



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

ELECTION PETITION NO. 1 OF 2017

**IN THE MATTER OF ARTICLES 1 (1), (2), 2, 3, 10, 19, 20, 21 (1), 23, 27, 38, 47, 50 (1), 81, 86, 87
AND 88 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF THE ELECTIONS ACT, 2011

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS, 2012

AND

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

BETWEEN

RISHAD HAMID AHMED.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....1ST RESPONDENT

ABDALLAH MWARUA CHIKOPHE.....2ND RESPONDENT

STANLEY MUIRURI MUTHAMA.....3RD RESPONDENT

JUDGEMENT

A. INTRODUCTION

1. The Petitioner, Rishad Hamid Ahmed through this Petition seeks to invalidate the declaration made on 10th August, 2017 by the 2nd Respondent, Abdallah Mwarua Chikophe that the 3rd Respondent, Stanley Muiruri Muthama was elected the Member of the National Assembly for Lamu West Constituency in the general election held on 8th August, 2017. The Independent Electoral and Boundaries Commission which

is the body tasked with conducting elections is the 1st Respondent.

B. PLEADINGS

i. The Petitioner's case

2. In the Petition dated 2nd September, 2017, the Petitioner averred that in the conduct of the impugned election the 1st and 2nd respondents abdicated their duty to administer the election in a neutral, efficient, accurate, accountable and impartial manner as required by Article 81 of the Constitution as read together with sections 39, 44 and 44A of the Elections Act, 2011, the regulations made thereunder and Section 25 of the Independent Electoral and Boundaries Commission Act, 2011, thus rendering the electoral process open to manipulation, malpractice and inaccuracies resulting in a shambolic and invalid outcome.

3. The Petitioner postulated that the election was attended by illegalities and irregularities on the part of the 1st and 2nd respondents in that the printed register of voters was not resorted to where voters were not identified through the electronic voter identification devices thus disenfranchising the voters; that pre-marked ballot papers were used at the two polling stations located at Mapenya Primary School; that his agents were ejected from polling stations; that ballots for voters who needed assistance were not marked according to their wishes; and that the counting of ballot papers was not open, fair or transparent resulting in the suppression of his votes and the inflation of the votes for the 3rd Respondent.

4. The Petitioner asserted that he and or his agents were denied an opportunity to verify and sign the electoral returns; that he was not provided with copies of forms 35A for a number of polling stations and where the same were provided the contents was different from those in the custody of polling officials; that there was unlawful and fraudulent alteration, modification and amendment of the polling forms for a number of polling stations; that forms 35A were filled and completed by strangers, interlopers and impostors; and that his authorized agents were unlawfully coerced and intimidated into signing electoral returns in the polling stations.

5. It was also the Petitioner's case that his team was not accorded an opportunity to raise complaints and air their grievances over discrepancies and inconsistencies in the tallies and results; that the 3rd Respondent was declared a winner without results from all the polling stations being announced; that there was failure to prepare accurate, complete and duly signed and stamped election returns including forms 35A, form 35B and the certificate of results; and that the results as transmitted electronically by the Kenya Integrated Election Management System (KIEMS) devices from the polling stations to the tallying centre was different from the results that were manually transmitted.

6. The Petitioner concluded his case by averring that the Deputy Returning Officer appointed and authorized for Lamu East Constituency was present at the Lamu West Constituency tallying centre and her actions and omissions contributed to the alleged electoral malpractices; and that the votes cast in the impugned election were vastly different and inconsistent with those cast for the other elective posts in the general election.

7. The Petitioner supported his Petition with his affidavit to which he attached exhibits

ii. The 1st and 2nd respondents' case

8. In their response to the Petition, the 1st and 2nd respondents denied each and every allegation stating that the election was conducted in compliance with the Constitution and the laws governing elections. They urged the court to dismiss the Petition with costs.

iii. The 3rd Respondent's case

9. In a response filed on 21st September, 2017 the 3rd Respondent asserted that the election was held in

compliance with the constitutional and legal principles governing elections. He denied each and every allegation by the Petitioner stating that at no time did he receive any information from his agents about the allegations made by the Petitioner.

C. THE PETITIONER'S APPLICATION DATED 30TH SEPTEMBER, 2017

10. On 30th September, 2017 I allowed the Petitioner's Notice of Motion dated 30th September, 2017 and issued the following substantive orders:

“The Petitioner's Notice of Motion dated 30th September, 2017 is allowed in the following terms:

1. There shall be a recount of all the votes cast on 8th August, 2017 in all the 122 polling stations in respect to the election of the Member of the National Assembly for Lamu West Constituency;

2. The 123rd ballot box with the colour code for the lid being that for the gubernatorial election and which was identified by the Deputy Registrar in her report dated 13th November, 2017 to be opened and the contents therein to be scrutinized and captured in the report to be prepared by the Deputy Registrar;

3. Scrutiny in terms of prayer No. 3 of the application, in so far as is practicable, to be conducted in respect to Majembeni Primary School Polling Stations No. 1 and No. 2.”

11. After issuing the said orders I made a promise to give the reasons for that decision in this judgement. I now set out to fulfill that promise.

12. In his application dated 30th September, 2017, the Petitioner had prayed for scrutiny and recount of the votes cast in all the 122 polling stations in Lamu West Constituency. During the pre-trial conference held on 29th September, 2017 an agreement was reached holding the application in abeyance pending the tendering of the evidence by the parties.

13. The application was supported by the grounds on its face and an affidavit sworn by the Petitioner. The affidavit was a restatement of the Petition.

14. When the application came up for hearing on 19th December, 2017, counsel for the Petitioner submitted that the election was marred by malpractices and irregularities that affected the outcome. He asserted that there was uncertainty of the exact results of the election and the margin of victory of 140 votes was extremely narrow thereby making an order of scrutiny and recount necessary. Counsel for the Petitioner submitted that the purpose of scrutiny is to assist the court to investigate if the allegations of irregularities and breaches of law are valid. Further, that the exercise is meant to assist the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process. In support of this submission, reliance was placed on the decision in **Philip Mukwe Wasike v James Lusureti & 2 others [2013] eKLR**

15. Counsel for the Petitioner postulated that the Petitioner had established grounds for issuance of orders by adducing evidence showing use of pre-marked ballot papers, denial of the right to vote to lawfully registered voters, unlawful ejection of the Petitioner's agents from polling stations, among other malpractices.

16. The respondents opposed the application. In an affidavit sworn by the 2nd Respondent on 11th October, 2017, the 1st and 2nd respondents denied all the averments made by the Petitioner in the application. The 2nd Respondent averred that although the margin between the Petitioner and the 3rd Respondent was 145 votes, that in itself did not point to any irregularities but was simply a reflection of

the sovereign will as exercised by the voters in the election. The 1st and 3rd respondents therefore urged the court to dismiss the application.

17. Making submissions on behalf of the 1st and 2nd respondents, counsel took the court through the evidence that had been adduced and urged the court to find that the Petitioner had not proved any of the allegations. He asserted that the Petitioner was asking the court to open the ballot boxes so as to rummage for evidence to support his unproved allegations. He concluded that allowing the application would be a waste of the court's time. According to counsel, the Petitioner was on a fishing mission. In support of his submissions, counsel cited among others, the decisions in **Gatirau Peter Munya v Dickson Mwenda Githinji & 2 others [2014] eKLR** and **Masinde v Bwire & another [2008] 1 KLR EP 547**.

18. In opposition to the application, counsel for the 3rd Respondent stressed that the margin of victory whether small or wide could not be used as a basis for ordering a recount or scrutiny. It was his submission that the party applying for scrutiny had a duty to place evidence before the court to support the issuance of the orders. Counsel asserted that from the evidence adduced, the Petitioner had not made a case for the issuance of the orders sought. In support of his position, counsel for the 3rd Respondent cited the cases of **Gatirau Peter Munya (supra)**, **Nathan James Adama v Abdikhaim Osman Mohamed & 3 others [2014] eKLR** and **Nicholas Kipkorir Arap Salat v Independent Electoral and Boundaries Commission & 7 others [2015] eKLR**.

