



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMABAY
ELECTION PETITION NO. 1 OF 2017
IN THE MATTER OF ELECTIONS ACT, 2011
AND
IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND
COUNTY ELECTION) PETITION RULES, 2017
AND
IN THE MATTER OF THE ELECTION FOR
THE GOVERNOR OF HOMABAY COUNTY
BETWEEN
JOSEPH OYUGI MAGWANGA.....1ST PETITIONER
JOSHUA ORERO.....2ND PETITIONER
VERSUS
INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION.....1ST RESPONDENT
THE RETURNING OFFICER -
HOMA BAY COUNTY.....2ND RESPONDENT
CYPRIAN AWITL.....3RD RESPONDENT
HAMILTON ORATA.....4TH RESPONDENT

J U D G M E N T

1. In a country run under democracy, elections provide institutional mechanisms to elect political leaders and enable the voters to hold them accountable for their performance in office. Those who do not come up to the expectations of the popular electorate for any reason are rejected and tossed out in the process.
2. Free and fair elections guarantee continuity of democracy. They are the greatest tool of people empowerment and confirm the worth and dignity of individual citizen as human beings. The right to vote not only reinforces an individual's self esteem and self respect but also gives him/her an opportunity to have a say in choosing those who will decide his/her destiny.
3. In essence, the right to vote is a direct exercise of the people's sovereign power granted under **Article (1)(1)** of the **Constitution of**

Kenya, 2010 and is embedded under **Article 38** of the Constitution which entitles each and every citizen the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for any elective public body or office established under the Constitution.

4. Free and fair elections and the right to vote are fundamental rights without which democracy cannot properly function.

In the South African case of **August & Another -vs- Electoral Commission & Others [1999] (3) SA 1(CC)**, it was stated that universal adult suffrage on a common voters' roll is one of the foundational values of the constitutional order of South Africa. This position is replicated in Kenya.

5. It was further stated in the same case that:-

“The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.”

Under **Article 4** of the Constitution, Kenya is a sovereign republic and a multi-party democratic state founded on the national values and principles of governance referred to in Article 10.

6. These national values and principles bind all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or values or implements public policy decisions (**Article 10(1)**) and they include **“inter-alia”** patriotism, the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, good governance, integrity, transparency and accountability (**Article 10(2)**).

7. Being a democratic state, Kenya held its second general elections under the 2010 Constitution on the **8th August, 2017**.

On that day, Millions of Kenyans from all walks of life yielded to the call of democracy and queued for many hours to honour and fulfill the obligation to the Nation of Kenya.

8. What each voter intended and wanted to do was to delegate his/her sovereign power to chosen representatives among the candidates who offered themselves for the various elective positions which included President of the Republic of Kenya, County Governor and Member of the National Assembly among others. The conduct of the elections was placed under the **Independent Electoral and Boundaries Commission (I.E.B.C)**, a public body established under **Article 88(1)** of the Constitution and granted the mandate to conduct elections to any elective body or office established by the Constitution. Its operation are governed by the **Independent Electoral and Boundaries Commission Act, 2011**.

9. With regard to the election of the County Governor for the County of Homa-Bay, the candidates were the incumbent governor, **Cyprian Archelus Otieno Awiti**, competing against **Joseph Oyugi Magwanga**, **Calvin Luke Medo Misama** and **Tom Otieno Onyango**.

Awiti, vied for the seat under the auspices of the political party known as **Orange Democratic Movement (ODM)** while **Magwanga** did so as an independent candidate. **Misama** and **Onyango** vied as independent candidate and nominee for **Jubilee Party** respectively.

10. As it were, the two main contenders were Awiti (**third Respondent**) and Magwanga (**first Petitioner**). It was thus a **“two horse race”**.

Hamilton Opata (fourth Respondent) was Awiti's running mate while **Joshua Oremo (second Petitioner)** was Magwanga's running mate.

Each of the four (4) candidates had high expectation of obtaining a big slice or chunk of the votes held by the Four Seventy Six Thousand Eight Hundred and Seventy five (476,875) registered voters in the County of Homa-Bay as the electoral system in Kenya is essentially one which may be referred to as **“First-past the post”** system, meaning that the candidates who receives the greatest number of votes would be declared the winner (**see, Article 180 (4) Constitution**).

11. With tremendous zeal or enthusiasm the people of Homa-Bay trooped to the one thousand and sixty two (**1062**) polling stations as early as 1.00am on the appointed date even though the actual polling was to commence at 6.00am. They all cherished the idea of realizing their fundamental political rights under Article 38 of the Constitution and therefore voted in huge numbers. The scenario was replicated all over the Country.

12. After the voting and counting of all the votes cast in the Homa-Bay gubernatorial election by those who chose to exercise their sovereign right, the electoral commission (**I.E.B.C**) (**first Respondent**) through its County Returning officer (**second Respondent**) announced the results on **10th August 2017** and declared the third Respondent as the duly elected governor for the County of Homa-Bay having garnered a total of **210,173** votes followed closely by the first Petitioner with **189,060** votes. The third candidate was Tom Onyango with **1432** votes and the fourth candidate, Misama Medo, had **668** votes.

13. Between the third Respondent and the first Petitioner the margin of votes was **21,113** votes. However, the first Petitioner was dissatisfied with the results as announced by the **I.E.B.C** and on the **6th September 2017**, filed this Petition on the basis of the grounds in the body of the Petition which include allegations of illegal appointment of County Deputy Returning Officers and Presiding Officers, illegalities and/or irregularities in the collation, tallying, verification and transmission of the gubernatorial election results, voter suppression, variance between the declared results and the actual results as tallied by the Petitioners, alterations of various Forms 37A as well as bribery and/or flagrant commission of electoral offences by the third Respondent.

14. These grounds are anchored on the facts and averments contained in the Petitioner's supporting affidavits dated 6th September 2017 and the affidavits of their witnesses including those who testified in court such as **Kennedy Otieno Osutwa (PW3), Juma Robinson Jalango (PW4), George Ondingo (PW5), Samwel Onyango Nyabwana (PW6), Esau Owino (PW7), Meshack Otieno Adoyo (PW8), James Oketch Olwero (PW9), Evans Omondi Aroo (PW10), Wilson Okumu (PW11), Gordon Odhiambo Owiti (PW12), Geoffrey Ombogo Makworo (PW13) and Madoo Ochieng Owino (PW14).**

15. With regard to the appointment of County Returning Officer, Returning Officers and Presiding Officers, it is pleaded by the Petitioners that the list of the officials was not provided by the IEBC as required by the election regulations and that cronies of the third Respondent were appointed to run the electoral process. It is also pleaded that the ODM party nomination was a sham due to widespread malpractice and irregularities committed by the third Respondent in collusion with the ODM Returning and Presiding officers who aided in ballot stuffing.

16. It is further pleaded that the first Petitioner contested the ODM nomination at the party's Nomination Appeals Tribunal which invalidated the nomination in a ruling made on 28th April 2017, but through shrewdness the third Respondent procured a direct nomination thereby causing the first Petitioner to resign from ODM and contest the gubernatorial elections as an independent candidate.

17. The Petitioners contend that persons who colluded with the third Respondent to rig the ODM nominations were appointed as the Presiding Officers after being sneaked in by the third Respondent. These included the Presiding Officer at Apuk Dok – Wangchieng Ward Karachuonyo who also served in ODM nominations named Zablou Owala. Other Presiding Officers affiliated to the third Respondent were Patrick Onyango Were, Jacob Nyakinda, Kennedy Ogaye, Chrispine Ouma and Enoth Owenga all in Karachuonyo Constituency. In Kabondo-Kasipul Constituency, there was Tobias Ondiege Othuro and Hastings Ochieng Jared. Humphrey Odhiambo and Dave Okoth were in Rangwe Constituency while Alphine Okoth, Paul Oulo Onyone, Sheila Akoth and Samuel Ouma Okoth were in Ndihiwa Constituency. It is contended by the Petitioners that all these officials were involved in electoral fraud, malpractices and electoral offences in their respective polling stations.

18. With regard to the alleged legal and procedural flows in the conduct of the elections, the Petitioners contend that Articles 81 and 86 of the Constitution read with Section 39 of the Elections Act were breached by the I.E.B.C in that it manipulated the results either deliberately and/or negligently by failing to electronically transmit results from the polling stations to the constituencies tallying centres together with prescribed form thereby exposing the collation and tallying of the results to manipulation by using methods incompatible with principles of accountability and verifiability.

19. The Petitioners plead that the entire election was marred with irregularities which later collectively and singularly rendered the process and the results lacking in fairness. That, the credibility of the election was put into question due to substantial, glaring and qualitative anomalies.

20. As to voter suppression, the Petitioners pleaded that the right to their voters to freely vote without undue influence from the third Respondent was compromised without any reprimand from the I.E.B.C and that the Petitioners' right to be elected was breached by the third Respondent contrary to Article 38(3)(c) of the Constitution.

The Petitioners contend that the voter suppression invalidated the electoral outcome as the IEBC failed in its mandate to conduct the elections in a free, independent, transparent, efficient and objective manner under Article 83 and 86 of the Constitution and also failed to ensure that no electoral malpractices would hinder the conduct of free and fair elections under Section 17 of the Elections Act, 2011.

21. As regards the variance between the declared results and the actual results as tallied by the Petitioners, it is pleaded that the Petitioners invested heavily in agents and an electronic tallying centre for all the 1062 polling stations and were able to get parallel results in the original Forms 37A. That, they reconciled Forms 37A obtained from agents and Forms 37B and Form 37C used by the IEBC to declare the results only to discover massive numerical discrepancies that fundamentally affected the final results to their disadvantage. That, a simple collation of the results in Forms 37A demonstrated that they won the election with an overwhelming majority of votes.

22. The Petitioners also pleaded that their agents' field notebooks collected by the lead agents at ward level together with Forms 37A issued to agents by the Presiding Officers and copies of Forms 37A pinned outside the polling stations were collected and delivered to the Petitioners' tallying centre for manual verification which was done and showed that they won the elections.

23. The Petitioners further pleaded that their chief agents at the tallying centres noticed that some results being announced at the Constituency tallying centres were not as announced at the polling stations and when they raised the issue with the respective Returning Officers they were told that nothing could be done about it. That, the affected polling stations with altered results included those in the table at paragraph 33 of the Petition. That, the sampled results showed that there was a variance of one hundred (100) to two hundred (200) votes in favour of the third Respondent deducted from the Petitioners already counted and tallied votes.

