



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
ELECTION PETITION NO. 4 OF 2017

SAMWEL KAZUNGU KAMBI.....PETITIONER

VERSUS

NELLY ILONGO THE COUNTY

RETURNING OFFICER, KILIFI COUNTY.....1ST RESPONDENT

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION.....2ND RESPONDENT

KINGI AMASON JEFFAH.....3RD RESPONDENT

JUDGEMENT

A. INTRODUCTION

1. At the conclusion of the general election held on 8th August, 2017, the 1st Respondent Nelly Ilongo, the Kilifi County Returning Officer declared the 3rd Respondent, Amason Jeffah Kingi as the person elected the Governor of Kilifi County. The Petitioner, Samwel Kazungu Kambi who was one of the candidates in the race has challenged that declaration through the Petition filed on 6th September, 2017. He has named the Independent Electoral and Boundaries Commission (IEBC) as the 2nd Respondent. The 2nd Respondent is the constitutional entity responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution.

B. THE PLEADINGS

(i) The Petitioner's case

2. The Petitioner's averment was that he was a contestant on a Kenya African Democratic Union (KADU Asili) party ticket for the elective post of the County Governor of Kilifi in the general election. He stated that the 3rd Respondent was declared a winner of the said election on 11th August, 2017 despite massive malpractices and irregularities experienced during and after the voting day which issues the respondents were aware of.

3. According to the Petitioner, the election was so badly conducted and marred with irregularities that it

does not matter who won or was declared the winner of the said election. He averred that the nature and extent of the flaws and irregularities significantly affected the results to the extent that the 2nd Respondent could not accurately and verifiably determine the votes each of the candidates received.

4. Referring to Section 83 of the Elections Act, the Petitioner asserted that the said provision contemplates that where an election is not conducted in accordance with the Constitution and the written law, the election must be invalidated notwithstanding the fact that the results may not be affected. He posited that in the disputed election the irregularities affected both the results and the conduct of the election thus rendering the election invalid.

5. It was the Petitioner's case that before, during and after the election date, there were massive electoral malpractices perpetuated by a number of presiding officers and deputy presiding officers in the entire Kilifi County but more particularly in Kaloleni Constituency, Malindi Constituency and at the County Tallying Centre at Pwani University. This, he asserted, was done with the cognizance of the respondents.

6. Turning to specific incidences of malpractice, the Petitioner stated that a yellow Isuzu Canter was intercepted leaving the county tallying centre, purportedly going to dispose garbage, but upon inspection was discovered to be ferrying assorted election materials including ballot boxes with marked ballot papers, election forms, seals and stamps. Upon being informed of the incident, the 1st Respondent suspended the election exercise at the county tallying centre.

7. The Petitioner stated that once the tallying process was suspended, the candidates and their agents were not allowed ingress to the tallying centre. He averred that the manner in which the tallying process was resumed is unknown and the same was done in a clandestine manner to the benefit of the 3rd Respondent. Further, that the resumption of the tallying and the subsequent declaration of the 3rd Respondent as the winner was shrouded in a cloud of secrecy as the other candidates or their agents were not in the know.

8. The second incident referred to by the Petitioner is the arrest of three presiding officers at Lagos Bar, Kaloleni on 9th August, 2017. He averred that the said election officials were caught red-handed locked in a room while marking and stamping ballot papers for the gubernatorial and senatorial positions.

9. According to the Petitioner, the third incident was the arrest and prosecution of three IEBC officials in Malindi constituency for committing electoral offences under the Election Offences Act, 2016.

10. The fourth incident averred to by the Petitioner was in connection to a teachers' meeting held at Coast Palace Hotel, Mariakani, Kilifi County about three weeks to the general election where the 3rd Respondent allegedly gave each teacher in attendance 1,000 shillings for lunch and promised them jobs as officials of the 2nd Respondent during the election. He averred that indeed the promise was fulfilled after some of the teachers in attendance secured jobs as presiding officers, deputy presiding officers and clerks during the election. Further, that the officers arrested at Lagos Bar, Kaloleni were some of the teachers who had attended the said meeting.

11. The Petitioner alleged that the 1st Respondent was in constant communication with the 3rd Respondent during the entire voting period and personally committed, condoned, and/or abetted some of the serious offences and malpractices witnessed in Kilifi County during and after the election.

12. The Petitioner therefore stressed that the gubernatorial election contravened the principles of a free and fair election under Article 81(e) of the Constitution as read together with Section 39 of the Elections Act and the regulations made thereunder.

13. Another ground in support of the Petition was that the relay and transmission of results from the polling stations to the county tallying centre was not simple, accurate, verifiable, secure, accountable, transparent, open and prompt. According to the Petitioner, the data and information recorded in forms 37A was not accurately and transparently entered into the KIEMS kits at the individual polling stations. Further, that the information in forms 37A was not consistent with the information in forms 37B and that

the results in forms 37B was materially different from the results publicly relayed by the 2nd Respondent.

14. The Petitioner stated that the election was not administered in a neutral, efficient, accurate, accountable and impartial manner thus contravening Article 81(e)(v) as read with sections 39, 44 and 44A of the Elections Act, the Elections (General) Regulations, 2012 and Section 25 of the Independent Electoral and Boundaries Commission Act. In support of this assertion, the Petitioner averred that in numerous instances the 1st and 2nd respondents selectively inflated, manipulated, engineered and/or deliberately distorted the votes cast and counted in favour of the 3rd Respondent thereby affecting the final results. The Petitioner asserted that his averments were supported by the evidence of his witnesses.

15. The Petitioner posited that the voting, counting and tallying of results failed the constitutional test as the results were not accurate or verifiable. He also asserted that the irregularities and illegalities resulted in the contravention of the Constitution and the electoral law.

16. The Petitioner therefore prayed for declarations and orders as follows:

“A. A declaration that the gubernatorial election in Kilifi County held on 8th August 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void;

B. A declaration that the 3rd Respondent was not validly declared as the Governor elect Kilifi County and that the declaration is invalid, null and void;

C. An order directing the 2nd Respondent to organize and conduct a fresh gubernatorial election in Kilifi County in strict conformity with the Constitution and the Elections Act;

D. A declaration do issue that the degree and extent of electoral offences and malpractices perpetrated by, and/or attributable to the agents of the 2nd Respondent and the 3rd Respondent in the Kilifi County gubernatorial election conducted on 8th August, 2017 invalidated the said election.

E. A declaration do issue that the degree and extent of electoral offences and malpractices perpetrated by, and/or attributable to the agents of the 2nd Respondent and the 3rd Respondent in the conduct of the Kilifi County gubernatorial election of 8th August, 2017 were in breach of, and violated Article 86 of the Constitution.

F. A declaration that each and all of the Respondents jointly and severally committed election offences, malpractices and/or irregularities;

G. Costs of the Petition; and

H. Any other orders that the Honourable Court may deem just and fit to grant.”

(ii) The 1st and 2nd respondents’ case

17. Through their response dated 26th September, 2017, the 1st and 2nd respondents opposed the Petitioner’s allegation that the impugned election was badly conducted or that there was non-compliance with Articles 1, 2, 10, 38(2) & (3), 81(a) & (e), 82, 86, 88(4), 165 or 249 of the Constitution or any provisions of the Elections Act and the regulations made thereunder. They instead asserted that the results clearly reflected the will of the people.

18. The 1st and 2nd respondents denied each and every specific allegation made by the Petitioner. They averred that the election met the requirements of Section 83 of the Elections Act. Further, that the voting, counting and tallying process at all polling stations and tallying centres was carried out in a free, fair,

transparent and orderly manner contrary to the Petitioner's allegations and that no proof had been laid before the court to support the said allegations.