19. The foundation of the law governing scrutiny in electoral disputes is traced to the Constitution, which at Article 86(a) requires IEBC to ensure that **“whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent.”** In short, the method used in an election ought to be auditable.

20. Section 82(1) of the Elections Act empowers an election court to order scrutiny by stating that:

“An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.”

21. The court's power is replicated in the Elections (Parliamentary and County Elections) Petitions Rules, 2017. Rule 28 provides for recount by stating that:

“A petitioner may apply to an elections court for an order to-

(a) recount the votes; or

(b) examine the tallying, if the only issue for determination in the petition is the count or tallying of votes received by the candidates.”

22. On scrutiny, the relevant part of Rule 29 provides that:

“(1) The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

(2) On an application under sub-rule (1), an election court may, if it is satisfied that there is sufficient reason, order for scrutiny or recount of the votes.”

23. It is not a farfetched statement to assert that the law on scrutiny and recount is now settled. Writing on this subject, the authors of the **Judiciary Bench Book on Electoral Disputes Resolution, 2017** state at page 78 paragraph 4.6.5.1 that:

“Although the terms ‘scrutiny’ and ‘recount’ are often used together and interchangeably,

and petitioners often pray for ‘*scrutiny and recount*’ of the votes cast at an election, the two remedies are conceptually different. A recount is limited to establishing number of votes garnered by the candidates and the tallying of such votes.... Scrutiny, on the other hand, goes beyond the simple question of the number of votes garnered by the candidates and extends to the validity of such votes....There is no room for examination of electoral misconduct in a recount.... Although scrutiny and recount are conceptually different, the conduct of a scrutiny inevitably entails the conduct of a recount. The converse, however, is not true.”

24. In a ruling delivered on 28th August, 2017 in the case of **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others** [2017] eKLR, (hereinafter simply referred to as **Presidential Petition No. 1 of 2017**), the Supreme Court considered at length the law on recount and scrutiny. At paragraph 45 the Court reiterated the guiding principles with respect to scrutiny and recount of votes in election petitions as follows:

“In the case of Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others (supra), this Court set out the following guiding principles with respect to scrutiny and recount of votes in an election petition. At paragraph 153, the Court pronounced itself as follows:

a. The right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.

b. The trial Court is vested with discretion under Section 82(1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for the order for scrutiny or recount.

c. The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.

d. Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules. [Emphasis added.]”

25. An order for scrutiny or recount can also be made in the interests of justice. In **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others** [2014] eKLR, the Supreme Court stated in paragraph 176 of its judgement that:

“[176] We have noted that in those cases where the trial Judges had allowed a blanket scrutiny of votes in constituencies, a sufficient basis had been established in the interests of justice, and it was considered fair and proper to all the parties, in the circumstances.”

26. Going back to its decision in **Raila Odinga and 5 others v Independent Electoral Boundaries Commission & 3 others, Petitions No. 3, 4 and 5 of 2013 (consolidated)** (hereinafter simply referred to as **Raila Odinga 2013**), the Court noted that a scrutiny of the results and the tallying forms used in an

election would help in establishing the accuracy of the total tallies, the number of registered voters, the number of valid votes cast and the number of rejected votes.

27. The Court went ahead and cited with approval the decision of the Supreme Court of India in **Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & Anr, Civil Appeal Nos. 5710 – 5711 of 2013; [2014]2 S.C.R.** wherein that Court stressed the conditions that have to be met before orders can issue thus:

“Before the Court permits the recounting, the following conditions must be satisfied:

i. The court must be satisfied that a prima facie case is established;

ii. The material facts and full particulars have been pleaded stating the irregularities in counting of votes;

iii. A roving and fishing inquiry should not be directed by way of an order to re-count the votes;

iv. An opportunity should be given to file objection; and

v. Secrecy of the ballot should be guarded.”

28. The agreement by the advocates for the parties to have the application for scrutiny heard after the witnesses had testified, was indeed in line with the holding by Kimaru, J in **Rishad H.A. Amana v IEBC & 2 others** and Lesiit, J in **Jacob Mwirigi Muthuri v John Mbabu Murithi & 2 others [2013] eKLR** that an application for scrutiny and/or recount can only be adequately and properly considered after the witnesses have testified. It is only then that the court can decide, based on tested evidence, whether to allow the application.

29. After hearing the evidence in this matter, one thing that clearly emerged was that the Petitioner had not received forms 35A for a number of polling stations. Considering the narrow margin between the votes received by the Petitioner and the 3rd Respondent, I found that it would be in the interests of justice to recount the votes cast for all the candidates in all the 122 polling stations in the impugned election. The credibility of the election could only be established by such a recount. I also ordered a scrutiny in two polling stations where the results were the same.

30. Another reason why I deemed it necessary to do a recount of the votes is the fact that when the Deputy Registrar was securing the election materials, an extra ballot box had been added to the ballot boxes for the impugned election thus making the ballot boxes 123 instead of 122. There was therefore need to find out how an election conducted in 122 polling stations had 123 ballot boxes.

D. A SYNOPSIS OF THE APPLICABLE LAW

31. The parties are in agreement that by virtue of Article 81 of the Constitution, the elements of free and fair elections are that the elections should be conducted through secret ballot; free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in a neutral, efficient, accurate, accountable and impartial manner.

32. Article 86 of the Constitution requires the 1st Respondent to ensure that in an election the voting method is simple, accurate, verifiable, secure, accountable and transparent; the votes are counted, tabulated and the results announced promptly by the presiding officer at the polling station; the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

33. The Elections Act, 2011 and the Elections (General) Regulations, 2012 as amended by Legal Notice

No. 72 of 2017-the Elections (General) (Amendment) Regulations, 2017 (hereinafter simply referred to as the Regulations) give flesh to the constitutional provisions.

34. In any election petition, two issues will regularly arise: the burden and standard of proof; and the interpretation of Section 83 of the Elections Act. It should be clear that here, reference is being made to Section 83 as it read on 8th August, 2017 and not the subsequent amendment made to that section.

35. Fortunately, the Supreme Court has clearly illuminated the law on these issues. On the burden of proof the Court in **Raila Odinga 2013** held that:

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

36. As for the standard of proof, the Court enunciated it at paragraph 203 thus:

“The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt - save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in Article 38(4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.”

37. The law on the burden of proof in electoral disputes was again restated by the Supreme Court in **Presidential Petition No. 1 of 2017** thus:

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

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

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

38. As for the standard of proof the Court outlined the law by stating at paragraphs 152 and 153 that:

“[152] We maintain that, in electoral disputes, the standard of proof remains higher than the

balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt. Consequently, we dismiss the petitioners' submissions that the Court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities.

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

39. The Court then turned its spotlight on the meaning and application of Section 83 of the Elections Act to election disputes and concluded that:

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

40. Earlier on, the Supreme Court had in the case of **Gatirau Peter Munya** (*supra*) interpreted Section 83 thus:

"[216] It is clear to us that an election should be conducted substantially in accordance with the principles of the Constitution, as set out in Article 81(e). Voting is to be conducted in accordance with the principles set out in Article 86. The Elections Act, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.

[217] If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities. [218] 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...

[219]...

[220] Where an election is conducted in such a manner as demonstrably violates the principles of the Constitution and the law, such an election stands to be invalidated."

41. The meaning of the terms "illegalities" and "irregularities" was elucidated by the Supreme Court at paragraph 304 of **Presidential Petition No. 1 of 2017** thus:

"Illegalities refer to breach of the substance of specific law while irregularities denote violation of specific regulations and administrative arrangements put in place."