24. The Petitioners contended that the alterations were conducted in all the eight constituencies and pointed to the collusion between the Respondents in altering the correct results in favour of the third Respondent thereby subverting the will of the people. That, the act of transferring or adding votes to the third Respondent at the expense of the Petitioner by officials of the I.E.B.C was violation of the law and under Article 86(a) of the Constitution, there would be required a verification of the accuracy of the tally purportedly attributed to the third Respondent of 210,173 votes which was not accurate or reflective of the votes genuinely cast and votes announced at the polling stations.

25. The Petitioners contend that the third Respondent benefited from the illegality of allocation of votes repeatedly done in multiple polling stations perceived to be his political stronghold and therefore they (Petitioners) would be entitled to scrutiny of the votes contained in the ballot boxes. That, the **true** results according to their own tally reflected the will of the people and were as follows:-

(2) Joseph Oyugi Magwanga - 223,311 votes

(3) Miasma Medo - 668 votes

(4) Tom Otieno - 1432 votes

26. With regard to alteration of various Forms 37A, the Petitioners pleaded that a number of alterations in Forms 37A was done contrary to the electoral regulations in that; some of them were not countersigned by the Presiding Officers and most of them were made in favour of the third Respondent to give him unfair advantage. That, the alterations occurred in relation to figures or rewriting the counterfoils across all the constituencies. That, the alterations on the counterfoil were made in ink and were not reflections of the original copies.

27. It is also pleaded by the Petitioners that in several polling stations, Forms 37A were altered and a number of votes changed without countersignatures by the Presiding Officers or Returning Officers. That, various Forms 37A were without the I.E.B.C stamp and Presiding Officer's signature. Some had different signatures by the same Presiding Officer. That, votes cast in the gubernatorial election were way more than the votes cast in all other positions including that of the President yet ballot papers were issued equally for all the six elections.

28. The Petitioners pleaded that there were huge differences in total votes cast for the presidential election and those case in the gubernatorial election e.g at Asego Nursery School - 327 votes were cast for President and 133 for governor. At Wiga Primary School – 584 votes were cast for presidential and 381 for governor. At Marinda Primary School - 461 votes for President and 259 for governor. That, polling stations not gazetted vide Gazette Notice Vol. CXIX No. 86 of 30th June 2017, were added and reflected in Form 37C e.g Sindo Beach Banda – Kaksingri West Suba South Constituency showing three (3) streams instead of two (2) streams shown in Form 37B.

29. The Petitioners went on to plead that the total registered voters in the gubernatorial Form 37C differed with total registered voters in presidential Form 34C and also with the total number of registered voters in the I.E.B.C portal yet the I.E.B.C had no explanation to give. That, in the IEBC portal the registered voters were 476,875, in the Form 37C they were 477,264 and in the Form 34C they were 476,932.

30. It was also pleaded by the Petitioners that some of the Forms 37A were uploaded in blank form but the total figure was retained in order to conceal the discrepancies in the votes announced. That, in Kasipul Constituency at Othoro, Siany, Ongujo, Ponge, Kalenga, Ombek, Buoye and Aroyo Primary Schools and in Kabondo Kasipul Constituency at Angino, Got-Ber (1 and 2), Dudi, Atemo Primary Schools and Omiro Youth Polytechnic the results were manipulated in favour of the third Respondent.

31. With regard to transmission of results, the Petitioners pleaded that the results started trickling in from 7.10pm on the 8th August 2017, and simultaneously with the I.E.B.C results, their (Petitioners) results started streaming electronically at their tallying centre. These showed that they (Petitioners) were performing impressively in both the I.E.B.C's portal and their servers and there was no variances so far. They however, noticed later that the results in the I.E.B.C portal had changed by placing the third Respondent with a constant margin of 52% against the first Petitioner's 46% even though the results from their tallying centre kept on fluctuating between the candidates. That, the issue was picked up with the County Returning Officer who merely remarked that he was not in charge of the servers.

32. The Petitioners contended that their agents were kicked out of the tallying centres when they raised concerns on the tallying process. That, by 4.00am on the 9th August 2017, they (Petitioners) had received 90% of the results from their agents and these showed that they were ahead of the third Respondent by over 40,000 votes such that even if the third Respondent had received all the remaining votes, he could not bridge the gap.

33. The Petitioners pleaded that at 8.00pm on the 9th August 2017, the I.E.B.C portal had surprisingly stopped streaming the results with only 39% of the results transmitted showing that the third Respondent was leading with the same margin from a 15% transmission. On enquiry from the I.E.B.C on the delay in the transmission of the results, yet all the votes at the polling stations had been counted, they (Petitioners) were told by the County Returning Officer that the matter would be followed up by all Constituency Returning Officers.

34. The Petitioners pleaded that they co-ordinated with their chief agents at the sub-counties to have them follow up the matter with the Returning Officers, but it was reported that the Returning Officers had already left their tallying centres for the County tallying centre at midnight or thereabout. That, they (Petitioners) found it absurd that the Returning Officers did not make it to the County tallying centre before midday on 10th August 2017, yet their tallying centres were not far from the County tallying centre. That, they raised the issue with the Returning Officers upon their arrival at the County tallying centre but were met with hostility and insolence and none of the Returning Officers offered any explanation.

35. With regard to acts of bribery or flagrant commission of election offences by the third Respondent, the Petitioners pleaded that the third Respondent and his agents especially one, **Nick Koreko**, a County Executive Committee member in charge of Finance moved around the County in a motor vehicle Reg. No. **KBY 185C** belonging to the County Government campaigning for the third Respondent and outrightly giving bribes to induce voters to vote for the third Respondent.

36. That, the County Executive Committee Members of Homa-Bay County flouted Section 16 of the Public Officers Ethics Act by engaging in active politics and abusing their influence and state resources to actively solicit for votes and further the political interest of the third Respondent. They also made official directives relating to the elections in a manner smacking of intimidation. That, a large portion of Homa-Bay voters being illiterate and a substantial number of them being poor they were easily influenced by improper considerations or representations by the third Respondent using public resources.

37. It is from the foregoing pleadings that the Petitioners contend in sum that the election was massively riddled with egregious procedural irregularities, systematic failure and massive numerical discrepancies whose cumulative extent and degree fundamentally affected the credibility and/or legitimacy of the election as conducted and supervised by the first and second Respondents both qualitatively and

quantitatively. That, there was express violation of the Constitution and electoral laws which are fashioned to ensure a free, fair and transparent election so as to reflect the overall will of the electorate.

38. The Petitioner also contend that the declaration of the third Respondent as the successful candidate was heavily tainted with irregularities and does not reflect the overall will of the electorate and should therefore be declared null and void.

The Petitioners therefore pray for “**inter-alia**” orders that the third and fourth Respondents were not validly elected hence their election as governor and deputy governor respectively of the County of Homa-Bay was null and void, that directions be given to the Director of Criminal Investigations to investigate electoral offences by the Respondents and the Director of Public Prosecution to prosecute them, that the Petitioners were validly elected as governor and deputy governor and be sworn in forthwith and assume office or in the alternative, a fresh election be held and that, the costs of the Petition be awarded to the Petitioners.

39. In addition to the supporting affidavits, the Petitioners testified in court as **PW1** and **PW2** to affirm and be cross-examined on the content of the affidavits which formed the evidential bedrock of their case against the Respondents. Some of their witnesses likewise testified and were cross-examined. These were **PW3** to **PW14**.

40. Allegations of non-compliance with the Constitution and the electoral laws in the conduct of the impugned election by the first and second Respondents and allegations of misconduct and impropriety bordering on criminality against the third Respondent with or without the support of the first and second Respondents prior to or during the election, are essentially the foundation of the Petition. In other words, the Petitioners are saying that the impugned election was no election at all in as much as it lacked integrity by not being conducted in accordance with the Constitution or electoral laws or at least established custom. That, the will of the electorate was not reflected in the end result.

41. However, the Petitioners’ allegations and contention against all the Respondents are denied and specifically disputed on the basis of the grounds in the respective responses to the Petition as fortified in the Respondents’ respective affidavit together with the affidavits of their witnesses some of whom testified in court including **Jacklyn Osiemo (DW1)**, **Kipruto Kiboo Yegon (DW2)**, **Ezekiel Juma Otieno (DW3)**, **Shaolin Meiguran (DW4)**, **Micheal Ngeno Kosgei (DW5)** and **Charles Otieno Ogunde (DW6)**. They all testified on behalf of the first and second Respondents.

42. The third and fourth Respondents did not testify in court but their witnesses did. These were **Francis Ogolla Kagoro (DW7)**, **Bernard Oduor Onyango (DW8)**, **Lazaro Oketch Okombo (DW9)**, **Narkiso Ochieng Tuko (DW10)** and **Marilyn Namayero Juma (DW11)**.

43. It was pleaded by the first and second Respondents that indeed, the impugned gubernatorial election was smoothly conducted in accordance with the relevant provision of the Constitution, the Elections Act, 2011 and the Rules and Regulations made thereunder. However, where there were delays in the opening of polling stations, the amount of time constituted in the delays was compensated by additional time after due closure time in accordance with the regulations.

44. The first and second Respondents pleaded further that no incidents of disturbances, voter bribery, intimidation and locking out of the Petitioners’ agents from any polling station occurred as alleged. That, there were a total of 476,875 voters registered in Homa-Bay as published by the I.E.B.C in accordance with the Elections Act. That, the voters participated in the election on 8th August 2017 and after due counting of the results at the polling stations, collation and tallying at the Constituency and County tallying centres, the third Respondent was declared as the duly elected governor for Homa-Bay County with a total of 210,173 votes followed by the first Petitioner with 189,060 votes hence a difference in votes of 21,113 votes between the two, a fact evidenced in the statutory Forms 37A, 37B and 37C.

45. The first and second Respondents denied that they tampered with the results declared at the various polling stations across the County or that any votes due to the Petitioners were granted to the third Respondent and contended that the petitioners allegation, that the results announced at the polling stations were different from those announced at the County tallying centre in respect of the Petitioners and third/fourth Respondents but not the other two candidates were not true.

46. The first and second Respondents contended that the summary of the results compiled by the Petitioners have no basis and are the product of fraudulent alterations of statutory forms by the Petitioners. They (first and second Respondents) pleaded with regard to the appointment of Presiding Officers and their deputies that the Elections (General) Regulation 2012, did not apply to such officers but only to the appointment of returning officers and their deputies.

47. It is the first and second Respondents contention that they did not play any role in the ODM party nominations and the aftermath thereafter. That, the more than eight thousand (8000) electoral officials were competitively appointed following necessary advertisement in the media and therefore the allegation by the Petitioners that they colluded with the third/fourth Respondents to hire about fourteen (14) officials are denied.

