.A.OMONDI**

**JUDGE**

#### **Acknowledgment**

This court is grateful to all counsel for their diligence and decorum in representing their briefs in this petition, and to the Senior Deputy Registrar Ms. Virginia Karanja for her assistance in the scrutiny proceedings. My sincere gratitude to Mr. Thomas Matwewtwe Nyamache and Prof. Ogutu Zadoc Abel and their supporters for their very dignified conduct throughout the proceedings

**H.A. OMONDI**

**JUDGE**