42. The Court then went ahead and explained under what circumstances illegalities and irregularities can lead to the nullification of an election. The Court stated that:

"[371] It is our view however, that elections, are all these things. None of the factors highlighted by the parties can be viewed in isolation. For by doing so, we run the risk of

cannibalizing a sovereign process. Elections are the surest way through which the people express their sovereignty. Our Constitution is founded upon the immutable principle of the sovereign will of the people. The fact that, it is the people, and they alone, in whom all power resides; be it moral, political, or legal. And so they exercise such power, either directly, or through the representatives whom they democratically elect in free, fair, transparent, and credible elections. Therefore, whether it be about numbers, whether it be about laws, whether it be about processes, an election must at the end of the day, be a true reflection of the will of the people, as decreed by the Constitution, through its hallowed principles of transparency, credibility, verifiability, accountability, accuracy and efficiency.

[372] It is in this spirit, that one must read Article 38 of the Constitution, for it provides inter alia, that every citizen is free to make political choices, which include the right to “free, fair, and regular elections, based on universal suffrage and the free expression of the will of the electors...”. This “mother principle” must be read and applied together with Articles 81 and 86 of the Constitution, for to read Article 38 in a vacuum and disregard other enabling principles, laws and practices attendant to elections, is to nurture a mirage, an illusion of “free will”, hence a still-born democracy. Of such an enterprise, this Court must be wary.

[373] It is also against this background that we consider the impact of the irregularities that characterized the presidential election. At the outset, we must re-emphasize the fact that not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so, there would hardly be any election in this Country, if not the world, that would withstand judicial scrutiny. The correct approach therefore, is for a court of law, to not only determine whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it.

[374] In view of the interpretation of Section 83 of the Elections Act that we have rendered, this inquiry about the effect of electoral irregularities and other malpractices, becomes only necessary where an election court has concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in the Constitution or in that law. But even where a Court has concluded that the election was not conducted in accordance with the principles laid down in the Constitution and the applicable electoral laws, it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice.”

43. In **John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR; Petitions Nos. 2 and 4 of 2017** (hereinafter simply referred to as **Presidential Petition No. 2 of 2017**) the Supreme Court at paragraph 373 restated the law on the effect of illegalities and irregularities on an election as follows:

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

44. The law as briefly outlined hereinabove shall be applied in the determination of the instant Petition.

E. ANALYSIS AND DETERMINATION

45. A perusal of the pleadings and the evidence indicates that the issues for the determination of this court are:

- a) Whether the election of the Member of the National Assembly for Lamu West Constituency held on 8th August, 2017 was conducted in accordance with the Constitution and electoral laws;
- b) Whether there were any illegalities or irregularities and if so, whether they affected the results and or the validity of the said election; and
- c) Costs.

i. Disenfranchisement of voters

46. The Petitioner's case was that the 1st Respondent caused and or denied lawfully registered voters their constitutional right to vote by refusing to resort to the printed register of voters where it was not possible to identify a voter through the voter identification device.

47. PW2 Mwanaesha Abdalla Ali, PW3 Omar Bwanaadi, PW5 Khuzeima Ahmed Mohamed, PW6 Waziri Mohamed Waziri, PW7 Ali Salim Abdolehman and PW10 Naushad Rishad Hamid all testified that they presented themselves with their identification documents at the polling stations in which they were registered but were informed that their particulars could not be found in the KIEMS device and therefore they could not vote. PW12 Bonea Abadima Galgalo, PW14 Tom Mboya Ondiek and PW20 Joshua Onyango Oswago who were the Petitioner's agents testified that agents were not called to witness whenever a voter was not identified by the KIEMS kit. Further, that none of the presiding officers resorted to the printed register of voters to identify the affected voters.

48. In response to the claim that voters were turned away from the polling stations, counsel for the 1st and 2nd respondents submitted that the allegation was not proved.

49. Starting with the evidence of the Petitioner, he stated that the Petitioner admitted that he did not know the number and identities of the voters who were sent away from the polling stations.

50. On the evidence of PW2, counsel submitted that this witness was unable to prove that she verified her status prior to the election. He asserted that the witness never verified her registration status before the election, only stating that her husband is the one who did so but without availing the verification message allegedly received from the 1st Respondent.

51. As for PW3, counsel stated that this witness testified that he had nothing to show that he was a registered voter and neither did he indicate the date that he went to verify his particulars at his polling station at Lamu County Assembly Hall. Further, that the witness admitted it would have been wrong for him to vote as his name was not in the register of voters.

52. Dismissing the evidence of PW5, the 1st and 2nd respondents' counsel asserted that this witness testified that she did not know in which of the polling stations at Kilimani Secondary School polling centre her name was listed. That the witness only queued and was told by the 1st Respondent's officials that her name was not in the register of voters. Further, that the witness was unable to prove that any officer of the 1st Respondent ejected her from the polling station when her name was not found in the register of voters.

53. With respect to the evidence of PW7 it was submitted that the witness had admitted that he did not know how to read and write and that he had not verified his registration details. Further, that the witness also testified that he had not named anyone who had witnessed his being turned away from Kandahari polling station.

54. Putting forward the 3rd Respondent's case, his counsel took a dim view of the credibility of the Petitioner's witnesses in respect to the allegation of the denial of the right to vote. In respect to the evidence of PW6 it was asserted that this witness never verified his details and only showed up on the

polling day when it was found that his name was not in the register of voters. The 3rd Respondent submitted that none of the witnesses provided a copy of the register of voters in order to support their claim that they were registered voters.

55. What is the court's take on this evidence? The right of every citizen to participate in free, fair and regular elections based on universal suffrage is indeed a right guaranteed by Article 38 of the Constitution.

56. The right to vote is not a right to be trifled with. It signifies the power of the people to pick those they desire to lead them for a given period of time. Not one single vote is more important than the next vote.

57. The importance of protecting the right to vote was emphasized in the South African case of **Richter v Minister for Home Affairs and 2 others (2009) ZACC**, cited by counsel for the Petitioner herein, where it was stated that:

“We should accordingly approach any case concerning the right to vote mindful of the bright, symbolic value of the right to vote as well as the deep, democratic value that lies in a citizenry conscious of its civic responsibilities and willing to take the trouble that exercising the right to vote entails.”

58. It goes without saying that he who alleges must prove. In the case at hand, the Petitioner and his witnesses asserted disenfranchisement. This is a serious allegation. The witnesses called by the respondents testified that they did not see any voter being denied the right to vote. It was thus the duty of the Petitioner and his witnesses to prove their allegation to the required standard.

59. It was not enough for the Petitioner and his witnesses to state that they were chased away from polling stations. Such evidence may have been sufficient in an ordinary civil suit. In an election petition where the standard of proof is higher than the standard of proof in an ordinary civil case, they ought to have backed their case with documentary evidence. Only registered voters are allowed to vote. They therefore needed to avail the register of voters to support their evidence. They failed to do so.

60. In the case of **Gatirau Peter Munya (supra)**, an allegation had been made that the total number of votes cast exceeded the number of registered voters. The Supreme Court held that the allegation was a serious one and ought not to be taken lightly. The Court found the allegation had not been proved stating that:

“[188] Can it be said that an electoral register, a public document, is a fact ‘especially’ within the knowledge of the IEBC in the context of the provisions of Section 112 of the Evidence Act? In our view, what is within the power of the IEBC is the custody of the register, and its production will be a matter of course, upon an application by a party who wishes to rely on its contents. We would agree with the learned Judges of Appeal, however, that the evidential burden regarding the contents of the register and declared results lies on the IEBC; save that this burden is activated, in an election petition, only when the initial legal burden has been discharged.”

The Court went ahead and concluded that:

“[191] In the instant case, the petitioner was content to rely on a document that had no evidential value, when he could have made an application for the production of the authentic register, to aid his cause in discharging the initial burden.”

61. In my view, the Petitioner herein and his witnesses ought to have availed evidence that the alleged voters had verified their registration particulars prior to the election. The best way to do so would have been by availing copies of the responses to the messages sent to the 1st Respondent. They did not do so. They could also have availed the register of voters for the particular polling stations. They again failed to do so.