48. The first and second Respondents also contend that the election was conducted in accordance with the provisions of the Constitution and the electoral laws and deny violating the constitutional provisions and the electoral laws in the electronic transmission of the results from the polling stations and the constituencies or in the collating or tallying of the results.

49. The first and second Respondents deny the Petitioners allegations of legal and procedural flaws, illegalities and/or irregularities in the collation, tallying, verification and transmission of the election results and also that they oppressed the participation of the Petitioners voters. They contend that the elections in Homa-Bay had a large turnout of 84% of the registered voters and that the results as declared in the various polling stations in the presence of agents of the candidates were duly entered in Forms 37A and duly signed by the presiding officer.

50. It is further contended by the first and second Respondents that the results as declared in the polling stations and entered into the respective Forms 37A were subsequently entered into Forms 37B at the various constituency tallying centres and subsequently into Form 37C at the County tallying centre. They (first and second Respondents) deny that the results as declared at the polling stations were altered

to the advantage and/or disadvantage of any candidate as alleged by the Petitioner in paragraph 33 and 34 of the Petition.

51. It is the first and second Respondents contention that the Forms relied upon by the Petitioners to the effect that the Petitioners votes as declared at the polling stations are not authentic and a product of the Petitioners' own fraudulent machinations to achieve an audacious creation of votes where none existed. That, the Petitioners' said actions are fraudulent, illegal and tantamount to electoral offences in as much as they altered Forms 37A for various polling stations to give an overall picture that they attained a higher number of votes, fraudulently altered individual forms to show that they had won the elections and presented forged and/or altered documents to the court.

52. The first and second Respondents deny that the results at polling stations had a variance of 100 to 200 votes in favour of the third/fourth respondents having been deducted from the Petitioners already counted and tallied votes and that the alteration goes across the eight constituencies showing a collusion between the Respondents in altering the correct result in favour of the third Respondent thereby subverting the will of the people of Homa-Bay.

53. The first and second Respondents also deny that they violated the law in verifying the accuracy of the tally of the 210,173 votes attributed to the third Respondent and contend that the third/fourth Respondents were validly elected as governor and deputy governor for Homa-Bay County without benefiting from the alleged illegal allocations of votes in their favour in multiple polling stations perceived to be their political stronghold.

54. The first and second Respondents further deny that the Petitioners received 223,311 votes and the third Respondent 179,551 votes as alleged by the Petitioners and that the number of votes cast in the gubernatorial election were more than that cast in the other positions. They (first and second Respondents) contend that at Sindo Main Beach Banda in Suba South Constituency, there was no third polling station and that the results entered in respect of a third station was erroneous and due to a clerical mistake at the point of entering the results into Form 37B from Form 37A.

55. It was the first and second Respondents contention that the registered voters in Homa-Bay for purposes of the gubernatorial elections was 476,875 as contained in the register of voters and set out in form 37C for Homa-Bay County. That, the Petition by the Petitioners lack merit and is grounded on fraudulent manipulation of electoral materials to show that the Petitioners attained the highest votes in the election.

56. The first and second Respondents also contend that the Petition is generic in nature and the allegations therein are spurious. They pray for the dismissal of the Petition with costs and for the court to uphold the election of the third and fourth Respondents as the governor and deputy governor respectively for the County of Homa-Bay.

57. As for the third and fourth Respondents, it was pleaded in their response to the Petition that the elections of the 8th August 2017, were free, fair and transparent and were held in accordance with the spirit and intention of Articles 81 and 86 of the Constitution, the Elections Act, 2011 and the Elections (General) Regulations 2012. That, the election regulations in relation to the polling, tallying and subsequent declaration of the results were complied with and adhered to and that, there was no incident of voter bribery, intimidation of the Petitioners' agents or throwing them out of any polling station as alleged.

58. It is also pleaded by the third and fourth respondents that the allegations of voter bribery and agent intimidation are lacking in particulars as the Petitioners have not disclosed which voter(s) was bribed, which agent was intimidated and which was locked out of the polling stations and for which reason. That, the election was largely peaceful, the tallying and subsequent declaration of the results was above board to which they (third/fourth Respondents) were declared winners by the second Respondent after garnering a total of 210,173 votes against the Petitioners, their closest rivals, who garnered 189,060 votes, a difference of 21,113.

59. The third and fourth Respondents further pleaded that the Petitioners never employed agents in every polling station and their agent (if any) never obtained copies of all the valid forms 37A or at all. That, as confirmed by their party's chief agent, the results announced at the polling stations were the same results as those submitted at the tallying centre. That, the allegation that the only results for two candidates were altered but those of the other two candidates remained true, was not only unreasonable but also self defeating.

60. That, the figures for the results of the gubernatorial election as tabulated by the Petitioners are imaginary and based on wishful thinking. That, the petitioners' could not properly tally the votes since they were not only incompetent but also participated in the elections and therefore biased. That, the impugned tallying by the Petitioners was only meant to mislead the court into believing that there could be some anomalies in the electoral process to warrant scrutiny, the call for which was a wild goose chase.

61. The third and fourth Respondents also pleaded that Regulation 3(2) of the Elections (General) Regulations, 2012, is in respect of the Constituency Returning Officer and Deputy Constituency Returning Officer and not the presiding officers and deputy presiding officers as alleged by the Petitioners. That, the appointment of presiding officers and deputy presiding officers by the first Respondent was governed under Regulation 5(2) of the Regulations which obligate the first Respondent to provide the list of persons proposed for appointment to political parties and independent candidates at least fourteen days prior to the proposed date of appointment to enable them make any representations.

62. That, the said list was provided to all the parties and the Petitioners are only clasp at every straw to find any justifiable reason to invalidate the results of an election which they fairly lost. That, there was no requirement for public participation in appointment of presiding officers and deputy presiding officers by the first Respondent as alleged by the Petitioners. That, the allegation by the Petitioners that ODM party nominations were marred with electoral malpractice and that the third Respondent conspired with the party's returning and presiding officers to rig elections is denied.

63. It is further pleaded by the third and fourth Respondents that the third Respondent did not irregularly obtain the ODM ticket as maliciously claimed by the Petitioners. That, the third Respondent won the party primaries which was the reason why he was given the ODM ticket. That, the first Petitioner is a perennial loser and whiner who did not procedurally resign from the ODM party occasioning

litigation in Nairobi Civil Appeal No. 264 of 2017 in which it is alleged that he fraudulently purported to have resigned from ODM way after the deadline for resignation and therefore his candidature as an independent candidate was questioned.

64. The third and fourth Respondents also denied that some polling officials were sneaked in by the third Respondent and contend that the allegations are quite unfortunate, callous and reckless. That, under Regulation 5(2) of the Elections (General) Regulations, 2012, it is the first Respondent which has the authority to appoint polling officers and not a candidate to an election and in any case, the Petitioners were required to make representations (if any) if they were dissatisfied by the list of polling officers which was provided before the election.

65. It is the contention of the third and fourth Respondents that the allegations that the electoral process did not meet the constitutional and statutory dictates are general and lack of specificity and are mere recital of what was contained in the presidential petition with the misplaced hope that would yield the same results as they lack in originality and authenticity.

66. The third and fourth Respondents pleaded that the Petitioners have not demonstrated how the right of their electors to free election without undue influence or unfair practices was violated by the third Respondent and have also not demonstrated which violations by the third Respondent were brought to the attention of the first and second Respondents to which they refused to act. That, the Petitioners sweeping allegation that they had agents in all the 1062 gazetted polling stations who availed to them all the valid copies of Forms 37A was outrageous at best as the said agents have not been identified and none of them (if any) has individually produced Forms 37A as evidence.

67. The third and fourth Respondents contend that the Petitioners relied on hearsay evidence from their so called undocumented chief agent and have not shown any proof of their documented agents who allegedly collected the Forms 37A from the polling stations. That, there was never any alterations of results in the polling stations listed in paragraphs 33 of the Petition as alleged by the Petitioners or at all and as a matter of fact, the third and fourth Respondents' agents in all the said polling stations provided all the Forms 37A which show results as being exactly as those announced at the tallying centre.

68. The third and fourth Respondents also contend that the origin and authenticity of the purported Forms 37A as provided by the Petitioners is suspect. That, they (third/fourth Respondents) engaged a data analyst to examine the Forms 37A provided by the Petitioners vis-à-vis those provided by all the Respondents and the conclusion reached was that there was a variation on the forms obtained from an undisclosed source by the Petitioners.

69. That, the said variance was as a matter of fact occasioned by the deliberately tampered Forms 37A obtained from the Petitioners with an intention of misleading the court. That, the alleged collusion between the Respondents are baseless, malicious, unfortunate and deliberately misleading as they deny altering the said forms as alleged by the Petitioners.

70. The third/fourth Respondents further contended that there was never any transfer of votes in any of the listed polling stations as the Forms 37A provided by their agents showed the results as those announced at the tallying centres. They deny any involvement in criminal activities and contend that the Petitioners have failed to provide any basis of their tallying and alleged variances. That, the Petitioners have plucked figures from no any known source with the retrogressive and false hope that it would cast doubt on the integrity of the electoral process.

71. It is also contended by the third/fourth Respondents that their Constituency agents were present during the tallying of votes at the Constituency which they reconciled with the votes received from the polling stations and confirmed the figures therein. That, Forms 37B were generated for all the eight Constituencies to which the respondents' agents witnessed and were supplied with copies. That, as established by the third Respondent's data analyst, if there was any tampering on Forms 37A the same was perpetuated by the Petitioners and the only reason why the self-tallied results varied with the results announced by the second Respondent was because the tampered Forms 37A were only used by the Petitioners themselves in their analysis.

72. The third/fourth Respondents pleaded that the Forms 37A obtained by their agents contained all the security features contrary to the deliberate misleading and false averments by the Petitioners. That, they (third/fourth Respondents) do not conduct elections, as such there is no evidence that they contributed to the alleged anomalies in the electoral system. That, the alleged anomalies were general in nature (if they indeed occurred) and affected all the candidates across board and cannot therefore be attributed to one candidate or be used to punish the winning candidate.

73. On the transmission of the results, the third/fourth Respondents deny the allegations made by the Petitioners in respect thereof and contend that the allegations lack in originality and authenticity and are similar recitals to those raised in the presidential petition aimed at giving an impression that the perceived supremacy failures (if any) in the conduct of the presidential election were replicated at the County level to cajole the court to making a similar finding in the spirit of the age long celebrated concept of "*share-decisis*".

74. The third/fourth Respondents contend that in any event, the results were declared on the basis of Form 37C which was made from a tally of all Forms 37B which were generated from a tally of Forms 37A. That, the allegations of bribery or commission of electoral offences by the third Respondent are clearly a clasping at every straw by the Petitioners with no prove of the same. That, the entire Petition and the allegations therein are all general in nature and have not been particularized.