19. Responding to specific incidents cited by the Petitioner, the respondents stated that the yellow Canter incident was manipulated by the Petitioner in order to lend credence to a pre-determined agenda of disrupting the election process. The respondents averred that the vehicle in question was officially contracted by the 2nd Respondent and was in the process of moving excess election materials from Kilifi North constituency tallying centre to the warehouse at the 2nd Respondent's offices located about 500 metres away.

20. According to the 1st and 2nd respondents, the Petitioner together with a large number of persons and other candidates exhibited aggressive and violent conduct towards the 1st Respondent as well as the Kilifi North Constituency Returning Officer causing the exercise to be temporarily suspended. The 1st and 2nd respondents averred that the Petitioner could not therefore purport to seek to rely on his own wrongful and unlawful conduct to allege wrongdoing on their part. They added that the resumption of the electoral and tallying process was as provided by law. According to them, authorized agents or candidates were never denied entry to the tallying centres.

21. On the Lagos Bar incident, the 1st and 2nd respondents stated that the same was as a result of criminal conduct perpetrated by unknown persons against the IEBC officers who had only gone to the said bar across the road from the tallying centre to attend to the call of nature. All allegations of alleged malpractices in regard to that incident were denied.

22. On the prosecution of election officials, the 1st and 2nd respondents averred that the said individuals were charged at the behest of the 2nd Respondent for dereliction of duty on a complaint lodged very early in the day and their conduct did not and could not have affected the outcome of the election in question.

23. The 1st and 2nd respondents denied any material discrepancies in the results and concluded that the election in question was carried out in strict compliance with the law in a neutral, efficient, accurate, accountable, free, fair, impartial and credible manner. They therefore urged that the Petition be dismissed with costs.

(iii) The 3rd Respondent's case

24. The 3rd Respondent opposed the Petition through a response filed on 26th September, 2017. The response is in two parts. In the first part he opposed the Petition based on preliminary points of law. The first point of law taken up was that the Petitioner omitted to state the results of the election. This issue was argued at the preliminary stage of this matter and a ruling delivered in which the Petition was sustained.

25. The second point of law raised by the 3rd Respondent was the Petitioner's failure to make the Deputy Governor a respondent. The parties agreed that this issue be addressed in the judgement of the court. I shall address it in due course.

26. Turning to the Petition itself, the 3rd Respondent denied all the allegations in the Petition and concluded by giving his election a clean bill of health.

27. On the alleged arrest of the 2nd Respondent's officers at Lagos Bar, Kaloleni, the 3rd Respondent denied knowledge of the incident.

28. As to the arrest of election officials in Malindi Constituency for committing electoral offences, the 3rd Respondent asserted that their prosecution does not amount to guilt and one can only conclude that electoral offences were committed if there is a conviction.

29. On the alleged meeting with teachers prior to the election, the 3rd Respondent stated that he was indeed invited for a meeting with the area teachers who listened to his speech on development of the education sector in Kilifi County and responded at length on the issues they desired to be addressed through their union representatives. He denied giving money to anyone or promising the teachers in attendance jobs with the 2nd Respondent as alleged by the Petitioner. He stressed that he did not in any way influence the appointment of presiding officers, deputy presiding officers and the clerks who participated in the general election.

30. It was the 3rd Respondent's averment that there was no unlawful or improper communication between him and the officials of the 2nd Respondent and neither did he commit, conspire, aid or abet any serious crimes or malpractices before, during and after the elections.

31. He thus urged the court to declare that he was duly elected in a free, fair, transparent, credible and valid election as a consequence of the exercise of sovereign power by the people of Kilifi County. He prayed for the dismissal of the Petition with an order directing the Petitioner to bear the costs of the proceedings .

32. The 3rd Respondent swore an affidavit on the same lines with his response. It is important to note at this point that the 3rd Respondent did not testify and his affidavit evidence was of no value to his case.

C. REASONS FOR THE DISMISSAL OF THE PETITIONER'S TWO APPLICATIONS DATED 2ND OCTOBER, 2017

33. On 12th January, 2018 I dismissed the Petitioner's two motions dated 2nd October, 2017 and promised to give the reasons for the decision in this judgement.

34. In one of the applications, the Petitioner sought an order preserving materials and equipment used in the election. Within the same application, he also sought a scrutiny of the preserved items. In the other application, the Petitioner sought scrutiny and recount.

35. The advocates for the parties agreed to have the two applications heard after the witnesses had testified.

36. For the purposes of this judgement, I will treat the two applications as a single application for information, scrutiny and recount.

37. In summary, the Petitioner's case was premised on the grounds that the process of voter identification, relay and transmission of results was severely compromised; that there existed serious electoral offences and malpractices; and that the information sought would aid the court in correctly, accurately and effectively determining the prayer for scrutiny and recount.

38. All the respondents opposed the application. Their case was that the application was wholly misconceived in law and a fishing expedition without any proper basis or foundation; that no sufficient reason or basis had been laid for the grant of the orders; that the application for scrutiny and recount lacked material particulars as to the polling stations in which results were disputed; that the court had no jurisdiction to grant the reliefs sought in the absence of prayers seeking relief to this end in the Petition itself; and that the difference in the votes between the contestants was so large that no useful purpose would be served in granting the relief sought.

39. 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.

40. 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.”

41. 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.”

42. 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.”

43. 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.”

44. 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.]”

45. 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.

46. 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.”

47. 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 this 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.

48. Recently a new development has emerged in election petitions wherein a petitioner will ask for information and at the same time apply for scrutiny and or recount. Ideally the prayers should be made in one application as an application for information is a precursor to an application for scrutiny or recount as was noted by the Supreme Court in Presidential Petition No. 1 of 2017 in its ruling of 28th August, 2017 that **“implicit in scrutiny is also the fact that the information sought is first granted before any scrutiny can be initiated.”**

49. An application like the one made by the Petitioner in Application No. 1 is not only an application for information but also an application for preservation of evidence. In my view, such an application should

be dispensed with at the pre-trial stage of an election petition. The outcome of such an application should not in any way affect the application for scrutiny which should come after the evidence and which is ordinarily filed at the interlocutory stage.

50. Applying the law to the facts of this case, it is apparent that this is not a matter in which orders of scrutiny and recount were available. Most of the incidences that formed the foundation of the application for scrutiny and recount occurred after the polling day. The Lagos Bar incident occurred after the results had been announced at the polling stations. The results were already in the public domain and scrutiny and recount would not have achieved anything. It would just have been a waste of the court's time and other resources.

51. As for the yellow Canter incident, it is only necessary to note that the ballot boxes and ballot papers that the vehicle was allegedly transporting were not linked to any of the 988 polling stations in Kilifi County. How was the court supposed to decide the polling stations to be scrutinized? It is also important to note that the results had also been announced at the polling stations.

52. The third incident was that of the arrest of three polling officials in Malindi Constituency for allowing voters to vote without validation of their registration status with the KIEMS kits. Was a scrutiny and/or recount viable in the circumstances? The answer is in the negative. Scrutinizing the election materials and opening the ballot boxes used in those polling stations would not have helped the court identify the ballot papers marked by the voters who were allowed to vote without validation of their registration details. Since voting proceeded by secret ballot, the ballot papers that were cast in those polling stations could not be linked to particular voters. It also could not have been determined as to which candidates the voters voted for. From which candidate would the votes have been deducted? A scrutiny or recount in the affected polling stations would thus have been a futile exercise.