62. The only conclusion is that they were not registered as voters or they failed to turn up at the polling stations on the voting day. The allegation of disenfranchisement of voters is found to be without merit and is dismissed.

ii. Use of pre-marked ballot papers

63. The Petitioner alleged use of pre-marked ballot papers in the election. His witnesses (PW13 Fatuma Ali Athman and PW14 Halima Yusuf Abdalla) who were his agents at Mapenya Primary School polling stations 1 and 2 testified that there were marks on the ballot papers used in the election of the Member of National Assembly.

64. The 2nd Respondent's averment was that the issue only affected presidential ballot papers. His evidence was, however, contradicted by that of DW15 Habib Abdalla Bwanamkuu.

65. That there were marks in the ballot papers used in the impugned election was indeed confirmed by the Deputy Registrar during the recount exercise.

66. What was the nature of the marks and how did they affect the election? Counsel for the Petitioner submitted that Regulation 77(1)(c) provides that during the counting of votes in an election, any ballot paper on which anything is written or so marked as to be uncertain for whom the vote has been cast, shall, subject to sub-regulation (2), be void and shall not be counted.

67. It was submitted for the Petitioner that during the scrutiny and recount exercise, the issue of the marks on the ballot papers was predominant. Further, that the marks were capable of causing confusion, uncertainty and ambiguity of the vote in circumstances where there was insufficient light, especially considering that the counting took place at night.

68. The Petitioner's counsel submitted that a ballot paper ought to be clean, clear and free from any marks. Further, that any marks on the ballot paper would raise serious complications thus rendering the election process unverifiable and unaccountable.

69. The 1st and 2nd respondents' submission on this issue was very brief. They stated that no pre-marked ballot papers were used in the election as the marks noted were prints originating from the printer.

70. On the allegation of use of pre-marked ballot papers, the 3rd Respondent submitted that the Petitioner admitted during cross-examination that the marks on the ballot papers were print marks from the factory and not pen marks. Further, that the Petitioner also admitted that when he arrived at the affected polling stations, he found that the agents and the polling officials had found a solution and voting was proceeding.

71. The 3rd Respondent also pointed out that PW13 Fatuma Ali Athman told the court that they found a solution to the problem. Further, that the witness told the court that the marks had no pattern and originated from the printer. According to this witness, the agreement was that a pen with a different colour from that of the prints be used by voters in marking the ballot papers.

72. The 3rd Respondent referred the court to the observations made on the marks by the Deputy Registrar during the scrutiny and recount exercise, and submitted that the marks were not intentionally placed on the ballot papers but had originated from the factory during the printing of the ballot papers.

73. In my view, the totality of the evidence placed before the court shows that the marks on the ballot papers originated from the printer. The people on the ground, including the Petitioner's agents, agreed that a pen of a different colour from the print marks be used by voters to mark the ballot papers. The expression of the voters' will was therefore not interfered with. The polling officials and the agents of the candidates in the two affected stations acted wisely in finding an agreeable solution to the problem. The right of the voters registered in the polling stations located at Mapenya Primary School was thus secured.

74. The fact that the voters' will was not affected by the print marks was evident from the successful execution of the recount exercise which confirmed the votes received by the candidates as had been captured during the election.

75. I therefore find the said ballot papers did not contravene Regulation 77(1) of the Regulations. In my view, the applicable law is sub-regulation (2) of the same Regulation which provides that:

“(2) A ballot paper on which a vote is marked –

a) elsewhere than in the proper place;

b) by more than one mark; or

c) which bears marks or writing which may identify the voter, shall not by that reason only be void if an intention that the vote shall be for one or other of the candidates, as the case may be, clearly appears, and the manner in which the paper is marked does not itself identify the voter and it is not shown that the voter can be identified thereby.”

76. Applying the cited sub-regulation to the facts of this case shows that the votes cast in the two polling stations conveyed the choice of the voters. There was therefore no irregularity committed and the election cannot be overturned on this ground.

iii. The handling of the Petitioner's agents and assisted voters

77. The Petitioner made averments concerning alleged unlawful rejection and removal of his agents from 21 polling stations which had 9,767 registered voters. According to the Petitioner, these actions denied him representation during the time of the opening of ballot boxes, casting of votes, sorting, counting and tallying of votes. The Petitioner's case is that the 1st Respondent caused and or permitted the marking and casting of ballots of voters who required assistance in the absence of his agents. Further, that the ballots were not marked in accordance with the wishes of the voters who required assistance. The Petitioner also averred that in the identified polling stations, the assisted voters were instructed to vote for the 3rd Respondent.

78. Another accusation made by the Petitioner is that the 1st Respondent permitted and counted ballots not cast for the 3rd Respondent to be counted for him and rejected or refused to count ballot papers validly cast in his (Petitioner's) favour.

79. The Petitioner commenced his submissions by pointing out that Regulation 62(2) provides that a presiding officer shall admit to the polling station not more than one agent for each candidate or political party. He then proceeded to point out a number of polling stations where the forms 35A and polling stations diaries showed that more than one agent had been admitted for one candidate or political party thus breaching the Regulation.

80. According to the Petitioner, the evidence negated the 2nd Respondent's persistence that the presiding officers had been well trained and had followed instructions to the letter. Further, that the 2nd Respondent had conceded during cross-examination that some presiding officers had ignored the training and failed to follow the policy which required that only one agent be allowed to represent a political party or candidate in a polling station.

81. Turning to the question of ejection of his agents from the polling stations, the Petitioner referred to his testimony in which he told the court that Patrick Charo Kahindi and Eliud had been ejected from Maisha Masha and Barogoni polling stations respectively. He also referred to the evidence of his Chief Agent, PW8 Mohamed Bakari Elmawi who testified that he received calls that their agents had been ejected from Witu Primary School polling station No. 3 and other polling stations.

82. The Petitioner pointed out that PW14 Halima Yusuf Abdalla, PW17 James Gichovi Wabuko and PW18 Edward Kombe Kithi all testified as to how they were ejected from the polling stations to which they had been detailed to represent him.

83. The Petitioner asserted that his agents were removed on the grounds that National Super Alliance (NASA) agents were already in the polling stations. According to the Petitioner, NASA is an alliance of political parties and it was only his agents, and not the agents of the other political parties in the alliance, who were ejected from polling stations.

84. The Petitioner posited that regulations 73(1) and 74(4) proclaim the key role played by agents in elections. The Petitioner cited the decision in **High Court Election Petition No. 11 of 2008, Reuben Nyang'inja Ndolo v Dickson Waithika Mwangi & 2 others** in order to stress the important role of agents in an electoral process.

85. According to the Petitioner, the purpose of agents in an election is to ensure the verifiability and transparency of the election process. He urged this court to find that the presiding officers' action of ejecting his agents while permitting other candidates to have more than one agent violated Regulation 62(2) and disadvantaged him.

86. Turning to his complaints on how the voters who needed assistance were handled, the Petitioner submitted that PW11 Patrick Charo Kahindi, PW12 Bonea Abadima Galgalo, PW16 Tom Mboya Ondiek and PW19 Dickson Mutinda Muli all testified that the presiding officers in the polling stations to which they were attached did not assist voters who required assistance in the presence of all the agents.

87. The Petitioner asserted that the presiding officers breached Regulation 72 which provides the manner in which a voter who requires assistance to vote ought to be handled.

88. Concluding his submissions on this topic, the Petitioner posited that the ejection of his agents from the polling stations set out in the Petition was a clear violation of the principles espoused in Articles 81 and 86 of the Constitution. He asserted that denying him the right to have agents during the casting, counting and tallying of votes rendered the election opaque and without any modicum of accountability or impartiality. In his view, this amounted to a violation of his right to equal protection and benefit of the law as guaranteed by Article 27 of the Constitution.

89. In response to the Petitioner's case, the 1st and 2nd respondents pointed to the evidence of DW2 Ramadhan Hussein and DW5 Hellen Moraa who told the court that they were presiding officers and did not eject any agent from their polling stations. Further, that DW2 told the court that some party agents left in a huff before signing the forms.