75. It is the third/fourth Respondents' contention that the entire Petition was filed by the Petitioners with the misguided hope of remaining relevant politically and should therefore be dismissed with costs for being unnecessarily vexatious, scandalous and an absolute abuse of the court process.

76. It was the pleadings and the affidavits in support thereof that the four (4) points or issues for determination in this Petition arose. These are as follows:-

1) Whether the gubernatorial election for the County of Homa-Bay was conducted in accordance with the Constitution and

Electoral Laws.

2) Whether there was non-compliance with the law by the first and second Respondents in the conduct of the said elections or if so, whether such nonconformity materially or fundamentally affect the results.

3) Whether the third Respondent was validly declared by the first and second Respondents as the duly elected governor for the county of Homa-Bay and if not, whether the Petitioners should have been declared as validly elected.

4) Whether the Petitioners are entitled to the orders sought in the Petition.

77. This court has given due consideration to the pleadings together with the supporting affidavits as well as the rival submissions filed and orally highlighted herein by the Petitioners through the firm of Muna Kanjama & Co. Advocates, and the first and second Respondents through the firm of Orego Odhiambo & Co. Advocates and the third and fourth Respondents through the firm of Prof. Tom Ojienda & Associates. It became apparent to this court that the issues arising for determination had to be resolved on the basis of firstly, the applicable laws starting with the Constitution followed by the electoral laws and secondly, the evidence presented in court in proving or disproving the allegations made by the Petitioners against the Respondents jointly and severally.

78. The burden of proof lay with the Petitioners and here we are referring to the legal burden of proof. And, the facts to be proved are those that have been clearly pleaded. It cannot be gain-said that the pleadings are the foundation of a party's case. They **“mark the terrain of any legitimate electoral contest”** such as this Petition which is the only way that the results of an election can be questioned.

79. The Supreme Court of Kenya in the Supreme Court Petition No. 5 of 2013, Raila Odinga & Others -vs- Independent Electoral & Boundaries Commission & Others, stated that:-

“A Petitioner seeking to nullify an election should clearly and decisively demonstrate that the conduct of the election was so devoid of merits and so distorted as not to reflect the expression of the people's electoral intent and that the evidence should disclose profound irregularities in the management of the electoral process.”

80. The court further stated that:

“...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden. The threshold of proof should in principle be above the balance of probabilities, though not as high as beyond-reasonable doubt. Where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the Respondents bear the burden of proving the contrary”.

(See also, Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & Others [2014] eKLR)

In Mbowe –vs- Eliufoo [1967 E.A 240], it was stated that any allegations made in an election petition have to be proved to the satisfaction of the court. Generally, the burden of proof lies on the person who wishes the court to believe in its existence unless it is provided by law that the proof of fact shall lie on any particular person (See, Sections 107-110 Evidence Act Cap 80 Laws of Kenya)

81. Proof is thus a question of evidence before the court be it direct or indirect (circumstantial) and the satisfaction of the court is the finding by the court that a fact or issue has been cogently and credibly proved to the required standard.

In electoral matters it is absolutely necessary that the evidence adduced in proof of a fact be credible. This is because partisan witnesses are a majority on either side and in some cases they tend to exaggerate or dramatize claims about what might have occurred during the election.

It was therefore incumbent upon the Petitioners to prove to the required standard and to the satisfaction of the court the allegations made in this Petition against the Respondents so as to prevail upon the court to exercise its discretion in their favour on all or any of the issues arising for determination.

82. Turning now to the issues and with regard to the first issue - whether the gubernatorial election for the County of Homa-Bay was conducted in accordance with the Constitution and electoral laws - it is instructive to note most importantly, that there is always a rebuttable presumption that elections are properly conducted in accordance with the law and that it is incumbent upon a person challenging that presumption to present to the court some material evidence in rebuttable (See, the Raila Odinga case, 2013 (supra).

83. Our main concern on this first issue would be the political rights guaranteed under Article 38 of the Constitution and on the periphery the principles set out in Articles 81 and 86 of the Constitution. It is these Articles together with Article 87 which establish the frameworks for elections in Kenya. While Article 38 guarantees the right to vote and the right to free and fair elections, Article 81 sets out the general principles including that the election administration be impartial, neutral, efficient, accurate and accountable. On the other hand, Article 86 relates to the vital process of voting, counting and tallying and requires the conduct thereof be in conformity with the prescribed standard.

84. Article 87 of the Constitution empowers Parliament to enact legislation to establish mechanisms for timely setting of electoral disputes while Article 88 establishes the Independent Electoral and Boundaries Commission (IEBC) which is responsible for **“inter-alia”** conducting elections to any elective body or office established by the Constitution and any other elections as prescribed by an Act of Parliament. In doing so, the Commission is guided by the Constitution and applicable statutory laws including the Elections Act, 2011 and the Rules and Regulations made thereunder which are a product of Article 87.

85. In **Gatirau Peter Munya –vs- Dickson Mwenda Kithinji and Others (supra)**, the Supreme Court of Kenya held that the Elections Act and the Regulations thereunder are **normative derivatives** of the principles embodied in Articles **81** and **86** of the Constitution and that in interfering them, a court of law cannot disengage from the Constitution. That, Article **81** and **86** establish the constitutional threshold against which the conduct of elections is to be measured to determine whether it meets established standards of democratic franchise.

86. In **Raila Amolo Odinga & Another -vs- IEBC & Others Presidential Petition No. 1 of 2017**, the Supreme Court in a dissenting opinion stated that an electoral cause is a right centric cause and at the heart of a Petition challenging the results of an election is the right to vote in free and fair elections. That, Articles 81 and 86 of the Constitution reinforce the right to vote elaborated under Article 38 of the Constitution and must therefore be applied to this core right and not vice-versa. That Articles 81 and 86 are to be facilitative of the fundamental rights under Article 38. That, the centrality of Article 38 as the primary purpose for the existence of Articles 81 and 86 must never be lost.

87. It was further stated in the case that the right to vote in free and fair elections is at the epicentre of the democratic character of Kenya as a Republic and is reinforced by Articles 81 and 86 which must be applied to the core right to vote. That, these Articles together with legislations and Regulations intended to give effect to Article 38 exist for the purpose of the same Article 38. That, it is envisaged under Articles 81 and 86 that no electoral malpractices or impropriety will occur that impairs the conduct of elections. This is the basis for the public expectation that elections are valid, until the contrary is shown through a recognized legal mechanism founded in law or the Constitution.

88. It is without doubt and this court so finds, that Article 38 of the Constitution is the core constitutional provision for consideration in determining whether or not the impugned election was conducted in accordance with the law. The Article confers political rights to the effect that:-

38(1)- “Every citizen is free to make political choices, which includes the right-

- a) To form or participate in forming a political party.**
- b) To participate in the activities of, or recruit members for a political party, or**
- c) To campaign for a political party or cause.”**

38(2) – “Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for-

- a) Any elective public body or office established under the Constitution or**
- b)Any office in any political party of which no citizen is a member”**

38(3) – “Every adult citizen has the right, without unreasonable restrictions-

- a) To be registered as a voter**
- b)To vote by secret ballot in any election or referendum and**
- c)To be a candidate for public office or office within a political party or union the citizen is a member and, if elected to hold office”**

89. On the basis of the provisions, it is axiomatic that the right to vote in a free and fair election is the key principle or attribute in all elections. It is this very attribute that needs to be preserved and protected by the court when considering an election dispute. It is indeed, the constitutional right lying at the heart of this Petition and other similar Petitions.

90. It is the reason why the constitutional court in **South Africa in August & Another -vs- Electoral Commission & Others (supra)** stated that:-

“Universal adult suffrage as a common voter’s roll is one of the foundational values of our entire constitutional order..... The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.”

The same court also stated in the case of **New National Party of South Africa -vs- Government of the Republic of South Africa & Others [1999] (3) SA 191CC**, that:-

“The right to vote is, of course, indispensable to and empty without the right to free and fair elections, the later gives content and meaning to the former. The right to free and fair elections underlines the importance of the exercise of the right to vote and the requirement that every election should be fair has implications for the way in which the right to vote can be given more substantive content and legitimately exercised.”

91. In yet another South African case, Xolile David Kham & Others -vs- Electoral Commission & Another Case No. CCT 64 of 2015: the constitutional court observed that the following factors are of fundamental importance to the conduct of free and fair elections:-

- 1) **Every person who is entitled to vote should if possible be registered to do so.**
- 2) **No one who is not entitled to vote should be permitted to do so.**
- 3) **The constitution protects not only the act of voting and outcome of elections but also the right to participate in elections as a candidate and to seek public office.**

92. It was stated in that case that the term “**free and fair elections**” does not have an internationally accepted definition. Some Nations have even thought of abandoning the free and fair standard and replacing it with the question whether the election is a legitimate expression of the will of the people or properly reflects the wish of the people. In this court’s opinion, the alternative thinking sounds and feels attractive to the Kenyan situation and its history in matters elections.

93. It was indeed, in the exercise of their right to vote and the right to free and fair elections that about 84% of the registered voters in Homa-Bay County turned out to participate in the elaborate electoral process which reached its peak on the 8th August 2017 and which started with the registration of voters, nomination of candidates to the actual electoral offices, voting, counting and tallying of votes and finally declaration of the winner. (See, Karanja Kabage -vs- Joseph Kuna [2013] eKLR).

94. Thus, the concept of free and fair election was expressed not only on the voting day but throughout the initial electoral process. The people of Homa-Bay and indeed the entire country realized their expectation that the conduct of the elections by the IEBC would accord the universal electoral integrity standards set in Article 21(3) of the Universal Declaration of Human Rights [1948], to wit:-

“The will of the people shall be the basis of the authority of government, the will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

95. These standards were further developed in Article 25 of the United Nations International Covenant for Civil and Political Rights (ICCPR of 1966), which emphasized the need for:

- 1) **Periodic elections at regular intervals**
- 2) **Universal suffrage that includes all sectors of society**
- 3) **Equal suffrage in the idea of one person one vote**
- 4) **The right to stand for public officers and contest elections**
- 5) **The rights of all eligible electors to vote**
- 6) **The use of a secret ballot process**
- 7) **Genuine elections**
- 8) **Elections that reflect the free expression of the will of the people.**

96. As for Article 81 of the Constitution, it provides for general principles for the electoral system i.e

- a. **Freedom of citizen to exercise their political rights under Article 38**
- b.
- c.
- d. **Universal suffrage based on the aspiration for fair representation and equality of vote, and**
- e. **Free and fair election which are:-**
 - i. **By secret ballot**
 - ii. **Free from violence, intimidation, improper influence and corruption.**
 - iii. **Conducted by an independent body**

iv. Transparent and

v. Administered in an impartial, neutral efficient, accurate and accountable manner.

