



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

ELECTION PETITION NO. 2 OF 2017

IN THE MATTER OF: ARTICLES 10, 22, 23, 38, 81, 88,

159, 258 AND 259 OF THE CONSTITUTION (2010)

AND

IN THE MATTER OF: THE ELECTIONS ACT, 2011 (AS AMENDED)

AND

IN THE MATTER OF: THE ELECTION (GENERAL) REGULATIONS, 2012

AND

IN THE MATTER OF: THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION ACT (2011)

AND

IN THE MATTER OF: THE ELECTION OF THE MEMBER OF

NATIONAL ASSEMBLY OF KIMILILI CONSTITUENCY

BETWEEN

SULEIMAN KASUTI MURUNGA.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1st RESPONDENT

MOSES MUNYESI (RETURNING OFFICER,

KIMILILI CONSTITUENCY).....2nd RESPONDENT

DIDMAS WEKESA BARASA *alias* DIDMAS MUTUA...3rd RESPONDENT

JUDGMENT

Introduction: -

1. **DIDMAS WEKESA BARASA *alias* DIDMAS MUTUA** was declared the duly elected Member of National Assembly for Kimilili Constituency in Bungoma County following the general elections held on the 8th day of August 2017. Being aggrieved by the declaration, **SULEIMAN KASUTI MURUNGA**, who was one of the candidates, lodged this Petition on 5th day of September 2017 challenging the election of **DIDMAS WEKESA BARASA *alias* DIDMAS MUTUA**.

2. The Petition was fully heard hence this judgment.

Background: -

3. The National Assembly seat for Kimilili Constituency attracted 13 candidates among them **SULEIMAN KASUTI MURUNGA** (hereinafter referred to as '**the Petitioner**') and **DIDMAS WEKESA BARASA *alias* DIDMAS MUTUA** (hereinafter referred to as '**Didmas**'). **Didmas** emerged the winner with 19510 votes against the **Petitioner** who was the first runners' up with 12457 votes. **MOSES MUNYESI** who was the Kimilili Constituency Returning Officer issued the Certificate of Elected Member of National Assembly to **Didmas** on the 9th day of August 2017.

4. In his Petition, the **Petitioner** sued the **Independent Electoral and Boundaries Commission** (hereinafter referred to as '**IEBC**'), **Moses Munyesi** (hereinafter referred to as '**the Returning Officer**') and **Didmas** as the **First, Second and Third Respondents** respectively. The **Petitioner** challenged the election of **Didmas** on the grounds of **massive irregularities, bribery, violence and voter intimidation** and **unlawful transmission of results**. The **Petitioner** swore an Affidavit in support of the Petition and filed 10 Witness Affidavits in further support thereof. The said Affidavits were sworn by **Dr. Edwin Masinde (PW1), Tonny Omusonga (PW5), Benjamin Lusweti** (did not testify), **Mathew Munyole Wafula (PW4), Ambrose Wanyonyi Masinde (PW8), Fatuma Juma (PW3), Mary Ito Emong** (did not testify), **Kleberon Barnabas Simiyu (PW7), Evans Kituyi Sikuku (PW6)** and **Zainabu Nafula Hassan (PW2)**.

5. The **Petitioner** contended that the general election for the National Assembly seat for Kimilili Constituency in Bungoma County held on the 8th day of August 2017 (hereinafter referred to as '**the election**') was carried out in such a manner that it is not possible to ascertain who won the election. That, the election was *inter alia* marred by such **massive irregularities** including the opening of the bale containing the election materials for the election before the official day scheduled for such opening, that his Agents were restrained from assisting illiterate voters, that voters were disfranchised, that there was shortage of ballot papers for the election, that Agents did not sign Form 34B, that the number of voters who cast their votes in some polling stations outnumbered the registered voters, that there were irrational and illogical coincidences and that there were instances of double-voting and multi-voting.

6. The **Petitioner** further contended that **Didmas** and his agents engaged in **bribery** and openly dished out money to voters. He also contended that there were instances of actual **violence** on voters and **intimidation of voters** and that even the **Petitioner's** agents were chased away from the polling stations. The **Petitioner** also raised the contention that the **results were not transmitted** in accordance to law.

7. The Petition was opposed by all the Respondents. **IEBC** and the **Returning Officer** filed a joint Response to the Petition. The **Returning Officer** also filed an Affidavit in support of the joint Response. Further thereto, **IEBC** and the **Returning Officer** filed 9 Affidavits by the Presiding Officers of various impugned polling stations. They are those of **Carolyn Nasimiyu Chuma** (did not testify) Presiding Officer of Chebukwabi Primary School Polling Station 2 of 2, **Daniel WangilaKefa (RW1)** Presiding Officer stationed at the Kimilili Constituency Tallying Centre, **Boaz Wamalwa Khaemba (RW5)**

Presiding Officer of Kimilili DEB Primary School Polling Station 3 of 4, **Ambrose Walela Njasi** (did not testify) Presiding Officer of Matili FYM Primary School Polling Station 3 of 3, **Lily Busolo Musasia (RW3)** Presiding Officer of Kamukuywa DO's Office Polling Station 1 of 3, **Joshua Makelo Were (RW4)** Presiding Officer of Matili FYM Primary School Polling Station 1 of 3, **Edwin Cheloti Killong (RW2)** Presiding Officer of Friends School Kamusinga Polling Station 1 of 3, **Saakarer Musimbi (RW6)** Presiding Officer of Kimilili DEB Primary School Polling Station 1 of 4 and that of **Justine Nafula Masinde** (did not testify) Presiding Officer of Kamusinga Primary School Polling Station 2 of 3.

8. **IEBC** and the **Returning Officer** contended that they did not breach the **Constitution**, the **Elections Act** (hereinafter referred to as '**the Act**') or the Regulations made thereunder in conducting the election. That the election and the electoral process was not unlawful, illegal, irregular, unfair, a nullity or unjust as it reflected the will of the voters in Kimilili Constituency which will must be respected and upheld. They further contended that **Didmas** was validly elected as the Member of National Assembly for Kimilili Constituency and that the Petition be dismissed with costs.

9. **Didmas** filed a Response to the Petition alongside an Affidavit. He also filed the Affidavits of **Beninge Wanyonyi Wanjala (RW10)**, **Leonard Buchunwe Khaemba (RW11)**, **Simon Wafula Wanjala (RW9)**, **Edwin Simiyu Wafula** (did not testify), **Lilian Nafula Soita** (did not testify), **Fred Wekesa Murungeti** (did not testify), **Joseph Wanyonyi Khaemba** (did not testify), **Hilary Brian Wabomba Wafula** (did not testify), **Edward Malale** (did not testify), **Edwin Chesuteck Kiso (RW12)** and that of **Emily Nafula Kituyi** (did not testify) in support of his Response to the Petition.

10. **Didmas** denied the Petitioner's allegations *in toto*. He contended that the **Petitioner** lost fairly and that he was never involved in any of the alleged violations of the law and as such there was no need of interfering with the election and the will of the voters in Kimilili Constituency. He prayed that the Petition be dismissed with costs.

11. At the close of the parties' cases, Counsels filed written submissions and highlighted thereon. The parties maintained their respective positions on the Petition. The **Petitioner** urged this Court to *inter alia* allow the Petition and find that **Didmas** was not validly elected as the Member of National Assembly for Kimilili Constituency and that there be a repeat of the election of the Member of National Assembly for Kimilili Constituency. The Respondents urged this Court to find that the Petition is not merited in law and that it should be dismissed with costs.

Analysis and Determination: -

12. I have keenly read and understood the contents of the Petition, the Responses, the witness affidavits, the respective issues for determination, the evidence, the parties' submissions and the respective decisions tendered in support of each of the parties' cases. I shall hence deal with this matter under the following heads: -

(a) **The Legal Framework;**

(b) **The Burden and Standard of proof in Election Petitions and the effect of interlocutory applications;**

(c) **Whether the grounds in support of the Petition were proved as required in law;**

(d) **Other emerging issues for consideration;**

(e) **Costs.**

(a) The Legal Framework: -

13. **Article 1** of the **Constitution** is on the Sovereignty of the people of Kenya. It is constitutionally provided that the sovereign power, which only belongs to the people of Kenya, can be exercised either

directly or through their democratically elected representatives. To immortalize the exercise of such power under the second limb, the **Constitution** lays down the principles and processes in **Articles 38 (Political Rights)** of the **Constitution** as well as **Articles 81 to 92 inclusive (Representation of the People)** of the **Constitution**.

14. **Articles 38** of the **Constitution** provides as follows: –

“(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.

(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 this Constitution; or

(b) any office of any political party of which the citizen is a member.

(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 political party of which the citizen is a member and, if elected, to hold office.

15. **Article 81** of the **Constitution** sets out the general principles on which the electoral system must be hinged on. It provides as follows: -

“The electoral system shall comply with the following principles: -

(a) freedom of citizens to exercise their political rights under Article 38;

(b) not more than two-thirds of the members of elective public bodies shall be of the same gender;

(c) fair representation of persons with disabilities;

(d) universal suffrage based on the aspirations for fair representation and equality of vote; and

(e) free and fair elections, which are –

(i) by secret ballot;

(ii) free from violence, intimidation, improper influence or corruption;

(iii) conducted by an independent body;

(iv) transparent; and

(v) administered in an impartial, neutral efficient, accurate and accountable manner.”

16. The electoral system, as it were, is a complex hub of institutions, activities and processes all intertwined and working together to achieve the constitutional guarantee under **Article 81 and Article 88** of the **Constitution** establishes **IEBC** as the institution responsible for conducting or supervising referenda and elections. Under **Article 89** of the **Constitution** **IEBC** is further charged with the responsibility of reviewing the names and boundaries of constituencies as well as the names, number and boundaries of wards periodically.

17. It is still **IEBC** which must ensure that all those eligible to be registered as voters are so registered (**Article 83**) and that the candidates cleared for various positions including independent candidates, so with the registered Political Parties, do comply with the **Electoral Code of Conduct (Articles 84 and 85)**. In respect to the actual voting, **Article 86** of the **Constitution** requires **IEBC** to 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.”

18. Once the voting is undertaken and the results declared **IEBC** is called upon under **Article 90** of the **Constitution** to allocate party lists seats in Parliament and the County Assemblies. **Disputes** arising from the electoral processes and activities after the declaration of the results of an election by **IEBC** are to be determined by the Courts as provided under the **Act** and the various **Regulations** made thereunder alongside other electoral laws including the **Election Offences Act No. 37 of 2016**.

19. Summing up the foregone, the Supreme Court of Kenya in the **Presidential Election Petition No. 1 of 2017** between **Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR** (hereinafter referred to as ‘**the 2017 majority judgment**’) expressed itself in **paragraph 200** as follows: -

“[200] The principles cutting across all these Articles include integrity; transparency; accuracy; accountability; impartiality; simplicity; verifiable; security; and efficiency as well as those of a free and fair election which are by secret ballot, free from violence, intimidation, improper influence or corruption, and the conduct of an election by an independent body in transparent, impartial, neutral, efficient, accurate and accountable manner.”

20. The foregone is therefore the legal basis upon which the **Petitioner** lodged the Petition.

(b) The Burden and Standard of proof in Election Petitions and the effect of interlocutory applications: -

21. The issue of the burden and standard of proof in election petitions is by now well settled by the law and binding precedents. That election petitions are not ordinary suits is not in doubt. Election Petitions are special disputes which tend to interrogate whether the electoral system and processes contemplated under **Article 81** of the **Constitution** were adhered to and/or attained in an election. The crux of that interrogation is **Section 83** of the **Act** which provides for instances where an election may be nullified. The said **Section 83** provides as follows: -

“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.”

22. That is the rationale why the incidences of proof are to be intently looked at.

(i) The legal burden of proof: -

23. The legal basis for the *legal burden of proof* is provided in **Section 107** of the **Evidence Act, Cap. 80** of the **Laws of Kenya**. The said section states as follows: -

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

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

24. The onus is therefore upon a Petitioner who seeks the annulment of an election **‘on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds ‘to the satisfaction of the court’. That is fixed at the onset of the trial and unless circumstances change, it remains unchanged.....’** (See **paragraph 131** of **‘the 2017 majority judgment’**).

25. That is the legal burden of proof.

(ii) The evidential burden of proof: -

26. The Petitioner on whom the legal burden of proof lies may or may not adduce sufficient and admissible evidence in proof of any of the allegations in the Petition. On one hand, if no sufficient evidence is adduced to the required standard, then the allegation(s) fail and it all ends there. On the other hand, if evidence is adduced to the satisfaction of the Court that an election ought to be impugned, then it becomes the burden of the Respondent(s) to adduce evidence rebutting the allegations and to demonstrate that the law was complied with and/or that the irregularities did not affect the result of the election. At that point the burden is said to shift to the Respondents. That is the *evidential burden of proof*.

27. The principle of *‘evidential burden of proof’* is hence anchored on the rebuttable presumption of validity of election results. That, until and unless a Petitioner discharges the evidential burden of proof an election is presumed valid. It is on that background that the Court in **Singh vs. Mota Singh & Another (2008) 1 KLR 1** stated that an election is a matter of public importance not to be lightly set-aside and in the case of **Jeet Mohinder Singh vs. Harminder Singh Jassi, AIR 2000 SC 258** the Supreme Court of India stated that *‘the success of a candidate who has won at an election should not be lightly interfered with...Any person seeking such interference must strictly conform to the requirements of the law...’*.

28. The Supreme Court in **the 2017 majority judgment** had the following to say on the evidential burden of proof in **paragraphs 132 and 133** thereof as follows: -

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

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

29. It therefore follows that the *legal burden of proof* is static and rests on the Petitioner throughout the trial. It is only the *evidential burden of proof* which may shift to the Respondents depending on the nature and effect of evidence adduced by a Petitioner.

(iii) The Standard of Proof: -

30. The **Black's Law Dictionary**, (9th Edition, 2009) at page 1535 defines '**the standard of proof**' as '*[t]he degree or level of proof demanded in a specific case in order for a party to succeed.*' In many jurisdictions and decisions world over three main categories of the standard of proof emerge being the *criminal standard of proof of beyond reasonable doubt*; the application of civil case *standard of 'balance of probabilities'*; and the application of an *intermediate standard of proof*.

31. My Lordships and Ladyship in **the 2017 majority judgment** in dealing with this subject and after reviewing many decisions found and held as follows: -

“[152] We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt. Consequently, we dismiss the petitioners’ submissions that the Court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities.

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

32. The foregone is the standard of proof which this Court will adopt in this Petition.

(iv) The effect of interlocutory applications: -

33. A Petitioner must discharge the legal and evidential burdens of proof in an election petition to the required standard of proof as to succeed. This depends on the allegations and/or grounds in support of the Petition. If the allegations are of criminal or quasi-criminal nature, then the standard of proof is beyond reasonable doubt and in any other case the standard of proof is the intermediate one of above the balance of probabilities but below beyond reasonable doubt.

34. In endeavoring to attain such a legal bar a Petitioner must adduce evidence and may also file an application or applications in accordance with the law. The applications may vary from one matter to the other depending on the circumstances of a case. Regardless of the number and nature of applications which may be filed it must always be remembered that a Petitioner is strictly bound by and limited to the contents of the Petition and the contents of the filed Affidavits accompanying the Petition. The applications are only supposed to aid in proving or disproving the grounds as already tendered in the Petition, but they should not amount to an attempt to change the nature and/or character of a Petition or tend to adduce fresh and further evidence in support of the Petition. It is therefore not open to a Petitioner to use an application as an attempt to introduce new or further evidence or new grounds in support of the Petition. Like a caged animal, a Petitioner is free to move but within the four corners of the Petition.

35. Therefore, any new or further evidence or grounds attained by the aid of an interlocutory application should not be used to determine a Petition. On an equal footing a Petitioner cannot benefit from rummaging through the documents filed by the Respondents for fresh or further evidence to support the Petition. The position remains so even where a Petitioner attempts to introduce such matters during the cross-examination of the Respondents and/or their witnesses. And, the position does not change when a party makes submissions on an issue which was not part of the Petition. Lastly, a Petitioner cannot benefit from the results of any scrutiny or recount exercises or any other exercise undertaken during the hearing of the Petition by the Court if such results do not support what was pleaded in the Petition.

36. That being the position in law, an election Court still has an **inquisitorial jurisdiction** in an election petition. That jurisdiction should however be sparingly invoked. In exercise of such jurisdiction the Court may on its own motion make enquiries into certain issues or even order for a scrutiny of the votes and/or other election materials as provided under **Section 82(1)** of the **Act**. When a Court opts to exercise that special *inquisitorial jurisdiction*, it must be for the purposes of assisting the Court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process but not to aid any of the parties in the case. Any evidence unveiled through the Court's exercise of its inquisitorial jurisdiction which is not founded in the Petition and the accompanying Affidavits, as said before, must not be used to determine the Petition.

37. There is also a further rationale behind the exercise of the inquisitorial jurisdiction by a Court. The Court's exercise may unearth evidence which may at times aid in making recommendations on the electoral processes possibly resulting in electoral law reform. Adding its voice to the issue the Supreme Court in **the 2017 majority judgment** found and held in **paragraph 374** that '*.....it is good judicial practice for the court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice.....*' That finding of the Supreme Court demonstrates the Court's exercise of the inquisitorial jurisdiction.

38. Courts do not operate in a vacuum; they play a very crucial role in the society being the custodians of justice and as such operate under the societal expectation that through them disputes will forever be determined. In appropriate instances, a Court is expected to make recommendations or orders that may lead to timely resolution of disputes generally or forestall or even reduce the occurrence or frequency of occurrence of disputes or to law reform. A Court must therefore widely open its legal eyes and see past the dispute before it into the society at large. In so doing however, a Court must guard against being carried away by such findings and should remain alive to what it ought to consider in deciding the matter before it.

39. Courts, as well as Legal Scholars, have severally upheld the position that parties are firmly bound by their pleadings. Just to mention a few; the Court of Appeal in **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR** cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded....."

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

40. The Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of **Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR** found and held as follows in respect to the essence of pleadings in an election petition: -

"[52] Further, the Court went on and observed that: -

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

to frame an issue not arising on the pleadings.....”

41. This Court also dealt with this question in **Kitale High Court Election Petition No. 1 of 2017 Robinson Simiyu Mwanga & Another vs. IEBC & 2 Others (unreported)** in its **Ruling No. 4** on scrutiny of votes which ruling was delivered on 07/12/2017. This is what I partly stated: -

“77. But what if the issues although not pleaded came up during the cross-examination of the witnesses and are therefore part of the record? The answer is found in the above decisions of the Supreme Court and the Court of Appeal. Such evidence goes to no issue. That seems to be the position taken by the Scholar Hon. Justice (Prof.) Otieno-Odek in his article aforesaid where he stated that ‘A party cannot be allowed to introduce, through cross-examination contests which were previously not specifically raised in the pleadings...’”

42. It is therefore only what is contained in the Petition and the accompanying Affidavits that shall be considered by this Court in determining whether the required standard of proof was attained in respect to the various allegations in the Petition.

(c) Whether the grounds in support of the Petition were proved as required in law: -

43. The Petition is based on four main grounds which are: -

(i) Unlawful transmission of results;

(ii) Massive irregularities;

(iii) Bribery;

(iv) Violence and voter intimidation.

44. According to **Section 83** of the **Act**, an election can be nullified in two instances: first, if it appears that the election was not conducted in accordance with the principles laid down in the Constitution and in written law and second, where there were illegalities and/or irregularities that affected the result of the election. The position so remains despite the amendment on **Section 83** of the **Act** which came into force on 2nd day of November 2017 which was not only stayed by the High Court but was declared not to act retrospectively by the Supreme Court in **Presidential Petition Nos. 2 & 4 of 2017 John Harun Mwau & Others vs. Independent Electoral and Boundaries Commission & Others**(unreported).

45. The Supreme Court in **the 2017 majority judgment** at **paragraph 203** firmly restated the above position in holding that: -

“[203] Guided by these principles, and given the use of word “or” in section 83 of the Elections Act as well as some of our previous decision, we cannot see how we can conjunctively apply the two limbs of that section and demand that to succeed, a petitioner must not only prove that the conduct of the election violated the principles in our Constitution as well as other written law on elections but that he must also prove that the irregularities or illegalities complained of affected the result of the election as counsel for the respondents assert. In our view, such an approach would be tantamount to a misreading of the provision.”

46. In this case the Petitioner has invoked both limbs of **Section 83** of the **Act** in challenging the election of **Didmas**. The grounds of massive irregularities, bribery and violence and voter intimidation are based on the second limb whereas the ground of unlawful transmission of the results is hinged on the first limb of that section of the law. I will now deal with each of the grounds singly.

(i) Unlawful transmission of results: -

47. The **Petitioner** pleaded in **paragraph 3A(l)** of the **Petition** as follows: -

“The transmission system of the results was made in a manner not provided for in law and which greatly affected the authenticity of the same as the relevant statutory forms were not properly filed.”

48. He further pleaded in **paragraph 3B (14)** of the **Petition** as follows: -

“The presiding officer before ferrying the actual results to the Returning officer should submit to the Returning officer the results in electronic form in the manner provided by the commission pursuant to Regulation 82.”

49. The law on the transmission of the results is found in **Section 39** of the **Act** and **Regulation 82** of the **Elections (General) Regulations, 2012** (hereinafter referred to as **‘the Regulations’**). I will reproduce the respective provisions as under: -

“39(1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.

(1A) The Commission shall appoint constituency returning officers to be responsible for –

(i) tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly:

(ii) collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and County women representative to the National Assembly, and

(iii) submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.

(1B) The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.

(1C) For purposes of a presidential election the Commission shall –

(a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;

(b) tally and verify the results received at the national tallying centre; and

(c) publish the polling result forms on an online public portal maintained by the Commission.

Regulation 82 of the **Regulations** provides that: -

82(1) The presiding officer shall, before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in electronic form, in such manner as the Commission may direct.

(2) The results submitted under sub-regulation (1) shall be provisional and subject to confirmation after the procedure described in regulation 76.”

50. The net effect of the above provisions was rightly discussed by my brother *Majanja, J.* in **Kisumu High Court Election Petition No. 3 of 2017 Jackton Nyanungo Ranguma vs. Independent Electoral and Boundaries Commission & 2 Others** (unreported) in paragraphs 38, 39 and 40 which I will, with utmost respect, reproduce as under: -

“38. A reading of Section 39 (1C) of the Act shows that electronic transmission and publication of polling result in a public portal is only statutory requirement for the Presidential election. Further, except for voter registration and voter identification; voting, counting, tallying and transmission of results for the election of the other elective posts including that of the Governor are mainly manual. In all other cases, including the County Governor election, the transmission of results contemplated by section 39(1A) and (1B) of the Act is that the votes at the Polling Station are counted and recorded in Form 37A. Each Form 37A is forwarded to the Constituency Tallying Centre. The Constituency Returning Officer tallies all the results from all the polling stations and records them in Form 37B. Forms 37B from all the Constituency Tallying Centres are forwarded to the County Tallying Centre where the County Returning Officer tallies all the results from the Forms 37B and announces the election results based on Form 37C.

39. Even accepting the errors, omissions and inconsistencies highlighted by PW4 and the other witnesses, the legal position remains that the votes as recorded in Form 37A are final. Unless Forms 37A are disputed, any errors in electronic transmission of results or publication in IEBC public portal cannot, of themselves and without more, invalidate Forms 37A. Where the results are electronically transmitted from the polling station to any other portal as the IEBC may direct, such results can only be termed as provisional thus underlining the primacy and finality of Form 37A. Regulation 82 of the Elections (General) Regulation, 2012 suggests that these results are provisional.....

40. Thus, even if I accept the testimony of PW4 that the results in the IEBC sever were manipulated, that fact does not change the substance of the Forms 37A received by the Constituency Returning Officers. In essence, the evidence of PW4 does not assist the petitioner’s case.”

51. Although the above Petition was on a gubernatorial contest the provisions and applicability of **Section 39** of the **Act** and **Regulation 82** of the **Regulations** remain intact to this Petition.

52. Turning to the evidence, in **paragraph 34** of his Affidavit the **Petitioner** deponed that ‘*I am aware the transmission system of the results were made in a manner not provided for in law, and were greatly hampered, affected and or interfered with to greatly impact authenticity of the same.*’ In cross-examination the **Petitioner** stated that the results were both physically and electronically transmitted by the Presiding Officers to the Returning Officer. On further examination on how the transmission was flawed the **Petitioner** stated that ‘*..I cannot say how the transmission was flouted and that will be answered by my Counsel.*’

53. Neither the **Petitioner’s** witnesses deponed to nor testified on the issue of transmission of results. The foregone is therefore the evidence which this Court must weigh to ascertain whether the **Petitioner** discharged the evidential burden of proof to the required standard of proof of beyond the balance of probability but below proof beyond reasonable doubt.

54. It is clear from the above evidence that the **Petitioner** did not have any clue of what was required to prove this ground and that is why when asked to explain how the electronic transmission process was flawed he responded that the answer was to be given by his Counsel. There was no allegation that any of the statutory Forms 35A was not delivered to the Returning Officer as required. As stated above the requirement of electronic transmission in this election was only provisional and even so, that electronic transmission process was not impugned in any way whatsoever. Since the **Petitioner** failed to demonstrate how the transmission process was in breach of the **Constitution** and/or the law then the evidential burden of proof was not discharged by the **Petitioner** and as such the same did not pass to the

Respondents. The ground must and hereby fails.

55. Be that as it may, the Respondents on their part maintained that the transmission process and system used in the election was credible and did not in any way compromise the integrity of the electoral process.

(ii) Massive irregularities: -

56. **The Black's Law Dictionary** (9th Edition, 2009) at page 906 defines the terms 'irregular' and 'irregularity'. 'Irregular' is defined as 'Not in accordance with law, method, or usage, not regular'. 'Irregularity' is defined as 'Something irregular; esp. an act or practice that varies from the normal conduct of action.' The Supreme Court in distinguishing between an 'illegality' and an 'irregularity' in **the 2017 majority judgment** stated that 'Illegality refer to breach of the substance of specific law while irregularity denote violation of specific regulations and administrative arrangements put in place'.

57. In the context of this matter therefore the grounds of bribery, violence and voter intimidation are illegalities for they infringe specific Acts of Parliament and are criminal in nature. Their standard of proof is therefore different from the one in irregularities. I will however deal with those issues later under their respective heads. I will now continue with the discussion on the irregularities.

58. Whereas the **Constitution** obligates **IEBC** to conduct elections and referenda, the actual exercise of conducting such an election and referendum is usually undertaken by human beings. Since elections are not every day occurrences, chances of having experienced workers remain very minimal. That being so, irregularities are likely to happen and that is why allowances for human and genuine errors must be given. That seems to be the rationale behind the second limb of **Section 83** of the **Act** which is to the effect that any non-compliance with the law which does not go to the extent of '**affecting the results**' should not be a basis of annulling an election.

59. The meaning of the phrase '**affect the result of an election**' has been legally defined by Courts as well legal scholars. The Acting Chief Justice in the Tanzanian case of **Mbowe vs. Eliufoo (1967)EA 240** had the following to say on the phrase: -

"...In my view the phrase 'affected the result', the word 'result' means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer that it appeared to be when first determined. 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 of the rules..."

60. **Hon. Justice (Prof.) Otieno-Odek Esq.**, Judge of the Court of Appeal and the Director of the Judiciary Training Institute in Kenya in his paper entitled '**Election Technology Law and the Concept of 'Did the Irregularity affect the result of the Elections?'**' also dealt with this issue at length and expressed himself in part as follows: -

"..... How is the result affected? The word 'affect' in Section 83 of the Elections Act is primarily used as a verb – it means to negatively influence the electoral process or raise doubt as to the integrity, verifiability or accuracy of the quantitatively or qualitatively declared result..... Therefore, if a consequence of irregularity is that a candidate would have polled more or less than what was recorded at the count, but the same candidate would still have been elected, the result would not have been affected....."

61. One of the Learned Justices in the Supreme Court of Uganda in the **Presidential Election Petition No. 1 of 2001** between **Rtd. Col. Kizza Besigye vs. Yoweri Kaguta Museveni & Another** (Mulenga, JSC) explained the meaning of the phrase '*affected the result of the election*' in a substantial manner and as follows: -

“To my understanding, therefore, the expression “non-compliance affected the result of the election in a substantial manner” as used in S. 58(6)(a), can only mean the votes a candidate obtained would have been different in a substantial manner, if it were for non-compliance substantially. That means that to succeed, the Petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that his winning majority would have been reduced. Such reduction however would be such as would have been reduced. Such reduction however would be such as would have put victory into doubt....”

62. Five years later, the Supreme Court of Uganda in the **Presidential Election Petition No. 1 of 2006** between **Rtd. Col. Kizza Besigye vs. Yoweri Kaguta Museveni & Another** held as follows: -

“In Claire Eastern Division Case (1892)4 QM& H 167, at p. 162 Ruffle vs. Rogers [1982] QB 1220, it was held that the “results” means the success of one candidate over another, and not merely an alteration in the number of votes given to each candidate. In other words the results of an election is the outcome of the election in terms of performance by the candidate and the number of votes each obtained. The results of an election are reflected in a return filed by the Election Commission,”

63. For a Court to arrive at the conclusion that the result of an election has been affected it has to consider the cumulative effect of the irregularities complained of. If the net effect of such irregularities leads to a firm conclusion that the electoral process was negatively influenced as not to reflect the will of the people or the integrity, verifiability or accuracy of the quantitatively or qualitatively declared result cannot be affirmed then an election must be declared void. Suffice to say that anything short of that affirms the validity of an election.

64. Closer home, the Supreme Court in the case of **Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 others SCK Petition No. 2B of 2014 (2014) eKLR** in dealing with **Section 83** of the Act expressed itself as follows: -

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

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

[218] Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election.....

[219] By way of example, if there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial Court would not be justified, merely on account of such shortfalls, to nullify such an election. However, a scrutiny and recount that reverses an election result against the candidate who had been declared a winner, would occasion the annulment of an election. Examples of irregularities of a magnitude such as to affect the result of an election, are not however, closed.

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

65. Recently, the Supreme Court in **the 2017 majority judgment** stated that; -

“[211] In our respectful view, the two limbs of Section 83 of the Elections Act should be applied

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

66. On that background, I will now consider the distinct irregularities as follows: -

Tampering with the bale containing the election materials at the Tallying Centre: -

67. There is no doubt that this allegation is one of the main contentions by the **Petitioner** in this Petition. The same finds its basis in the Petition as follows: -

“3A(a) On the eve of the elections (7th August 2017) at the constituency tallying/electoral centre at Kimilili National Assembly ballots had its seal removed and or was open with spilling ballots to the floor and none of the candidates nor the agents in particular those of the petitioner ever witnessed the said opening of the box. In other words the opening of the Kimilili parliamentary ballot box was not done in the open and transparent manner thereby fully compromising the integrity of the process.

(b) THAT the foregoing was notwithstanding the fact that the relevant boxes with ballots for presidential, gubernatorial, women representative and county Assembly membership did not have this anomaly as the same was opened with full view of the candidates and agents.”

68. The allegation is supported by the evidence of the **Petitioner, PW1, PW5, PW6** and **PW7**. The **Petitioner** in **paragraph 8** his Affidavit deponed that ‘in the 1st place, it was noted by my agents as well as myself that the box containing ballots for the member of parliament Kimilili had seal removed and or was open with spillage of the ballots to the floor, this being on the eve of the elections date and this being detected prior to the dispatch to various polling stations.’ In **paragraph 9** of his Affidavit the **Petitioner** further deponed that the issue was brought to the attention of the Returning Officer and the presiding officers amid protests and complaints but the same was roundly dismissed on the basis that the box was heavy. He wondered and failed to understand in paragraphs 10 and 11 of his affidavit why the other boxes containing the election material for the other elective posts were intact and were opened in the presence of the people including himself but that particular box was unsealed, and many ballot papers spilled on the ground. To him, the act of tampering with the box and the spillage of the ballots greatly compromised the integrity of the election thereby making it questionable as to the veracity of its transparency.

69. In further examination-in-chief, the **Petitioner** stated that the ballots were glaringly accessible from the box and that no audit was carried out to verify the contents thereof. He further stated that no formal reports were made to the police or to any other authority on the issue and that the failure compromised the security of the ballots and raised accountability issues. He also stated that the explanation given by the **Returning Officer** was unsatisfactory as ballot papers were lost and that led to interference with the voting and the ballots. The **Petitioner** however stated that he was only informed of the incident by his agents.

70. On cross-examination by **Mr. Omwenga** Counsel for **IEBC** and the **Returning Officer**, the **Petitioner** confirmed that although he was not personally present at the tallying centre and that he did not initially see the alleged box he was duly represented by his two agents namely one **Alice** and one **Nabibi**. That, the two agents are the ones who reported the matter to him, but he remained not sure if the two agents had sworn any affidavits to that effect. The **Petitioner** was however sure that **PW1**, who was also a candidate in the election and who lost but did not challenge the election, had sworn an affidavit and as such he was his witness in the Petition.

71. While cross-examined by **Mr. Ndambiri**, Counsel for **Didmas**, the **Petitioner** stated that he went to the tallying centre at around 03:00pm and saw the box and that it was a big one. That, the box had no seals by then. While at the scene the **Petitioner** met the **Returning Officer** and raised the issue of the box with him, but he did not lodge any further complaint over the issue as his agents had told him that they had already formally complained to the **Returning Officer**. That the **Returning Officer** assured him that all will be well, and the **Petitioner** gave him the benefit of doubt and agreed to proceed on with the election. The **Petitioner** was however shocked by the many other things which were to unfold later.

72. On re-examination by his Counsel **Mr. Ombito**, the **Petitioner** confirmed that he was not personally present at the tallying centre and that he learnt of the issue of the box from his agents and fellow candidates who were then present.

73. **PW1** was also a candidate in the election and was number 6 out of the 13 candidates. He deponed that he was at the tallying centre on the eve of the election and prior to the distribution of the election material. That, he noted that the ballot papers which were to be used in the election were torn and seals removed whereas the ballot papers for the positions of the President and all the others were intact. That, he, in the presence of the other candidates and agents including **PW6** and **PW7**, protested to the **Returning Officer** and even took photographs using his phone camera which photographs were later processed by **PW5**. He annexed the photographs as Exhibits EM 2 (a) and (b) to his affidavit. He was advised by **Mr. Ombito** Counsel that the opening of the ballots was grossly illegal and unsupported in law and believed that that compromised the integrity of the entire exercise.

74. In cross-examination by **Mr. Ombito**, **PW1** stated that he saw all the 6 boxes containing the election materials for all the elective positions at the tallying centre but was not allowed to access them. That, the boxes had brown wrappings and that it was the wrapping of the box containing the election materials for the election that was torn. Whereas to him all the boxes appeared similar in size he was not aware which elective post had the highest number of candidates. That, he was in the company of **Didmas** and two other candidates at the tallying centre. **PW1** stated that it was him who noted the anomaly on the box and informed the other candidates as he protested. He then raised the issue with the **Returning Officer** and demanded an explanation. That, the **Returning Officer** explained that the wrapping was damaged when the box was being off-loaded since the box was the heaviest of the six boxes. That, although he was not satisfied with the reasons given by the **Returning Officer**, **Didmas** instead dismissed the issue as inconsequential. Since the **Returning Officer** was irritated by **PW1**'s interrogation, he asked whoever was not satisfied with the explanation to take photographs of the box and proceed to court and that is how **PW1** took the photographs. **PW1** confirmed that he saw the light blue ballot papers from where he stood but did not know the number of barrels of papers that were in the box. According to **PW1** the ballot papers were exposed, and anything could have happened.

75. During cross-examination by **Mr. Ndambiri**, **PW1** confirmed that he stood around 5 metres away from the boxes. **PW1** confirmed that it was only the wrapping on the box that was torn and not the ballot papers and that he did not see any ballot paper that was torn. He also clarified that the phrase seal in his affidavit meant the wrapping. He also admitted that the affidavit of **PW5** had erroneous dates.

76. In re-examination by **Mr. Ombito**, **PW1** reiterated that the boxes appeared similar in sizes and that he took the photograph on 07/08/2017 and that the same was developed by **PW5** who runs a studio on 04/09/2017.

77. **PW5** deponed that he is a Cyber operator as well as a photographer. That he met **PW1** on 07/08/2017 at 08:00am and was '*invited to see a photo which he [PW1] had taken over voting materials which had their seals removed to process some photographs.*' That, he processed and printed the photos on his machine using a printer make BROTHER T300.

78. **PW5** admitted in cross-examination that the name appearing in his identity card is TONNYCARD OMUSONGA which was different from the name he used in the affidavit. He also admitted that the contents of paragraph 2 of his affidavit were erroneous and clarified that **PW1** went to his place of work on 04/09/2017 and not on 07/08/2017. **PW5** likewise admitted that he did not have any ownership

evidence of the machine he used to process the photographs. He further confirmed that he did not avail any certificates showing that he was a photographer or was trained in Cyber operations.

79. **PW6** deponed that he was a Ford-Kenya/NASA agent in Khwiroro polling station in the election. That, on 07/08/2017 he was at the tallying centre together with other agents and candidates including **PW1** and Hon. Richard Sipilipili and realized that the box containing the ballot papers for the election *'had removed seals and was open.'* That, he protested to the **Returning Officer** alongside the other agents for about 2 hours demanding to know why only the box containing the materials for the election was open. That he and the other agents were then chased away by the **Returning Officer**.

80. Being cross-examined by **Mr. Oribo** Counsel for **IEBC** and the **Returning Officer** who appeared alongside **Mr. Omwenga**, **PW6** reiterated that he was a Ford-Kenya agent under the NASA coalition stationed at Khwiroro Polling Station. That, he arrived at the tallying centre at around 08:45 am with **PW1** who was a candidate sponsored by the ANC Party which party was also under the NASA coalition. That, at around 10:30am as he was about 8 metres from the box he realized that the wrapping on the box containing the materials for the election was torn and he protested amid seeking an explanation from the **Returning Officer**. That, the **Returning Officer** informed them that the box was damaged due to its weight and that he was chased from the tallying centre as the **Returning Officer** wanted to go on with his other duties. **PW6** could not give the size of the box but estimated it to be about 1 metre in height. He left and did not report the matter to the security officers or to any police station.

81. On further cross-examination by **Mr. Ndambiri**, **PW6** who stated that **PW1** was his uncle also informed this Court that he was not an agent for Ford-Kenya but an agent for ANC Party. **PW6** still firmly stated that he was an agent for ANC Party even after the letter he annexed in his affidavit as **Exhibit EK-2** to the effect that he was an agent for Ford-Kenya was read out to him. He further stated that when he entered the tallying centre he found many other people ahead of him who were taller than him but all the same he managed to see several boxes containing the ballot papers placed vertically on top of each other and that the one containing the ballot papers for the election was in the middle. He could not however estimate the distance from the floor to where that box was. **PW6** went on to say that he saw the contents of the box with torn wrapping. That, he saw light green papers which the people thereat said they were ballot papers. That, as the people were protesting they were all chased by the security officers at around 01:00pm. He did not hear any candidate threatening to withdraw from the election because of the torn wrapping. He then went to the polling station where he was designated as an agent and witnessed the voting taking place as scheduled. He thereafter signed Form 35A as an ANC Party agent.

82. On re-examination **PW6** reaffirmed the contents of the affidavit and his testimony before the Court as true and even restated that he was an agent for ANC Party under the NASA coalition. That, when he saw the box with the torn wrapping he protested and demanded for answers but was not satisfied with what the **Returning Officer** told them that the box was so heavy and fell as it was off-loaded. In a turn of events, **PW6** could not tell the height of the box. He could not also tell the number of the people at the tallying centre and could also not tell how many other boxes were on top of the impugned box. He however confirmed that Form 35A for Khwiroro Primary School Polling Station 2 of 2 was signed on 08/08/2017.

83. **PW7** deponed that he was an agent for Ford-Kenya Party at Lutonyi Primary School and that he went to the tallying centre on 07/08/2017 to confirm the dispatch of ballot papers. That, they realized that the wrappings of the box containing the materials for the election were torn and that the box was open, and the ballot papers were spilling and accessible. That, he complained to the **Returning Officer**, the security officers and the other officials and was told that the box was heavy. He was then chased away, and the process went on.

84. While cross-examined by **Mr. Oribo**, **PW7** stated that he was an agent of a political party known as NASA Ford-Kenya which had its headquarters in Nairobi and whose Chairman is one Moses Masika Wetangula whom he had not met in his life. That, he was recruited by a Super-Agent one **Mary Ito** who was in-charge of Chebukwabi Ward. While confirming that all the ballot papers were accordingly dispatched to all polling stations **PW7** could not however state when that happened. **PW7** stated that he

stood about 10 metres from where the impugned box was but declined to estimate the said distance in Court and insisted that he could only do so at the tallying centre.

85. **PW7** further stated that the impugned box had the writings '**Member of Parliament**' on one of its sides. That, he saw ballot papers inside the torn box but did not see their serial numbers. That, he also saw two other boxes containing election materials for the Presidential and Gubernatorial positions and that the three boxes were placed side by side. That, he asked why the impugned box was open and he was only told that the box was heavy. He was not satisfied with the explanation but was told by the **Returning Officer** to leave. That, he was not aware of the weight of the box and did not lodge any complaint to the police.

86. On further examination by **Mr. Ndambiri**, **PW7** confirmed that he had no letter of appointment as an agent but went to the tallying centre as an agent of the **Petitioner**. That, he did not know **PW1** and **PW6** and did not enter the room where the boxes were, but he could see them from where he stood. He saw three boxes lying horizontally which one of them was written in black '**Member of Parliament**' on the side that faced him. **PW7** further stated that the ballot papers in the impugned box were visible, accessible and could easily fall from the box. That, he left the tallying centre when there was a heated argument between the candidates and the **Returning Officer**. He never saw any one taking photographs at the tallying centre. **PW7** confirmed one **Debora Masinde** to be his wife but did not know if she was related to **PW1**.

87. On re-examination by **Mr. Ombito**, **PW7** confirmed that the said **Debora Masinde** was his wife but that he did not know all her relatives and further that he did not know **PW1**.

88. The Respondents replied to the issue. As said, **IEBC** and the **Returning Officer** filed a joint Response. In **paragraph 3** thereof they gave a chronology of what happened about the box containing the materials for the election. That, the **Returning Officer** received six big boxes containing election materials for the six electoral positions on 03/08/2017. That, the boxes were heavy and the one containing the materials for the election was the heaviest as the position had attracted the highest number of candidates. That, ideally the boxes were to be offloaded by a crane but since none was available they were manually offloaded from three lorries which each carried two of them. Due to the weight of the impugned box the **Returning Officer** had to hire 15 more casuals and while offloading it the box leaned on one side and the outer cover or the wrapping which was made of a special material of carton and polythene got slightly damaged on one side. However, all the contents therein remained intact and that none of the ballot papers was spilled, damaged or destroyed in any way. That, the **Returning Officer** recorded the event in his official Note Book and then invited all the candidates for various elective positions in the constituency with their agents for a briefing on 07/08/2017 where he satisfactorily explained what had happened to the impugned box and well prior to distributing the materials.

89. It was further stated that the **Returning Officer** indeed opened the box in the presence of all those who were present, and a verification was done which revealed that the torn part had not interfered with the ballot papers which were in their respective smaller bales. Further that, upon distributing the ballot papers to all the polling stations within the Constituency there arose no complaint on inadequacy of the materials. That, the **Petitioner** who was absent during the exercise only showed up later in the evening after the distribution of all the election materials had been done and made inquiries on a totally different issue which did not touch on the box, the ballot papers or how they were distributed. That the **Petitioner** and his agents did not attend the meeting but **PW1** and three other candidates did.

90. The foregone contents of the joint Response were reiterated in detail by the **Returning Officer** in **paragraphs 7 to 16** inclusive of his affidavit. He further deposed in **paragraph 45** of his affidavit that he did not know **PW6** and **PW7**. In **paragraphs 56 to 58** inclusive the **Returning Officer** challenged the affidavit of **PW5** and contended that it contained erroneous information on when the alleged processing of the photographs was done. That, **PW5** did not prove his expertise in photography neither his ownership and name of the Cyber Café in issue. He then questioned the authenticity of the photographs and urged this Court to disregard them.

91. On cross-examination by **Mr. Ombito**, the **Returning Officer** confirmed that he received six bales containing the election materials for the six elective positions in the constituency on 03/08/2017 at the tallying centre. That, he was present when the materials were delivered by three lorries each carrying two of bales thereof. That, he realized that the bale containing the materials for the election was the heaviest, although he could not recall its weight, as the position had attracted the highest number of candidates being 13. That, as a result thereof the bale was instead carried by 25 casuals unlike the other bales. He was also aware that the constituency had 4 Wards being Kimilili, Maeni, Kamukuywa and Kibingei and that Maeni Ward had 7 candidates for the position of Member of County Assembly (MCA). He however could not recall the number of the candidates for the MCA positions in each of the other wards but knew that they were a total of 17 candidates for the MCA positions in the entire constituency. He also confirmed that the weight of a ballot paper varied depending on the number of the candidates and that each bale had its weight written on it and that is how he knew the weight of the bales and that the impugned bale was about 1.5 metres square. He went further to reiterate how the bale was damaged and clarified that the main cause of the incident was that the door to the room inside the warehouse where the bale was to be kept turned out to be small for that bale and although the wrapping got damaged and the ballot papers were exposed none of them was destroyed or lost.

92. The **Returning Officer** did not report the incident to the police or to IEBC and he did not photograph the bale as well but made some notes in his official Note Book. He then locked the warehouse where the bales had been kept and maintained an all-round security vigil. He then sent an SMS to all the candidates, but not their agents since he did not have their phone numbers, calling them for a meeting on 07/08/2017 just before he distributed the election materials for them to witness the exercise and for him to also explain what had happened to the impugned bale. That, he explained the incident to the candidates who attended the meeting and even though the candidates initially complained over the issue he verified the contents by counting the packets of the ballot papers which were inside the bale and they found out that they were all intact and all the candidates were satisfied that all was well, they shook hands and even agreed to delete any photographs which any candidate had taken as a sign of satisfaction that the contents of the bale were intact and that they later briefed the media about all what had happened and the matter rested there.

93. The **Returning Officer** once again reiterated the foregone during cross-examination by **Miss Wekesa** who appeared for **Didmas** alongside **Mr. Ndambiri**. He confirmed that all Presiding Officers signed for all the election materials they collected from him and that none complained of any shortage of such materials. According to the **Returning Officer**, he explained how the bale was damaged and all the candidates present were satisfied with the explanation he gave; that they all shook hands as a sign of amicable resolution of the matter and in good faith and even called the media for coverage. He did not see the need of reporting the incident further in view of the consensus reached by the candidates and that he was utterly surprised to see the issue again raised in the Petition. The **Returning Officer** maintained his position on the matter during re-examination by **Mr. Oribó**.

94. **RW1** also filed an affidavit on the issue. He was a Presiding Officer at the tallying centre and deputized one **Slyvia Musuya** and that both were in-charge of logistics at the tallying centre. In **paragraphs 3 to 14** of his affidavit **RW1** explained the events surrounding the bale since he was present on the 03/08/2017 when the bales were received as well as on the 07/08/2017 during the meeting with the candidates. Indeed, his testimony is the same as that of the **Returning Officer**.

95. **RW1** further clarified that the impugned bale was not able to go through the door into the room inside the warehouse where it was to be kept due to its bulkiness and instead it was kept in the corridor inside the warehouse under very tight security. That, it was during that exercise that its wrapping was damaged and partly exposed the ballot papers but none of the ballot papers were spilled. That, at the meeting with the candidates the **Returning Officer** rightly and satisfactorily explained the events that led to the rapture of the wrapping and even proceeded to verify the ballot papers according to their serial numbers and it was found that everything was intact. That, all the candidates who were present were then satisfied with the explanation and the verification exercise and a consensus was reached that the distribution exercise do proceed and it so happened. He also deponed that as a sign of good faith and satisfaction the candidates who had taken photographs of the bale deleted them.

96. During cross-examination by **Mr. Ombito, RW1** confirmed that *'the candidates protested that maybe some ballot papers were already out. There was a consensus that the bale was to be opened and physical counting of the ballot papers be made. That was done, and we found that all materials were intact. The concerns were verbal. Not all candidates were then present.'* While confirming that **PW1** and **Didmas** were among the candidates who were present during the exercise, **RW1** could not however confirm whether all the candidates who had taken photographs of the bale deleted them.

97. **RW1** further clarified during cross-examination by **Miss Wekesa** that the damage on the bale was occasioned inside the warehouse as they were storing the six bales. He described the incident as purely accidental and confirmed that he was also involved in ensuring the safety of all the election materials at the warehouse and the tallying centre. That, there was no complaint of any nature whatsoever when the materials were physically verified and dispatched as required.

98. **Didmas** also responded to the issue in **paragraph 6** of his **Response** and **paragraph 6** of his **Affidavit**. He corroborated the evidence of the **Returning Officer** and **RW1** on how the candidates were invited to the meeting on 07/08/2017 and what transpired during the meeting. He confirmed that, unlike the **Petitioner** and his agents, he was personally present with his Personal Assistant, and further that despite the damage to the wrapping on the impugned bale there was no ballot paper which was missing, spoilt or destroyed. **Didmas** maintained the position during further examination-in-chief and cross-examination in Court and stated that he was among the candidates who asked for an explanation from the **Returning Officer** and he personally demanded for a verification exercise which revealed that no ballot paper was missing and a consensus on the distribution of the materials was reached. He denied the photograph annexed by **PW1** in his Affidavit as not how the impugned bale looked like.

99. That was the evidence surrounding the issue of the impugned bale. Going forward I will be referring to the container which had the ballot papers for the election as **'the bale'** or **'the impugned bale'**. From the evidence it is not in dispute that the bale contained some smaller pallets wherein the ballot papers were. That, the bale was wrapped with a special material made of carton and polythene and that one side of the bale was ruptured and the ballot papers for the election were exposed.

100. On one hand the **Petitioner** believes that the bale was deliberately torn, and the ballot papers interfered in a manner giving some candidates, more so **Didmas**, an undue advantage over the other candidates. To him, the integrity of the election was highly questionable and cannot pass the constitutional test of transparency. The **Petitioner** further holds the position that in view of that anomaly the result of the election did not therefore express the will of the people of Kimilili Constituency and to that end he urges this Court to annul the election accordingly.

101. The Respondents on the other hand are opposed to the **Petitioner's** position. They took the common position that the incident was purely accidental and that there was no interference at all with any ballot papers and as such the election was conducted within the constitutional parameters of integrity and transparency. They pleaded that the election should not be interfered with as it expressed the will of the electorate. It is those two opposing positions which this Court is called upon to interrogate and determine the effect of the rapture of the bale on the election.

102. It is the **Petitioner** who bears both the legal and evidential burden of proof. There is no doubt that none of the candidates or their agents were present at the warehouse on 03/08/2017 when the bales were received by *inter alia* the **Returning Officer**. That being so, the evidence of the **Returning Officer** and **RW1** on the events of that day is not directly controverted. However, this Court is to look at the matter in consideration of the entire evidence of all the other witnesses who testified on the issue wholesomely to *inter alia* determine whether the bale was intentionally ruptured.

103. That, the **Returning Officer** scheduled a meeting for 07/08/2017 and invited the candidates to update them on the events of 03/08/2017 is not denied. Contrary to **paragraph 8** of the **Petitioner's** affidavit it turned out in evidence and so did the **Petitioner** confirm that he did not personally attend the meeting but his two agents namely **Alice** and **Nabibi** who updated him on the progress of the meeting and informed him that they had lodged complaints with the **Returning Officer** on the ruptured bale. None of

the said agents swore any affidavit or testified in the matter. Therefore, the evidence of the **Petitioner** on what transpired at the meeting held at the Constituency Tallying Centre was largely hearsay and without any meaningful probative value. It is hereby disregarded. The only first-hand evidence by the **Petitioner**, which was admitted by the **Returning Officer**, was that the **Petitioner** went to the tallying centre and met the **Returning Officer**. However, there is no consensus on the time and the nature of the discussions the two held but the **Petitioner** did not lodge any complaint over the bale.

104. The **Petitioner** was convinced that the bale was intentionally interfered with. Interference with election materials amounts to a serious election offence in law and under **Section 13 of the Election Offences Act No. 37 of 2016** which came into force on 04/10/2016 one is liable on conviction to a fine of **Kshs. 500,000/=** or to imprisonment for a term not exceeding 5 years or to both. The **Petitioner** who served as the Member of the National Assembly for Kimilili constituency during the last term of the House indeed took part in formulating the **Election Offences Act**. With such background, the **Petitioner** opted not to take up the issue further. He did not lodge any formal report with the police to pave way for police investigations to unearth those culpable. In his own words he *'gave the Returning Officer the benefit of doubt.'* That being so, the **Petitioner** must have then been and/or is deemed to have been satisfied with the explanation given by the **Returning Officer** on the bale. Further, contrary to what the **Petitioner** indicated, it turned out that none of his two agents lodged any complaint over the issue neither did any of them either swear affidavit or in any way participated in this matter.

105. **PW1** who was a candidate in the election was present at the meeting called by the **Returning Officer**. He confirmed that the **Returning Officer** explained the rapture of the bale which he did not agree with. He did not lodge any complaint over the matter. **PW1** neither alleged nor proved that because of the rapture of the bale some ballot papers were either lost or damaged. He only deponed that *'I believe [the] removal of seals and opening of these ballots greatly compromised the integrity of the entire exercise.'* Having admitted that *'it was the seal [meaning the wrapping] that was broken and not the ballot papers'* **PW1** did not demonstrate how that compromised the integrity of the election. He generally stated that anything could have happened to the ballot papers which were exposed. He also dealt with the issue of the photographs which I will deal with shortly.

106. It was **PW5** who allegedly processed the photographs from **PW1's** phone. The admissibility of electronic evidence is provided for in **Sections 106A to 106I** of the **Evidence Act**, Cap. 80 of the Laws of Kenya. **Section 106B (1)** states as follows: -

“Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible. ”

107. **Section 106B (2)** gives the attendant conditions as follows: -

“(a) the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer.

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of

its content: and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.”

108. Where a party wishes to rely on electronic evidence under the foregone provisions, the one who undertook the actual work of processing that electronic evidence must prepare a Certificate whose contents are provided for in **Section 106B (4)** as follows: -

“(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particular of any device involved in the production of that electronic record as may be appropriate for the purposes of showing that the electronic record was produced by a computer.

(c) dealing with any matters to which conditions mentioned in sub-section (2) relate; and

(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it.”

109. As the format of the Certificate under **Section 106B (4)** is not provided for I am of the considered view and do hold that the **PW5**'s affidavit can be and is hereby treated as such a Certificate. Looking at the foregone legal provisions and the contents of the affidavit of **PW5**, there is no difficulty in finding that the affidavit, which is the Certificate herein, has not attained the required legal bar. **PW5** handled the issue so casually and just stated that *‘I processed and printed photos on my machine..... the printer used was BROTHER T300 – which I used.’* And, that was all. The nature and description of the machine as well as the process used in processing the photographs was not given. **PW5** did not also give evidence that he either ran a Cyber business or was trained in Cyber operations. He equally did not prove that he was a qualified photographer.

110. Suffice to say that there is every reason and need to strictly comply with the law when dealing with electronic evidence in this era of technological advancement. I take judicial notice of the fact that through technology one can easily come up with anything *‘real ’* be it a still or live photograph or a video more so even a fictitious one. It is just that easy. That is why for such evidence to be admissible the Certificate must strictly pass the test laid in the law. I now find and hold that the photographic evidence in this case did not pass the legal test as the Certificate was not in accordance to the law. That evidence was in the first instance inadmissible. The same is for and is hereby rejected.

111. **PW6** deponed and reiterated during cross-examination by **Mr. Oribo** that he was a Ford-Kenya agent under the NASA coalition stationed at Khwiroro Polling Station. He annexed a letter to that effect from Ford-Kenya Party in his affidavit. However, during cross-examination by **Mr. Ndambiri** he stated that he was not a Ford-Kenya agent but an agent for the ANC Party. When asked about the letter he annexed in his affidavit **PW6** had nothing to say but maintained that he was not an agent for Ford-Kenya at any time. I have also perused Form 35A for Khwiroro Polling Station 2 of 2 and found that **PW6** signed it as an ANC Party agent. With such evidence, **PW6** cannot be treated as a reliable witness. It therefore comes out that **PW6** understood even by the time he was swearing his affidavit as a Ford-Kenya agent in support of the Petition that he was untruthful. A witness should not create an impression in the mind of a Court that he or she is not straight-forward for that greatly injures the credibility of the witness and renders the evidence highly doubtful. That is the case with **PW6** who even admitted that **PW1** was his uncle and that he had accompanied him to the tallying centre as his agent and not as an agent for the **Petitioner** whom he even did not know.

112. But even if I take the position that **PW6** was instead an agent for ANC Party still there is no evidence in such support. He neither availed any appointment letter from the ANC Party nor did he prove that he took an Oath of Secrecy. He therefore did not prove that he was accredited by **IEBC** as an agent pursuant to **Section 42** of the **Act**.

113. What about the allegation that **PW6** was present at the tallying centre? **Regulation 85** of the **Regulations** provides for the persons allowed into tallying centres. One of such persons is ‘**an authorized agent**’. Having denied that he was an agent for Ford-Kenya Party and failed to prove that he was an agent for ANC or at all an agent one wonders how **PW6** gained access into the tallying centre. **PW6** further testified that while inside the tallying centre he stood at about 8 metres from where the bale was and that there were many people who were taller than him and who stood in front but nevertheless he was able to see where the bale was. To him, there were several bales containing the election materials for all the elective positions which were vertically placed on top of each other and that the impugned bale was in the middle. That evidence contrasted that of **PW1**, **PW7**, the **Returning Officer** and **RW1** who all stated that the bales were placed side by side. Further, apart from the evidence that the bale was raptured, **PW6** did not allege that ballot papers were either lost or destroyed in anyway.

114. Turning to **PW7**, although he deponed that he was a NASA Ford-Kenya party agent at Lutonyi Primary School he did not produce any evidence in support. As a by the way I have noted that Form 35A for Lutonyi FYM Primary School Polling Station 1 of 2 was signed by **PW7** as an agent for ANC and not Ford-Kenya. **PW7** equally did not state how he found his way into the tallying centre and in what capacity was he thereat. Be that as it may, he stated that he stood about 10 metres from where the bale was and when asked to estimate the distance in Court **PW7** blatantly declined and stated that he could only do so if he is instead taken back to the tallying centre.

115. Another observation made by **PW7** was that he only saw 3 boxes containing the ballot papers for the elective positions of the President, Governor and Member of National Assembly and that the bale had the writing ‘**Member of Parliament**’. *Could it be true that the bale had such writings?* **Article 93(1)** of the **Constitution** creates the Parliament of Kenya to consist of the National Assembly and the Senate. The two houses are distinct and composed of different members none of whom can serve in both Houses at the same time. It hence defeats reason that instead the bale had the writing ‘**Member of Parliament**’. Reasonably, if at all the bale had any writing then it ought to have been ‘**Member of the National Assembly**’.

116. From the foregone analysis of the evidence of **PW6** and **PW7** coupled with the fact that the **Petitioner** did not recognize them as his agents, their failure to prove that they were authorized agents, their conflicting evidences on the events at the tallying centre and their questionable demeanors on one hand and the position taken by the **Returning Officer** that **PW6** and **PW7** did not attend the meeting on 07/08/2017 as they were not duly accredited agents to access the tallying centre, I find the testimony of the **Returning Officer** highly persuasive. I am hence not convinced that **PW6** and **PW7** were at the tallying centre as alleged by **PW1** neither am I convinced that they attended the meeting called by the **Returning Officer** or witnessed the distribution of the election materials at the tallying centre. That therefore leaves the evidence of **PW1** on the part of the **Petitioner** on the events at the tallying centre.

117. But even if I take it that **PW6** and **PW7** were at the tallying centre as alleged, like **PW1**, they did not allege that any ballot papers were either lost or destroyed because of the rapture of the bale neither did any of them lodge any complaint over the issue nor demonstrated how the rapture affected the election.

118. The **Returning Officer** and **RW1** explained how the bale was raptured. To enhance transparency in the process the **Returning Officer** invited all candidates to a meeting and explained what had happened to the bale. It was **Didmas** who demanded for verification of the ballot papers and upon the **Returning Officer** carrying out the exercise it was confirmed that all the ballot papers were intact, and the distribution was done. None of the **Petitioner’s** witnesses denied that the verification exercise took place. I now find that the explanation by the **Returning Officer** and **RW1**, the convening of the meeting and the verification exercise as reasonable, credible and truthful steps towards demonstrating that the rapture of the bale was accidental, and I hereby decline the invitation that the rapture of the bale was intentional.

119. Having said so, what I now must determine is whether there is evidence that the rapture of the bale, although innocently occasioned, compromised the election or affected the result of the election. The **Petitioner** did not adduce any such evidence as well as **PW1**, **PW6** and **PW7**. None of them demonstrated how the rapture of the bale went forth to affect the result of the election. There was no proof that any ballot papers were lost or damaged because of the incident or that the election was affected in a demonstrably and reasonable manner. I therefore return the verdict that the rapture of the bale did not in any way affect the result of the election. The ground hereby fails.

Assistance of illiterate voters: -

120. The Petitioner in **paragraph 3A(c)** of the **Petition** pleaded that his agents ‘*were restrained in most polling stations from assisting illiterate voters contrary to law.*’ In **paragraphs 19** and **20** of his Affidavit the **Petitioner** named several polling stations where he alleged that the illiterate voters were not assisted in accordance with the law. The polling stations are Kamusinde Friends School, ACK - Kamusinga, Chebukwabi Polytechnic, Kaptola Factory, Siuna Primary School, Nasyanda, Kibingei RC, Kimilili FYM, Kitai, Lutonyi Primary, Kibingei Factory and Namawanga Market.

121. The allegation was supported by **Mary Ito Emong** in her affidavit who deponed that she ‘*observed that it was the presiding officer who was assisting illiterate voters NOT agents.*’ The said **Mary Ito Emong** did not however testify. Her affidavit was therefore not adopted as part of the evidence for the **Petitioner** and as such the contents thereof are of no probative value at all. It is only the evidence of the **Petitioner** and **Mary Ito Emong** that was on that allegation.

122. The allegation was denied by all the Respondents. **IEBC** and the **Returning Officer** further availed several presiding officers of some of the polling stations mentioned by the **Petitioner** who explained that the law never allowed the candidates or the agents to assist any illiterate voters but the Presiding officers. **Didmas** equally restated the legal position in his testimony.

123. I must restate the importance of what happens in a polling station as was rightly captured by the Court of Appeal in the case of **IEBC vs. Maina Kiai, Khelef Khalifa & 3 others (2017) eKLR** that: -

“...It is clear beyond peradventure that the polling station is the true focus for the free exercise of the voters' will.....”

124. It therefore means that whatever happens in a polling station is of great importance to an election and all those involved must endeavor to discharge their duties within the law. The law on assistance to voters, including illiterate voters, is well set out in **Regulation 72** of **the Regulations** as follows: -

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

(2) Where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such voter, in the presence of the agents.

(3) The presiding officer may make such necessary and respectful inquiry in order to establish that the voter and the person the voter has chosen to assist him or her satisfies the provisions of this regulation.

(4) The person chosen by the voter is not required to be qualified to vote but is required to have attained the age of eighteen years.

(5) The following shall apply with respect to a person who assists a voter under this regulation

(a) the person shall, before assisting or supporting the voter, make a declaration of secrecy before the presiding officer in Form 32 set out in the Schedule;

(b) a person who breaches his or her declaration commits an offence under the Act;

(c) the person shall assist or support only one voter at that election and have a mark as proof of assisting or supporting a voter.

(6) Where a presiding officer grants the request of a voter under this regulation, the presiding officer shall record in the polling station register against the name of the voter the fact that the voter was assisted and the reason for the assistance.

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

125. From the reading of the above provisions any voter who suffers a disability or is unable to read or write and needs any assistance to vote is to, in the first instance, be given an opportunity to be assisted by a person of the voter's own choice and which person shall not be a candidate or an agent. In the event the voter has no such a person it is only the Presiding officer who is to assist the voter but in the presence of the candidate and/or agent if they are then present.

126. The allegation by the **Petitioner** is hence not an allegation calling for any legal interrogation but a correct restatement of the law. Had the **Petitioner** alleged that he and/or his agents were not allowed to witness how the illiterate voters were assisted then that would have been a different thing altogether. That being the case, I find that there is no allegation for determination by this Court.

Agents chased away from polling stations: -

127. This allegation is contained in **paragraph 3A(d)** of the **Petition**. In paragraphs 13 and 14 of his affidavit the **Petitioner** deponed as follows: -

“13. THAT further my agents were chased away from several polling stations failing to perform their duties specifically at CHEBUKWABI polling station and nearly ALL other polling stations at the time of counting of the ballot papers.

14. THAT as a result of this wide spread non-participation of my agents in the polling stations – counting, many did not sign the relevant forms to confirm compliance of the votes received.”

128. In cross-examination, the **Petitioner** stated that he had agents in all the 107 polling stations within the Constituency and that all the agents were not in their respective polling stations from the opening to the closure of those stations. He also stated that his agents were not even allowed to be present during the counting exercises and that they protested but the polling station officials who were very hostile, ignored them.

129. **PW1** also averred in **paragraph 11** of his affidavit that he ‘noted that my agents as well as those of Mr. Murunga were chased away from polling centres-Matili FYM, Lukhome Baptist, Sivakale and Sosio. ‘During cross-examination **PW1** stated that he was only told by his agents that the **Petitioner’s** agents, whom he did not know their names, were chased away from some polling stations.

130. **PW4** swore an affidavit and testified before Court. He was the Deputy Chief Agent for Ford-Kenya in Kimilili Ward and was in-charge of the party agents in all the 13 polling stations within the ward. On the issue of the Ford-Kenya agents being chased away from polling stations **PW4** deponed in **paragraph 5** that ‘while moving around, I found he had removed ALL agents from the three streams at Matili FYM... It was at 8:00am and agents were out for over 30 minutes....I wasn’t given any reason..’

131. In cross-examination by **Mr. Oribo, PW4** confirmed that he went around the entire Ward on the day of the election and found Ford-Kenya agents in their respective stations. He gave the names of the agents he met at the various polling stations who were fully discharging their duties without any interference, but he could not give the names of the agents who were allegedly chased away at Matili FYM station. This is what he further stated about Matili FYM station:

“.....the name of the one who removed the agents from those stations is not given.....I was not present when the agents were removed from the stations. I therefore did not witness the incidents....”

132. While cross-examined by **Mr. Nbambiri, PW4** restated that the agents were at their various polling stations and that he had told those agents at the two polling stations at Kambini CCI Polling Centre not to sign the Form 35A. After he was taken through the Forms 35A by Counsel **PW4** stated that ‘*I have confirmed from the Forms 35As that it is not true that all our agents did not sign the statutory forms.*’ I have also taken the liberty and perused the Forms 35A and do concur with **PW4** that many of the forms appear to have been signed by Ford-Kenya agents.

133. The allegation that the agents were chased away hence centered on Matili FYM Polling Centre which had 3 polling stations. I say so since both the evidence of the **Petitioner** and **PW1** on the issue were largely hearsay. Both were allegedly informed of the incidents by their agents whom they did not even name. It was **PW4** who confirmed that he went around the polling stations in the Ward and found agents at work save at Matili FYM Polling Centre. **PW4** however admitted that he did not know the name of the one who removed the agents from those stations, he was not present when the agents were removed from the stations and that he did not witness the incidents. **PW4** did not even name the agents.

134. **RW4** was the Presiding Officer at Matili FYM Polling Station 1 of 3. He denied the allegation that agents were chased away from the station. He stated that the agents were all inside the station as required from the time the station was opened until the counting of the ballots was completed. That, even his request for a short health break after the close of voting and before the start of the counting was vehemently resisted by the agents and he had to seek the intervention of the security officers. He could not therefore understand how the allegation that the agents were chased from the polling station could have any basis in such a scenario. On an equal footing, **RW12** who was the Jubilee Chief Agent for the Parliamentary candidate in Kimilili Constituency denied the allegation and so did **Didmas**.

135. Agents play a very critical role in elections and it is of paramount importance that they be allowed to freely conduct their affairs. They are a key reference on aspects of transparency and the integrity of an election. Therefore, an allegation that agents were denied the opportunity to discharge their duties in a polling station is a very grave one more so in view of the holding in the **IEBC vs. Maina Kiai** (supra) case. The allegation is indeed of a criminal nature as provided for in **Section 13(i)** of the **Election Offences Act** and one is liable on conviction to a fine of **Kshs. 500,000/=** or to imprisonment for a term not exceeding 5 years or to both.

136. Such allegations therefore ought to be well proved and beyond any reasonable doubt. A Petitioner ought to not only name the polling stations but also disclose the names of the agents, have them swear affidavits and avail such agents for cross-examination. There must also be some form of corroboration unless otherwise stated in law. Short of that, chances are that the allegation may not be easily proved.

137. That was the case here. Apart from naming Matili FYM Polling Centre, the names of the agents in the polling stations were not disclosed. No affidavits were sworn, there was no evidence on how and why the agents were outside the polling stations, and the agents never testified before Court. In the unique circumstances of this matter I find and hold that the allegation that the **Petitioner’s** agents were chased away from all or any of the polling stations within Kimilili Constituency during the election was not proved.

Disenfranchisement of voters: -

138. In **paragraph 3A(e)** of the **Petition**, it is pleaded that ‘*in several polling stations notably Kimilili DEB a number of voters were denied to vote thereby disenfranchising them and compromising the interests of the Petitioner.* In **paragraphs 15 and 16** of his affidavit the **Petitioner** deponed that many voters were disenfranchised by being chased away from polling stations before voting despite their names appearing in the Voter Registers. He named **PW2** and **PW3** as among those affected.

139. **PW2** deponed in an affidavit and stated in evidence that she is the holder of a Kenyan Identity Card No. 2092851 and that she was registered at Kimilili DEB Polling Station 2 of 4 under registration number 0002927240 as a voter. That, on the day of the election she went to the polling station and gave her identity card to the polling station officials for purposes of voting. That, she was electronically identified as a voter and was issued with ballot papers but before she voted one of the officials told her that her identity card was fake and withdrew the ballot papers and despite complaining to the security officers and the other officials at the station she was not allowed to vote.

140. There was however a change of the position during cross-examination where **PW2** clarified that she could not be identified electronically as a voter despite a repeat of the exercise. It cannot therefore be that she was issued with ballot papers in those circumstances. **PW2’s** evidence before Court is hence at variance with her affidavit evidence.

141. The allegation was vehemently denied by the Respondents. **Didmas** deponed and testified that he met **PW2** complaining that she was not allowed to vote outside Kimilili DEB Polling Station 2 of 4 on the day of the election. On enquiry, he decided to first check the status of **PW2** as a voter by sending her identity card number to the **IEBC** portal through number 70000 and the response was that the identity card holder was not registered as a voter. While cross-examining **PW2** **Mr. Ndambiri** asked **PW2** if she was ready that the electronic verification exercise from the **IEBC** portal be done in Court to confirm whether she was a registered voter, but the request was vehemently opposed by both **PW2** and the Petitioner’s Counsel.

142. There was also **PW3** who deponed and testified that she did not vote. That, she was also a registered voter at Kimilili DEB Polling Station 2 of 4 and that she was electronically identified as a such on the election day but when she was about to be given the ballot papers one of the **IEBC** officials stated that she had already voted. That, she complained to the security officers and to the **Petitioner** who was then at the station but despite the **Petitioner’s** intervention she did not vote.

143. In cross-examination, **PW3** stated that she was registered as a voter in 1992 and since then she all along voted in elections and that she had not updated and/or confirmed her status with **IEBC** since her first registration in 1992. The Respondents denied the allegation.

144. As discussed above, the right to vote is a fundamental one and firmly entrenched in the **Constitution**. **IEBC** is obligated to ensure that anyone who is entitled to vote so votes. The voter registration system in Kenya has evolved with time. Initially, voters were manually registered and so identified at elections. With advancement in technology and changes in the law the electronic registration of voters and electronic voter identification systems were put in place. Those systems do exist to date. The current voting process is contained in **Regulation 69** of **the Regulations**. For clarity purposes I will reproduce the entire provision: -

“69. Voting procedure

(1) Before issuing a ballot paper to a voter, an election official shall-

(a) require the voter to produce an identification document which shall be the same document used at the time of registration as a voter;

(b) ascertain that the voter has not voted in that election;

(c) call out the number and name of the voter as stated in the polling station register;

(d) require the voter to place his or her fingers on the fingerprint scanner and cross out the name of the voter from the printed copy register once the image has been retrieved;

(e) in case the electronic voter identification device fails to identify a voter the presiding officer shall-

(i) invite the agents and candidates in the station to witness that the voter cannot be identified using the device;

(ii) complete verification Form 32A in the presences of agents and candidates;

(iii) identify the voter using the printed Register of voters; and

(iv) once identified proceed to issue the voter with the ballot paper to vote;

(2) A voter shall, in a multiple election, be issued with the ballot papers for all elections therein at the same time and shall after receiving the ballot papers –

(a) cast his or her votes in accordance with regulation 70 without undue delay;

(b) submit to having one finger as prescribed by the Commission immersed, dipped or marked in ink of a distinctive colour which, so far as is possible is sufficiently indelible to leave a mark for the period of the election;

(c) where a voter has no finger, make a mark on the next most suitable part of the body; and

(d) upon collecting his or her identification documents, immediately leave the polling station.

(3) A person who knowingly falls to place a ballot paper issued to him or her (not being a spoiled ballot paper) into a ballot box before leaving the place where the box is situated commits an offence under the Act.

(4) An election Officer who deliberately refuses to stamp any ballot paper commits an offence.

(5) The presiding officer may where a voter so request, explain the voting procedure to such voter.”

145. **Regulation 70 of the Regulations** explains how a voter who has been issued with ballot papers is to vote. From the reading of the above twin provisions the starting point is the identification of a person as a registered voter. That must be done electronically. A voter's name must first appear in the electronic register at a polling station. Whereas **PW2** and **PW3** allege that they were registered voters that fact was not proved. The **Petitioner** did not avail copies of the Registers of voters for Kimilili DEB Polling Station 2 of 4 to so confirm neither did any witness otherwise testify and prove that **PW2** and **PW3** were duly registered voters at that polling station. Even the **Petitioner's** application by way of Notice of Motion dated 19/09/2017 did not contain a prayer for the Register of Voters at the polling station neither was such a prayer made thereafter. There was as well no application for scrutiny made by the Petitioner for Kimilili DEB Polling Station 2 of 4.

146. Further, **Didmas** stated that he verified the voter status for **PW2** and the identity card was not recognized in the **IEBC** system. **PW2** and the **Petitioner's Counsel** surprisingly refused to undertake the verification exercise in Court. This Court also remains alive to the fact that the evidence of **PW2** and **PW3** in their affidavits and before Court was inconsistent.

147. Having failed to first prove that the **PW2** and **PW3** were registered voters and were eligible to vote at Kimilili DEB Polling Station 2 of 4, the allegation that they were denied an opportunity to vote at cannot stand. The same fails and is hereby dismissed.

Shortage of ballot papers: -

148. The **Petitioner** pleaded in **paragraph 3A(f)** of the **Petition** that *‘at a number of polling stations notably Chebukwabi there was a shortage of parliamentary ballot papers and voting ended prematurely for the parliamentary candidates.’* In **paragraph 17** of his affidavit the **Petitioner** deponed that *‘I was equally informed by my Super-Agent Mary Ito Emong – see affidavit – that at Chebukwabi polling centre the parliamentary voting ended at 3.00pm.’*

149. The said Super-Agent **Mary Ito Emong** did not testify before Court. That being so her affidavit evidence was not adopted neither was it tested. The allegation was therefore not proved and hereby fails.

Number of votes cast outnumbering registered voters: -

150. The **Petitioner** pleaded in **paragraph 3A(i)** of the **Petition** that *‘the total number of votes in some polling stations notably Friends School Kamusinga stream 1 were far much more than the total number of the votes registered in the entire centre.’* In **paragraph 26** of his affidavit the **Petitioner** deponed that *‘total number of vote’s registered for Friends School Kamusinga stream 1 were 633 – and total voters for the entire station were 1899 yet from form 35B, total number of votes received from same station stream 1 were 4,823, and total number of votes received from same station were 5,776.’* The **Petitioner** further deponed in **paragraph 27** of his affidavit that *‘this was part of the illogical results emanating from shambolic practices of 1st and 2nd Respondents which greatly compromised the integrity of the results.’*

151. On cross-examination by **Mr. Omwenga**, the **Petitioner** had the following to say *‘In Form 35B... Friends School Kamusinga Stream 1 of 3 had more voters than the registered voters. I garnered 200 votes, 3rd Respondent got 196 votes among the other candidates. The total votes were 483. What was entered was instead 4823.....I do not know if the figure of 4832 was an error and I am sure it must have benefitted a candidate.....’* While cross-examined by **Mr. Ndambiri**, the **Petitioner** admitted that he had an agent at the Friends School Kamusinga Stream 1 of 3 whose name he could not recall and who did not sign the Form 35A. That, the figures in Form 35A were rightly transposed into Form 35B. That, he did not tally the figures appearing on the column of total valid votes in Form 35B.

152. In re-examination by **Mr. Ombito**, the **Petitioner** stated that it was not normal for a polling station to have more voters who cast their votes than the registered voters and that the error in Friends School Kamusinga Stream 1 of 3 *‘had erroneous effect and that is why we are in court today.’*

153. The **Returning Officer** acknowledged the error in Form 35B and described it as a pure human error. To him the error was typographical and attributed it to fatigue on the part of the **IEBC** officials at the tallying centre who continuously worked for such long periods hence it was possible for one to enter the figure **4823** instead of **483**. He confirmed that the number of votes garnered by each candidate appearing in Form 35A were rightly transposed into Form 35B and that the error did not affect the results of any candidate.

154. **RW2** was the Presiding Officer of the Friends School Kamusinga Stream 1 of 3. He stated that the station had 633 registered voters and that 487 voters turned out and voted. That there were 3 spoilt votes and that he could not account for one vote. That, he explained all that in the Polling Station Diary. He also described the error as a pure typographical one and explained that the Form 35A that was in Court was a duplicate one since the original had been transmitted to the tallying centre and as such it had some illegible parts including the entries on the various types of votes and ballot papers. He however confirmed that he fully filled in all the details in the original Form 35A.

155. **Didmas** admitted the error as well. He equally stated that the same was a common typographical error which did not affect the result of the election or at all.

156. I have perused the contents of Form 35A for Friends School Kamusinga Stream 1 of 3 and Form 35B. I confirm the error. I also confirm that the number of the votes garnered by each candidate appearing in Form 35A were rightly transposed into Form 35B. Even though the Respondents alluded the error to be

a typographical one, what this Court must do is to ascertain whether the error affected the result of the election.

157. The error was on the second last column of Form 35B which had the total number of valid votes from each polling station in the constituency. That column has a total of **42804** valid votes out of **52267** registered voters in the constituency thereby translating to 81.2693% voter turnout. The **Petitioner** contended that the error must have benefitted a candidate but he neither named the candidate nor described how the candidate benefitted. The **Petitioner** was under a duty to demonstrate how that error affected the result of the election more so that he did not contend wrong transposition of the results.

158. Having carefully considered this ground I am fully satisfied that the error did not affect the results of any candidate either as entered in Form 35A or in Form 35B. The error was on the summation of the votes garnered by each candidate in that polling station and not on the individual number of votes garnered by the candidates. On an equal footing, the error therefore did not affect the total number of votes garnered by each candidate in the constituency as entered in Form 35B. Whereas the net effect of the error may have been a wrong representation of the voter turnout, I find and hold that the error did not transcend to the realm of affecting the result of the election. I am equally satisfied that the error was a typographical one. That ground therefore fails.

Signing of Declaration Form 35B by the Petitioner and his Agents: -

159. It was pleaded in **paragraph 3A(h)** of the **Petition** that '*At the constituency tallying centre at Kimilili only agents of the 3rd Respondent signed in endorsement of form 34B and none of the petitioner's did the same.*' In **paragraph 24** of his affidavit the **Petitioner** deposed that '*only jubilee party agents in favour of 3rd Respondent signed form 35B and none of my agents signed the same... See annex 'SKM 4.'*

160. While cross-examined by **Miss Wekesa**, the **Petitioner** stated that '*I was not at the tallying centre. My agents left the tallying centre in protest...*' That position was confirmed by the **Returning Officer** and **Didmas**.

161. The law on the signing of the declaration forms by Presiding Officers, candidates and/or agents is in **Regulation 79 of the Regulations** whose effect is that: -

(i) A candidate or agent who refuses or otherwise fails to sign the declaration forms are required to record the reasons for the refusal or failure to sign.

(ii) Where a candidate or an agent refuses or fails to record the reasons for refusal or failure to sign the declaration form the Presiding Officer is required to record the fact of their refusal or failure to sign.

(iii) The Presiding Officer is also supposed to record the absence of a candidate or agent.

(iv) That the refusal or failure of a candidate or agent to sign a declaration form or to record the reasons for their refusal to sign or the absence of a candidate or an agent at the signing of a declaration form or at the announcements of results at a polling station or a tallying centre shall not by itself invalidate the results.

162. **Regulation 97 of the Regulations** has it that a mere non-attendance of any candidate or agents at the time and place duly expected to be shall not invalidate any lawful act done thereat.

163. Whereas the refusal or failure of a candidate or agent to sign a declaration form or to record the reasons for their refusal to sign or the absence of a candidate or an agent at the signing of a declaration form or at the announcements of results at a polling station or a tallying centre cannot by itself invalidate the results, the failure by the Presiding Officers to sign the declaration forms may invalidate an election depending on the extent, magnitude and effect of such irregularities.

164. In this case the contention is that the Form 35B was not signed by the **Petitioner** or his agents at the tallying centre but only by **Didmas** and his party agents. The **Petitioner** admitted that he never went to the tallying centre and that his agents left the tallying centre in protest. That was confirmed by the Respondents. The failure to sign the Form 35B by the **Petitioner** and his agents was therefore deliberate. In such a case the **Petitioner** cannot be heard to turn around and allege non-signing of the Form 35B. One cannot act in contravention of the law and at the same time expect to benefit from that act. Such a conduct is not expected of a person who acts in good faith. The ground therefore fails.

165. Be that as it may, I think it is prudent to lightly touch on an issue which is not part of the Petition but hinges on the effect of non-signing of the declaration forms. The issue is whether the lack of the remarks by the Presiding officer in declaration forms where candidates or agents did not sign renders the forms invalid. The law is silent in such a case.

166. I will take the following approach on the issue. Where a declaration form is duly signed by the Presiding or Returning Officer but is not signed by the candidate and/or the agents and does not have the comments by the Presiding or Returning Officer as required such an incomplete form cannot be held to be invalid unless that complaint is part of the Petition, the Presiding or Returning Officer fails to give a satisfactory explanation and it is demonstrated that the lack of the comments or remarks thereof affected the results of the election.

Irrational coincidences: -

167. It was pleaded in **paragraph 3A (j)** of the **Petition** that *‘There were irrational coincidences in the total number of votes received by the petitioner in a number of polling stations notably Chebukwabi, Kitai, Khwiroro, Kibingei and Friends School Kamusinga that lack any rational explanation.’* In **paragraph 29** of his affidavit the **Petitioner** deponed that the coincidences were that he garnered 43 votes in each of the two polling stations at Chebukwabi Primary School Polling Centre whereas **Didmas** garnered 172 and 268 votes respectively in those polling stations; that in Kitayi Primary School Polling Stations 1 and 2 he garnered 101 votes in each station; that in Khwiroro Polling stations 1 and 2 he garnered 105 and 107 votes respectively against **Didmas’** 198 and 192 votes respectively; that in Kibingei RC Polling stations 1 and 2 he garnered 55 and 56 votes respectively and in Friends School Kamusinga Polling stations 1 and 2 he garnered 200 and 202 votes respectively. The **Petitioner** described the said coincidences as **‘strange coincidences’** and as **‘not normal coincidences’**.

168. **IEBC** and the **Returning Officer** were of the position that the results in all polling stations in the constituency were as per how the voters cast their votes and there was nothing they could do rather than presenting the results as they were. **Didmas** stated that there was nothing in the alleged results that defied logic.

169. **Article 38** and **Article 81** of the **Constitution** guarantees the right to vote by secret ballot in any election or referendum. A voter has a right to vote for any candidate of his or her choice in an election and it is the choice of that voter which must carry the day. In other words, the will of the voter must always be upheld even if the results show certain coincidences unless it is demonstrated that the coincidences are otherwise deliberately occasioned and/or are not guided by reason or by fair consideration of the facts and that they affect the result of the election. Just like in life, twins and look-alikes are normal life occurrences and they can be equated to the coincidences in this case.

170. Therefore, for a Petitioner to succeed under this head there must be proof that the coincidences were otherwise occasioned and how they interfered with the will of the people as to affect the result of the election. From the pleadings and evidence, the **Petitioner** did not explain how irrational, strange or abnormal the alleged coincidences were and how they affected the result of the election. In that case the ground was not proved and must fail.

Double and multi-voting at Kamukuywa D.O.’s Polling station: -

171. The **Petitioner** pleaded under **paragraph 3A(p)** of the **Petition** that *‘There was double and multi-*

voting particularly in Kamukuywa DO Polling station and there were serial marking of spoiled ballots indiscriminately for the parliamentary ballots as well as double dishing out of ballots which affected the legitimacy of the petitioner's rights.'

172. It was **PW8** who swore an affidavit on this allegation. He deponed that he was the Ford-Kenya agent at the polling station on the election day and that the voting process began well until around 07:00am when he noticed that around 20 ballot papers with serial numbers NA00041701 to NA00041720 for the Member of the National Assembly for Kimilili Constituency and for the President had been marked with a stamp with the word '**SPOILT**' and placed inside the ballot boxes. That, because of that anomaly **NO AGENT** signed any of the statutory forms at that polling station.

173. On cross-examination by **Mr. Oribo, PW8** confirmed that he indeed signed all the statutory forms in that polling station as required. On further cross-examination by **Mr. Ndambiri, PW8** stated that it was the Presiding Officer who informed the agents then present of the anomaly and asked them if they were ready to proceed on with the voting. That, it was agreed that the voting proceeds and the issue be dealt with during the time of counting of the ballots. **PW8** confirmed during re-examination by **Mr. Ombito** that it was indeed the Presiding Officer who called the agents, informed them and they discussed the issue. However, **PW8** changed his earlier testimony and stated that the meeting agreed that the 20 votes in issue were to be regarded as '**SPOILT**' but that did not happen during the counting.

174. **RW3** was the Presiding Officer at the Kamukuywa D.O.'s office Polling Station 1 of 3. She swore an affidavit and testified before Court. It was her evidence that as the in-charge she had the overall responsibility at the station and had to ensure that everything was done as required and had the liberty to hold meetings with the agents and candidates in the event need arose. That, as she went around the station monitoring how the Clerks were working she noticed that one Clerk who was issuing the Presidential and Member of National Assembly ballot papers was instead using a wrong stamp. That, the wrong stamp used was the '**IEBC REJECTED OBJECTED TO**' and not the one with the word '**SPOILT**' as alleged. That, on realization of the anomaly **RW3** stopped the voting process and confirmed from the counterfoils that the first 20 ballot papers for the position of President and Member of National Assembly had been stamped with a wrong stamp and already cast into the ballot box. That, she called for a meeting with all the agents who were present and informed them of the occurrence. That, she also gave them the serial numbers of the ballot papers in issue. The meeting unanimously agreed that voting should proceed and unless on other grounds the ballot papers in issue be considered as valid votes. That, the voting then resumed and the ballots in issue were so treated during the counting of the votes and no one raised any issue on the matter. That, the agents who were then present, including **PW8**, signed the Form 35A as required. That, she recorded the incident in her Field Diary and not in the Polling Station Diary and she reallocated the Clerk who had used the wrong stamp some other duties.

175. There is no doubt that the incident occurred. What is to be ascertained is whether the incident was deliberate and what impact it had on the election. As admitted by **PW8** during cross-examination it was **RW3** who found out the anomaly, stopped the voting, called and informed the agents and even availed all the serial numbers to the agents. That explains how **PW8** got the serial numbers for the ballot papers in issue. It is also not in issue that it was agreed that the voting was to continue. The point of departure between **PW8** and **RW3** is what was to happen to the wrongly stamped ballot papers. **PW8** did not depone in his affidavit what was allegedly agreed on the impugned ballot papers. He however had two different positions on the issue. He stated during cross-examination that the issue was to be revisited during the counting exercise but that did not happen. He then changed during re-examination and stated that the ballot papers were to be regarded as spoiled but again that did not happen. **RW3** on the other hand contends that the meeting resolved that save for any sound anomaly the ballot papers were to be regarded as valid votes.

176. To aid in resolving the issue I will consider the type of stamp used. According to **PW8** the stamp had the word '**SPOILT**' whereas according to **RW3** it was an '**IEBC REJECTED OBJECTED TO**' stamp that was used. Apart from the averment in the affidavit of **PW8** there was no other evidence availed on the nature of the stamp. Whereas **RW3** was the one who discovered the anomaly **PW8** did not state how far he was from where the Clerks who were issuing the ballot papers were or how far he was from the

transparent ballot boxes and if he was able to see the stamp used on the ballot papers once the ballot papers were folded and inserted into the ballot boxes. Further, the **Petitioner** did not seek for any scrutiny of the votes with a view to ascertain the type of stamp used as well as the validity of those votes in the face of the differing positions. There is also the undisputed fact that **PW8** signed Form 35A at the end of the counting exercise and did not raise any complaint whatsoever.

177. The foregone analysis leads me to the finding that the evidence of **RW3** is credible and believable whereas the evidence of **PW8** is inconsistent and raises more doubts and questions than clarity and answers. I am hence convinced that the stamp used was the '**IEBC REJECTED OBJECTED TO**' stamp and not the '**SPOILT**' stamp. Having believed **RW3**, it renders either of the unstable stands taken by **PW8**, that the fate of the wrongly stamped ballot papers was to be determined during the counting exercise or that they were to be regarded as spoilt votes, to be highly doubtful. That is so further to the fact that whereas **PW8** was present during the counting exercise he did not allege that he revisited the issue in any way whatsoever.

178. From the way **RW3** handled the matter I am satisfied, and do hereby find, that the use of the wrong stamp by the Clerk was not deliberate and that the conduct of **RW3** in the circumstances of this case was not commensurate to a cover up but a step towards enhancing transparency. The irregularity may have *inter alia* been caused by inadequate training of the Clerks or may have been a genuine mistake given that the stamp is only used during the counting exercise and in a case where there is a dispute between the Presiding Officer and the agent(s) on whether a vote is to be treated as rejected. Either way the irregularity is clearly and satisfactorily explained.

179. Having agreed to treat the ballot papers as valid unless otherwise voided and on the principle of secrecy of the vote, all the candidates taking part in the election were placed at par. Indeed, the decision was both reasonable and fair to all the candidates. I do not see how that decision leaned against the **Petitioner** herein or how it gave an undue advantage to any candidate. As such I return the finding that the irregularity in using a wrong stamp on the 20 ballot papers at Kamukuywa D.O.'s Office Polling Station 1 of 3 was not deliberately occasioned and did not affect the result of the election.

180. There was also another incident at the station. **PW8** deponed that '*one voter was found with 2 ballot papers after voting....the said voter had voted for other boxes and was finalizing for women representatives and Governor....I asked him whether he had double voted all along and he said 'yes'....the serial numbers were WR00502519 and GOV00502720.....after raising alarm a clerk who had occasioned this was arrested but later released....*'

181. During cross-examination, **PW8** admitted that he did not know the name of the voter and that the two ballot papers were not for the position of the Member of the National Assembly, that he was the one who reported the matter to the Presiding Officer. That, the ballot papers were stamped but could not know the type of the stamp used and that he did not see the ballot papers during the counting.

182. In **paragraph 4** of her affidavit **RW3** admitted that one Clerk issued two ballot papers for the Gubernatorial seat and two ballot papers for the Women Representative position to a voter. However, during cross-examination **RW3** stated that the voter was issued with one extra ballot paper for the Gubernatorial position and that she noted the anomaly before the voter cast any of the ballot papers. That, she called the agents then present to another meeting and confirmed that the voter had 7 ballot papers instead of 6, that she withdrew the extra ballot paper which she stamped it as '**SPOILT**' and handed over the Clerk to the police. That, she captured the incident in the Polling Station Diary. **RW3** testified that the voting and counting was credible and transparent and out of the 484 registered voters there were 346 valid votes, 2 rejected votes and 1 stray vote. That, all agents then present signed Form 35A.

183. As to whether the undisclosed voter was issued with duplicate ballot papers in all the elective positions, **PW8** did not come out clearly. He stated in **paragraph 5** of his affidavit that the voter **was found** with 2 ballot papers '*after voting*' meaning that the voter had completed voting but remained with two more ballot papers. **PW8** did not also disclose who found out the excess ballot papers from the voter. In **paragraph 6** of his affidavit **PW8** instead states that the voter was finalizing the voting for the Woman

Representative and the Governor and that 'I asked him whether he had double voted all along and he said 'yes'. The voter was not availed as a witness neither his details tendered more so given that the matter was reported to the police. Given that the sequence of voting was that the last ballot box was for the Gubernatorial position and the second last ballot box was for the Woman Representative according to **PW8**, it is not clear whether the alleged duplicate ballot papers which the voter had used bore the same serial numbers. Since the voting had been stopped and in view of the incident it was certainly expected of **PW8** to request that the booklets for the ballot papers be re-verified to ascertain whether the ballot papers were in duplicate before the voting exercise resumed. That did not happen.

184. There is no allegation that such a request was made by any of the agents thereat but declined. I also note that no scrutiny of the votes for that polling station was sought. May be the exercise would have laid bare what exactly happened.

185. **RW3** deponed that she was the one who found out that the voter had 7 ballot papers instead of 6 ballot papers the excess one being for the Gubernatorial position and acted. She also recorded the incident in the Polling Station Diary. I have perused the Dairy and found that it was indicated that there was only 1 excess ballot paper for the Gubernatorial position. By analysis and juxtaposing the evidence of **PW8** and that of **RW3** on whether excess ballot papers were issued to the voter in all the elective positions I am not persuaded by the evidence of **PW8** as there is no cogent evidence to that end. I now find that there was only 1 excess ballot paper issued by the Clerk to a voter and that ballot paper was for the elective position of the Governor and which ballot paper did not find its way into the ballot box. That being the position coupled with the fact that there was only one such isolated incident and that the matter was referred to the police and that no other witness was called by the **Petitioner**, not even the investigating officer, I am clear in my mind that the irregularity did not affect the result of the election. By and large, the irregularity of double and multi-voting was not proved. In any event, none of the alleged extra ballot papers were for the position of the Member of National Assembly.

186. As I now rest the ground of massive irregularities, the foregone analysis has not revealed any irregularity that was proved to have affected the result of the election.

(iii) Bribery: -

187. Bribery is one of the election offences provided for in the **Election Offences Act No. 37 of 2016**. **Section 9** of the **Election Offences Act** creates the offence as follows: -

(1) A person who, during an election period –

(a) directly or indirectly offers a bribe to influence a voter to –

(i) vote or refrain from voting for a particular candidate or political party;

(ii) attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending support to or for a political party or candidate;

(b) in any manner unlawfully influences the result of an election;

(c) directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates.

(2) A person who, during an election period, accepts or agrees to accept a bribe that is offered in the circumstances described in subsection (1) commits an offence.

(3) A person who commits an offence under this section shall be liable, on conviction, to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to

both.”

188. Bribery is therefore a criminal offence as well as an election offence. It can also be described as an election offence of a criminal nature. As discussed above the standard of proof in relation to such a ground is beyond any reasonable doubt.

189. The **Petitioner** pleaded the particulars of bribery in **paragraph 3A(g)** and **(o)** respectively of the **Petition** that *‘The 3rd respondent and several of his agents were present outside a number of polling stations notably Matili FYM, Chasamisi Market, Kibunde, Kibingei FYM and Maeni openly dishing money and or bribing voters to vote him’* and *‘The asst. chief in some polling stations openly dished out money to voters prior to elections to influence the voting in favour of 3rd Respondent.’* However, the **Petitioner** did not depone to that allegation in his affidavit. The **Petitioner** in answer to questions during cross-examination stated that he personally witnessed the acts of bribery by **Didmas** and/or his agents at Matili FYM, Chesamisi Market and Kibingei FYM but he did not report the matters to the police. He could also not recall the names of his agents in those polling stations neither did he indicate in whose company he was in when he witnessed the incidents.

190. **PW4** swore an affidavit and testified in Court. He was the Deputy Chief Agent for Ford-Kenya party in Kimilili Ward and in-charge of the 14 polling stations within the ward. He deponed in **paragraphs 10** to **14** inclusive of his affidavit that *‘the asst. chief was in Kambini polling station and was at the gate dishing out money to voters if favour of Didmas Wekesa.....I tried to find out what asst. chief was doing but he was hostile and he chased away the agents.....the chief moved to ALL 14 polling stations dishing money to voters before the vote....the asst. chief’s name is ...and both were going on dishing money on polling throughout the day...I brought this to the attention of the security people who did nothing and we quarreled with both chief and asst. chief such that we nearly fought after straggled.....’*

191. **PW4** stated in cross-examination that he witnessed the bribery incidents by **RW9** at Kambini Polling station at midday. That, he could not recall the names and the number of the voters who indulged in the act neither did he report to the police. He however verbally reported to the Presiding Officer. That, he also witnessed bribery of voters by the Chief at Malili FYM at 08:00am where the Chief gave Kshs. 1,000/= to one **Daniel Kaburu** among many others. Again, **PW4** reported the matter to the Presiding Officer. He also witnessed the Chief bribing voters at Kambiri Polling Centre at noon and at Bus Park Polling Centre at 04:00pm. That, the Chief was giving out Kshs. 200/= and Kshs. 1,000/= notes. He also received similar complaints from his agents within the ward.

192. **IEBC** and the **Returning Officer** denied the allegations of bribery and availed **RW4**, the Presiding officer Matili FYM Polling Station 1 of 3, who stated that he did not witness any acts of bribery either as alleged or otherwise neither were any such reports made to him at the station. He also denied knowing the persons and names of the Area Chief or **RW9** and he could not confirm whether any or both were at the station on the day of the election. He as well denied seeing **Didmas** or receiving complaints that he was engaged in bribery.

193. **Didmas** also denied the allegations of bribery and categorically stated that he was not involved in the alleged acts of bribery either before or during the election day. **RW9** deponed that his duties on the day of election as the Area Assistant Chief was to maintain law and order and to enforce the directive that voters should leave polling stations after voting. That, he went around the sub-location and where he met voters gathered he talked to them and they dispersed and that there was no single incident of confrontation with any one. He denied having engaged in any act of bribery either as alleged or otherwise or having received any reports on the said acts.

194. The acts of bribery as allegedly witnessed by the **Petitioner** and **PW4** were not reported to the police or to any investigative agency or organ. Therefore, no further investigations were undertaken. Again the **Petitioner** as one of the members of the National Assembly which came up with the **Election Offences Act** in 2016 which Act created bribery as an election offence did not act as expected. Despite witnessing and receiving information from his agents on the acts of bribery the **Petitioner** basically took no action. He not only failed to lodge appropriate complaints but also did not also urge his agents to do so. From

the way the evidence unfolded there is no single allegation of bribery that was corroborated. They are all singular averments by either the **Petitioner** or **PW4**. Such averments do not attain the proof of beyond reasonable doubt. Even in a normal criminal case such evidence cannot be a basis of placing an accused person on his or her defence. The evidence falls far much below the required standard of proof. To that end the ground fails.

(iv) Violence and voter intimidation:

195. The **Election Offences Act** creates the offences of **undue influence** and **use of force or violence during the election period** under **Sections 10** and **11** respectively. For ease of this discussion I will reproduce the offences as tailored: -

“10(1) A person who, directly or indirectly in person or through another person on his behalf uses or threatens to use any force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or on account of –

(a) inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election;

(b) inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate; or

(c) impeding or preventing a person from being nominated as a candidate or from being registered as a voter,

(2) A person who induces, influences or procures any other person to vote in an election knowing that the person is not entitled to vote in that election commits an offence.

(3) A person who directly or indirectly by duress or intimidation –

(a) impedes, prevents or threatens to impede or prevent a voter from voting; or

(b) in any manner influences the result of an election.

(4) A person who directly or indirectly by duress, intimidation or otherwise compels or induces any voter who has already voted at an election –

(a) to inform that person or any other person of the name of the candidate or political party for which the voter has voted; or

(b) to display the ballot paper on which the voter has marked his vote.

Section 11 provides as follows: -

11. A person who, directly or indirectly in person or by any other person on his behalf, inflicts or threatens to inflict injury, damage, harm or loss on or against a person –

(a) so as to induce or compel that person to support a particular candidate or political party

(b) on account of such person having voted or refrained from voting; or

(c) in order to induce or compel that person to vote in a particular way or refrain from voting, Commits an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both”

196. Just like the offence of bribery, the standard of proof in relation to the offences of undue influence and use of force or violence during the election period is beyond any reasonable doubt.

197. It was pleaded in **paragraph 3A(k) and (n)** of the **Petition** that *'The supporters of the petitioner were subjected to endless and savage intimidation and violence malicious damage and arson before and during the elections by agents known to belong to 3rd Respondent some which led to various reports to police stations.....The electoral process in particular counting and rest of activities in the polling hall at Malili FYM and Kambini were interfered by the an authorized presence of area chief and Asst. chief who quarreled voters and intimidated agents.'* In **paragraphs 30 to 33** of his affidavit the **Petitioner** deponed that requisite police reports were variously made to the police including by **Collins Soita Khamala** and **Benjamin Luseti** and that there was a pending case in Kimilili SPM's Court. That, the **Petitioner** formally wrote a complaint letter to the **Returning Officer** on the widespread violence and terror by **Didmas** and his supporters and copied it to the police. He annexed a copy of the letter as Exhibit '**SKM-5**'.

198. During cross-examination the **Petitioner** stated that all incidents of violence and threats were reported to the police and several suspects were charged with election offences. However, neither the charge sheets were availed, nor the complainants testified in Court including one **Benjamin Lusweti** who had sworn an affidavit. The police were as well not summoned to assist the Court. The **Petitioner's** evidence remains the only evidence for consideration on the two grounds. With such evidence, the **Petitioner's** testimony narrows down to hearsay which cannot hold any of these two serious grounds. The grounds thereby fail.

(d) Other emerging issues for consideration: -

(i) Forms 33, 35A, 35 and the Polling Station Diaries: -

199. Counsel for **Didmas** submitted that the **Petitioner** did not raise any issues touching on Forms 33s and the Polling Station Diaries and majority of Forms 35A in his pleadings and affidavits and as such using the same in the determination of this Petition would be prejudicial to his client. Counsel relied on the decisions in **Mahamoud Muhumed Siret vs. Ali Hassan Abdirahman & 2 others (2010) eKLR, Hove vs. Gumbo (HC 7752/2002 High Court of Zimbabwe – unreported), Charan Lal Sahu & Others vs. Singh (1985) LRC(unreported), Quinne-Leandro vs. Jonas Maginley AG 2010 CA 8, John Waweru Kiarie vs. Beth Wambui Mugo & 2 others EP No. 13 of 2008 (unreported), Gerald Khoacheke & Others vs. Attorney General CIV/APN 237/96 and Dickson Daniel Karaba vs. John Ngata Kariuki & 2 Others (2010) eKLR** in buttressing that argument.

200. The **Petitioner** on his part relied heavily on the documents in issue and went ahead to 'unearth' what he described as massive irregularities in the said documents and even in other Forms 35A for other polling stations rather than those named in the Petition and the affidavits. **IEBC** and the **Returning Officer** did not address themselves to the issue.

201. I believe to have dealt with this issue substantively under the rubric '**the effect of interlocutory applications**' wherein I also looked at the exercise of the inquisitorial jurisdiction by an election Court. As a way of emphasis, my position remains clear that any issue which is not specifically pleaded in the Petition and supported by admissible evidence even if it comes up during the hearing of the Petition cannot form the basis of determining a Petition. Likewise, any documents obtained and/or used during the hearing can only go to the extent of proving the allegations already pleaded in the Petition but cannot be a basis of introducing new or further issues. A party which wishes to rely on any new matters must formally so request by way of an application otherwise such a party will be unfairly riding on an 'amended Petition' through the back door. That will be prejudicial to the other parties.

202. In this case the **Petitioner** sought for and was granted copies of all Forms 35A, 35B, 35C, Polling Station Diaries and Forms 33 vide the ruling of this Court delivered on 23/10/2017. Whereas in making the orders I remarked in **paragraph 30** of the said ruling that *'the second issue is that Form 35B is an aggregate of the contents of all Form 35As. That means for one to authenticate or verify the contents of*

Form 35B there is need to access all Form 35As as well as Form 33s. The third issue relates to the contents of polling station diaries under **Regulation 73** of the **Regulations**. The contents thereof have a direct bearing on the contents of Form 35As, Form 35B and Form 33s' it remains that the relevance of any of the said documents goes to whether the issue sought to be proved is already part of the Petition and not otherwise. It must also be understood that the grant of the documents is not in itself an open cheque to use any of their contents at will. The relevant contents are only those which touch on the disputed issues already before Court. A party must always remain alive to the foregone legal confines. As opposed to not granting the order for supply of the documents when made by a party, I take the position that it is fair and just to avail the documents since they can assist in the general preparation of the matter unless it is rationally and reasonably demonstrated otherwise. As also said the documents may assist the Court in its inquisitorial jurisdiction.

203. It seems that the **Petitioner** did not act with that caution in mind on receipt of the documents. He spent a considerable period in venturing into new 'revelations in the documents'. Such an exercise, despite its magnitude and revelations, did not aid the **Petitioner's** case or at all. That is the reason why this Court only limited itself to the documents which touched on matters which were pleaded in the Petition and deponed to in the affidavits while considering the grounds in support of the Petition. As such the Court concurs with the submission by the Counsel for **Didmas**.

(ii) The 'Mini-Scrutiny': -

204. The **Petitioner** dubbed the exercise of retrieving the Forms 33 from the ballot boxes as a 'mini-scrutiny'. That exercise was not a scrutiny at all. It was such a simple exercise for retrieval of the forms and whose mechanics were clearly defined in order (c) of the ruling. I have perused the **Report** by the **Deputy Registrar** dated 10/11/2017. The methodology as captured in **paragraphs 4 to 7** inclusive was in line with the order of the Court. For accountability and transparency, it was indeed for the Deputy Registrar to indicate the serial numbers of the seals found on each ballot box before the opening and the serial numbers of the new seals affixed after the retrieval. It was also for the Deputy Registrar to indicate the number of Form 33s found in each ballot box.

205. There are however instances where the Deputy Registrar exceeded the mandate donated by the order. For instance, the matters concerning Form 35As, the contents of Form 33s and the presence of the name of another polling station on the lid of a ballot box for a different polling station. To that extent **paragraphs 12, 13 and 14** are hereby expunged from the **Report** and the record.

206. There was also an issue which the **Petitioner** relied on heavily and although it is not part of the Petition I believe it's worth a consideration. It relates to the varying number of Form 33s in the ballot boxes. Be that as it may, even if the averment was made in the Petition I still do not think that the ground would hold. I have perused the forms and noted that the Presiding Officer was supposed to record the votes counted in rows of 50s. That reasonably explains what the **Returning Officer** stated that some Presiding Officers interpreted that instruction to mean that a fresh Form 33 was to be used for each bunch of 50 counted votes and accounted for more than 13 forms in some boxes. I have equally confirmed that in those cases where there were more than 13 forms or where a candidate had more than one Form 33 the forms were filled in counts of 50s.

207. As to the less number of the forms there are two reasons which I find plausible. One, in instances where a candidate did not garner any vote some Presiding Officers did not see the need to prepare the form and two, some forms were not inserted in the ballot boxes but were physically delivered to the **Returning Officer** at the tallying centre and that they were held as '**Non-strategic materials**'.

208. I must state that there is no legal requirement that Forms 33 must be inserted in the ballot boxes. **Regulation 81** of the **Regulations** lists what must find its way into the ballot boxes and Form 33 is not one of them. Whereas there is no problem in placing the said forms in the ballot boxes there is equally no problem in not placing them inside the ballot box if they remain accounted for. Further, the **Petitioner** did not raise the issue of missing Forms 33 after the retrieval exercise for Court's further directions and as such he is estopped by dint of **Section 120** of the **Evidence Act** from taking that route as there is evidence

that there were some other forms that were not placed inside the ballot boxes. Had the **Petitioner** raised the issue the Court would have squarely dealt with it but the applicability of the said forms would remain as laid down herein before. I will rest the issue there.

(iii) Whether the performance of IEBC and the Returning Officer was questionable: -

209. The Petitioner pleaded in **paragraph 3A(m)** of the **Petition** that *‘The performance of 1st and 2nd Respondents were questionable and failing below average and the same officers failed to give relevant for 35 to the petitioner and his agents for scrutiny despite several requests for the same.’* In **paragraph 35** of his affidavit the Petitioner deponed that *‘the role of 1st and 2nd Respondents have been partisan as evidenced by my numerous notices for productions which have gone unheeded. See annex ‘SKM 7 (a) (b).’*

210. **IEBC** and the **Returning Officer** denied the allegation and contended that they carried out the election within the confines of the **Constitution** and the law. **Didmas** as well denied the allegation.

211. The **Petitioner’s** contention is therefore that he requested for some documents from **IEBC** and the **Returning Officer** but the same were not availed. The issue was dealt with in the ruling of this Court delivered on 23/10/2017. That aside, **IEBC** and the **Returning Officer** stated that all the documents were all along in the official **IEBC** portal and the **Petitioner** was at liberty to access them. In any event the documents were availed, and the **Petitioner** has not demonstrated how his request for the documents, which came after the declaration of the results by the **Returning Officer**, affected the performance of **IEBC** and the **Returning Officer** and how that non-performance either contravened the **Constitution** and/or the electoral law or how it affected the result of the election. The ground fails.

(e) Costs: -

212. Pursuant to **Section 84** of the **Act** costs follow the cause and an election Court can award such costs. The Court’s jurisdiction is further provided for under **Rule 30** of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017** where in making an order for costs a Court may specify the total or maximum amount payable and the person from whom the costs are payable. The Court may also make orders on costs in respect to specific instances during the matter. Costs can also be taxed in the event the Court does not determine the issue.

213. Costs ought to be adequate to compensate the work done on one hand and not to be so high as to unjustly enrich the parties or cause unwarranted dent on the public purse or injure the body politic by undermining the principle of access to justice as enshrined in **Article 48** of the **Constitution** on the other hand. (**Kalembe Ndile and Another vs. Patrick Musimba and Others (2013) eKLR**).

214. All Counsels unanimously prayed for an award of Kshs. 10,000,000/= either way the matter is determined. The Petition was relatively not complex and apart from the single interlocutory application the hearing went on without any unnecessary interruption. A total of 23 witnesses testified and their evidence is on record. I have noted the nature and quality of the submissions tendered and decisions relied on and there is no doubt that a lot of considerable time and research was employed in the preparation of the pleadings, the application and the submissions further to the preparation of the witnesses and the hearing.

215. I have also considered comparable decisions on costs including **Kisumu High Court Election Petition No. 1 of 2017** where an award of Kshs. 5,000,000/= was made to be shared between the Respondents; **Dickson Mwenda Kithinji vs. Gatirau Peter Munya & 2 others (2013) eKLR** where a total award of Kshs. 5,000,000/= was made and in **Kakamega High Court Election Petition No. 11 of 2017 Hamzah Musiri Kevogo vs. IEBC & 3 Others** where an award of Kshs. 3,000,000/= on each set of the Respondents was made. Although the decisions are on gubernatorial petitions I have read them and found that the matters were conducted in similar manner as this Petition. I therefore find that they serve as a good guide on the aspect of costs.

216. From the foregone and in consideration of this Petition I find that a total award of **Kshs. 6,000,000/=** on instruction fees is adequate.

Conclusion: -

217. As I come to the end of this matter I am satisfied that the election was conducted within the Constitution and the law and that the few irregularities which were proved did not affect the result of the election. However, there is need for **IEBC** to offer more and adequate training to its officers especially the Presiding Officers and the Polling Station Clerks in the discharge of their various duties. Equally, there is need for the political parties and independent candidates to offer adequate training to their agents.

218. I also wish to express my sincere and immense gratitude to all the Counsels who appeared in these proceedings for the courteous manner they conducted themselves in and the well-researched submissions, both oral and written, and the authorities referred to which I have found truly useful. If I have not expressly referred to any authority cited, that it is not out of disrespect or lack of appreciation for their industry.

219. Having patiently considered all the grounds in the Petition and found that none was proved as required in law, I now make the following final orders:-

- (a) The Petition be and is hereby dismissed with costs.**
- (b) The instruction fees for the 1st and 2nd Respondents are capped at Kshs. 3,000,000/= as well as the instruction fees for the 3rd Respondent which are capped at Kshs. 3,000,000/=.**
- (c) The total costs shall be taxed and certified by the Deputy Registrar of this Court.**
- (d) The Respondents shall equally share the security deposit upon the certification of the costs and the Deputy Registrar shall take into account the amount of money the 1st and 2nd Respondents were to pay in respect of the exercise carried out vide the ruling of this Court of 23/10/2017 if the amount remain unsettled.**
- (e) A Certificate of the determination of this Petition in accordance with Section 86(1) of the Elections Act, 2011 shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly.**

Those are the orders of this Court.

DELIVERED, DATED and SIGNED at BUNGOMA this 20th day of February 2018.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Mr. Ombito and **Mr. Savula** Counsels for the Petitioner.

Mr. Omwenga and **Mr. Oribó** Counsels for the First and Second Respondents.

Mr. Ndambiri and **Miss Wekesa** Counsels for the Third Respondent

Neuno– Court Assistant