53. At the end of it, I found that the Petitioner had not laid any basis for an order of scrutiny or recount. Allowing the prayer for an order directing the 1st and 2nd respondents to avail certain information and materials to the Petitioner would thus have served no purpose in such circumstances. That explains the dismissal of the Petitioner's two applications dated 2nd October, 2017.

D. A SYNOPSIS OF THE APPLICABLE LAW

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

55. 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.

56. 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.

57. 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.

58. 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.”

59. 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.”

60. 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].

61. 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.”

62. 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.”

63. Earlier on, the Supreme Court had in the case of **Gatirau Peter Munya v Dickson Mwenda Githinji & 2 others [2014] eKLR** 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.”

64. 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.”

65. 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.”

66. 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.”

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

E. THE NON-INCLUSION OF THE DEPUTY GOVERNOR AS A RESPONDENT

68. From the outset, the 3rd Respondent took the position that this Petition is fundamentally defective because the Petitioner failed to include the Deputy Governor as a respondent. This contention is found in the 3rd Respondent’s response to the Petition. The 3rd Respondent also took up the issue through the notice of motion application dated 28th September, 2017.

69. The 1st and 2nd respondents supported the position taken by 3rd Respondent. The Petitioner was of the opposite view.

70. Although this is a matter that ought to have been dispensed with at the preliminary stage, the parties agreed to address the issue at the conclusion of the trial. The agreement to delay the determination of this issue has been useful to the court as relevant decisions have been made during the intervening period.

71. In summary, the 3rd Respondent’s argument is that Article 180(5) of the Constitution recognizes the

person nominated by a governor to be his or her deputy as a candidate in the election for the post of deputy governor. Article 180(6) then mandates the 2nd Respondent to declare the nominee, of the candidate elected as the governor, to have been elected as the deputy governor.

72. It is the 3rd Respondent's case therefore that the election of the governor and his or her deputy is inseparable as they are both elected in the same election.

73. Pointing to Section 18 of the Elections Act, the 3rd Respondent asserts that a county governor candidate or a political party shall not at any time change the person nominated as deputy governor candidate after the nomination of that person has been received by the IEBC. Further, that in the event of death or resignation of the deputy governor nominee, the political party may substitute its candidate before the date of presentation of nomination papers to the IEBC.

74. It is the 3rd Respondent's case therefore that the Elections Act recognizes the deputy governor as a candidate in the elections and in questioning the validity of the election of a governor, the petitioner must also question the validity of the election of the deputy governor.

75. The 3rd Respondent states that in compliance with Regulation 87(4)(b), the 2nd Respondent had published in the Gazette dated 18th August, 2017 that Gideon Edmund Saburi was the person duly elected as the Deputy Governor, Kilifi County.

76. Pointing to Rule 2 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 the 3rd Respondent states that in relation to an election petition, a respondent means a person whose election is complained of. It is thus the 3rd Respondent's case that the Constitution and the laws governing elections are clear that a deputy governor is directly elected by the voters and in questioning the election of a governor, the petitioner also questions the election of the deputy governor.

77. Pressing ahead with the argument on the importance of having a deputy governor as a respondent in an election petition, the 3rd Respondent states that in any election of a county governor, the name of the deputy county governor is conspicuously printed on the ballot paper in the same row in juxtaposition to that of the governor. He therefore posits that the election of a governor is invariably and inextricably interwoven with that of the deputy governor so that an election for one is an automatic election for the other and the two cannot be separated in the manner the Petitioner has done in this case.

78. Turning to the effect of the Petition on the deputy governor, the 3rd Respondent contends that determining the Petition would mean that the rights of the deputy governor will stand to suffer as a result of a trial conducted without his participation. His view is that this would violate the deputy governor's non-derogable right to a fair trial guaranteed by Article 25(c) of the Constitution.

79. The 3rd Respondent contends that he has a right to raise this issue on behalf of the deputy governor by virtue of Article 22 of the Constitution. Giving further reasons why this Petition should not be allowed to stand, the 3rd Respondent asserts that it breaches the rule of natural justice which protects the right to a hearing.

80. The 3rd Respondent points out the absurdity that would arise were this court to nullify his election, stating that no vacancy would occur in the office of the governor since Article 182 of the Constitution provides that whenever a vacancy occurs in the office of the governor, the deputy governor shall assume office as the governor of the county for the remainder of the term of the governor. It is the 3rd Respondent's assertion that among the reasons that may lead to a vacancy in the office of governor is removal under the Constitution (Article 182(1)(e)). According to the 3rd Respondent, a removal of a governor through an election petition is a removal from office under the Constitution and the deputy governor will thus occupy the office of the governor since his election has not been invalidated. The 3rd Respondent urges this court to strike out the Petition herein for failure to include the deputy governor as a respondent.

81. Although the Petitioner expressed opposition to this application he did not address the issue in his final submissions.

82. It must be noted that the issue raised by the Petitioner is not a pedestrian one. The question that needs to be answered is the consequence of the failure to name a deputy governor as a respondent in a petition seeking the nullification of the election of a governor. This question has recently received attention from a number of judges of this Court. However, there is no unanimity on the issue which apparently is yet to find itself on the table of the higher courts.

83. In **Wavinya Ndeti & another v Independent Electoral and Boundaries Commission (IEBC) & 2 others [2017] eKLR**, the 3rd Respondent, Alfred Nganga Mutua had sought to have the election petition struck out. One of the grounds in support of his application was that the petitioner had failed to join his deputy governor as a necessary respondent and thereby denied the deputy governor the right to participate in the petition.

84. After considering the relevant provisions, Muchelule, J in a ruling delivered on 10th November, 2017 held that:

“It is clear from these provisions that a governor is directly elected by registered voters in a county. He nominates a running mate to be on the same ticket with him. If he is elected the running mate becomes the deputy governor who is deemed to be elected. In other words, the deputy governor is not directly elected by voters in the county. He will only assume office of the governor if it falls vacant under any of the circumstances under Article 182. If the validity of the election of the governor is successfully challenged by petition, then both him and the deputy governor will leave office. In my view, unless there is an election act or omission alleged against a deputy governor during the election of the governor he will not become a necessary party in the election petition filed against the governor. He will not be a respondent in the petition. The governor will be the respondent in the petition because he is the one who has been directly elected in the election, and he is therefore the one who will cease to hold office if the election is validly and successfully challenged. The deputy governor will be collateral damage, as it were. The governor is the person whose election is complained of under rule 2, hence his being made a respondent.”

85. Confronted with the same issue in **Hassan Omar Hassan & another v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR**, Achode, J in a ruling delivered on 24th October, 2017 had this to say:

“Based on the provisions of the law cited and the jurisprudence that emerges from the above mentioned cases, it is my view that the joinder of the Deputy County Governor is not crucial to the instant petition. A reading of Article 180(1) clearly indicates that it is the County Governor who is elected directly by the voters registered in the county and as such, in the event an election petition against a County Governor results in the nullification of the results, the Deputy County Governor no matter how compelling a case he/she may put forward, suffers the same fate as the Governor by dint of having assumed office through the same irregularly declared ticket.”

86. The opinion of the two judges is that it is not necessary to include the deputy governor as a respondent in a petition seeking to invalidate the election of a governor.

87. Thande, J is of a contrary opinion. In her decision in **Mwamlole Ichappu Mbwana v Independent Electoral and Boundaries Commission & 4 others [2017] eKLR** she had the opportunity of addressing the issue at length after considering the decisions of Muchelule, J, Achode, J and other judges who were of the view that non-joinder of a deputy governor was not fatal to a petition seeking the invalidation of the election of a governor.