And, Article 86 provides that:

“At every election, the Independent Electoral and Boundaries Commission shall ensure that –

a. Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent.

b. The votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station.

c. The results from the polling stations are openly and accurately collated and promptly announced by the returning officer and

d. Appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.”

97. Relating all the foregoing provisions to the evidence adduced herein, it is clear that the impugned gubernatorial election was largely conducted in a manner which was proper, peaceful and free from violence, intimidation and any other breaches of the law. All those who turned out to vote were not encumbered to do so in any manner. They individually proceeded to the various polling stations to cast their respective vote in direct exercise of their sovereign power under Article 1(1) of the Constitution by electing leaders of their choice. Thereafter, they retreated to their respective fixed abode to await the results and confirm that their sovereign will was actually put into effect.

98. The process and events complained of by the Petitioners before or during the voting was most essential for reason that any transgression thereof would have negatively impacted on the rights guaranteed under Article 38 of the Constitution and bring into serious doubt the credibility of the election with regard to whether it was conducted in accordance with the Constitution and the electoral laws. This is where the qualitative test in the determination of the Petition aptly applied and since an election which is largely free, fair, credible and peaceful upto the point of voting cannot possibly endear itself to nullification for violation of the law, this court must now find with regard to the first issue that the impugned election was indeed conducted in accordance with the law.

99. In any event, the allegations by the Petitioners suggesting otherwise were not credibly established and proved. These related to the process and events before or during the voting day and included that the Petitioners’ voters’ right to freely vote was unduly influenced by the third respondent without any reprimand from the first and second Respondents.

100. That, the third Respondent and his agents especially one, Nick or Nicholas Koreko moved around in a County Government of Homa-Bay motor vehicle Reg. No. KBY 185C campaigning for the third Respondent and outrightly giving out bribes to induce voters to vote for the third Respondent.

101. That, the Executive Committee Members of Homa-Bay flouted Section 16 of the Public Officers Act by engaging in active politics and abusing state resources to actively solicit for votes and further the third Respondent’s political interest. That, these Executive Committee Members made official directive’s relating to elections in a manner smacking of intimidation. That, there was collusion between the Respondents to recruit the presiding officers and Constituency returning officers. Other allegations related to the nomination of the third Respondent by the Orange Democratic Party (ODM) as the party’s candidate for the gubernatorial election.

102. The foregoing allegations were grounded mostly on the evidence of the Petitioners through the first Petitioner (**PW1**) and some of their witnesses including their chief agent, Kennedy Osutwa (**PW3**) and other agents such as Essau Owino (**PW7**), Meshack Adoyo (**PW8**), James Olwero (**PW9**), Evans Aroo (**PW10**), Wilson Okumu (**PW11**), Gordon Owiti (**PW12**) and Maddo Owino (**PW14**).

103. However, the Petitioners in their evidence failed to establish to the required standard the manner in which the Respondents colluded in the recruitment of the presiding officers or Constituency returning officers as they clearly based their allegations on mere suspicion which was not independently corroborated and therefore insufficient and unreliable in confirming or proving the act or omission complained of.

104. The first Petitioner indeed admitted that he never raised any formal complaint regarding the gazettelement of the returning officers and also that he had no authority to appoint such officers or even the presiding officers. He said that his suspicion of the alleged collusion was aroused by the first Respondent’s failure to give them an opportunity to raise any objection to the appointment of the said officials. He also said that he was informed that the presiding officers were secretly recruited thereby denying him an opportunity to make recommendations even though he did not have any preferred names for such appointment.

105. The foregoing evidence clearly demonstrated that the allegation of collusion between the Respondents on recruitment of electoral officials was based on hearsay and lacked credibility. In any event, how could there have been collusion if the third/fourth Respondents and indeed the Petitioners, had no role to play in the appointment of the electoral officials? Besides, there was nothing to show that the said officials were recruited by means unknown to law.

106. As for allegations of bribery or corruption, undue influence and intimidation, the Petitioners relied on information given to them by their agents including the chief agent, Osutwa (PW3), who produced a copy of a letter allegedly written by a youth group to the County returning officer as well as photos/video clips as evidence of acts of corruption attributed to the third Respondent and the County Government employee or executive called Nicholas Koreko. Surprisingly, he (PW3) was clueless about those items and how they related to the acts complained of and indeed the impugned election.

107. He (PW3) said it loud and clear that the videos were made by a person unknown to him but were handed over to him by the witness Maddo Owino (PW14) who seemed to deny the fact by saying that he reported the bribery incident to a ward co-ordinator. He (PW14) stated in his evidence that he prepared the video clips which showed firstly, an argument between the Petitioners and the electoral officials in front of the third Respondent. Secondly, declaration of the results in which the third Respondent was declared the winner. Thirdly, declaration of the senatorial election results. Fourthly, declaration of the results for Woman Representative and fifthly, the County Executive Nicholas Koreko giving money to alleged voters on the 13th July 2017.

108. None of the aforementioned videos were referred in the affidavit of the witness (PW14) and neither establishes beyond any reasonable doubt any criminal or improper conduct on the part of any of the Respondents or any other person. The video said to implicate the individual known as Koreko was not taken on the voting day and its relationship with the voting or the process before the voting could not even be fathomed by the witness (PW14) himself. In any event, the validity of the videos to the credibility of the impugned election and the actual reason for taking them was not established thereby casting suspicion that the videos were nothing but a mirage intended to create a situation that never was.

109. Esau (PW7) talked about threats made to an agent called Beatrice, who did not lead evidence of the fact. Meshack (PW8) talked of an agent called Gideon Magak who was allegedly arrested after being found with a seal prior to the counting of votes. He (PW8) also talked of Beatrice being assaulted. As noted hereinabove, Beatrice did not lead evidence in support of what was stated by PW7 and PW8. Magak, did not also lead evidence in support of what PW8 stated.

110. James (PW9) said that he was told that some individuals were openly bribing voters but none of those informers led evidence in support of the fact. He (PW9) talked about one Tobias Ombogo being roughed up and beaten and one Susan Okumu being locked out of a polling station when the counting of votes commenced. Neither, Tobias nor Susan led evidence in support of the testimony by James (PW9) who did not even provide the names of the people who were allegedly bribed. Surprisingly, he (PW9) made allegations which he admitted that he did not personally witness.

111. Evans (PW10) indicated that a musician called Gauza or Gauzor Okal was beaten and taken to Matata Hospital but he (musician) did not lead evidence to confirm the fact. Evans (PW10) also said that a nominated MCA called Mary Gaya bribed people while in a Toyota Probox motor vehicle. He said that the incident occurred while he was thirty (30) metres away yet he could not identify the registration number of the vehicle.

112. Wilson (PW11) talked of old illiterate voters being bribed. He indicated that the information was given to him by one Alice, who did not lead evidence to confirm the fact. He (PW11) said that the old voters were from his village but he did not provide their names. He also said that he witnessed the said Alice giving out money but did not indicate the fact in his affidavit. He again said that he saw people with written notes which were being read by electoral officials under the table or over the table during the counting of votes. However, he did not produce any of the written notes or a sample thereof. None of the old voters including one Mzee Owira led evidence to confirm the claims attributed to them.

Gordon, (PW12) talked of having witnessed incidents of bribery at Wanjare Primary School in Ndhiwa, but he could not even mention the names of the alleged bribe givers and takers nor provide even a scintilla of evidence of the alleged bribery.

113. In sum, the Petitioners' evidence presented by the aforementioned witnesses with regard to the allegations of bribery, corruption, undue influence, intimidation of voters and/or agents or any other criminal or improper conduct before or during the process of voting remained uncorroborated by independent evidence hence unreliable for this court to hold that the impugned election was not at all conducted in accordance with the Constitution and the electoral laws. To say the least, the evidence was nothing short of afterthoughts, outright lies, sensational and a comedy of sorts.

114. With regard to the second issue for determination i.e whether there was non-compliance with the law by the first and second Respondents or if so, whether such non-conformity materially or fundamentally affected the results. In the pleadings, the issue is addressed by the Petitioners under four headings or pillars to wit; **[i] illegal/procedural flaws [ii] variance between the declared results and the actual results as tallied by the Petitioners [iii] alterations of various Forms 37A and [iv] transmission of results.** Apparently, these factors revolve around the electoral process of counting, tallying, collating or tabulation and declaring the results.

115. It was evidently clear that upto and during the voting, the process was conducted reasonably well and in accordance with the law. It would however, appear that things started **“going south”** during the process of counting, tallying, collating and declaring the results, a duty which was of course in the hands of the first and second Respondents and which was to be conducted in accordance with statutory law and the principles set out in Articles 81 and 86 of the Constitution.

116. The Elections Act, 2011 and the Regulations made thereunder as was held in the **Munya Case** (supra) are normative derivatives of the principles embodied in Articles 81 and 86.

It is clear in this case that Article 81 (e) (iv) and (v) and Article 86 of the Constitution are the basis of the bone of contention arising between the Petitioners and the Respondents. It is thus the Petitioners contention that the electoral process as conducted by the first and second Respondents after the voting exercise was tainted with illegalities and procedural technicalities which were serious enough to affect the validity of the election and its outcome.

117. The focus is largely on the alleged acts or omissions of the first and second Respondents during the conduct of the election in the crucial stages of counting, tallying, collating and declaring the results. The Petitioners contend that the first and second Respondents were careless and negligent in that regard. The contention is however, denied by the first and second Respondents as well as the third and fourth Respondents. Indeed, the Respondents have taken a common stand in calling for the dismissal of the Petitioners allegations in support of the Petition.

118. Be that as it may, it is an accepted truism that imperfections in the electoral process are inevitable and mistakes or errors will always be made in the administration of elections, which is an elaborate task performed by human beings of different strengths and weaknesses.

Thus, 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 to nullify the election. (See, **Raila Odinga & Another –vs- IEBC & Others Presidential Petition No. 1 of 2017 and the Raila Case 2013**) [supra].

119. So, where an election is substantially conducted in accordance with the law, it may nonetheless be nullified if procedural/administrative errors/mistakes or irregularities are material or fundamental or serious enough to affect its validity in any manner. In the English case of **John Fitch -vs- Tom Stephenson & Others [2008] EWMC 501**, it was held that where possible the courts seek to give effect to the will of the electorate even where there have been significant breaches of official duty or election rules.