90. The 1st and 2nd respondents asserted that the announcement of results in the absence of a candidate or agent, or failure of a candidate or agent to sign a declaration form does not invalidate the results. Reference was made to Regulation 79(6) and (7) in support of this argument.

91. On his part, the 3rd Respondent made detailed submissions on the allegation of the ejection of the Petitioner's agents from polling stations. He started by pointing out that although the Petitioner alleged ejection of his agents from 22 polling stations, only nine agents swore affidavits out of which seven actually testified.

92. Turning to the evidence of the witnesses who came to court, the 3rd Respondent stated that although the Petitioner had indicated that PW11 Patrick Charo Kahindi, his agent at Maisha Masha Primary School polling station had been ejected, the witness never made such an averment in his affidavit and admitted during his oral testimony that he was present throughout the exercise.

93. As for the evidence of PW12 Bonea Abadima Galgalo, the 3rd Respondent stated that this witness testified that he had been harassed to leave the polling station by one of the Kenya Defence Forces

soldiers but he came back after half an hour. Further, that on cross-examination the witness denied knowledge of the presence of another ODM agent at the station but later admitted that Shure Yusuf was the other ODM agent. It was also pointed out by the 3rd Respondent that the witness also admitted signing everything else apart from form 35A. The 3rd Respondent therefore asked the court to find that this witness was not credible.

94. The 3rd Respondent urged the court to treat the evidence of PW13 Fatuma Ali Athman with caution stating that although the witness had testified that she was ejected on the false premise that there was another agent representing her party, the polling station diary actually revealed that there was indeed another ODM agent in the station. Further, that the witness had admitted that ODM had two agents in every polling station.

95. The 3rd Respondent asked the court to reject the evidence of PW14 Halima Yusuf Abdalla stating that the witness was not credible. The 3rd Respondent pointed out that although the witness had averred that she was ejected before the counting and tallying of votes commenced, she had disclosed during cross-examination that she was ejected just before the voting process was about to begin and had stayed outside the polling station the whole day. The 3rd Respondent called into question the credibility of the witness stating that the witness testified about the events that were happening in the polling station yet she was allegedly outside the polling station.

96. As for PW17 James Gichovi Wabuko, the 3rd Respondent urged this court to find that the witness was not the ODM agent at Witu Primary School polling station. In saying so, the 3rd Respondent referred to the fact that there was another ODM agent by the name Rukia Abbas who was dismissed by PW17 as an impostor. Further, that the witness admitted that neither the Petitioner nor the Chief Agent had made any averments disowning the said Rukia Abbas.

97. In respect to the evidence of PW18 Edward Kombe Kithi, the 3rd Respondent asserted that this witness had signed the 2nd Respondent's documents and one Bernard Kitheka was also listed as an ODM agent in the same polling station.

98. Lastly, the 3rd Respondent stated that the ejection of PW9 Ahmad Mohamed Abdulkadir from the tallying centre was deserved as he became unruly after the 3rd Respondent was declared the winner. Further, that the process had indeed come to an end and the ejection of PW9 cannot be said to have affected the results.

99. The centrality of agents in an election cannot be disputed. Parts XII and XIII of the Regulations are populated with provisions on the roles of agents from the time the polling stations are opened until the time the votes are counted and the results announced.

100. In **Ahmed Abdullahi Mohamad & another v Hon. Mohamed Abdi Mohamed & 2 others, Nairobi Election Petition No. 14 of 2017**, Mabeya, J explained the consequences of the failure of agents to sign the declaration forms as follows:

“89. As regards the signing of the declaration forms by agents, the regulations give a caveat as to when the failure of agents or candidate to sign the declaration forms will be excused. The failure to sign is excused if the Presiding Officer records that fact in the declaration form itself. This is what Regulation 79(4) decrees. The requirement is mandatory. In this regard, I hold the view that for Sub-Regulation 6 of Regulation 79 to apply and excuse the failure by an agent to sign the form, the Presiding Officer must record the fact on that form. The recording of the fact is for purposes of accountability, credibility and verifiability of the results in the declaration form.

90. While failure by agents or candidates to sign Form 37A does not invalidate the results, the fact of such failure must clearly be noted or recorded in the form by the Presiding

Officer in terms of Regulation 79(4) of the Regulations. Where such forms are not signed by agents and the presiding officer fails to note or record that fact, a question of credibility of the results therein arises.”

101. Earlier on, the retired Chief Justice W.M. Mutunga in his concurring opinion in **Gatirau Peter Munya** (supra) had, on the issue of failure by candidates or agents to sign declaration forms, opined that:

“[249] It is, therefore, time for us to develop our election petition litigation: we must depart from the current practice in which a petitioner pleads 30 grounds for challenging an election, but only proffers cogent evidence for 3. A candidate, or her agent, cannot abscond duty from a polling station, and then ask the Court to overturn the election because of her failure to sign a statutory form. Every party in an election needs to pull their own weight, to ensure that the ideals in Article 86 are achieved: that we shall once and for all have simple, accurate, verifiable, secure, accountable, transparent elections. The election belongs to everybody, and it is, therefore, in everybody’s collective interest, and in everybody’s collective and solemn duty, to safeguard it.”

102. In **Dickson Mwenda Githinji v Gatirau Peter Munya & 2 others [2014] eKLR** the Court of Appeal tackled the issue of failure by agents to sign statutory forms thus:

“124. In the instant case, we note that the accuracy of the declared results have not been challenged in relation to those polling stations where the appellant contends that Form 35s were signed by strangers. In the case of William Maina Kamanda, Election Petition No. 5 of 2008, signatures in Form 16As were found to be missing but the results in all the forms whether signed or unsigned were taken into account. In the instant case, the net effect is that the appellant has not shown that the total number of vote’s casts for each candidate was materially affected by the presence or absence of agents’ signatures on Form 35s. Subject to the testimony of DW 10, we find that the appellant has failed to point out and prove that an irregularity of law occurred as to the signatures appended on Forms 35s and 36s and that this irregularity materially affected the result.”

This is the case that went to the Supreme Court as **Gatirau Peter Munya** (supra) resulting in the already cited comments of the former Chief Justice.

103. In essence, failure by a candidate or his/her agent to sign the form declaring the results does not of itself render an election a candidate for invalidation. However, Regulation 79(4) makes it mandatory for a presiding officer to record the fact of the refusal or failure by a candidate or an agent to sign the declaration form. Failure by a presiding officer to record the fact or refusal by a candidate or an agent to sign the declaration form amounts to an irregularity. Whether such an infraction of the Regulations should result in the voiding of the election will depend on the facts and circumstances of each case. Not all irregularities or illegalities will result in the invalidation of an election.

104. What needs to be determined is whether the Petitioner’s agents were actually ejected from polling stations. If it is established that the Petitioner’s agents were indeed ejected from polling stations, then the issue of the impact of the action on the credibility of the election will have to be addressed.

105. The Petitioner gave the impression that he was targeted by the presiding officers. The evidence adduced by his witnesses show otherwise. The fact that some of the Petitioner’s agents were indeed denied access to the polling stations cannot be disputed. The main reason advanced was that NASA agents were already in those polling stations.

106. There is evidence on record that the ODM Presidential candidate, Raila Odinga, who was running on the NASA coalition banner had written to presiding officers introducing his agents. It is noted that NASA was not a political party but a coalition of political parties. Any agent appointed by Raila Odinga was therefore an ODM agent. The presiding officers did not therefore act in error by denying ODM agents entry to polling stations in which NASA agents had already been admitted. For the purpose of the

election NASA and ODM were one and the same thing.

107. It is also important to note that after the issue was brought to the attention of the presiding officers, agents who had appointment letters from ODM were admitted into the polling stations. No malice can be read into the actions of the presiding officers. The letters from the NASA presidential candidate had genuinely caused confusion. The failure to admit the agents of the Petitioner did not affect the transparency or validity of the elections. Agents representing the other candidates were in the polling stations. No evidence was adduced to show that these agents colluded with the polling officials to tilt the playing field to the disadvantage of the Petitioner. No prejudice was suffered by the Petitioner as a result of the delayed admission of his agents to a few of the polling stations.