88. She started by answering the question as to whether a deputy governor was elected or nominated. She

stated that:

“From the foregoing provisions it is clear and it is not disputed that the governor is directly elected by the registered voters in the county. As regards the deputy governor, Article 180(5) requires each candidate for election as governor to nominate a person qualified for nomination for election as county governor as a candidate for deputy governor. Article 180(6) provides that no separate election shall be conducted for the deputy governor. The provision then goes on to state that the candidate nominated by the person who is elected county governor shall be declared “to have been elected as the deputy governor.” The clear reading of the wording of that provision is that once a governor is elected then the person he nominated shall also be declared to have been elected as the deputy governor. I am therefore not persuaded by the argument that the deputy governor is merely nominated and not elected.”

89. Relying on the decisions of the Supreme Court in **Moses Mwicigi & 14 others v Independent Electoral and Boundaries Commission & 5 others [2016] eKLR** and the Court of Appeal in **Kipkalya Kiprono Kones v Republic & another ex-parte Kimani Wa Nyoike & 4 others [2006] eKLR**, the learned Judge opined that a deputy governor can only be removed through an election petition as the **“deputy governor came into office through the law and can only be removed through a process set out in the law.”**

90. The Judge went ahead and found that if the deputy governor was condemned unheard in the petition before her it would offend the principles of natural justice. On this, the Judge stated that:

“The steadfastness of our Courts in upholding the principles of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made in ordinary litigation cannot be disaffirmed. The same steadfastness must also be applied in electoral disputes. To proceed to hear this Petition without notice to, or the participation of the deputy governor, is to go against the principles of natural justice. This Court cautions itself that any decision it may make in violation of these principles however “right” the decision may be, such decision must be declared to be no decision.”

91. Turning to the absurdity that would arise in case of the nullification of the election of a governor where the deputy governor is not made a respondent, the learned Judge held that:

“57. Going back to the submission that the Petitioner has no complaint against the deputy governor and thus did not need to enjoin her as a co-respondent, the question begs, if this Court were to allow the Petition and nullify the election of the governor, what would be the fate of the deputy governor? It must be borne in mind that upon election of the 5th Respondent, the deputy governor was also declared to have been elected as deputy governor in line with Article 180(6). The deputy governor was issued with her own Form 37D being the certificate declaring her as duly elected. Through what legal process, instrument or order will the Form 37D issued to the deputy governor be vacated, set aside or quashed if she is not a party herein?

58. What would happen if upon nullification of the election of the governor, the deputy governor declines to vacate office on the ground that she is not aware of the proceedings or of any order against her? What if she insists on assuming the position of county governor of Kwale County under Article 182(2)? My view is that she would be within her legal right to so insist....”

92. A reading of the Constitution will show that a deputy governor is an alternative governor so that where the office of the governor becomes vacant, the deputy governor steps into the office without the need for an election. The role of the deputy governor is to support the governor in attaining his or her vision for the county. In order to give the governor the opportunity of achieving his goals and so as to ensure harmonious operations, the drafters of the Constitution found it necessary to give a gubernatorial

candidate room to pick a person of his or her choice as a running mate. The only condition imposed is that the person should be qualified to run for the office of a governor.

93. The makers of the Constitution were then faced with the dilemma of ensuring that the deputy governor received the mandate of the people. Hence the decision to have the deputy governor elected together with governor.

94. In order to ensure that the nomination of the deputy governor met the constitutional principle which requires that all holders of elective public offices receive the mandate of the people, two elections were designed. One election is that of the governor which is through the popular vote. The other election is that of the deputy governor which is through nomination by the governor.

95. In **Moses Mwicigi** (supra) the Supreme Court observed that:

“It is clear to us that the Constitution provides for two modes of ‘election.’ The first is election in the conventional sense, of universal suffrage; the second is ‘election’ by way of nomination, through the party list. It follows from such a conception of the electoral process, that any contest to an election, whatever its manifestation, is to be by way of ‘election petition’.”

96. That the deputy governor is elected in his own right is clear from a reading of Article 180(5) which requires each candidate for election as county governor to nominate **“a person who is qualified for nomination for election as county governor as a candidate for deputy governor.”** The deputy governor is a candidate in the election. Article 180(6) commands IEBC not to **“conduct a separate election for the deputy governor”** but to **“declare the candidate nominated by the person who is elected county governor to have been elected as the deputy governor.”** [Emphasis supplied].

97. In my view, the manner in which the Constitution is drafted does not envisage a situation in which the election of the governor is nullified and that of the deputy governor remains undisturbed. Two elections are indeed held for the governor and the deputy; one by popular vote and another one by nomination but they are so conjoined to the extent that once the election of the governor is invalidated, that of the deputy governor is also voided. Removal of a governor from office through an election petition may have been one of the reasons behind the enactment of Article 182(4) of the Constitution which provides for the possibility of both the office of the county governor and that of the deputy governor becoming vacant thereby requiring an election for the office of the county governor. It is thus not possible for a deputy governor to stick around once the election of the nominating authority (the governor) is invalidated.

98. Therefore, a person who seeks to remove a governor from office through an election petition must make the deputy governor a respondent, for a successful petition not only affects the election of the governor but also invalidates the election of the deputy governor. Failure to include the deputy governor as a respondent will therefore render such a petition incurably defective for it seeks to invalidate the election of the deputy governor through the back door. The fate of such a petition is to have it struck out or amended, if the constitutional timeline for filing it has not lapsed.

99. If then, a deputy governor is elected, then how is he or she removed from office? It was submitted for the Petitioner that in an election for governorship, it is only the governor who is elected and as such, the deputy governor need not be made a party to a petition challenging the election of the governor. Counsel for the Petitioner went ahead to suggest that the issue had been addressed by the Court of Appeal in **Dr. Thuo Mathenge & another v Nderitu Gachagua & 2 others [2013] eKLR** where the Court stated at paragraph 68 that:

“We are of the considered view that the evidence adduced by the 1st appellant that he believed his supporters voted against him because of the error on the ballot paper was based on opinions and speculations. We say so because we did not find any basis for such speculations and opinions in the evidence adduced. Firstly, from the foregoing it is clear that it is only the Governor who is directly elected by the voters. We cannot help but note that the

appellant's witnesses did admit that they were aware that it was only the Governor who was being directly elected by the voters and that the successful candidate's nominee would be the Deputy Governor. Therefore, we find the contention by the appellants' witnesses that they had supported the 1st appellant on account of Dr. Geoffrey Kamau Kibui being his running mate and that the error on the ballot papers influenced them to vote against the 1st appellant unreasonable. It is quite clear that the said witnesses understood that it was only the Governor who would be directly elected; his running mate would be the Deputy Governor. Therefore, at no instance were the appellants' witnesses voting for the Deputy Governor. We further find this contention to be unreasonable because if indeed the said Dr. Geoffrey Kamau Kibui was the appellant's witnesses preferred candidate for the position of Deputy Governor, why then would they vote for another candidate vying for the seat of Governorship whose running mate was not Dr. Geoffrey Kamau Kibui"

100. With respect to counsel for the Petitioner, I find that the Court of Appeal did not address the question as to the consequences of the failure to include a deputy governor as a respondent in a Petition challenging the election of the governor. The issue before the Court was whether an error in the name of the deputy governor nominee had affected the credibility of the election.