120. In an earlier case, **Woodward -vs- Sarsons [1875] LR 104**, it was indicated that the question must be whether the departure from the prescribed method of election is so great, that the court would be satisfied, as a matter of fact, that the election was not an election under the existing laws. It is not enough merely to say that great mistakes or errors were made in the conduct of the election under the law as a minor or insignificant irregularity in the conduct of the election would not render it void, if it is shown to have been conducted substantially according to the provisions of the electoral laws. (See also, **Opitz -vs- Wrzeneskys (2012) 3 SCR 760**, **Haig -vs- Canada (1993) 2SCR 995** and **Nana Addo Dankwa Akufo & Others –vs- John Dramani Mahama & Others [2015] SGL**).

121. The cases aforementioned, affirmed the solid legal proposition that if the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls provided that it did not affect the results of the election. In the present context, the proposition attracts the application of **Section 83** of the **Elections Act, 2011**, with its “**clarion call**” that an election is not to be upset on account of any informality or minor irregularities.

122. The provision prior to the recent amendment provided that:-

“No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.”

Clearly, the objective of the provision is to prevent an election from becoming void on ground of insignificant informality/error or irregularity.

In **Kiiza Besigye –vs- Electoral Commission & Yoweri Kaguta Museveni Presidential Election No. 1 of 2006**, and **Mwiru -vs- Nabera & Others Election Petition No. 3 of 2011**, the courts in Uganda observed that courts ought to disregard irregularities for no election can be impeccable and totally free of any mistakes. However, the gravity and extensiveness of the mistake would determine the substantiality of the non-compliance complained of, and inform the decision on whether or not any election should be nullified.

123. The aforementioned test of irregularity was actually laid down in the celebrated English case of **Morgan -vs- Simpson [1975] 1QB 151**, where the essence of **Section 37** of the **Representation of People’s Act 1949**, which was similar to our **Section 83** of the **Elections Act 2011**, was summarized as follows:-

a. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.

b. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls – provided that it did not affect the results of the election.

c. But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls – and it did affect the result – then the election is vitiated.

124. In **Opitz -vs- Wrzeneskys** (supra), it was stated that the practical realities of election administration are such that imperfections in the electoral process are inevitable, and on this account, elections should not be lightly overturned, especially where neither a candidate nor the voters have engaged in any wrong doing.

However, **Section 83** of the **Elections Act** is not a panacea for all manner of errors or irregularities as an election would be vitiated by an election court on account of errors or irregularities which materially or fundamentally affect the results.

125. Therefore, a court would have to look to the substance of a case to determine whether the infraction complained of is, of such a nature, as to be fairly calculated in a reasonable mind to produce a substantial effect upon the election and the results thereof. Most importantly, it is

the irregularities of substantial degree or magnitude which would lead to a reasonable person to conclude that the election was not free and fair and thus, an affront to the right to vote and the will of the electorate and/or beg the question whether the infractions compromised the process so much that an ordinary “**Mwanainchi**” (citizen) cannot say that the win as declared was a valid one.

126. The effect of the alleged irregularities must be calculated to really influence the result in a significant manner. Whereas the word “**effect**” in ordinary English means consequence of something, the word “**affect**” means to impact or cause or change in some way. The two words are most times used interchangeably as they more or less mean the same thing but in election matters the word “**affect**” is dominantly used.

127. In the Tanzanian case of **Mbowe –vs- Elifoo** (supra), the meaning of “**affected the result**” was discussed. It was thus stated that the word “**result**” means not only the result in the sense that a certain candidate won and another lost. The result may be said to be affected if after making adjustment for the effect of proved irregularities the contest seems much closer than it appeared. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance with the rules.

128. In the English case of **Hackney (1874) 20M&H77**, it was stated by **Grove J.** that the expression “**the result of the election**”, does not mean the result as to another candidate having been elected at the poll. The result may be of various kinds. The result of the election would be affected if, instead of a majority of 500 there was a majority of only 10 or even 100. Upon a scrutiny, the matter might be very different. Other causes might also produce a very considerable change of relation between the parties, and might have a very important effect upon the ultimate, depending upon the magnitude of the majority. Does not the word “**affect**” mean substantially “**bear upon the result**”? When fairly and substantially viewed by the tribunal having cognizance of the law and fact, was what occurred reasonably calculated to affect the election?

129. In giving meaning to the expression aforesaid and asking the questions aforesaid, the court in the **Hackney’s** case was considering an Act of Parliament similar to our Section 83 of the Elections Act, 2011. So, the questions asked when our ancestors lived in 1874 would apply in this case in this age and time. Hence, it is clear that Section 83 of the Elections Act is intended to prevent an election from becoming void on ground of insignificant irregularities. It also clearly implies that elections are not always perfect.

130. As noted hereinabove, the burden of proof lay with the Petitioners. It was thus their obligation to prove to the required standard that the impugned election was marred with irregularities in relation to the transmission of results by electronic means, alterations of the statutory result Forms 37A and variance between the declared results and the actual results as tallied by the Petitioners. These are the factors which form the four basic pillars of the Petitioners’ case with regard to the second issue for determination.

131. The first pillar relates to alleged legal and procedural flows in the electronic transmission of the results from the polling station to the Constituency tallying centres. It is similar or close to pillar four which attempts to show how the process was flawed to the detriment of the Petitioners and how the applicable law in that regard was deliberately or negligently flouted by the first and second Respondent and in particular Section 39 of the Elections Act.

132. The Petitioners thus allege that there were irregularities in collating, tallying, verification and transmission of the results but the main focus in pillar one and four of their case is the transmission by the results from the polling stations to the tallying centres or centre of electronic means which they say was conducted in violation of Articles 81 and 86 of the Constitution read with Section 39 of the Elections Act.

133. The Petitioners contend that the first Respondent (IEBC) manipulated results either deliberately and/or negligently by failing to electronically transmit results from polling stations to Constituency tallying centres together with prescribed forms thereby exposing the collation and tallying to manipulation by using methods incompatible with principles of accounting and verifiability and thereby rendering the process and its results unfair and putting into question the credibility of the entire election.

134. The contention is apparently grounded on the fact that the Petitioners had their own tallying centre or centres from where they could monitor the electronic transmission of the results through the first Respondent’s public portal. They implied that they were able to capture the results from the polling stations using their own “**servers**” at their tallying centre/s. They alleged that their own results started streaming in at about 7.10pm after the voting and this happened simultaneously with the first Respondent’s results in its public portal.

135. The Petitioners alleged that the streaming of the results in their servers and that of the first Respondent progressed well and showed that they (Petitioners) were performing impressively. However, at a later stage, the results in the first Respondent’s portal suddenly changed and placed the third Respondent at a constant lead margin of 52% against their 46%. But, the results in their tallying centre kept on fluctuating between the two leading candidates and by 4.00am on the 9th August 2017, they (Petitioners) had received 90% of the results from their agents showing that even if the third Respondent had received all the remaining votes, he could not bridge the gap between him and them.

136. The Petitioners contended and/or implied that the results from their tallying centre showed that they were ahead of the third respondent in the votes received. They had 40,000 votes above the third Respondent’s votes but were surprised that at 8.00pm on 9th August 2017, the first Respondent’s portal had stopped streaming with only 39% of the results transmitted with the third Respondent leading with the same margin from 15% transmission.

137. It was at that point that the Petitioners suspected that something was amiss. They alleged that their complaints in that regard to the returning officers were met with bluffs and hostility. As such, they submitted that the failure by the first Respondent to effectively transmit results electronically compromised the verifiability of the results. However, their evidence in that regard and indeed in regard to all the issues perking to the electronic transmission of the results presented in court mostly through their secretariat staff, Osutwa (**PW3**) and Ombogo (**PW13**) failed to establish or disclose any substantial defect in the electronic transmission of the results. They did not produce any record of the streaming from their servers.

138. The two witnesses did not say that the Kiems Kit with regard to the transmission of the results was a total failure for the purpose it was intended. They were not at the polling stations to witness any alleged failure by the presiding officers to act as required under Regulation 82 of the Elections (General) Regulations in submitting the results. In any event, the evidence shows that the Petitioners are not saying that the results were never transmitted electronically. Their problem was that the process was rather slow as to be termed effective. They have not shown how the “slow” transmission was used by the first Respondent to manipulate the results (if at all).

139. If the belief was that the alleged manipulation was detected at the Petitioners’ tallying centre simply because at one point the first Respondent’s public portal remained stagnant then the belief was misplaced in as much as it was based on an irregular activity of setting up a partisan private tallying centre yet the constitutional mandate to conduct an election is vested in the first Respondent and this includes the electronic transmission of results from the polling stations to the tallying centres.

140. In **Obado –vs- Oyugi and Others SC Pet 4 of 2014**, it was stated that the Constitution gives exclusive jurisdiction and mandate to the IEBC to hold election for all elective positions in the Country. The role cannot be transferred to other persons so that results generated by the Petitioners’ campaign secretariat cannot be given undue consideration given that it lacked legal sanction under the election law.

From the foregoing, and considering in particular that a private tallying centre is not legally recognized and that Section 39 (1C) (a) of the Elections Act provides for electronic transmission of results in a presidential election without specifying other elections, it would follow that the alleged irregularities in the transmission of the results as specified in pillars one and four of the Petitioners case are not valid grounds and have not, in any event, been proved. Besides, except for registration and identification of voters, voting, counting, tallying and transmission of the results for gubernatorial elections are mainly manual (See, **Jackton Nanungo Ranguma –vs- IEBC & Others Election Petition No. 3 of 2017 (KSM)**). In any event, there was no evidence that any person was prejudiced by the alleged omission to electronically transmit the text result. It was not even shown how transparency was not achieved by such omission, if any.

It is for all the foregoing reasons that pillar one and four must fail.

141. As regards the second pillar, it is intertwined with the third pillar. The two pillars ought therefore be considered together as they essentially relate to irregularities in the statutory result Forms 37A, 37B and 37C with a bias towards Form 37A which is normally generated by presiding officers at the polling station and show the votes each candidate received at every polling station.

142. Form 37B also shows the votes each candidate received at every polling station, only that it is generated at the Constituency tallying centre by the returning officer on the basis of what is contained in Form 37A. On the other hand, Form 37C shows the total number of votes that were cast in respect of each candidate.

Undoubtedly, Form 37A is the most important of the three forms because it is the foundation of Form 37B and to an extent, Form 37C. Anything going wrong with the Form (37A) would invariably impact on Forms 37B and eventually Form 37C. That is the more reason Form 37A is the primary statutory result form and the polling station where it is generated is the true locus for free exercise of the voters’ will (see, **Raila Odinga & Another -vs- IEBC & Others, 2017 (supra)**).

143. The polling station is where the people cast their vote and it is where the vote is counted. The results, declared at the polling station are final (see, **IEBC –vs- Maina Kiai & Others [2014] eKLR**).