108. In conclusion, I find that the allegation by the Petitioner that his agents were singled out for ejection from polling stations has no basis. Where the Petitioner's agents were rejected or ejected, this was due to the confusion surrounding the relationship between NASA and ODM. Nevertheless such problems were quickly resolved and the transparency of the election cannot be faulted on this ground.

109. Regulation 72 provides the procedure for dealing with voters who require assistance to vote. A reading of the said Regulation will show that the preferred method for assisting an illiterate voter or one with disability to vote is for the voter to go to the polling station with a person of his or her own choice. In such a situation, the voter marks and casts his or her vote with the assistance of a person he or she has selected and trusts. However, where the voter is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such a voter, in the presence of the agents.

110. I have perused the evidence of the Petitioner's witnesses and I agree with the advocate for the 3rd Respondent that the witnesses gave contradictory testimony. Their evidence on the manner in which voters who needed assistance were handled cannot therefore be believed. No voter swore an affidavit in support of these serious allegations about disenfranchisement of voters.

iv. Irregular opening and closing of polling stations

111. The Petitioner alleged that Regulation 66 which requires voting to commence at 6.00 a.m. and close at 5.00 p.m. was not complied with.

112. It was the Petitioner's case that Maisha Masha Primary School polling station opened at 8.30 a.m. and closed at 9.30 p.m. meaning that the polling period was illegally extended by two and a half hours. The Petitioner identified Majembeni Primary School polling station as having closed at 3.01 p.m., two hours before the prescribed closing time.

113. The 1st and 2nd respondents did not submit on the issue of irregular opening and closing of polling stations.

114. On behalf of the 3rd Respondent, it was submitted that there is no evidence to suggest that any voter was denied an opportunity to vote as a result of any changes in the opening or closing of voting. The 3rd Respondent submitted that not a single voter swore an affidavit averring that he or she was prevented from voting because of a polling station opening late or closing early.

115. Regulation 66 provides for eleven hours of voting on an election day. Where voting in a particular polling station starts late, Regulation 64(3) authorizes the presiding officer, in consultation with the returning officer to extend the hours of polling by the amount of time which was lost in starting late.

116. In the case at hand, it appears that an irregularity may have occurred in respect to the two identified polling stations. However, there was no evidence tendered to show that failure to adhere to the polling hours disenfranchised any voter. It is also noted that the failure to adhere to the polling hours was confined to a very small number of polling stations. In my view, the election was not affected by this breach of the Regulations. There is no evidence that late opening or early closing of a few polling

stations was intended to disenfranchise the voters.

v. Failure to prepare and provide the Petitioner with accurate, complete, duly signed and stamped forms 35A

117. The Petitioner, citing various authorities, submitted that form 35A must be signed by both the presiding officer and the deputy presiding officer. He then went ahead and submitted that the 2nd Respondent on cross-examination conceded that a number of forms 35A were not signed by the presiding officers and the deputy presiding officers.

118. Tied to this was the allegation that forms 35A were filled by strangers and interlopers.

119. Responding to the matter of alleged filling of forms 35A by unauthorized persons, the 1st and 2nd respondents submitted that the mystery persons were never identified in court and the Petitioner actually admitted that he had not identified the said unauthorized persons and impostors. They urged the court to dismiss the allegation as unproved.

120.. The 3rd Respondent's response was that the Petitioner and his agents were not denied the opportunity to sign forms 35A. Instead what happened was that the Petitioner's agents refused to sign the forms and as per Regulation 79(7), the refusal or failure of a candidate or agent to sign a declaration form or to record the reasons for their refusal to sign as required shall not by itself invalidate the results. The 3rd Respondent cited the decision of the Court of Appeal in **Mercy Kirito Mutegi v Beatrice Nkatha & 2 others [2013] eKLR**, in support of his position. He pointed out that PW12 stated that he refused to sign the results whereas PW17 and PW18 did not sign the declaration forms because other agents had signed on behalf of their party.

121. The Petitioner's claim that the 2nd Respondent conceded upon cross-examination that a number of presiding officers and their deputies did not sign forms 35A is not entirely correct. The evidence of the 2nd Respondent was that:

“All the form 35As were signed by the presiding officers. I am aware of one form that was not signed by the deputy presiding officer. At page 56 is Form 35A for Manda Primary School. The presiding officer did not sign it. The deputy presiding officer signed the form. Aside from that form there was another form not signed by the deputy presiding officer. At page 11 is Form 35A for Kangaja Primary School Station 1 of 1. It is neither signed by the presiding officer or deputy presiding officer.”

The evidence shows that only one form was not signed by both the presiding officer and the deputy presiding officer.

122. In a general election, six elections are held concurrently. Although the elections are held on the same day in the same polling stations and by the same polling officials, each of the six elections is separate and independent from the other. The form 35A which is filled in respect of the election of a Member of National Assembly for a given constituency should only be signed by agents of the parties or candidates who are participating in that election. Agents for political parties not participating in the election of Member of National Assembly are not supposed to sign the form 35A which is the results form for that election. However, the signing of the form by a person who is not entitled to sign, unless established to be fraudulent or to have affected the outcome of the election, should not be a ground for invalidating an election. Genuine mistakes may sometime occur due to the pressures attendant to the conduct of a general election.

123. Evidence was adduced that in some polling stations, agents for political parties which had not sponsored candidates for the National Assembly contest signed forms 35A. This was improper. The question is whether the act affected the outcome of the election. In my view, it did not. It has not been demonstrated by the Petitioner that the signing of forms 35A by persons who had no role in the impugned

election affected the results in any way. This was a simple act of signing results that had already been announced and there is no way that a signature could change the results.

vi. Intimidation and coercion of the Petitioner and/or his agents into signing electoral returns and voter bribery

124. The allegation that the Petitioner's agents were forced to sign the electoral forms was not supported by any evidence. PW8 talked of voter intimidation but he never witnessed any voter being intimidated and neither did he name the voters who were intimidated.

125. On alleged voter bribery, PW8, PW12 and PW21 testified of voters receiving Kshs. 200. The witnesses, however, had no particulars of the voters who received the bribes and the people who gave out the bribes.

126. An allegation of voter intimidation or voter bribery is a serious allegation amounting to an accusation of commission of an electoral offence. In such a situation the standard of proof required is beyond reasonable doubt. That standard has not been discharged by the Petitioner. The election cannot therefore be overturned on these grounds.

vii. The Gazettement of the Deputy Returning Officer

127. The evidence that was adduced by the Petitioner and which was not disputed by any of the respondents established that DW8 Khadija Mohamed Ahmed who was the Deputy Returning Officer during the elections held in Lamu West Constituency on 8th August, 2017 was gazetted as the Deputy Returning Officer for Lamu East Constituency.

128. The 2nd Respondent's explanation was that the error in the gazettement was occasioned by the fact that DW8 had briefly served in Lamu East Constituency. Further, that when the error was noted, communication was made to the 1st Respondent's legal affairs office seeking a rectification of the mistake.

129. The Petitioner submitted that the presence of DW8 in Lamu East Constituency was in breach of Regulation 3. According to the Petitioner, the participation of DW8 in the election amounted to the presence of a stranger and gave rise to doubts as to the credibility and transparency of the entire election process. He asserted that the 1st and 2nd respondents acted in disregard of the law by allowing an unauthorized person to preside over the impugned election, consequently undermining its integrity.

130. The 1st and 2nd respondents did not make any submissions on this issue.

131. The 3rd Respondent's position was that the Petitioner had failed to explain how the occupation of the office of the Lamu West Constituency Deputy Returning Officer by DW8 had affected the outcome of the election. He submitted that prior to the election the Petitioner was aware that DW8 was the Deputy Returning Officer for Lamu West Constituency and never raised any issue but only brought up the matter after he lost the election.