101. Rule 2 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 defines a "respondent" in relation to a petition as: –

“(a) the person whose election is complained of;

(b) the returning officer;

(c) the commission; and

(d) another person whose conduct is complained of in relation to an election.”

102. The Supreme Court (Presidential Election Petition) Rules, 2017 state that the term respondent:

“Means the President-elect and includes the deputy President-elect, the Commission and any other person named in the petition as a respondent.”

103. The deputy president is elected in the manner that a deputy governor is elected. In my view, the rules would require that since the election of the deputy governor is also complained of, he or she should be made a respondent.

104. Having established that a deputy governor is elected, the only way to challenge his or her election is through an election petition. As opined by Thande, J, the only way to remove a deputy governor from office is through constitutional provisions. It is not sufficient to say that since the election of a governor has been nullified, then the office of the deputy governor becomes vacant. If this was so, then the impeachment of a governor would lead to the vacation of office by the deputy governor. I therefore agree with Thande, J that failure to make the deputy governor a respondent in a petition challenging the election of a governor is a fundamental defect that would lead to the striking out of the petition. This is because the election of a governor and the election of a deputy governor are inseparable. To make a decision on the election of a deputy governor without hearing him or her would indeed be a very grave error and a breach of the right to a fair hearing.

105. In fact the Regulations are littered with provisions which recognise and give a voice to a running mate in the conduct of elections. For example, Regulation 74(4) provides that a person nominated as a deputy to a candidate is among the persons entitled to access the counting venue in a polling station. How then, can courts, of all institutions, tell a person who has been elected that his or her participation in a case which is likely to overturn his or her election is not necessary?

106. It is indeed without doubt that the fate of a deputy governor's election is so intertwined with that of

the governor to the extent that the participation of the deputy governor may not change the course of events. It is, however, important to note that the right to a hearing is granted not because of the weakness or strength of the case of a party. The right is protected because no man should be condemned unheard.

107. In the circumstances, I find the 3rd Respondent's notice of motion dated 28th September, 2017 merited. Nevertheless, considering the distance travelled in this matter, I find it fair and just to consider the merits of the Petition.

F. ANALYSIS & DETERMINATION

108. The global issue for the determination of the court is whether the election of the 3rd Respondent met the constitutional and legal threshold for elections in Kenya. The answer will be found by considering the pleadings filed, the evidence tendered, and the submissions made by the parties.

(i) The suspension of the process by the 1st Respondent at the county tallying centre at Pwani University on 9th August, 2017

109. The 1st Respondent admitted that she suspended the process at the county tallying centre at Pwani University after consulting Ms Consolata Nkatha the Vice Chairperson of the 2nd Respondent. She later resumed the exercise after the Petitioner and his group left the tallying centre.

110. According to the Petitioner, the 1st Respondent's action breached Regulation 64(1) and (2) which governs the adjournment of elections by providing that:

“64. (1) Notwithstanding the terms of any notice issued under the Act or these Regulations, a presiding officer may, after consultation with the returning officer, adjourn the proceedings at his or her polling station where they are interrupted by a riot, violence, natural disaster or other occurrence, shortage of equipment or other materials or other administrative difficulty, but where the presiding officer does so, the presiding officer shall re-start the proceedings at the earliest practicable moment.

(2) The discretionary powers of a presiding officer under sub- regulation (1) shall include a power in the circumstances therein mentioned to transfer the proceedings to another polling station or public facility in the same constituency, and where presiding officer does so –

a) The presiding officer shall advertise the fact in such manner as is sufficient to bring it to the notice of voters; and

b) The electoral area for the polling station from which the proceedings are transferred shall, for all the purposes of these Regulations, be deemed to be part of the electoral area of the polling station to which the proceedings are transferred.”

111. It was the Petitioner's submission that sub-regulation (2) is couched in mandatory terms and required the 1st Respondent to advertise the suspension of the exercise and the resumption of the same in such a manner as was sufficient to bring it to the notice of voters which she failed to do. Further, that the Petitioner was not aware of the resumption of the tallying exercise. Counsel therefore posited that there was no proper and valid declaration of the results for the gubernatorial election conducted in Kilifi County.

112. On this issue, counsel for the 1st and 2nd respondents submitted that it was the Petitioner's own actions that led to the suspension of the process at the Kilifi North constituency tallying centre only and the Petitioner cannot be allowed to benefit from his own wrongful and unlawful conduct.

113. Counsel for the 1st and 2nd respondents submitted that the 1st Respondent was categorical that the

process at the county tallying centre had not commenced at the time she suspended the process.

114. Counsel further submitted that it was the Petitioner himself who told his agents not to go and sign the forms at the tallying centre and he cannot therefore be heard to say that he was unaware that the process had resumed.

115. Counsel for the 1st and 2nd respondents concluded his submissions on the issue by stating that the Petitioner's reliance on Regulation 64 is misplaced as the same relates to adjournment of proceedings at a polling station and not the tallying centre.

116. Submitting on this incident, counsel for the 3rd Respondent asserted that the suspension of the tallying process is not evidence of electoral malpractice and in the circumstances of the threat of physical injury to the 2nd Respondent's officials, the suspension was justified. Counsel asserted that the Petitioner decided not to go back to the tallying centre and instructed his agents not to go there. Further, that the election law permits the 2nd Respondent's officials to announce results in the absence of the candidates or their agents.

117. What was the impact of the suspension on the election? As correctly pointed out by counsel for the 1st and 2nd respondents, Regulation 64 cannot aid the Petitioner's case. That particular enactment relates to adjournment of polling by a presiding officer in a polling station. Even Regulation 64A introduced by the 2017 amendments relates to the postponement of an election by the IEBC. Indeed the 1st Respondent appreciated in her evidence that she had no powers to suspend the process at the tallying centre and only did so because her life was in danger and after consulting her boss. The tallying centre for Kilifi North Constituency and the county tallying centre were all located at Pwani University. DW3, the returning officer for Kilifi North Constituency, testified about broken doors and threat to their lives. In fact the Petitioner himself testified that he had to protect the 1st Respondent from harassment by the agitated mob.

118. It is important to appreciate that it was the Petitioner's team which forced the 1st Respondent to take the action she took. The evidence also shows that the tallying at the county tallying centre had not commenced.

119. Another important thing to note is that the Petitioner himself told the court that he directed his agents not to go back to the tallying centre. He must therefore have become aware that the electoral process had restarted.

120. A review of the evidence leads to the conclusion that no irregularity can be read into the decision of the 1st Respondent. It was indeed the action of the Petitioner and his group which forced the 1st Respondent to take the action she took.

121. Addressing the effect of widespread violence prior to the presidential election held on 26th October, 2017, the Supreme Court in **Presidential Petition No. 2 of 2017** stated that:

“[314] Were any State agencies, such as the police who are allowed to resort to a limited measure of force to prevent crime, protect lives and property, and quell violent insurrection, to deploy excessive force resulting in injury, destruction of property or death, they certainly would be undermining the authority of the Constitution. By the same token, where civilians, for whatever reason, resort to acts of violence and intimidation, with the object of preventing others from exercising their democratic right to vote, or impeding election officials from executing their constitutional responsibilities, such civilians will engage themselves in the atavistic path of undermining the authority of the Constitution. Article 3(1) of this vital charter categorically declares that “every person has an obligation to respect, uphold and defend this Constitution.”

[315] The terms of Article 81(e) (ii) of the Constitution, read in proper context, must be understood to mean that no person, candidate, political party, party agent or supporter, or State agency is to resort to acts of violence, intimidation, improper influence or corruption, to defeat the will of the people exercising their democratic rights to vote. The said provision cannot be read as sanctioning or lending legitimacy to acts of violence and intimidation, to achieve the invalidation of an election. If we were to hold otherwise, the authority of the Constitution would be surrendered to cynical acts of violence: all that one would need to do, is to instigate violence in any corner of the Republic during a Presidential election, and thereafter petition this Court to nullify the election. **Those who intentionally instigate and perpetrate violence must not plead the same violence as a ground for nullifying an election.** [Emphasis added].

122. The Petitioner cannot be allowed to reap any benefit from violence that was visited upon the 1st Respondent and the other officials of the 2nd Respondent by people associated with him.

123. Of utmost importance is the fact that by the time the incident took place, results had been announced in all the polling stations and the tallying of votes was taking place at constituency tallying centres. Therefore, the contention by the Petitioner that the incident at Pwani University county tallying centre affected the outcome of the election has no value. If the Petitioner had a functional campaign centre he ought to have known, by the time of the incident, the number of votes he had obtained in the election.

124. I also find that agreeing with the Petitioner that the post polling incident affected the outcome of the election would be contrary to the decision of the Court of Appeal in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2015] eKLR** wherein it was held that:

“It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters’ will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion.”

125. Prior to the pronouncement of the law by the Court of Appeal, the Supreme Court had noted the centrality of the polling station in an election process by stating in **Gatirau Peter Munya (supra)** that:

“Rule 33(4), in our opinion, looks up to Article 86(b) and (c) of the Constitution, which places a premium on the polling station as the basic arena of voting, and counting of votes.”

126. In view of the fact that the results had already been announced at the polling stations and what remained was the tallying and collation of the same at the county tallying centre, it becomes difficult to agree with the Petitioner that the 1st Respondent’s actions affected the outcome of the election. As such I hold and find that the suspension of activities at the county tallying centre by the 1st Respondent was not irregular as the action was informed by good reason and common sense. I also find that the said action did not in any way affect the results or outcome of the gubernatorial election in Kilifi County.

(ii) The Canter incident at Pwani University

127. On this incident the Petitioner’s counsel urged the court to believe the Petitioner’s evidence stating that DW2, who was in charge of logistics, did not provide an inventory as to what materials the vehicle was transporting. Further, that the initial information was that the vehicle was carrying garbage but was found to be transporting election materials. He therefore urged the court to find the Petitioner’s evidence unchallenged and uncontroverted.

128. The 1st and 2nd respondents’ take on this issue is different. Their counsel submitted that there was no interception of any Canter allegedly ferrying election materials. The 1st and 2nd respondents’ counsel asserted that the evidence of the Petitioner shows that he, in the company of other persons not entitled to

be at the Kilifi North Constituency tallying centre, interfered with the work of the 2nd Respondent's officials. Further, that the Petitioner admitted that he indeed did not mention the incident in his letter of complaint dated 10th August, 2017 which is a clear indication that the version now advanced is simply an afterthought intended to buttress the grounds in support of his case.

129. Counsel for the 1st and 2nd respondents submitted that once the evidence of DW1, DW2 and DW3 is considered, it becomes clear that the 2nd Respondent was simply ferrying excess election materials to its warehouse situate nearby in order to create space at Kilifi North Constituency tallying centre for election materials coming in from the polling stations.

130. In relation to the Canter incident, counsel for the 3rd Respondent submitted that no evidence of the nature and type of election materials allegedly found in the lorry was adduced by the Petitioner.

131. Counsel asserted that even if the Petitioner's evidence is to be believed, that fact alone does not affect the results that were collated, tallied and announced in the polling stations and captured in forms 37A. Further, that the incident has not in any way been linked to any of the forms 37A.

132. Counsel concluded by pointing out that the incident occurred on 9th August, 2017 by which time the necessary information had been captured on the requisite forms 37A and there would have been no need to attempt to manipulate any information in the ballot papers and ballot books.

133. Looking at the evidence adduced in relation to the Canter incident, it is easy to believe the 1st and 2nd respondents' case that the vehicle in question was transporting unused election materials to the IEBC offices located a short distance from the tallying centre. As already stated, the counting, tallying and announcement of results had been concluded at the polling stations. The results were already in the public domain and it is difficult to understand how those results could have been replaced with other results.

134. As correctly submitted by counsel for the 3rd Respondent, the Petitioner did not provide any particulars about the election materials and how those materials could be used to rig the elections.

135. In any case, this was a post-declaration incident. In **Dickson Mwenda Githinji v Gatirau Peter Munya & 2 others [2014] eKLR**, the Court of Appeal held that:

“177. One of the grounds in the Petition was to the effect that the 2nd and 3rd respondents did not take proper care and custody of the ballot boxes whose seals were broken. This allegation raises a post-declaration irregularity... It is our considered view that post-declaration non-compliance with the electoral rules for the proper custody of the election material by election staff is not *per se* one of the grounds for setting aside the election of a returned candidate. However, non-compliance with the electoral rules as to the proper custody of electoral material may be evidence that a pre-declaration irregularity did in fact take place. When the ballot boxes and their seals have been tampered with or there are fewer votes in the ballot boxes, this may be evidence of a pre-declaration irregularity.”
[Emphasis supplied].

136. Flowing from the above statement, it follows that it is only a post-declaration irregularity that affects the results or the outcome of an election which can lead to the invalidation of an election. In order for a petitioner to succeed in upsetting an election based on post-declaration incidents, he or she must demonstrate that the incidents affected the voting and counting of votes. In the instant case, the Petitioner has failed to connect the Canter incident with the voting and counting of votes in any of the polling stations within Kilifi County. As such, the Canter incident cannot be used to invalidate the election of the 3rd Respondent. Again, the Petitioner failed to appreciate the centrality of the polling station in a modern day election as pronounced in **Maina Kiai** (supra).

(iii) The arrest of IEBC officials in Malindi Constituency

137. During the hearing of the Petition evidence was adduced of the arrest of the 2nd Respondent's officials at Msabaha Football Ground, Kakuyuni Primary School and Majivuni Primary School polling stations. The evidence was to the effect that some clerks in those polling stations were arrested and charged for allowing voters to vote without validation of their registration in the KIEMS kits. According to the Petitioner, these incidents constitute *prima facie* and conclusive evidence of electoral offences and malpractice.

138. In response, counsel for the 1st and 2nd respondents submitted that the Petitioner acknowledged in his own testimony that it was the 2nd Respondent that complained against the officials for dereliction of duty. Further, that the said officials are presumed innocent until proved guilty. Counsel added that the validity of the results at the affected polling stations was accepted and confirmed by the Petitioner's agents who signed forms 37A. Counsel closed by stating that the matter complained of had absolutely no impact on the outcome of the election and urged the court to find this particular ground devoid of merit.

139. Counsel for the 3rd Respondent made submissions similar to those made by counsel for the 1st and 2nd respondents on this issue.

140. Looking at the evidence on record I find that some clerks of the 2nd Respondent were arrested and later charged for failing to pass voters through the KIEMS kits. The 2nd Respondent took action meaning that the incident occurred. Based on the already outlined standard of proof applicable to election petitions, I find that the occurrence of the incident was established. Of course, the guilt or otherwise of the clerks involved is a matter for determination by the court handling the criminal trial.

141. What then was the impact of the incident on the gubernatorial election? The Petitioner postulated that the arrest of the officials proved widespread irregularities and malpractices in the election. He, however, failed to adduce evidence of other similar incidents. The conclusion would then be that the incident was limited to the three polling stations.