Indeed, the second and third pillars currently under consideration are the basis and gravamen of the Petitioners case as what happened at the polling stations and Constituencies tallying centres after the voting on that 8th August 2017 is actually what the Petitioners greatly addressed and sought to prove mostly through the evidence of Geoffrey Ombogo (**PW13**) as contained in his supporting affidavit dated 6th September 2017, and his testimony in court.

In the decision of the Court of Appeal in the case of **Dickson Mwenda Kithinji –vs- Gatirau Peter Munya & Others Civil Appeal No. 38 of 2013 at Nyeri**, it was held that any annexures to the pleadings in an election petition form part of the pleadings. It is no wonder that pleadings mark the terrain of any electoral contest.

144. As already noted hereinabove the Petitioners’ case is centred on alleged irregularities which occurred mostly at the polling stations and the Constituencies tallying centres during the process of counting, tallying, collating, tabulating and declaring of the results. In an electoral process the word “**Irregularity**” would connote breaches of the rules or deviation therefrom. It was thus expected that the first and second Respondents would fully comply with the regulations and rules laid down for the conduct of the impugned election as failure to do so would invite drastic consequences, and the evidence for such failure would invariably come from the election material which includes the result Forms 37A, 37B and 37C “**inter-alia**”.

145. In **Woodward -vs- Sarsons** (supra), it was held that Regulations made in an Act of Parliament and the Rules made thereunder are distinct in that those under the Act are absolute while those under the Rules are directory. Strict compliance with the Act is necessary while it is sufficient if the Rules are substantially complied with.

146. Interference with the electoral process at any stage in any untoward manner such as manipulation, rigging or tampering with statutory forms would amount to a serious illegality and compromise the integrity of the entire process. Such an occurrence may be prevented by the requirement that the process be transparent to the voters’ right from the nomination of candidates through casting of the vote and tabulation. In that regard, a key feature would be a strict chain of custody of electoral material and this explains why such materials have to be strictly secured all the way from the polling stations to the tallying centres in the Constituencies and the County head offices.

147. The allegations of irregularity made by the Petitioners against the first and second Respondents and by extension, the third and fourth Respondents are associated with the statutory result forms used in the impugned election and which appear to be the bane of this Petition. The Petitioners identified the irregularities in their pleadings and they include alterations and/or cancellation of figures or results in the

Forms, discrepancies in Forms 32A, discrepancies in the Forms in relation to the entries, signatures, stamps and variances in the results. Other irregularities related to ballot boxes and seals were also identified in the pleadings and the evidence adduced by the Petitioners' agents such as Osutwa (PW3), Jalango (PW4), Ondigo (PW5), Nyabwana (PW6) and Ombogo (PW13).

148. Ombogo (PW13) was the key witness with regard to the irregularities in the statutory forms and the effect thereof on the final result and the credibility of the process leading to the result. His evidence was to a large extent relied upon by the Petitioners and the witnesses mentioned hereinabove (i.e PW3, PW4, PW5, PW6). In his affidavit, he deponed that he oversaw the whole election process and monitored all the results as the head of the Petitioners' election secretariat where he was involved in the setting up of the Petitioners' parallel tallying centre for purposes of receiving and tallying results supplied by the first Respondent.

149. He (PW13) deponed that a command structure from the County level through the Constituency level up to the polling station was developed and agents were connected to their result transmission systems manned at the Petitioners' tallying centres. That, from a scrutiny of the results availed to him he noted shocking and negative irregularities. He prefers to call them egregious irregularities. He deponed that those irregularities showed that there was a variance of results between Forms 37A and Form 37C.

150. Ombogo produced Annexure marked "G0-2" in Vol. 4 of the Petitioners' bundle of documents and Annexure marked "G0-7" in the bundle marked Vol.7 to establish the variance in the said forms. He also deponed that out of eight (8) Forms 37B, only those from Kasipul, Homa-Bay town and Suba North were in the prescribed form. That, in some Forms 37B submitted at the County tallying centre, the figures varied significantly with the figures in Forms 37A issued to their agent. He relied on Annexure "G0-7" in Vol.7 of the bundles and Annexures marked "G0-1" and "G0-2" respectively in Vols. 2, 3 and 4 of the bundles to show the variation in figures between the said Forms 37B and Forms 37A.

151. It was further deponed by Ombogo (PW13) that in some polling stations agents were not allowed to sign Forms 37A (Annexure marked "G0-6" in Vol.6 and "G0-9" in Vol.7) and in about 311 Forms 37A were not stamped with the first Respondent's stamp (Annexure "G0-6" in Vol.6 and Annexure "G0-13" in Vol.7). That about 299 Forms 37A issued by various presiding officers contained alterations which were not countersigned (Annexure marked "G0-6" in Vol.6 and Annexure marked "G0-9" in Vol. 7). That, about 95 Forms 37A submitted at the County tallying centre were not signed by presiding officers or deputies (Annexure "G0-12" in Vol.7) and that presiding officers or deputies did not sign Forms 37A (Annexure marked "G0-14" in Vol.7).

152. Ombogo's evidence further indicated that the results submitted at the County tallying centre showed that in a number of polling stations in some of the altered Forms 37A votes were deducted from the first Petitioner and the same added to the third Respondent (Annexure marked "G0-10" in Vol.7). The tables in paragraph 33 of the affidavit demonstrates the fact in all the eight Constituencies.

153. It is also indicated that in some polling stations, the figures in Forms 37B and Form 37C were different from those announced and entered in Forms 37A in that votes garnered by the first Petitioner were completely omitted in Forms 37B and 37C. The table in paragraph 34 of the affidavit establishes as much. That, in some polling stations, the number of voters who voted in the presidential election were more than those who voted in the impugned gubernatorial election. The table in paragraph 35 of the affidavit demonstrates the difference.

154. It was further deponed by Ombogo (PW13) that in Sindo Main Beach Banda - Kaksingiri, West, Suba-South Constituency there are only two gazetted polling stations, yet the results transmitted indicated a third polling station - Sindo Main Beach - 3 which was non-existent and was not gazetted but its results were indicated in Form 37C used to declare the results at the County tallying centre (Annexure marked "G0-4" in Vol.4). That, the number of the registered voters in Form 37C and the presidential Form 34C differed. And, the number of registered voters in the first Respondent's portal also differed with the number in Forms 37C and 34C as demonstrated in the table in paragraph 37 of the affidavit.

155. Ombogo (PW13) also deponed that the results announced showed that the votes cast for gubernatorial elections differed from votes cast for other elective petitions in the County. The table in paragraph 38 demonstrates as much.

All in all, the witness (PW13) readily stood by the contents of his affidavit and his testimony in cross-examination. The sum total of his evidence is a clear and terse statement that there was substantial non-compliance with the electoral laws by the first and second Respondents in the counting, tallying and declaration of the results in that the process was marred with substantial irregularities which affected the validity or credibility of the election and its outcome.

156. The indictment is here directed to the first and second Respondents. They stand accused by the Petitioners for occasioning substantial irregularities in the last stages of the electoral process through their presiding officers in the polling stations and the returning officers in the tallying centres.

As far as the Petitioners were concerned, what started and proceeded smoothly and peacefully in the initial stages of the electoral process appeared to have turned into a nightmare in the counting and tallying halls and became a classic display of carelessness, negligence and recklessness by the electoral officials.

157. All the statutory documents separately exhibited herein by both the Petitioners and the Respondents confirmed that there was serious breach of fundamental provisions of the electoral laws and in particular, the **Elections (General) Regulations, 2012**, which was most operative during the electoral process which followed the voting exercise.

158. It is evidently clear that there was indeed breach of the regulations by electoral officials and more so, the regulations contained in Parts 12 and 13 of the legislation which deals with electoral materials, counting of votes, tallying and announcement of electoral results. Some of the presiding officers appeared to have completely abdicated from their roles. There was sufficient evidence from the Petitioners showing that they (presiding officers) in some instances failed to use secured statutory forms or even sign and stamp them.

159. There were several alterations in the result Forms 37A and most were not countersigned despite the fact that the alterations were on figures or results. In some forms, no entries were recorded and instead blank forms were submitted to be used in the tallying process. There was rewriting and overwriting of the counterfoils in all the eight Constituencies and most did not tally with the originals.

160. Some forms were altered in ink and did not reflect the originals and some did not have visible or clearly visible entries. Some of the forms were photocopies. As for ballot boxes, some were broken and a considerable number were secured with unofficial seals.

All the foregoing irregularities and/or discrepancies were established with abundant credibility by the Petitioners through their witnesses, Osutwa (PW3), Jalango (PW4), Ondigo (PW5), Nyabwana (PW6) and Ombogo (PW13) as corroborated by the report of the deputy registrar dated 21st November 2017 on the access orders made by this court on 7th and 15th November 2017, as well as the report of the Petitioners' agents in the exercise filed herein on 21st December 2017.

161. In essence, Form 37A was the primary document in the tallying so that once it was found wanting in content, the entire tallying process and the results thereafter announced through Forms 37B by the returning officers at the Constituencies and through Form 37C by the County returning officer would be devoid of credibility. The invalidity of Form 37A would invariably mean the invalidity of Forms 37B and 37C.

Most of the Forms 37A used in the announcement of the results at the polling stations have through the Petitioners evidence been found wanting in content and form.

162. The fact was never substantially disputed nor disproved by the first and second Respondents. They thus, did not discharge their evidential burden of disproving the Petitioners proven allegations of irregularities in the statutory Forms 37A and by extension Forms 37B and Form 37C and therefore, non-compliance with the electoral laws. Their responses to the allegations were mere denials which were discredited during cross-examination by the Petitioners.

163. A perusal of the witness affidavits deposed by the Constituencies returning officers at Karachuonyo (DW1), Homa-Bay town (DW2), Rangwe (DW3) and Suba South (DW4) reveals an unusual uniformity in content with only slight modification to suit a specific Constituency. Quite curiously, the returning officers from the Constituencies of Kasipul i.e Clement Osiemo Mokobo, Kasipul-Kabondo i.e Moses Sarara, Ndhiwa i.e Yusuf Wasike and Suba North i.e Bernard Chienga were not availed for cross-examination. Therefore, the veracity of their respective affidavits was never tested as it should have in a case of this magnitude.

164. The absence of the presiding officers in the polling stations with disputed results was also curious and quite telling. These were the most important people in the dispute. They were responsible for the entries in the all important Forms 37A and all that appertained to the forms yet the first and second Respondents did not deem it fit to obtain witness affidavits from them or even call them to testify in court. Only one presiding officer i.e Charles Otieno ogunde (DW6) was availed in court but by default, since he had not deposed an affidavit in support of the Respondents (first and second) case.