132. The 3rd Respondent urged the court to find that by operation of Section 120 of the Evidence Act, Cap. 80 the Petitioner was estopped from raising an issue about DW8's gazettement.

133. As correctly pointed out by counsel for the 3rd Respondent, the Petitioner has not indicated in what manner the participation of DW8 in the impugned election affected the outcome of the election. However, it was wrong for the 1st Respondent to gazette DW8 as the Deputy Returning Officer for Lamu East Constituency yet her station was Lamu West Constituency. As submitted by the Petitioner, there was non-compliance with Regulation 3, which requires returning officers and deputy returning officers to be gazetted before an election. It is also noted that the 2nd Respondent did not adduce any documentary

evidence showing that the legal affairs office of the 1st Respondent had been alerted of the mistake and requested to rectify the error.

134. It is, however, clear that the participation of DW8 as Lamu West Constituency Deputy Returning Officer in the general election did not of itself affect the validity of the impugned election.

135. I also agree with the 3rd Respondent, that the Petitioner ought to have raised the issue prior to the election. Raising it after the election cannot be said to have been done in good faith. The Petitioner cannot be heard to say that he was not aware that DW8 was going to be the deputy returning officer in the election. Regulation 3(2) requires the 1st Respondent to provide the list of persons proposed for appointment, as constituency returning officers and deputy returning officers, to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them make any representations. The appointment of DW8 was thus in the public domain, and presumably within the knowledge of the Petitioner, even before her gazette. During the preparations for the elections, the Petitioner must have interacted with DW8. He never raised any issue. In my view, it would be such a drastic step and a total disregard of the people's will to nullify the election on this irregularity alone.

viii. Discrepancies in the entries in forms 35A and 35B

136. The Petitioner submitted that there were discrepancies in the results in forms 35A emanating from the polling stations and the form 35B generated by the 2nd Respondent at the tallying centre. The Petitioner zeroed in on Lamu Fort Hall polling station No. 1 of 5 and submitted that the Petitioner's results were reduced by 63 votes while the 3rd Respondent's votes were inflated by 28 votes.

137. The Petitioner clearly brought out the issue of suppression and inflation of votes to his disadvantage by averring at paragraph 77 of his affidavit sworn in support of the Petition thus:

“THAT the IEBC copy of the Form 35A for Lamu Fort Hall 1 polling station indicates that I garnered 178 votes and the 3rd Respondent had garnered 66 votes while my agent's copy of the same Form 35A indicates that I obtained 241 votes while the 3rd Respondent obtained 36 votes. Curiously, the IEBC portal indicates that I garnered 241 votes as per the agent copy of Form 35A.”

138. The 1st and 2nd respondents did not make specific submissions on the question of the discrepancies in the entries in the results forms.

139. In response to the allegation of falsification of vote tallies and results in forms 35A and 35B, the 3rd Respondent submitted that the Petitioner and his witnesses did not exhibit any declaration forms different from those supplied by the 1st Respondent. Further, that the Petitioner ought to have annexed the forms he felt were falsified so as to enable the court compare them with the forms submitted to the court by the 2nd Respondent. He therefore asserted that the Petitioner's allegation of falsification of forms was not backed by any evidence.

140. What were the results for Lamu Fort Hall polling station No. 1 of 5 and Lamu County Assembly Hall polling station No. 3 of 3? A curious thing about this Petition is the 2nd Respondent's unexplained failure to exhibit form 35B. He, however, did not dispute the correctness of the copy of form 35B placed before the court by the Petitioner.

141. The recount by the Deputy Registrar of the votes for Lamu Fort Hall polling station No. 1 of 5 yielded the following results:

Candidate

Votes Received

Ahmed Abdi Kassim	62
Ahmed Rishad Hamid	259
Kariuki Julius Ndegwa	5
Kinyanjui Antony Mwaura	1
Muthama Stanley Muiruri	31
Mwangi Anastacia Wanjiru	2
Nyaga Mary Immaculate	0
Tett Betty Njeri	3

It is also important to note that the same results were captured in the form 35A that had been printed for Lamu Fort Hall polling station No. 1 of 5. However, the polling station name had been amended by hand to read Lamu County Assembly Hall polling station No. 3 of 3. The same results were attributed to Lamu County Assembly Hall polling station No. 3 of 3 in form 35B. Another point to note is that at page 22 of the exhibits annexed to his Petition, the Petitioner exhibited an unaltered form 35A for Lamu Fort Hall polling station No. 1 of 5, which though faint, shows that the Petitioner had 259 votes and the 3rd Respondent had 31 votes. This means the results attributed to Lamu County Assembly Hall polling station No. 3 of 3 as a result of alleged mix-up of forms 35A actually belonged to Lamu Fort Hall polling station No. 1 of 5. This is confirmed when one considers the results for Lamu County Assembly Hall polling station No. 3 of 3.

142. The recount by the Deputy Registrar disclosed that the results for Lamu County Assembly Hall polling station No. 3 of 3 were:

<u>Candidate</u>	<u>Votes Received</u>
Ahmed Abdi Kassim	53
Ahmed Rishad Hamid	241
Kariuki Julius Ndegwa	12
Kinyanjui Antony Mwaura	0
Muthama Stanley Muiruri	36
Mwangi Anastacia Wanjiru	5
Nyaga Mary Immaculate	0
Tett Betty Njeri	3

143. In the form 35A availed to the court by the 2nd Respondent, the same results are attributed to Lamu Fort Hall polling station No. 1 of 5. It should be noted that the amended form 35A for Lamu Fort Hall polling station No. 1 of 5 presented to the court by the 2nd Respondent had actually been printed for Lamu County Assembly Hall polling station No. 3 of 3. Another crucial piece of evidence is the unaltered form 35A for Lamu County Assembly Hall polling station No. 3 of 3 which was provided by the Petitioner at page 17 of the exhibits annexed to the affidavit sworn in support of the Petition. The results in that form mirror the results obtained by the Deputy Registrar.

144. The form 35A availed to the court by the 2nd Respondent for Lamu Fort Hall polling station No. 1 of 5 shows that the Petitioner received 241 votes and the 3rd Respondent had 36 votes. However, the results for the same station posted to form 35B gave the Petitioner 178 votes. 64 votes were given to the 3rd Respondent. The 2nd Respondent did not offer any cogent explanation for the variation in the figures in form 35A and form 35B.

145. Looking at the documents availed by the 1st and 2nd respondents, the exhibits of the Petitioner and the results of the recount carried out by the Deputy Registrar, it is clear that the evidence of the 2nd Respondent, DW3 and DW7 that the form 35A for Lamu County Assembly Hall polling station No. 3 of 3 had erroneously been taken to Lamu Fort Hall polling station No. 1 of 5 and used to post the results of Lamu Fort Hall polling station No. 1 of 5 cannot be true. The testimony of the same witnesses that the form 35A for Lamu Fort Hall polling station No. 1 of 5 had also landed in Lamu County Assembly Hall polling station No. 3 of 3 and was used to declare the results of that station is also untenable.

146. The game played by the 2nd Respondent and his team was so high-tech that DW3 who was the presiding officer at Lamu County Assembly Hall polling station No. 3 of 3 actually signed the printed form 35A for Lamu Fort Hall polling station No. 1 of 5 and DW7, the presiding officer for Lamu Fort Hall polling station No. 1 of 5 signed the one for Lamu County Assembly Hall polling station No. 3 of 3 in order to support their claim of an alleged mix-up. What they forgot to do was to transfer the results. They also overlooked the fact that an election petition could be filed and a scrutiny or recount ordered.