142. The incident which touched on the three polling stations in Malindi Constituency cannot be used to make a finding in respect of all the other polling stations. In **Dickson Mwenda Githinji** (supra) the Court of Appeal said as much when it stated that:

“Can the finding and observations made in 7 polling stations be used to make a determinative conclusion in relation to 953 polling stations spread within Meru County? The learned Judge correctly observed that one cannot extrapolate the findings of 7 polling stations and use the same as a sample to determine what happened in all 953 polling stations. We concur with the reasoning of the trial Judge on this issue.”

143. Nevertheless, I agree with the Petitioner that what occurred was a serious breach of the sanctity of the election in the affected polling stations. The positive thing to note is the swift action taken by the 2nd Respondent when the infraction came to light. Only 156 'voters' were affected by this breach of the law. Such a figure cannot be used to invalidate an election in which over 320,000 people voted. Indeed, the entire results of the three polling stations were tainted by the irregularity. Still, those were 3 out of 988 polling stations. The incident cannot be used to invalidate the election.

(iv) The Kaloleni Lagos Bar incident

144. Submitting on the incident in which some presiding officers were allegedly nabbed at Lagos Bar, Kaloleni marking ballot papers, counsel for the Petitioner stated that the incident occurred before the presiding officers had submitted the actual results at the tallying centre as the results submitted electronically were provisional results. It was counsel's assertion that a perusal of the polling station diaries for the stations in which the arrested presiding officers served showed that the sections showing the ballots papers issued, votes cast and valid votes were blank. This, according to counsel, was a serious

malpractice which breached Regulation 73(2) which requires a presiding officer immediately at the close of polling to record the number of ballot papers issued to him or her, the ballot papers issued to voters, the number of spoilt ballot papers and the number of unused ballot papers.

145. In response, counsel for the 1st and 2nd respondents submitted that DW4, DW5, DW6 and DW7 were all clear and categorical on the fact that no ballot stuffing took place. He stated that these witnesses narrated how they were attacked by a mob.

146. Counsel for the 3rd Respondent asserted that the Petitioner admitted that the 3rd Respondent was not present during the incident at Lagos Bar and neither were the involved IEBC officials agents of the 3rd Respondent.

147. In my view, apart from the unfortunate fact that four presiding officers were attacked at Lagos Bar, Kaloleni, there is not much that can be read into the incident. The Petitioner alleged that the presiding officers were manipulating results. However, no evidence was adduced to support the allegation. His agents signed the results at the polling stations in which those officers presided over the elections. Nothing would have been easier than for him to point out the figures tampered with. He may argue that the malpractice was aborted. That being the case, then nothing untoward occurred at Lagos Bar.

148. In conclusion, I find that the Petitioner's claim that the presiding officers were caught red-handed manipulating the results ignores the decision of the Court of Appeal in the already cited **Maina Kiai** case. If there was any illegality that happened at Lagos Bar, and there is no evidence that there was any illegality, then I find that the Petitioner has failed to connect such an illegality with the results of the election. The Petitioner's fears that an election could be manipulated outside the polling station is an enactment of the scenarios in the past elections where votes could be manipulated as the ballot boxes containing the votes were being transported from the polling stations to the tallying centre for counting and tallying. The Constitution and the electoral laws now in place have taken care of this mischief.

(vi) Discrepancies in forms 37As, forms 37B, Form 37C and polling stations diaries

149. The Petitioner submitted that there were serious anomalies relating to results as declared in various forms 37A, 37B and Form 37C. Further, that the said forms have serious omissions that are against the law thus putting the authenticity of the forms in question. The Petitioner's counsel submitted at length on this issue pointing out constituency by constituency the discrepancies in the results in forms 37A and forms 37B. Discrepancies between the results in forms 37B and Form 37C were also pointed out. Finally, the Petitioner's counsel focused the court's attention on incomplete polling station diaries.

150. Counsel for the 1st and 2nd respondents submitted that the Petitioner was attempting to expand his case against the respondents by referring to discrepancies as identified in the affidavits sworn in Election Petition No. 5 of 2017 which had been struck out. Counsel asserted that the discrepancies pointed out by the Petitioner in respect of forms 37A and forms 37B are irrelevant considering that the 1st Respondent had stated that she sourced the results declared in Form 37C from the forms 37A of the individual polling stations.

151. It was submitted for the 1st and 2nd respondents that the entries had been cross-checked and found to be correct and that the Petitioner had not challenged the contents of forms 37A and Form 37C.

152. The 3rd Respondent did not make any submissions on the issue.

153. A review of the Petitioner's pleadings and evidence will show that the issue of alleged inconsistencies in the results as captured in the different declaration forms was a spontaneous reaction to the evidence of the 1st and 2nd respondents' witnesses. What I glean from the Petitioner's submissions is that the results had some arithmetic errors. This is normal for almost all elections. The only question is whether those errors were so pervasive that they affected the results of the election.

154. Despite being challenged to state the results he obtained in the election, the Petitioner shied away from this challenge only stating that the election was so riddled with illegalities and irregularities that the results could not be known. Despite stressing that the results could not be known, he curiously persisted that he had won the election.

155. The results declared by the 1st Respondent show that the 3rd Respondent won with 218,686 votes. The runner-up was Gideon Maitha Mungaro who received 56,547 votes. The Petitioner came third with 44,470 votes. Taking the margin between the 3rd Respondent and the other candidates, and accounting for any arithmetical errors, the 3rd Respondent's lead would still remain undisturbed.

156. The discrepancies pointed out by the Petitioner were not perverse and systematic so as to give the impression that there was a concerted intention by the 2nd Respondent and its officials to rig the election. I therefore do not find any merit in the contention by the Petitioner that the inconsistencies in the results as captured in the various declaration forms rendered the election unverifiable.

(vii) Alleged bribery

157. Relying on the evidence of PW3, Lawrence Kadweka Kombe who was the presiding officer at Ndatani Primary School, counsel for the Petitioner submitted that the evidence of the said witness proved that the 3rd Respondent had bribed voters at Coastal Palace Hotel, Mariakani. Further, that the evidence of PW3 had not been controverted as the 3rd Respondent did not adduce evidence to the contrary. The court was urged to find that the Petitioner had through PW3 tendered cogent, precise and independent evidence. The Petitioner's counsel made heavy weather of the 3rd Respondent's failure to testify stating that he failed to take the opportunity to shed light on the issue. Citing the decision in **Moses Wanjala Lukoye v Benard Alfred Wekesa Sambu & 3 others [2013] eKLR**, counsel submitted that the Petitioner had successfully discharged his evidentiary burden of proof thus shifting the burden of rebutting the same to the 3rd Respondent.

158. In response, counsel for the 1st and 2nd respondents submitted that the Petitioner had failed to discharge the burden of proof as PW3 had disowned his testimony and accepted there was no bribery when it was put to him that he had committed an election offence himself. He urged the court to find that this allegation was unfounded.

159. On her part, counsel for the 3rd Respondent urged the court to find that the Kshs.1,000 received by PW3 was not a bribe but late lunch as the organisers of the function had not served food. She further submitted that when the witness was cross-examined he agreed that the 3rd Respondent did not personally give him the money.

160. On the allegation that the 3rd Respondent had promised to secure jobs with the 2nd Respondent for teachers in the meeting, counsel stated that PW3 had agreed that he did not get his job from the 3rd Respondent and that the 3rd Respondent had not participated in his recruitment.

161. It should be noted from the outset that an allegation of bribery has a criminal aspect to it. As stated by the Supreme Court in **Raila Odinga 2013** and **Presidential Petition No. 1 of 2017**, the standard of proof required is that applicable in criminal cases. When PW3 was put under cross-examination he stated that the Kshs.1,000 he received was not a bribe but money for lunch. The 1st and 2nd respondents' witnesses denied being in the meeting in which money was allegedly dished out by the 3rd Respondent. If the 3rd Respondent gave out money, and there is no evidence that he did so, then that money was not given to influence anybody to vote for the 3rd Respondent or manipulate votes in his favour. In any case, PW3 was categorical that the function in which the money was allegedly dished out took place prior to the recruitment of the temporary polling staff by the 2nd Respondent.

162. In light of the evidence adduced I find that the Petitioner did not discharge the burden of proof. That

being so, the 3rd Respondent had nothing to rebut. The allegation that the 3rd Respondent bribed voters and the 2nd Respondent's employees therefore fails.

(vii) Other allegations

163. Among the issues raised by PW2, Jumaa Katana Konde, who was the Petitioner's Chief Agent, was the handling of voters who required assistance at one of the polling stations at Kadzonzo Primary School as well as Imani Primary School and the presence of pre-marked ballot papers at Mariakani Primary School.

164. Counsel for the Petitioner submitted that the witness' testimony that agents were not allowed by the presiding officer to witness voting by voters who required assistance was not controverted. According to counsel, this act was in breach of Regulation 72.

165. Counsel also submitted that PW2's testimony about the presence of pre-marked ballot papers was corroborated by DW9 and DW10. Further, that DW10 actually talked of an entire booklet of ballot papers being pre-marked. According to counsel, the 1st and 2nd respondents did not tender any evidence nor called any witness to rebut the said claims.

166. On the other hand, counsel for the 1st and 2nd respondents submitted that the allegation touching on assisted voters was rebutted by the production of a sample of forms 32A at pages 1276-1299 of the response to the Petition. Let me state straightaway, and with utmost respect to counsel for the 1st and 2nd respondents, that none of the sampled forms 32A belonged to any of the two stations mentioned by PW2. They cannot therefore be used to rebut the evidence of PW2.

167. Still on the same issue, counsel for the 1st and 2nd respondents submitted that the agents of the Petitioner verified the results declared in the two stations were correct by signing forms 37A. A perusal of the forms 37A for Imani Primary School polling station No. 1 of 1 and Moi Kadzonzo Primary School polling stations 1 of 2 and 2 of 2 confirm that the agents of KADU Asili, the party on whose ticket the Petitioner was contesting the gubernatorial position, did indeed sign the results.

168. Lastly, counsel for the 1st and 2nd respondents postulated that the Petitioner had miserably failed to discharge his burden of proof with regard to the issue. Also, that if the incident did indeed occur, the Petitioner had failed to demonstrate how it affected the outcome of the election.

169. The position taken by the counsel for the 3rd Respondent was that the issue of the handling of voters who needed assistance was not pleaded in the Petition and the court should ignore the same. Nonetheless, counsel went ahead and submitted that PW2 had admitted upon cross-examination that the KADU Asili agents had signed forms 37A.

170. The testimony of DW10, the ODM agent at Mariakani Primary School polling station No. 1, was that she never saw PW2 at that station on that day. On the markings on the ballot papers, she testified that they were in one booklet relating to the presidential election. DW9 gave similar testimony on the pre-marked ballot papers.

171. Looking at the evidence adduced on this issue, I find that there were indeed blotched ballot papers but that did not affect the voting. DW10 was clear that an agreement was reached on the way forward and the voting continued. After the voting, the votes were counted and the results acknowledged by the agents through signing. The marks could not have affected the results as the choices made by the voters could easily be discerned by looking at the ballot papers.

172. On the allegation that agents were not allowed to witness voting by voters who required assistance, I find the same unbelievable. Had such an issue arisen, the Petitioner's agents would not have signed forms 37A for the stations that were allegedly affected. The voters said to have voted in the absence of the agents did not swear affidavits to confirm this allegation.

173. The alleged variance between the results electronically transmitted and those in the hard copies of forms 37A was never proved by the Petitioner. He also did not adduce any evidence in support of his claim that there were substantive and significant variances between the votes cast in the impugned election and the other posts that were being contested in the general election.

174. On the alleged compromise and manipulation of the 2nd Respondent's electronic transmission system, I find that no evidence was adduced to support the allegation. Citizen TV may indeed have displayed results of the election but there was no evidence adduced to show that the same was gotten from the 2nd Respondent's servers. It is possible that Citizen TV was collating and tallying the results as they were being released at the polling stations.

175. Counsel for the Petitioner in his submissions pointed out alleged anomalies in forms 37B for all the constituencies in Kilifi County. In my view, the anomalies pointed out did not affect the authenticity of those documents apart from one which I will point out shortly. Not much can therefore be read into the anomalies pointed out by counsel for the Petitioner.

176. There was an admission by DW3, the returning officer for Kilifi North Constituency, that he did not sign Form 37B.

177. I will proceed straight to the point on this issue by quoting the decision of the Supreme Court in **Presidential Petition No. 1 of 2017** where it was stated that:

“[377] Form 34C, which was the instrument in which the final result was recorded and declared to the public, was itself not free from doubts of authenticity. This Form, as crucial as it was, bore neither a watermark, nor serial number. It was instead certified as being a true copy of the original. Of the 4,229 Forms 34A that were scrutinized, many were not stamped, yet others, were unsigned by the presiding officers, and still many more were photocopies. 5 of the Forms 34B were not signed by the returning officers. Why would a returning officer, or for that matter a presiding officer, fail or neglect to append his signature to a document whose contents, he/she has generated? Isn't the appending of a signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such officer, that he stands by the “numbers” on that form?”

178. It is a fact that the people of Kilifi North constituency participated in the election. Their votes were however mishandled by DW3. The law requires that the unsigned Form 37B be ignored. Even if this route is taken, and the results for Kilifi North Constituency excluded from the gubernatorial election results, the 3rd Respondent would still maintain his lead.

179. It is also noted that the 1st Respondent stated that she verified each of the 988 forms 37A. With this evidence, I do not see how the votes for Kilifi North Constituency can be excluded from the votes cast in the gubernatorial election. The unsigned Form 37B for Kilifi North Constituency cannot therefore be a ground for invalidating the election in the circumstances of this case.

G. COSTS

180. In election petitions, costs follow the event. However, electoral justice should not be made unattainable. In the circumstances of this case I also note that the respondents and especially the 3rd Respondent filed a plethora of applications, a majority of which were decided in favour of the Petitioner. I would have awarded the respondents Kshs 5 million as costs but considering what I have stated above, I award them the sum of Kshs. 4 million as costs with Kshs. 2.2 million going to the 1st and 2nd respondents and the balance of Kshs. 1.8 million going to 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 costs shall not therefore be subjected to taxation by the Deputy Registrar.

H. CONCLUSION AND FINAL ORDERS

181. Having considered the allegations made by the Petitioner, and the evidence adduced in support of the same, the only conclusion I can reach is that he has failed to prove his case. It is also clear that the Petition herein is defective and ought to have been struck out *ab initio*. This Petition therefore stands dismissed. A certificate shall issue under Section 86 of the Elections Act to the Independent and Electoral Boundaries Commission, the Speaker of the Senate and the Speaker of the County Assembly of Kilifi upholding the 1st Respondent's declaration that the 3rd Respondent, Kingi Amason Jeffah was validly elected as the Governor of Kilifi County in the election held on 8th August, 2017. Costs are awarded to 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