165. None of the eight Constituency returning officers were at the polling stations where the profound irregularities occurred and then carried over to the Constituencies and eventually to the County tallying centre. The only way of ascertaining the extent or otherwise of the proper conduct of an election is by going to the primary source of the results and this is Form 37A. It was therefore ill-informed for the first and second Respondents to fail to call at least some of the presiding officers to provide some evidence in this matter, particularly the presiding officers whose polling stations were negatively mentioned.

166. After all, the irregularities established herein by the Petitioners were attributed to the presiding officers whose functions are clearly specified in Regulation 5(1A) and 79(2A) of the Elections Regulations, 2012. And, together with Regulation 79(1) (2) (3), Regulation 81 and 82, they meticulously prescribe what the presiding officers are supposed to do. A violation of the regulations would definitely impact on the credibility of the ultimate outcome of the election as the polling station is the arena of voting and counting votes. The returning officers could not explain the irregularities in the handling of the statutory forms from the polling stations. They only attempted to proffer an explanation as to what exactly transpired. As it were, **"their goose was cooked"** after the presiding officers failed to testify in court.

167. Be that as it may, not every irregularity on procedural in-fraction is enough to invalidate an election. The irregularities must be of such a profound nature as to affect the declared result on the integrity of an election (see **SC Presidential Petition No. 2 of 2017** (supra)). Having proved that there were indeed serious irregularities, mistakes and errors in the statutory Forms 37A (and by extension Forms 37B and 37C) occasioned mostly by the presiding officers, the Petitioners were next required to establish that the said irregularities affected the outcome of the election. Undoubtedly, process gives rise to the outcome and therefore, deviation from the process must be considered against its effect to the declared results if only to determine whether the principle of fairness, transparency, accountability and verifiability was upheld in the electoral process.

168. It is the gravity and extensiveness of the mistake or error which determines the substantiality of the non-compliance complained of and inform the decision on whether or not an election should be nullified (see, **Kiiza Besigye –vs- Yoweri Museveni** (supra)). Reversal of vote tallies as was herein alleged by the Petitioners would be grave enough to affect the result and so would stuffing of ballot boxes or destruction of ballot boxes or any other kind of serious irregularity calculated to subvert the will of the electorate.

169. As noted hereinabove, the electoral system in Kenya is the one referred to as **"first-past the post"**. This means that whoever attains the highest number of valid votes is declared the winner. However, the win does not become absolute if the method or process used to pass the post before others is flawed or tainted with irregularities. Even in a football game or any other game for that matter, there are rules or regulations to be followed. In football, for instance, a clear goal is disallowed if a player scores it while in an offside position or if the score is made by hand - (Remember Diego Maradona's **"hand of God"** during the world cup game between Argentina and England in 1986. The goal was wrongly allowed because the referee had not seen the handball).

170. So, even in elections, a win is not guaranteed if it is not achieved within rules and regulations prescribed by the Constitution and the

electoral laws. The implied contention by the Petitioners in this matter is that the third Respondent's win in the impugned election was achieved outside the prescribed rules and regulations but the referee (IEBC) either did not see the "foul" or looked the other way.

171. The Petitioners maintain that the impugned election was tainted with massive irregularities which affected the results and the credibility of the process leading thereto. But, the big question is, - did they prove the contention by cogent and credible evidence?? Because, if they did not succeed in so doing, then the proven irregularities notwithstanding, the results declared by the first and second Respondents would stand.

172. In the Ugandan case of **Katwiremu Bategama -vs- Musheneza EP No. 1 of 1996**, it was held that:-

“Although the Petitioner has in many instances proved to the satisfaction of the court that there were irregularities in the process of conducting the parliamentary election, he has not gone beyond that as the law requires. He had to show that these irregularities affected the result of the election in a substantial manner”.

“To affect the results” or **“effect on the results”** as noted hereinabove do not necessarily relate to numbers as figures alone if the process is flawed are worthless. Sometimes, it is difficult to ascertain the winner on account of errors in tallying and in the transposition of the results (see, the Court of Appeal decision in **Oyugi -vs- Obado case**).

173. Evidence be it affidavit or oral evidence is the key factor in any trial and for it to be of cogent value it must meet the demands of proof. Herein, this court is satisfied that the Petitioners' evidence have met the demands of proof by establishing to the required stand not only that the irregularities in the statutory forms were substantial but also that they affected or had an effect on the results in a substantial manner such that what was declared by the first and second Respondents as the result may not have actually been the correct result.

174. Through the evidence of PW13, as corroborated by that of PW3, 4, 5 and 6, the Petitioners proved that the primary statutory Forms 37A used to declare the results at the polling stations not only contained significant discrepancies but also lacked consistency and uniformity. It cannot be overemphasized that a polling station where Form 37A is generated is the heart of the election so that anything going wrong there would invariably impact on the credibility of the election and the results arising therefrom.

175. In both the **Maina Kiai's case** (supra) and the **Presidential Petition No. 1 of 2017 (Raila 2017)** (supra), it was stated and affirmed that the counting of the votes as elaborately set out in the Act and the Regulations with its often, transparent and participatory character using the ballot as the primary material, means, as it must the count there is clothed with a finality, not to be exposed to any risk of variation or subversion.

176. Here, we have been told that the results declared at the polling station were different from those declared at the Constituency tallying centres and at the County tallying centre. This is a fact which the Respondents could not disprove considering the high level of irregularities in the generation of the Forms 37A all the way to Forms 37B and 37C. Failure to stamp a primary statutory form is a serious infraction and so, is the failure to countersign any alteration of figures/results in the form.

177. In **Gunn -vs- Sharpe [1974] QB 808**, it was shown that the mistake was not stamping 102 ballot papers thereby did affect the result and in **James Omingo Magara -vs- Manson Nyamweya & Others Civil Appeal No. 8 of 2010**, it was held by the Court of Appeal that when a document is not signed by its author, it means that the author does not own it. It follows therefore that Forms 37A with no presiding officer's signature are worthless and their results should be excluded from the final tally. In the same vein, the absence of countersignatures against alterations, especially where such alterations relate to the votes garnered by the candidates, the results of the election on these forms are unverifiable.

178. It was also credibly shown by the Petitioners that some of the Forms 37A were blank while others had no security features nor serial numbers. That, some ballot boxes were open or broken and most did not have the official I.E.B.C seals coloured green, blue or red with the letters **“I.E.B.C”** inscribed on them. All these factors created serious doubt on whether the final result declared by the first and second Respondents in favour of the third/fourth Respondents was a true reflection of the will of the people of Homa-Bay County. More so, considering that the entire process of counting, tallying and declaring the results was seriously flawed.

179. The irregularities occasioned by the first and second Respondents in the impugned gubernatorial election were of substantial degree and magnitude which would lead to a reasonable man to conclude that the election was not free and fair. It is utterly shocking that the Forms 37A exhibited herein by both the Petitioners and the Respondents contained significant errors and irregularities. The result contained therein differed, yet all the documents originated from the I.E.B.C, a fact undisputed by all parties. Each party is blaming the other for altering or forging their respective documents.

180. However, the Petitioners having discharged their legal burden in proving that the results documents in their possession and those in the possession of the Respondents originated from the first Respondent [I.E.B.C] contrary to the suggestion that their (Petitioners) documents came from elsewhere or through criminal conduct, the evidential burden regarding the forms and the results contained therein lay with the first and second Respondents but, it was never discharged. They failed to prove that the Petitioners documents are forged. They never even availed the original documents to establish any suspicion of forgery.

181. None of the returning officers (DW1, 2, 3, 4 and 5) had any evidence of forgery other than merely stating that the documents were altered without identifying the culprit or culprits who may as well have been themselves or their own presiding officers at the polling stations. The witnesses availed by the third/fourth Respondents i.e Francis Ogolla Kagoro (DW7), Bernard Oduor Onyango (DW8), Lazaro Oketch Okombo (DW9), Narkiso Ochieng Tuko (DW10) and Marilyn Namenyero Juma (DW11) did not dispute the result variance between their documents and those of the Petitioners. Not even one of them established that the Petitioners' documents were forged.

182. Such an attempt was made by Marilyn (DW11) despite the fact that the third/fourth Respondents had almost thirty (30) witness who

deponed affidavits in support of their case. Needless to say that the attempt by Marilyn (DW11) was a flop for want of necessary qualification. She is not a qualified handwriting expert or document examiner. She only succeeded as a **“data expert”** in showing the variance in results between the different sets of documents produced by the Petitioners and the Respondents.

183. It is beyond peradventure that what **“broke the camel’s back”** in this matter is the existence of two sets of result forms originating from the first Respondent. In one set of results, the third Respondent emerged as the **“winner”** and in the other set, the first Petitioner emerged as **“winner”**. This simply meant that the gubernatorial election in the County of Homa-Bay was indeterminate and that the entire process of counting, tallying and declaring the result as conducted by the first and second Respondents was a sham.

184. Suffice to hold that, on this one, the I.E.B.C blundered, blundered and blundered some more and is now paying the price for the inefficiency, carelessness, recklessness and negligence of some of their electoral officials. It is a pity that they acted without any sense of patriotism or justice or common decency while performing an important national remit. It would appear that their motto was – **“get the job, get it done whichever way, get paid from public coffers “chap-chap”, get lost”**.

With this kind of attitude it is no wonder that none of the presiding officers save DW6 showed up in court or even deponed an affidavit to defend their **“honour”** and the result declared by the first and second Respondents. Instead, they left the buck to stop with the returning officers and indeed, the I.E.B.C.

185. For all the foregoing reasons, the answer to the second issue for determination in this matter must be in the affirmative with the resultant effect of providing the answer to the third issue for determination and that is to say, that the third Respondent was not validly declared as the duly elected governor for the County of Homa-Bay and that, the first Petitioner ought not have been declared as validly elected from a flawed process for which he has now benefitted.

186. In sum, this Petition is allowed with orders that a fresh gubernatorial election for the County of Homa-Bay be held and that the Petitioners cost pegged at Kshs.6Million subject to taxation be borne by the first Respondent in the sum of kshs.4Million and the third/fourth Respondents in the sum of Kshs.2Million.

A certificate shall issue to the first Respondent and the Speaker of the Senate pursuant to Section 86 of the Elections Act.

187. Orders accordingly.

JUDGMENT DELIVERED and DATED at HOMA BAY this 20TH DAY of FEBRUARY, 2018.

J. R KARANJA

JUDGE

In the presence of:

..... for the 1st and 2nd Petitioners

..... for the 1st and 2nd Respondents

..... for the 3rd and 4th Respondents

..... court assistant

J. R. KARANJA

JUDGE