147. A perusal of the forms presented to the court by the 2nd Respondent show that in Lamu Fort Hall polling station No. 1 of 5 the Petitioner lost 63 votes when his votes were reduced from 241 in form 35A to 178 in form 35B. On the other hand the 3rd Respondent gained 28 votes when his votes were increased from 36 to 64 during the transposition of the results from form 35A to form 35B. By that act alone, the 3rd Respondent gained an advantage of 91 votes. In the recount the Deputy Registrar established that the Petitioner garnered 259 votes and the 3rd Respondent had 31 votes in Lamu Fort Hall polling station No. 1 of 5. This again confirms that the Petitioner lost 91 votes when his votes were reduced from 259 to 178 in form 35B. Of course, the Petitioner gained 18 votes in Lamu County Assembly Hall polling station No. 3 of 3 when his votes were increased from 241 in form 35A to 259 in form 35B. The 3rd Respondent's votes were reduced from 36 to 31 in this station. The 3rd Respondent was therefore disadvantaged by 23 votes but this cannot be compared to the loss of 91 votes suffered by the Petitioner through the actions of the 1st and 2nd respondents. When the 23 votes lost by the 3rd Respondent is deducted from the 91 votes lost by the Petitioner, it is clear that 68 votes cast for the Petitioner could not be accounted for. This is a significant number of votes considering that form 35B indicates that the 3rd Respondent received 11,084 votes followed by the Petitioner who garnered 10,939 votes.

148. It is true that elections are about numbers. In gubernatorial and parliamentary elections, a candidate with the highest number of votes is declared the winner. So long as the win is obtained in a clean election, the difference in votes between the winner and the runner-up does not count. In **Gatirau Peter Munya** (supra), the Supreme Court warned that the margin between candidates is not a ground for invalidating an election. In that regard the Court stated:

“[201] It is clear that the Constitution requires that for one to be declared a winner in a gubernatorial election, he or she needs to garner a majority of the votes. This is the logical meaning to be attributed to the words “greatest number of votes”. It matters not how wide or small the margin of victory is. Indeed, this is the requirement in all the elections other than a Presidential election, where specific percentages are prescribed by the Constitution.

[202] The issue of margins in an election other than a Presidential election, can bear only transient relevance and only where it is alleged that there were counting, and tallying errors or other irregularities that affected the final result. A narrow margin between the declared winner and the runner-up beckons as a red flag where the results are contested on allegations of counting and tallying errors at specified polling stations. Where a re-count, re-tally or

scrutiny does not change the final result as to the gaining of votes by candidates, the percentage or margin of victory however narrow, is immaterial as a factor in the proper election-outcome. To nullify an election in such a context would fly in the face of Article 180 (4) of the Constitution.

[203] In the circumstances, the mere description of a percentage or margin as “small” or “wide” is of no legal import, unless it is inextricably linked to a definite uncertainty, an unresolved doubt, as to who won an election.”

149. In the case at hand, there is clear evidence that the votes cast were adulterated by the activities of the 1st and 2nd respondents. The 1st and 2nd respondents may want to plead human error in respect of the alleged mistaken interchange of forms 35A for Lamu County Assembly Hall polling station No. 3 of 3 and Lamu Fort Hall polling station No. 1 of 5. In **Dickson Mwenda Githinji** (supra) the Court of Appeal gave guidance on how the defence of human error in an election dispute is to be dealt with. The Court stated:

“141. It is our considered view that whereas human error may be an excuse for tallying mistakes, a party that raises this excuse must prove the existence of human error. Human error is not a blanket excuse that justifies and excuses any arithmetic, collating or tallying mistakes. Human error is neither an excuse for all errors or mistakes in transposition nor is it an excuse for failure to have the statutory forms duly signed by authorized persons. Simply stating that human error is responsible for the mistakes is not proof of existence of the error. The burden to prove the existence of human error rests on he who asserts. Human error must be proved. Human error is excusable if it is a single, isolated and random occurrence. When the mistakes or errors are multiple and persistent such mistakes cease to be human errors and point towards an inefficient, negligent, careless or even deliberate occurrence of the errors and this affects the credibility of the declared results. In the instant case, the mistakes on record do not reveal a pattern in favour of any one candidate but shows that there were multiple errors and mistake that go towards the overall integrity and credibility of the figures entered for each candidate. It is our considered view that due to the multiplicity of the mistakes, there are indications that human error is not a plausible explanation for all the irregularities identified. We cannot say that human error was the cause of the mistakes with certainty because there is no evidence. We find that the 2nd and 3rd respondents raised human error as an excuse but failed to discharge the burden to prove its existence.”

150. Earlier in the judgement the Court had stated that:

“137. ...Is human error an absolute excuse and justification for any tallying mistakes or errors in collating and tallying the results of elections? What is human error? Human error can simply be described as an error made by a human. However, people make mistakes, but why they make mistakes is important. In considering whether human error is an excuse for mistakes or error in electoral tallying, the basic premise is to determine whether the errors or mistakes are random, persistent, multiple or systemic. If the mistakes are premeditated and persistent, multiple and systemic, substantial and reveal a pattern or cause prejudice to any particular candidate, or affect the will of the people; then the integrity and credibility of the declared results comes into question.”

[Emphasis added]

151. It is my view that the defence of human error is not available to the respondents in this case as there was a deliberate move by the 1st and 2nd respondents to suppress the votes of the Petitioner. What is not clear is whether the 3rd Respondent who was a beneficiary of the activity was involved in the manipulation of the results. A perusal of the evidence presented to the court does not link him to the activity. I will therefore not make any adverse findings about him. However, the evidence adduced

shows that the 1st Respondent, DW3 and DW7 were actively involved in the malpractice. DW7 told the court that DW8 alerted her about the alleged mix-up of forms. DW8 therefore knew about the execution of the project.

ix. Other allegations

152. The Petitioner alleged declaration of results prior to announcement of results from all the polling stations. He also claimed differences between the results that were electronically transmitted to the tallying centre and the results in the hard copies of forms 35A. He asserted that the counting of ballot papers was not open, fair or transparent. Another allegation made by the Petitioner was that votes cast in the impugned election were vastly different and inconsistent with those cast for the other posts in the general election. These allegations were not backed by any evidence and where evidence was adduced, the same was wanting. The allegations were therefore not proved.

F. THE DECISION

153. In an election that is closely contested, it is the little things that really count. Small mistakes whether intended or accidental can distort the will of the people. It is the duty of the courts to ensure that those who occupy elective offices do so on the strength of clean electoral processes. In the circumstances of this case one cannot confidently say that the impugned election reflected the will of the people of Lamu West Constituency. In deference to their democratic right to elect their Member of National Assembly in a free and fair election, I allow the Petition

G. COSTS

154. An election petition is more than a contest between a petitioner and the respondents. It is therefore important that whatever the outcome of a petition, reasonable costs should be awarded. Costs that would discourage filing of petitions or appear to punish the losers should be discouraged. In the circumstances of this case, I award the Petitioner Kshs. 3 million. The 1st and 2nd respondents will pay 1.5 million shillings and the balance of Kshs. 1.5 million will be paid by the 3rd Respondent. Using the power donated to this court by Rule 30(1)(a) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, I direct that the costs awarded shall be the total costs payable. The same shall therefore not be subject to taxation by the Deputy Registrar.

H. ORDERS

155. In light of my findings in this judgement, the Petition succeeds and orders shall issue as follows:

(a) A declaration is hereby issued that the election of the Member of the National Assembly for Lamu West Constituency held on 8th August, 2017 contravened the constitutional and statutory provisions governing elections;

(b) A declaration is issued that the 3rd Respondent, Stanley Muiruri Muthama was not validly declared the elected Member of the National Assembly for Lamu West Constituency and the declaration is invalid, null and void;

(c) A certificate shall issue to the 1st Respondent and the Speaker of the National Assembly conveying the determination of the court;

(d) The determination of the court shall be transmitted to the Director of Public Prosecutions for action on the criminal aspect of the identified election malpractice;

(d) An order is issued directing the 1st Respondent to hold a fresh election in conformity with the Constitution, the Elections Act, 2011 and the regulations made thereunder; and

(f) The Petitioner shall have costs from the respondents in the terms already stated in this judgement.

Dated, signed and delivered at Malindi this 21st day of February, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT