



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MARSABIT
ELECTION PETITION NO. 1 OF 2017
(FORMERLY NAIROBI MILIMANI ELECTION PETITION NO.22 OF 2017
IN THE MATTER OF: ARTICLE 1(2), 3, 38, 81, 84 ,86 AND 87 OF THE CONSTITUTION OF KENYA
AND
IN THE MATTER OF:SECTION 76 OF THE ELECTION ACT (No.24 of 2011)
AND
IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)PETITION RULES, 2017, THE
ELECTIONS (GENERAL) REGULATIONS, 2012 AND THE ELECTIONS OFFENCES ACT (NO.37 OF 2016)
AND
IN THE MATTER OF:THE WOMEN REPRESENTATIVE ELECTIONS FOR MARSABIT COUNTY HELD DURING THE
GENERAL ELECTIONS CONDUCTED ON THE 8TH OF AUGUST 2017
BETWEEN
NASRA IBRAHIM IBREN.....PETITIONER
VERSUS
1. I.E.B.C..... 1STRESPONDENT
2. ARNOLD MUTWIRI NJABANI MARSABIT
COUNTY RETURNING OFFICER.....2ND RESPONDENT
3. SAFIA SHEIKH ADAN.....3RD RESPONDENT

JUDGEMENT

INTRODUCTION

On 8th August 2017 Kenyans exercised their Constitutional right to participate in electing their leaders.The independent Electoral and Boundaries Commission (IEBC) fulfilled its mandate and conducted the elections throughout the Country.The petitioner was the incumbent Marsabit County Woman member of the National Assembly.Upon completion of the election exercise, the 3rd respondent was declared the winner.The 3rd respondent garnered 41,019 votes while the petitioner got 35,340 votes.The voter turnout was 79.99%.There were 110,708 valid votes and 2,644 rejected votes out of 141,708 total registered voters in the county.Being dissatisfied with the outcome, the petitioner filed this petition.Initially the petition was filed in Nairobi but the Chief Justice on 15th September, 2017 vide gazette notice Vol.CXIX No.137, gazzetted the Marsabit High Court as the Election Court.

THE PETITION AND ITS GRIEVANCES

The Petition is dated 3rd September, 2017 and was filed on 7th September 2017. The petition tabulated the results of the election as follows:

NAME OF CANDIDATE	POLITICAL PARTY	NUMBER OF VOTES
Elizabeth Pius Pantoren	KANU	19,866
Safia Sheikh Adan	Jubilee Party	41,019
Nasra Ibrahim Ibren	Frontier Alliance Party	35,340
Amina Guyo Halake	Orange Democratic Movement	3,709
ChristineKoreya Seyere	MCCP	8,933
Farhiya Yarow Abdi	DP	690
Bernadetta Okutu Shama	PNU	1,151
Total valid Votes		110,708
Rejected Votes		2,644
Registered Votes		141,708
Voter Turnout		79.99%

The Petitioner contends that the 1st and 2nd respondents committed several electoral offences, irregularities and malpractices. The election as overseen by the two respondents was exceptionally flawed. The election did not comply with Constitutional provisions enshrined under Articles 1, 2, 10, 38, 81, 82, 84, and 99. The election also failed to comply with several statutory provisions. These include Sections 62, 73, 75(6), 79, 81 and 83 of the Election (General) Regulations, 2012, section 44 of the Elections Act, and Section 6 of the Election Offences Act, No.37 of 2016.

SPECIFIC IRREGULARITIES & MALPRACTICES:

(a) Laisamis Constituency

The petitioner listed the following complaints with regard to the election in Laisamis Constituency.

- i. Losikiriash Primary School polling station. Form **39B** gives number of rejected votes as 0 but the portal gives the number as 216.
- ii. Gatab Primary School polling station Form **39B** gives number of rejected votes as 2 votes but the portal gives **440** votes.
- iii. The total number of votes each candidate got is not indicated in the form **39B**. Only the overall total number of valid votes is stated.
- iv. Jaffar Galgalo who signed the form **39B** was not gazetted as the returning officer for the Constituency.
- v. The Petitioners' agents on account of not belonging to Jubilee party in an alleged Jubilee stronghold, were denied the right to fully participate in the elections both at the polling stations and Tallying centre as well as during the counting of the votes.

- vi. Assisted voters were coerced and assisted by presiding officers and made to vote in the absence of the party agents. Such voters were intimidated to vote for Jubilee party candidates.
- vii. Assisted voters who were accompanied by those who were to assist them were not made to fill the forms 32 as mandated by the law.
- viii. Presiding officers refused to ensure that the votes being counted were verified by the agents present.
- ix. Counting of votes was done with the aid of light from mobile phones after the provided lanterns had been switched off.
- x. The Petitioner's polling agents were denied the right for a recount when sought and the right to access forms 39As.
- xi. The returning officer was changed a few weeks to the elections upon the 3rd respondent's influence.

(b) Saku Constituency

- i. The Petitioner's agents were denied access to both forms 39As and Bs.
- ii. Marked ballot papers were found scattered around.
- iii. Assisted voters were coerced by polling officials into being assisted in the absence of party agents and coerced to vote for Jubilee party candidates only.
- iv. Petitioner's agents were denied the right to verify the counting and tallying of the votes.
- v. The results transmitted electronically to the portal differ substantially with the figures on the form 39B.

(c) Moyale Constituency

- i. The following polling stations had the number of rejected votes in the form **39B** different from the results on the portal

Ø Walensu Taka mobile

Ø Urah Nursery School.

Ø Anona Nursery School.

Ø Funan Dimo Mayatta centre

- ii. At Sololo Primary School polling station, the number of valid votes in form **39B** is **875** while the portal indicates **977**.
- iii. At Ramote Primary, the portal indicates the total valid votes as **168** whereas form **39B** indicates **173**.
- iv. In some wards, the petitioner's agents were chased away by closing the doors before counting began. This led to stuffing of ballots in the boxes for the 3rd respondent.
- v. In various polling stations, voters were denied the right to take part in the elections without cogent reasons.
- vi. Voters who were in the queue after 5.00pm were denied the right to vote but were instead chased away.
- vii. Some polling stations including Al-Huda, and Baraza Park opened late and closed early and voters who were on the queue after 5.00pm were chased away.
- viii. At Kinisu polling station, ballot papers marked for the petitioner were intentionally put in a ballot box for the member of County Assembly and marked as stray votes.

(d) North Horr

Mobile stations in the entire ward were converged in one place at Dukana Primary School instead of election being conducted at Bulluk, Arabtris, Kubi Adhi, Gof Dukana, Dibandiba, Dololo Boji and Elyibo.

The Petitioner contends that the above irregularities and non compliance with the law substantially and materially affected the results of the election. Out of 384 polling stations, 246 were discovered to have had a mismatch in the total number of votes cast for each of the six elections as follows:-

- i. 112,399 votes were cast for the presidential candidates.
- ii. 103,514 votes were cast for the women representative candidates
- iii. 108,948 votes were cast for the senatorial candidates.

The Petitioner further averred that in 25 polling stations, there is no data on the portal for the Women Representative position. These polling stations have a total of 9,490 votes.

Relief Being Sought

(a) A DECLARATION do issue that the Marsabit County Women Representative election was not conducted in accordance with the constitutional principles elucidated under Article 81 and 86 of the Constitution of Kenya and thus the free will of the Marsabit electorate was vitiated.

(b) A DECLARATION do issue that on account of the foregoing, the 3rd Respondent herein, SAFIA SHEIKH ADAN was not validly elected as the Women Representative of Marsabit County in the Women Representative elections held on the 8th August, 2017.

(c) A DECLARATION do issue that the Marsabit women Representative County Elections were so badly conducted and marred with non-compliance to statutory provisions, irregularities and improprieties that their irregularities substantially and significantly affected the results thereof.

(d) AN ORDER do issue directing the 1st and 2nd Respondents to organize and conduct a fresh Women Representative Election for Marsabit County in strict conformity with the Constitution and the Election Act and/or Election regulations.

(e) Costs of the Petition and any other order the honorable Court may deem just and fit to grant

1ST AND 2ND RESPONDENT'S RESPONSE TO THE PETITION

The two respondents denied committing any electoral offence or malpractice. The respondents maintain that the petitioner's contentions are unfounded, speculative, malicious, frivolous, vexatious and brought in utmost bad faith.

Laisamis Constituency

The respondents deny that there is any variance on the results on the portal and form 39B. The form 39B captured the primary results of votes cast and ultimately provide the accurate aggregate count. Mr. Jaffar Galgalo was initially gazetted as a returning officer for Isiolo North constituency but was transferred to Laisamis due to administrative and logistical challenges in Isiolo. The Petitioner's agents were allowed to fully participate in the electoral process. No voter was coerced to cast his/her vote in a particular way. Forms 32As for assisted voters were duly filled. It is further stated that no accredited agent was denied the opportunity to verify the votes cast or participate in the counting process. The counting was done in rooms which had sufficient light. No request for a recount was made by the petitioner's agent.

Saku Constituency

The Petitioner's agents were not denied the forms 39As' or Bs'. No accredited agent was denied the right to verify the counting and tallying of votes.

Moyale Constituency

The two respondents deny any variance between the results on the portal and those on the form **39B**. There was no ballot stuffing that took place. No voter was turned away who was on the queue after 5.00pm.

North Horr

The merging of mobile stations in Dukana ward is denied. It is further stated that even if there was merging of the mobile stations, the same did not affect the outcome of the tally.

RESPONSE BY THE 3RD RESPONDENT

The 3rd respondent maintains that the Marsabit County Women Representative Elections conducted on 8th August, 2017 was free, fair, transparent and was conducted in accordance with both constitutional and statutory provisions. The 3rd respondent was declared the winner and the Petitioner was the runner up. There is a difference of 5,677 votes between the two parties. The electronic transmission of the votes was properly done.

Laisamis Constituency

It is stated by the 3rd respondent that the statutory forms are the basis for the declaration of the results and not the contents of a portal or website under Regulation 87 (General) Regulation, 2012. The results for Losikiriash Primary polling stations and Gatab Primary School polling station are clearly stated in the forms **39A's**. All the results from the polling stations were tallied in the presence of the petitioner's agents. The returning officer for the constituency was duly gazetted. No one was coerced to vote for the 3rd respondent. No party accredited agent was denied the right to participate in the electoral process.

Saku Constituency

It is contended that no one was coerced by the presiding officer to vote for the 3rd respondent. No election malpractice was committed. The primary data is contained in forms **39A's, 39B** and **39C**.

Moyale Constituency

The 3rd respondent maintains that the portal is not a primary source of transmitted results from the polling stations. The results for Urah Nursery School streams 1 & 2 are indicated in the respective form **39A's**. The results for Anona Nursery school for both streams have been provided. The form 39A for Funan Dimo Manyatta polling centre provides the correct results. The same applies for Ramote Primary school polling station. No one was denied the right to vote.

North Horr

None of the voters in the mobile polling stations were disenfranchised. The 3rd respondent tabulated the results in the mentioned mobile polling stations as follows:

DATA AS PER FORMs 39A

CODES	POLLING STATIONS	REGISTERED VOTERS	ABDI FARIYA YARROW	ADAN SAFIA SHEIKH	HALAKE AMINA GUYO	IBREN NASRA IBRAHIM	PANTOREN ELIZABETH PIUS	SEYERE CHRISTINE KOREYA	SHAMA BERNADETTA OKOTH	VALID VOTES	REJE VOTE
006-1	Of Bulluk AP Post	100	0	0	2	38	6	0	1	47	0
005-1	of Arabrtris AP Post	83	1	0	0	40	4	2	1	48	0
015-1	of KubI Adai Dam	229	0	1	0	125	37	9	1	173	0
017-1	of Golf Dukana	162	1	1	0	79	34	2	2	119	0
008-1	of Dibandiba Manyatta	207	0	1	2	12	28	1	2	146	0
016-1	of Dololo Boji Manyatta	281	3	3	0	151	34	5	3	199	0
002-1	of Elijibo Water Hole	172	3	2	0	78	13	3	0	99	0

Petitioner's Evidence

Eleven witnesses testified for the petitioner. The Petitioner testified that she relied on the information transmitted to the public portal by the 1st and 2nd respondents to get the election results. She did not get access to the statutory forms. All her agents were denied the forms 39As. She was not given the forms 39B's for North Horr and Saku. She was also not given the form 39C. She found out that some candidates were given the statutory forms.

It is the petitioner's evidence that the election was not free and fair. It was a total sham. Twenty five polling stations had no data entered on the portal. These polling stations are:-

MOYALE – SOLOLO WARD

Madoadi Primary School, Sololo Women group, Gudlogo, Sololo Madrasa Hellu Manyatta Ward, Manyatta Burji Madrasa 1 & 2, Hellu Nursery School, Hellu Social Hall, Moyale Girls Secondary School, Moyale Primary School, Karbuni Primary School, Hambalo dispensary, Huga Mobile station.

NORTH HORR

Yaralgana polling station. Elgade primary, Chalbi primary, Sarima Manyatta, Darade AP Post

SAKU CONSTITUENCY

Dugindole nursery, Taana Intergrated Madrasa

LAISAMIS CONSTITUENCY

Kurkum Primary school, Koros Water point, Ngurnet Primary School, Elbaro Primary School, Merile Primary school

The petitioner testified that six polling stations recorded a higher number of voters compared to the registered voters as indicated in the table below.

POLLING STATION	REGISTERED VOTERS	VOTES CAST
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Anona Nursery– Moyale Constituency.	156	256
Urah Nursery	414	755
NorthHorr Primary school –	648	1108
Malabot primary school (North Horr)	450	812
Gatta Primary school – Laisamis	440	809
Losikiriashi Primary school, Laisamis,	216	411

It is the Petitioner’s evidence that there is mismatch in 246 polling stations for the six different elections on the portal as indicated in the petition. The results were transmitted electronically and she relied on the results on the Portal. In some polling stations, the results on the portal are different from those on the statutory forms. These polling stations include Losikirachi Primary school, Gatab Primary School, WarsuTaka mobile, Urah Nursery school, Anona Nursery school, Sololo Primary school, Ramuite primary school. The form 39B for Moyale constituency was not signed by any agent. The form 39B for Laisamis was signed by someone not authorized as a tallying agent for the petitioner’s party.

The petitioner contends that her agents on account of not belonging to Jubilee party were denied the right to participate in counting and tallying the votes. They were also denied the right to participate in assisting those voters who required assistance. Assisted voters were coerced to vote for Jubilee candidates in all the six polls. Some voters were issued with multiple ballot papers. In some polling stations which are her stronghold such as Baraza Park and Al Huda primary school in Moyale, the polling stations were opened late and closed early. The petitioner further testified that the respondent’s agents were biased and partisan. In some polling stations, voters were turned away and told the time was over. Other voters were denied the right to vote as could not be identified by the Kiems Kits. Some voters were told to buy versaline and go back for them to be identified by the kits. After the court ordered the preservation of the election materials, some ballot boxes had no seals or the seals were broken. Some boxes had their lids interchanged.

According to the petitioner, the elections results are declared at the County level but the portal should indicate the same results. The statutory forms are the primary documents. At Al Huda Polling station, a polling clerk advised voters to vote for Jubilee candidates. The form 39C used to declare the results is fake.

The petitioner further testified that she vied for the Marsabit Women member of National Assembly Representative on a Frontier Alliance Party ticket (FAP). Voting took place in the mobile polling stations. Some of the ballot boxes were found to be intact during the preservation of election materials exercise.

PW2 JOHN LOTTO SEGALAN was a Senatorial candidate for Marsabit County during the 8th August, 2017 election. He vied for the position on a FAP ticket. He testified that on the voting day he did cast his vote at Loglogo Nursery school polling station. He visited other polling stations where he found that the entire voting process was very slow. The polling stations he visited are Korr Primary School, Bulah Primary school, Tirrim Primary School, BurriHarrima and Sunyuro mobile stations, Nomad primary school and Halisirwa mobile polling station. Due to the slow nature of the polling exercise, some voters returned to their home without voting.

PW2 further testified that he went to the constituency tallying centre at Laisamis at 9.00pm. The returning officer, Jaffer Galgalo, allowed those present to introduce themselves. The returning officer then started announcing the results from a piece of paper. He asked him why the results were not being displayed on the screen. Results from some polling stations started being brought to the tallying centre but were not accompanied by the party agents. PW2 and the party’s chief agent complained to the returning officer but he ignored them. The returning officer told them “***Kama hamtaki muende***”- **You can leave if you want**”. PW2 left the tallying centre and told the returning officer “***see you in Court***”. PW2 lost the senatorial seat. The Returning officer allowed the agents of Political parties at the tallying centre. Only the

Presidential results were being displayed on the screen. He asked the returning officer to allow him make copies of the papers he was using to announce the results but he refused. All what he wanted was to confirm what the returning officer was reading from.

PW3 HASSAN MARSA SARBO is a resident of Marsabit. He was the running mate for Honourable UKUR YATANI KANACHO who was the incumbent governor and was defending his seat. On 8.8.2017 he did cast his vote at Manyatta Primary School in Manyatta/Helu ward, Moyale Constituency. He later visited St. Mary's primary school polling centre where he found about 30

People outside the polling station. He was told that the presiding officer had not allowed them to vote on the basis of unfounded allegations that their names were not on the voters' register. He was shown the voter registration slips by those who had been barred from voting. He visited Fatul Bahr Madrasa polling stations and observed a similar situation. He proceeded to Khulafa Rashidin Primary school Polling centre and found about 20 people who informed him that they had not been allowed to vote yet they had not undergone the identification process through the Kiems Kit.

PW3's further evidence is that he prepared a list of about 38 people from manyatta/Helu ward who had not been allowed to vote. He went with them to the Moyale Constituency tallying centre and presented their issues to the Constituency Returning officer. The Returning officer took them through the voting process but ignored the issue of those voters who had been denied their right to vote. P3 believes that those voters were from Honourable Ukur Yattani Kanacho's strongholds and majority of them were his members. At Baraza Park polling centre, a huge number of voters was denied the right to vote on the ground that the voting period had ended despite the fact that the voters were already on the queue.

PW3 also testified that he took the list of the 38 people to the tallying centre while the voting exercise was on-going. He did not check the voters' register. He did not send a short text message (sms) to the IEBC number 7000 to confirm if the 38 people were registered voters.

PW4 HUSSEIN ISSA WOCHE hails from Hellu ward in Moyale Constituency. On 8.8.2017 he went to Fatul-Bahr Madrasa polling station at 4.00am. He was registered as a voter at that polling station. He was allowed into the polling centre at around 7.00am. The presiding officer took his voter's card and told him to wait. He stayed there upto 1.00pm when he was given his voter's card back and chased away. He ended up not voting. While at the polling station, PW3 went there. His name was checked in the Kiems Kit and was told to wait. He was denied his right to vote.

PW5 SHARU AYALA GHACHO comes from Hellu ward in Moyale Constituency. His evidence is similar to that of PW5. On 8.8.2017 he proceeded to Fatul Bahr Madrasa polling centre where he was registered as a voter. His voter's card was taken and was made to wait upto 1.00pm. He was later given his voter's card and chased away. The returning officers was questioned but he became arrogant. He was not the only one who could not vote. Those who were denied their right to vote started screaming. The Police were called to the polling station. During cross examination by Mr. Muganda, the witness sent his identification number to the IEBC verification number 7000 and the response was that "*No records found*".

PW6 DAVID GAMALE SHAMO resides at Hellu ward in Moyale Constituency. He also went to Fatul Bahr Madrasa polling station on 8.8.2017 at about 4.00am. His voters card was taken and was told to wait until 1.00pm when he was given back his voter's card and chased away. The returning officer was arrogant and blamed it on technicality and lack of time. The voting clerks checked his documents but returned his documents.

PW7 ADAN MAHULO SHAME comes from Hellu Ward in Moyale Constituency. On 8.8.2017 he went to St. Mary Primary School polling station where he is a registered voter at 4.00am. The presiding officer took his voter's card and told him to wait. He stayed there upto 1.00pm when he was told he could not vote. He was given back his voter's card and chased away. The returning officer became arrogant and blamed it on technicality and lack of time. He had also his registration slip. He was registered as a voter in January, 2017.

JULIUS LEKOROLE was the Petitioner's eighth witness. He was a Chief agent for the Frontier Alliance Party and was stationed at Laisamis Constituency tallying centre. On the voting day at about 8.20am, he received a telephone call from one of their agents. He was told that at Loiyangalani polling centre stream one, the Presiding Officer, Mr. David Lotabo was insisting on filling the ballot papers for assisted voters even when the voters had their own people who could assist them. The Presiding officer tore a form **32** that had been filled by one Francisca Ngoti Koope while assisting her grandmother. PW8 reported the incident to the Returning officer, Mr. Jaffer Galgalo. He also sent Mr. Galgalo a text message on the complaint. The messages were printed out and annexed to his affidavit.

PW8 further testified that he went to the tallying centre. While at the tallying centre he received phone calls from the party agents that they were denied copies of forms **37A's and 39As**. Once again he reported the incidents to the Returning officer. The Returning officer started reading out the results. After reading the results of five polling stations, he requested him to use the projector in the room to display the form **39A** or at least hold the form so that the agents could see the results. Together with PW2, they complained but the returning officer told them "**Kama hamtaki muende**". He chose to get out of the tallying centre and told the returning officer "**see you in Court.**" PW8 later learnt that the form **39B** had been signed on his behalf by one of the party agents, **DOMINIC DABALEN** who was stationed at Laisamis Primary school polling station. According to PW8 there were other party agents at the tallying centre. He voted at Loglogo Catholic hall at around mid-day.

PW9 DAUDI KIFILE DARCHE was an agent for FAP at Saku polling station in Saku Constituency. Polling went on at the station upto around 9.00am when there was confusion. One voter was told she was in the wrong stream and was directed to go to the other stream. There were two streams. The Presiding officers for the two streams, **JAMES NAWA** and **JILLO BIDU** chased away voters. While voting continued, despite the assisted voters adequately describing a candidate, they were required by the Presiding officer to further state the candidate's name/or the political party and point at the candidate's picture. If an assisted voter favoured the Jubilee Presidential candidate, the Presiding officer ticked all the other ballots in favour of Jubilee candidates. PW9 further testified that he spotted voters who were given extra ballot papers for the positions of Governor and Women Representative. He also saw voters being given money by a group of people whom he believed were agents of the 3rd respondent. At about 7.00pm, about 15 voters who were not in the queue walked to the station and were allowed to vote yet it was past the statutory period. He does not know the names of those who were assisted to vote. His witness affidavit was sworn on 3rd September, 2017. They were allowed to witness assisted voters casting their votes. He signed the form **39A** for stream 2. He did not have a problem with the voting. The witness confirmed that the results contained in the form **39A** were correct. His other party agent signed the form **39A** for stream 1.

PW10 SAMUEL NJUGUNA MWANGI is a Nakuru based businessman. He was the Chief agent for Thirdway Alliance

Party during the August, 2017 election. On that day in the evening he went to the Laisamis Constituency tallying centre. He witnessed exchange of words between the Returning Officer and John Lotto Segelan who was with FAP Chief agent Julius Lekorole. The two asked the Returning officer to allow them photocopy the forms that were being used to announce the results or project the forms on the screen. The Returning officer refused and told them to go. PW10 used his phone to take a video of the exchange of words. He later produced a CD on the

scuffle. The words “**Kama Hamtaki Muende**” are not in the video.

PW11 DR. NOAH AKALA ODUWO is the deputy director of campaigns and elections for the orange Democratic Movement Party (ODM). He is a Medical doctor as well as a qualified statistician. He testified that during the hearing of the Presidential Petition No.1 of 2017, **RAILA AMOLO ODINGA & ANOTHER V THE IEBC & 2 OTHERS**, at the Supreme Court, the Petitioners were granted read only access to the IEBC’s server for purposes of scrutiny into the result transmission process. He was in the petitioner’s team which assisted in the scrutiny. In the process of accessing the information, he got data relating to the Marsabit County Women Representative. According to him, from the data obtained in the servers, the Women Representative elections for Marsabit County were done in a manner that grossly violated the Constitutional Principles of free, fair, verifiable, Credible and accountable elections to the effect that the free will of the Marsabit County residents was vitiated.

PW11 testified that the Kiems Kits were used to transmit the election results electronically. The Kiems Kits contain a File Transfer Protocol (FTP) server. Once the results are transmitted through the use of the Kiems Kits, they go to the Results Transfer Server (RTS) located at the IEBC offices. The results would then be beamed on the public online portal which can be accessed online. The entire process is complete within seconds. He got the information for Marsabit County after copying the IEBC logs from the file Transfer server. The logs were provided to them in soft copy.

PW11 testified that in six (6) polling stations, there were more votes than the registered voters. Those six stations exceeded the maximum 700 voters for a polling station. It is his evidence that at Butiye polling station 172 voters voted for the president but did not vote for the women Representative. Twenty five (25) polling stations had no data for the Women Representative. The public portal had results but the servers had no results. The effect of that anomaly is that the results on the portal did not come from the Kiems Kits. There were 246 polling stations which had a mismatch in the total number of votes cast for each of the six elections.

PW11’s further evidence is that the results for Women Representative are declared on the basis of the statutory forms namely **39A’s, 39B’s** and **39C**. The public Portal showed that the 3rd respondent was the winner. The declaration of the results are made at the County Tallying centre. The results from the polling centres are taken to the constituency tallying centres for announcement. During cross-examination by Mr. Muganda, the witness testified that the four annexures in his affidavit which indicate the anomalies in the election results have no IEBC mark or certification.

1st and 2nd Respondents’ Evidence

Five witnesses testified for the two respondents.

DW1 JASON MBUGUA KURIA was the Returning officer for Moyale Constituency. He declared the results for Members of County Assembly (MCAs) and National Assembly (MP). He did this after tallying the results in the statutory forms **39As**. There was no difference in rejected votes between the forms and the portal. All the registered voters who turned up were allowed to vote. No voter was told to wait or turned away. There were no reports made to him that voters had been turned away. He received all the forms **39As** from the 136 polling stations in Moyale Constituency. After tallying the results, he transmitted them to the County returning officer. His form **39B** contains the results from the polling stations.

DW2 JAFFAR GALGALO was the Returning officer for Laisamis Constituency. His role included Supervision of the conduct of elections and announcement of the results for Members of County Assembly and National Assembly. Gatab Primary School and Losikiriash Primary School had polling stations. The two polling stations had no difference in rejected votes between the portal and the forms **39As or 39B**. He is the one who declared the results at the Constituency Tallying centre on the basis of final tally of all the forms **39As**. He did not use the results that were transmitted electronically to the IEBC offices at Bomas of Kenya National Tallying Centre.

DW2 further testified that he was initially gazetted as a Returning officer for Isiolo North Constituency before being transferred to Laisamis Constituency. The allegations that a Presiding officer at Farakonen Primary School polling station influenced voters was not reported to him. No incidents of voters being chased away was brought to his attention. The 3rd respondent was declared the winner and this was done on the basis of tallying of the results from the statutory forms.

DW2 informed the Court that he received all the forms 39As from Laisamis Constituency. At the tallying centre there was a register for the party agents to record their names and access the centre. He did not chase away any agent from the tallying centre. The elections were conducted in a free and credible manner. He prepared the form **39B** but did not give the totals for each candidate at the end. The agents are given the form **39As** at the polling centres.

DW3 JUSTUS MWANZA NZOMO was the Returning officer for Saku Constituency. All the polling stations were prepared and opened on time. The voting process went on without any hitches. The petitioner's agents were not denied access to either forms 39A's or 39Bs. No other forms apart from the IEBC forms were used in the elections. It is his further evidence that the allegations that marked papers were found on the floor are not true. There was no discrepancy on the results in the forms and the Portal. He signed the form 39B after tallying the results. Voters were identified using the Kiems Kits. Other identification methods were used where the Kiems Kits failed. The turn out in the Constituency was 80.6%. 21,832 out of 27,082 registered voters did cast their votes.

D.W4 ABDIRASHID ADISOMO was the Presiding officer at Farakoren Primary school polling station in Laisamis Constituency. The station was opened for voting at 6.00am. Two voters, Francis Lesas and Luka Lekana voted using the polling booths. Francis Lesas did not make any enquires from him on the set up of the polling station. No party agent left the polling station to go out and influence voters. He denied marking ballot papers in favour of Jubilee party candidates in the absence of party agents. He assisted illiterate voters in the presence of party agents. The instruction was that none of the party agents was to speak to a voter. Once an assisted voter picked his/her choice. He would call the party agents to hear the voter's choice and he would proceed to mark the ballot.

DW5 ARNOLD MUTWIRI JABANI was the County Returning officer on 8th August, 2017. He received all the results from the **384** polling stations that were collated and recorded in forms **39As**. He also received all the forms **39Bs**. The Petitioner got **35,340 votes** while the 3rd respondent got **41,019 votes**. No election irregularities were reported to him. The winner was declared using the statutory forms and not the results on the portal. He had to wait for all the forms to be sent to the County tallying centre. The Constituency Returning officer tallied the results in the forms **39As** and prepared the forms **39Bs**. Upon receiving the forms **39As** and **39Bs**, he started re-tallying the results from the forms **39As** and prepared the form **39C**. He declared the results on 11.8.2017. Two Party agents signed the form **39C**. These were **Hussein Malicha of Kanu** and **Halake Wako of Jubilee**.

It is DW5's evidence that he used the forms 39As to key in the results in the form 39C. He received all the forms 39A's. He is not allowed to amend the results from the polling stations. The IEBC policy during the election was that voters were to be identified using the Kiems Kits. The cancellation of the names of voters after having cast their votes on the register was done away with as someone could pick a ballot paper, mark it and put it in the ballot box and cancel a voter's name without the voter being present. Kiems Kits shows those who voted and the time they voted.

Evidence for the 3rd Respondent

The 3rd respondent had ten witnesses including herself. **DW6 BENJAMIN NJURIA LOTOROBO** was a Jubilee Party agent at Loiyangalani primary school polling station. His evidence is that the Presiding officer at the polling station did not insist on filling ballots for assisted voters. The Presiding officer assisted such voters but in the presence of the Political parties' agents. The Presiding officer would ask

the assisted voter about his/her preferred candidate. He would then place the ballot on a table in the presence of all the party agents and mark the preferred candidate. A form 32 was also signed. DW6 also testified that the agents signed the form 39A and were issued with copies. The assisted voters were accompanied by their relatives. Even those who did not have relatives with them were assisted.

DW7 MICHAEL LOGIMANE LESAIGOR was a FAP agent at Farakoren primary school in Laisamis Constituency. The polling station was open on time and there were polling booths. Francis Lesas is known to him and he voted at 6.30am. He left the station until 4.00pm when he returned. The FAP agents at the station signed the form 39A and were given a copy. The presiding officer assisted the illiterate voters. The agents stood behind the Presiding officer as he assisted the illiterate voters.

DW8 WARIO ROBA BARIRE was a Jubilee party agent at Saku Primary School polling station. It is his evidence that voters who were on the wrong stream were guided to the proper stream. He was in stream 1. The Presiding officer James Nawe, assisted illiterate voters. He did not sign the form 39A. He is a teacher by profession. His colleague signed the form 39A.

DW9 OMAR ABDI DANDO was a Jubilee party agent at St. Mary's Primary school polling station. There were around seven (7) Political Parties Agents. The voting exercise went on very well and the votes were counted. He is a University graduate. He signed the form 39A and gave it to his party Chief agent.

DW10 MOHAMED GALGALO GUYO was a Jubilee party agent at Al Huda Polling station in Moyale Constituency. His evidence is that each party was required to have two agents. No agent was sent away from the polling station. No voter was turned away or stopped from voting. The FAP agent signed the form 39A.

DW11 ABDILATIF MOHAMED AGA was the Jubilee Party Chief agent for Moyale Constituency. He visited other polling centres to witness the voting. He was stationed at the tallying centre. It is his evidence that the first ten people on the list provided by Hassan Marsa Sarbo (PW3) are not registered voters as per the polling register. His party agents at the polling stations did not report to him any complaints. He also sent messages to the IEBC number 7000 and found that those on PW3's list are not registered voters.

DW12 BARU DAHAROWA CHANA was a Jubilee party agent at Farakoren primary school polling station. The Presiding officer, Rashid Adisomo assisted illiterate voters in the presence of all party agents. Voting started at 6.00am. He did not see any voter being denied the right to vote. Majority of the voters were assisted.

DW13, HUSSEIN BURJE SAGO was a Maendeleo Chap Chap Party agent at Saku primary school polling station. No voter was chased away for being on the wrong stream. Such voters were directed to the correct stream for voting by the electoral officials. The Presiding officer assisted illiterate voters. The agents witnessed the process of assisting illiterate voters. No one complained of voter bribery. They were allowed to sign the form 39A. The party agents were given the form 39A. He was in stream 1. He saw the Presiding officer taking a photograph of the form 39A and sending the form electronically. If the party agent is interested in the poll for a governor or senator, he will only sign that form and may not sign the forms for the other polls.

DW14 JAMES PETER KABARE is a Microsoft certified Technician. He is a qualified I.T. specialist dealing with computer hardware, software, networks and telecommunications. His evidence is that if a log file is accessed, it will indicate who accessed the server, the profile of the person and the time of access. The documents annexed in PW11's Affidavit do not contain such information. Anyone with computer

skills can go to excel and produce what PW 11 Dr. Noah Akala has produced. He has twelve years' experience in Information Technology.

DW14 further testified that the IEBC provided pre down loaded logs in a hard disk. The petitioners in the Presidential election just viewed the logs. The primary information for the elections for Women Representatives were the forms **39As**, **39Bs** and **39C**. The source of information for documents retrieved from a server is normally shown at the top or bottom of the printed document.

DW15 HALAKE WAQO HALAKE was the Marsabit County Chief agent for Jubilee Party. No complaint was lodged against any Jubilee party agent. He was present when the results for Women Representative were announced at the County tallying centre. No agent raised an issue with the announced results at the County tallying centre.

DW16 HON. SAFIA SHEIKH ADAN is the 3rd respondent. She was elected as the Women Representative in Marsabit County. She was in Jubilee Party. The County tallying centre was at the Catholic Mission Hall in Saku Constituency in Marsabit Town. She got 41,012 voters. The County Returning officer used the form **39C** to declare her as the winner. She gave a speech after she was declared the winner. She was issued with a copy of the form **39C**. She was validly elected as the Women Representative for Marsabit County. The Petitioner got 35,335 votes. The data contained in the form **39C** is correct. There were seven candidates for the position of Women Representative. According to her, the elections were free and fair. She was validly elected.

Petitioner's Submission

Mr. Walukwe relied on his written submissions dated 8.2.2018. Counsel submit that the petition has raised several issues. The 1st and 2nd respondent did not carry out the election in accordance with the law. The 1st issue to be dealt with is what is the burden of proof in election petitions and to what standard should the burden be discharged. It is submitted that the petitioner has discharged her burden of proof and that burden shifted to them. Respondents counsel relied on the case of **Raila Odinga V four others; S.C. petition No.5 of 2013 as (consolidated with Petition No.3 &4 of 2013)** In that case the Supreme Court stated as follows with regard to the issue of burden of proof.

“A petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question.”

Counsel also relies on the case of **Raila Odinga and another V IEBC and 4 others & Attorney General & another; Supreme Court Petition No.1 of 2017** which affirmed its initial holding in the following terms

“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.”

Mr. Walukwe further submit that there is an issue involving witness affidavits which are filed contemporaneously with election petitions. Such affidavits constitutes parts of the pleadings. The petitioner while filing the petition filed a total of 14 affidavits out of which 10 witnesses testified. There is the affidavit of Dr. Noah Akala (PW11) which the respondents failed to respond to yet it contains averments on specific polling stations. The issues of mismatch in the election results were pleaded in the petition and supported by an affidavit. No response was made to those allegation and no request for further particulars was made. The court is therefore duty-bound to determine whether the allegation by the petitioner was specifically responded to. Counsel relies on the case of **Dickson Mwenda Kithinji V Gatirau Peter Munya where the** Court of Appeal had this to say on the issue of affidavit filed together with the pleadings.

“In Plott – V The Acasia Company Ltd (1959) EA 248 and in Esso Petroleum Company –V- South Port Corporation (1956 ALL ER 864, it was observed that the function of pleadings is to give a fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. In Day-V William Hill (1949)1 All ER 219, it was stated that if documents are referred to in the pleadings, they become part of the pleading. In the case of Castelino – V- Rodriques (1972) EA 233, it was stated that a reference in a document incorporates the contents of the annexure in the document (see also Kabwimukya –V- John Kasinga (1978) HCB 251)”

“That the basic tenet in admitting an affidavit is for the other party to be able to respond. In the instant case, it is our finding that the affidavit in support of the Petition which contained annexures DMK2, DMK3 and DMK4 were filed with the Petition and the respondents had an adequate opportunity to respond to the issues raised therein. We find that these annexures having been part of the petition did not introduce any new evidence that was not in the original Petition. The annexures never changed the nature and character of the Petition and did not give rise to new facts and allegations. They were not a serious departure from the petition as they were an integral part of the Petition as filed.”

Counsel for the petitioner further submit that there is the issue as to whether the elections for Marsabit Woman Representative to the National Assembly was conducted in accordance with the constitution, electoral laws and regulations. It is submitted that the petitioner has raised several issues pertaining to the manner in which the election was conducted. The 1st one involves violation of the right to vote. Article 38 of the Constitution provides for the citizens' rights to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors. Election is by way of secret ballot and no citizen should be denied his right to vote. The petitioner specifically pleaded and subsequently proved that several people in Marsabit County were denied the right to vote despite having been duly registered. The denial was ostensibly on account of their ethnicity thereby violating the sacrosanct constitutional principles under Articles 38, 81 and 83 of the constitution. PW4 Hussein Issa Woche went to vote at Fatul Bahr Madrasa polling station in Moyale but was not allowed to vote yet he had IEBC acknowledgement slip. The witness had earlier confirmed his status as a voter. PW5 Sharo Ayala Ghacho also went to the same polling station with his national identity card and his acknowledgement slip but was not allowed to vote. David Gamale Shamo suffered the same fate at St. Mary's polling station. The same problem affected PW7, Adan Mahule Shame who could not vote at St. Mary's polling station. PW3 took down a list of 38 people who had voters cards but could not vote to the presiding officer but they were not assisted. It was alleged that those voters were not identified by the machines. The presiding officers violated regulation 69(1)(e)(iii) by failing to identify the voters using the printed manual register. If one could not

be identified by the machines then alphanumeric search was to be used followed by document search. A form 32A was to be filled thereafter. If the three processes failed, the law provided for the use of the printed auto voter register. DW1 admitted that if only one identification method is used then that would be an irregularity. The allegations and evidence by the witnesses who were denied the right to vote were not controverted.

Mr. Walukwe maintain that the election was not done in accordance with the law as fake and inauthentic forms were used. The petitioner requested for the production of the original statutory forms 39As, 39Bs and 39C used during the election but the same were not filed with their responses. The 3rd respondent filed 17 forms 39As and 4 forms 39Bs. Those forms contain several anomalies. The form 39B for Saku constituency is alleged to have been signed by Hussein Malicha, Halake Wako Halake and Hussein Harbo who were agents of various political parties. The signing was done on 10.8.2017 yet the form is dated 9.8.2017. The form 39B for Moyale Constituency was signed by Hussein Malicha, Abdilatif Mohamed Aga and Ibrahim Galgalo Guyo on 11.8.2017 but no single agent who was at the tallying centre signed the form. The form 39B for North Horr constituency was allegedly signed by Hussein Malicha, Halake wako and Halima Darro on 10.8.2017 while the one for Laisamis constituency was signed by Dominic Dabalen who was a FAP agent at Laisamis Primary school polling

station. The form 39C was allegedly signed by the same Halake Wako and Hussein Malicha. The manner in which the forms were signed raised the question as to why only two persons representing only two political parties accurately witnessed the execution of all of the Marsabit County's collation forms except one. It should be noted that Marsabit is a very vast county and the two agents purportedly managed to execute the forms in different constituencies on the same day. This raises the issues as to whether the forms can be considered to be authentic for the purposes of the information therein.

PW11 testified that the forms in themselves are counterfeit for various reasons. The barcode overlap, the serial numbers in the forms are printed in a manner which makes them virtually impossible to read and ascertain their authenticity. The lay out of the forms is wrong and other security features such as anticopy are missing. PW2 and PW8 testified that they were categorically kicked out of the Laisamis tallying centre by DW2. This raised questions on the source of the results. The court has to take judicial notice of the fact that Marsabit is a vast county and the two witnesses could not have moved around and signed the forms. This cast doubt on the credibility of the witnesses.

The forms presented before the court have several anomalies. In two polling stations namely Yaa Alгаа and Salima mobile in Laisamis constituency the forms 39As were not signed by the presiding officer or his deputy. In ten polling stations namely: Satur Primary, Soweto nursery, all in Laisamis, Forole Primary, Sasala Manyatta, Quilta Manyatta, Turbi Primary, Bubisa primary, Alia Bay wildlife Headquarters all in North Horr, Karare mixed school and Tawaq intergrated Madrasa all in Saku the forms were not signed by any agent. 31 forms 39As have alterations which were not counter signed and this affected 10,082 votes. In 98 polling stations no FAP agent signed. Regulation 79 provides for the declaration of the results by the presiding officers whereby agents or candidates are supposed to sign the declaration form. The presiding officer is required to record the reasons for the refusal or failure to sign the forms. Counsel relies on the case of **Ahmed Abdullahi Mohamed & another V Mohamed Abdi Mohamed & 2 others; Nairobi E.P. No.14 of 2017** where the court observed as follows on the issue of signing of the forms:

***“from the foregoing, it is clear that while the non-signing of the statutory form by a candidate or his agent is excused under Regulation 79(6), it is not so for the presiding officer or the returning officer. It is a criminal offence for any of those officers to fail to sign the statutory forms under section 6(1) of the Election Offences Act. Statutory Forms that are not signed by the said officers are not worthless pieces of paper whose contents would not count in the final tally of results. It is the signing of those statutory forms by the said officers that gives the forms credence and make the results therein accountable and verifiable. Failure to sign a statutory form is not a mere error, it is a grave irregularity that destroys the credibility and authenticity of the results contained therein.*”**

As regards the signing of the declaration forms by agents, the regulations give a caveat as to when the failure of agents or candidate to sign the declaration forms will be excused. The failure to sign is excused if the Presiding officer records that fact in the declaration form itself. This is what Regulation 79(4) decrees. The requirement is mandatory. In this regard, I hold the view that for sub Regulation 6 of Regulation 79 to apply and excuse the failure by an agent to sign the form, the Presiding officer must record the fact on that form. The recording of the fact is for purposes of accountability, credibility and verifiability of the results in the declaration Form. While failure by agents or candidates to sign form 37A does not invalidate the results, the fact of such failure must clearly be noted or recorded in the form by the Presiding officer in terms of Regulation 79(4) of the Regulations, Where such forms are not signed by agents and the presiding officers fail to note or record that fact, a question of credibility of the results therein arises.”

Counsel for the petitioner submit that there was a misuse and abuse of the printed voter register. Regulation 69(1)(d) provide for how the printed copy of the voter register is to be used. Where the voter cannot be identified by the electronic voter identification device, then he ought to be identified using the printed voter register. And once identified then the voter's name should be crossed from the printed register. If

alternative identification is used then form 32A is to be filled. The presiding officer is required under Regulation 72(6) to record in the polling station register the fact that the voter was assisted and the reason for the assistance. DW1 and DW5 testified that the voter registers were not used at the polling station in Marsabit. The legal provisions on the voter register are mandatory and were violated.

The Petitioner pleaded that there was irregular appointment of Jaffer Galgalo as the returning officer for Laisamis constituency. The officer was initially appointed for Isiolo but was transferred to Marsabit. The appointment violated Regulation 3 which requires that prior to the appointment the list of those appointed be given to political parties and candidates at least 14 days before the appointment. The appointment is to be done transparently and competitively and should be published in the gazette so as to give wide publicity. **Jaffer Galgalo** is a member of the Borana community and known supporter of a member of the community. There was an agreement between the candidate that locals would not be allowed to become returning officers. The officer was clandestinely recruited without consultation instead of one **Antony Kirori Kimani** who was not a local. The Election is a process and not an event and the issue of Regulation 3 was dealt with in the case of **Republic V IEBC ex parte Khelef khalifa** and another. PW2 and PW8 testified that this specific returning officer refused to show them where he was reading the results from or even allow them to take photos of the forms. The officer therefore was openly biased. This also resulted to the signing of the form 39B by the Dabalen who was not a tallying centre agent. Counsel relies on the case of **Abdikhaim Osman Mohammed & another V Independent Electoral and Boundaries Commission & 2 others; Nairobi C.A; Civil Appeal No.293 of 2013**, the Court of appeal considered the qualitative aspects of an election and held as follows:

“Besides the quantitative irregularities mentioned above, there were also qualitative irregularities brought to the attention of the Judge which he nevertheless ignored. The learned Judge had received evidence that the contest was too close to call. He had been told that the voting patterns heavily leaned on clanism. Candidates received virtually all votes from the areas of their clans. So when events or irregularities occurred in any of those candidates’ strongholds, the Judge was obliged to give serious considerations to those events and their effect to guide the exercise of the Judicial discretion. He ignored all that.”

It is further submitted that the 1st and 2nd respondents disobeyed the orders of the court issued on 30.11.17. The orders were granted as per the prayers that were sought. Copies of the poll book diaries and forms 32 were to be provided and this was not complied with. The court issued an order for the preservation of the election materials. Several anomalies were observed. 17 boxes from Laisamis constituency had no IEBC logo branded seals. Four boxes from Laisamis had broken seals 3 boxes from Saku had interchanged lids. Nine boxes from Moyale had broken seals, 35 polling stations had no IEBC branded seals, four boxes from Moyale had their lids interchanged, four boxes from North Horr had no IEBC logo branded seals. Three boxes from North Horr had broken seals, 2 ballot boxes from North Horr had interchanged lids and 70% of the boxes could not be identified using the respective name of the polling stations.

Mr. Walukwe maintains that all these were electoral malpractices and violated Article 86(d) of the constitution which provide among other things for the safe keeping of election materials. Regulation 86(2) require the returning officer to keep election Materials in safe custody. Regulation 61 provide for colour coding of the ballot boxes and ballot papers. All those requirements were violated. In the case of **William Odhiambo Oduor V IEBC and 2 others, Kisumu Election Petition No.2 of 2013** the court emphasized the need to preserve election materials.

Counsel for the Petitioner submit that the petitioner’s agents were denied the right to participate in the elections. PW9 testified that there was favoritism in the manner of voting and the IEBC officials favoured Jubilee. The presiding officer for Saku polling station stream 2 did not testify to counter those allegations. The agents are important participants in the election process as held in the case of **Henry Okello Nadimo V Independent Electoral and Boundary Commission & 2 others, Busia HC Election No.2 of 2013**.

The Petitioner testified that at Kinisa polling station she witnessed the ballot marked in her favour being maliciously put in the ballot box for the member of county assembly. This evidence was not controverted. DW1 alleged that such a process would lead to stray ballot.

It is therefore submitted that the 3rd respondent was not elected as the Marsabit Woman representative in accordance with the law. The elections were conducted in a manner that utterly violated the constitutional principles under Article 38, 81(e) and 86. The irregularities materially affected the results of the election given the margin of victory of mere 5,677 votes. The results does not reflect the true will of the

people of Marsabit.

Submissions By The 1st And 2nd Respondents

Mr. Kabene submit that the petition raises the following issues:

- (i) Whether there were irregularities in the conduct of the election for Woman Representative held on 8.8.2017, if so what were the irregularities and whether those irregularities affected the outcome of the election.
- (ii) Whether the law or regulations on transmission of the results was complied with
- (iii) Whether the two respondents or their agents committed any election offences
- (iv) Whether the election was conducted in accordance with the constitution, statute and requisite regulations
- (v) Who should bear the cost.

It is submitted that the petitioner has failed to discharge the burden of proof. In the case of *Joho V Nyange and another (2008) eKLR*

The court held as follows;

“while the proof has to be done to the satisfaction of the court, it cannot be said that the standard of proof required in election petitions is proof beyond reasonable doubt. Like in fraud cases, the standard of proof is higher than on a balance of probabilities and where there are allegations of election offences, a very high degree of proof is required.”

Mr. Kabene submit that the petitioner failed to discharge the burden of proof as she did not adduce cogent, reliable, precise and unequivocal evidence to prove the grounds pleaded in the petition to the satisfaction of the court.

The petition is premised on alleged discrepancy between the results on the public portal and form 39B. PW11 could not prove that he had accessed the IEBC server. The annexures to his affidavit are not dated and it is not known when the alleged access took place. The orders of access issued by the Supreme Court were in respect of a Presidential election and not this petition. Section 27(2) of the IEBC Act provides for the manner in which information can be accessed from the commission. The petitioner's case is also premised on the alleged variance on the results on the forms and those transmitted electronically. Counsel relies on the case of *JACKTON NYANUNGO RANGUMAV IEBC & 2 OTHERS in that case Manja J.* stated as follows:

“It is clear that from section 39(c) of the Act that electronic transmission and publication of polling results in a public portal is only a statutory requirement for the Presidential election. 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 34A which 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 34B. Forms 34B 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 34B and announces the election results based on form 34C. Even assuming accepting the errors, omissions and inconsistencies highlighted by PW4 and the other witnesses, the legal position remains that the votes as recorded in forms 34A are final. Unless Forms 34A are disputed any error in electronic transmission of results or publication in the 1st respondent's public portal cannot, of themselves and without more, invalidate forms 34A. Where the results from the polling station are electronically transmitted from the polling station to any other portal as the 1st respondent may direct, such results can only be termed as provisional thus underlining the primacy and finality of form 34A. Regulation 82 of the Elections (General Regulations, 2012 suggests that these results are provisional...”

Mr. Kabene further submitted that Mr. Jaffer Galgalo (DW2) testified that he was initially gazetted as a returning officer for Isiolo North constituency vide gazette noticed dated 5.5.2017 but was later transferred to Marsabit county vide a corrigenda dated 10.7.2017. The transfer was an administrative action.

It is further submitted that the petitioner alleged that her agents were denied the right to participate in the election due to the fact that they did not belong to Jubilee party. No agent was called as a witness to prove that allegation. Regulation 79(6) provides for instances where an agent or candidate refuse to sign the forms. Their refusal does not invalidate an election. PW28 and PW8 testified that they were denied access to the forms 39As by the Laisamis constituency returning officer. Those forms were to be issued to the agents by the presiding officers at the polling station. Section 62 (2) of the Election Act give power to a returning officer to kick out persons who disrupt the tallying or counting of votes.

On the issue of the assisted voters, it is submitted that regulation 72 provide that a candidate or an agent is not supposed to assist a voter. If the voter is not accompanied by a person qualified to assist him or her, then the presiding officer shall assist such a voter in the presence of the agents. DW4 Abdirashid Adisomo testified on the illiteracy levels in Marsabit county and the high number of voters who required assistant. The voters were properly assisted. DW7 and DW8 explained how party agents participated in the process of assisting voters. Mr. Kabene relies on the case of *JUSTUS GEZITO MUGALI M'MBAYA V INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 2 OTHERS [2013]eKLR* In that case **Justice Ogola** held as follows:

***“In my view, the allegation that the illiterate voters were misled not to vote for the Petitioner were not proved. A candidate could either be identified by his name, his photograph or party symbol. In addition, evidence was led to show the process through which assisted voters taken. It was a participatory process involving all the parties’ agents. It is notable that none of the Petitioner’s witnesses proved this allegation. In fact, PW7 agreed with the Respondents that he was not aware of any voter who left confused or was misled in respect of the a petitioner’s names. This Court finds the allegations relating to voter assistance baseless and are therefore dismissed.*”**

It is further submitted that no agent was denied the right of recount as alleged. Rule 80 of the Elections Act provides for instance where party agents may seek recount at the polling stations. No witness was called to testify on that issue. Allegations that the petitioners agents were chased away or denied access to the polling stations in Saku and Moyale constituencies were not proved. Lesaigor Michael (DW7) was a FAP agent and he testified that at Farakolen polling station the agent were allowed to participate in the elections. Regulation 74(3) empowers a presiding officer not to admit more than one agent of a political party in the counting venue. It is also submitted that no voter was denied the opportunity to exercise their civic right to vote. PW4, PW5, and PW6 gave evidence that they were denied the opportunity to cast their votes and choose a leader of their choice contrary to Article 38 of the constitution. The witnesses produced voter identification slip as proof of registration of voters. DW1 testified that the registration slip is not an entitlement to vote. The slip is an acknowledgement that one has applied for registration. It is not a voters card. For one to vote he had to be identified that he was in the voters register if indeed he was a registered voter. The right to vote under section 3 of the Election Act is a preserve to an adult Kenya citizen who is dully registered in the main register of voters. Some of those people alleged to have been denied the right to vote were found not to be registered voters.

Mr. Kabene further submits that the allegations that voters were coerced and intimidated to vote for Jubilee candidates were not proved. The mobile stations in North Horr constituency recorded a high voter turn out of 69%. Section 7(2) of the Election Act empowers the IEBC to determine the location of a polling station having regard to geographical considerations and accessibility. The court granted orders on scrutiny of the SD cards and no report was to be filed. The 1st and 2nd respondents wholly complied with the orders and no poll book diaries or forms 32 were to be produced. On 20th December 2017 the Court clarified its orders.

It is contended that the election for Woman Representative for Marsabit County was conducted in an impartial, neutral efficient, accurate and accountable manner. It was conducted in accordance with the law. The petitioner’s evidence does not prove her case.

3rd respondents submission

Mr. Muganda, Miss Hashim and Miss Barako appeared for the 3rd Respondent. Counsels submit that the issues for determination are whether the election for Marsabit Women member of National Assembly was conducted in accordance with the law, whether there were any irregularities, whether if there were any irregularities the same affected the results and whether the 3rd respondent was validly elected. It is submitted that an election petition is an audit undertaken by an election court on the basis of the complaint raised in the petition in order to confirm if an election was conducted in accordance with the constitution and electoral laws. The burden of proof at all material times rests on the petitioner to prove the petition. It is not sufficient for the petitioner to generally point out irregularities that may have taken place during the election. The petitioner must prove that such irregularities affected the results. It is contended that the standard of proof in the election petitions have been referred to as the **intermediate standard of proof**. Counsel rely on the **case of Raila Odinga and another V The Independent Electoral and Boundaries Commission and Others [2017]eKLR**. In that case the court held as follows:

“in many other jurisdictions including ours, where no allegations of criminal or quasi-criminal nature are made in an election Petition, an “intermediate standard of proof” one beyond the ordinary civil litigation standard of proof on a “balance of probabilities”, but below the criminal standard of beyond reasonable doubt”, is applied. In such cases, this court stated in 2013 Raila Odinga case that the threshold of proof should in principle be above the balance of probability, though not as high as beyond reasonable doubt....”

It is further submitted that an election court should not upset an election by substituting the will of the electorate with its decision unless the petitioner satisfies that there was noncompliance with the constitution and the law governing elections or that any alleged malpractices and irregularities were of such magnitude that they substantially and materially affected the results and therefore affected the will of the electorate. The petitioner is bound by her pleadings as set out in the petition and cannot introduce new issues which are not pleaded. Rules 8 and 12 of the Election Petition Rules 2017 states that the petition shall be supported by an affidavit which shall set out the facts and the grounds relied in the petition. The petitioner has sought to introduce new issues namely that the election documents were not properly signed and the materials (mainly polling station diaries) were not properly kept, forgery of signatures, stamping of forms, non compliance of court orders and allegations on some polling stations which were not specifically pleaded. Some allegations are contained in affidavits of witnesses who were not called to testify.

The 3rd respondent submit that the allegations in the petition have not been proved. The results for Losikiriash and Gatab polling stations are indicated in the forms 39As. No one has disputed those results. It is alleged that in 25 polling stations no data was entered on the portal. However the form 39As, 39Bs and 39C captures all those results without any difference. The petitioner also alleged that there was no data for the mobile stations but evidence adduced shows that people voted in those polling stations and the results are available. Counsels further submit that the petitioners allegation that in six polling stations namely Anona Primary, Uran nursery stream 1 and 2, North Horr Primary stream 1-4, Marabot Primary, Gatab Primary, Losikiriash primary and Kenisa primary, the votes cast exceeded the registered voters has not been established. The results in those polling stations were availed to the court and the forms were signed by party agents. Allegations that there is variance in the results for the six polls has not been proved. Any variance can be attributed to the fact that there was an extra polling station at the Marsabit prison where voters only voted for the President. There also could be stray votes for the different elections and differences in the number of rejected votes between the various elected posts.

It is further submitted that the petitioner is alleging that there were irregularities in the transmission of the results from the polling station and therefore the results in the forms are different from those on the portal. According to the petitioner, the transmission was supposed to be electronic. In the case of **NATIONAL SUPER ALLIANCE (NASA) V IEBC High Court Petition No.328 of 2017**, the court of Appeal held as follows;

“To our mind what was required of the Respondent was to put in place a mechanism that is set out in Section 44 of the Act. The

particular of the mechanism, whether electronic, manual or any other mode was not expressly provided in Section 44A.If that were the intention of parliament, nothing would have been easier than to specify.”

Counsels for the 3rd respondent submit that the votes are counted at the polling stations in the presence of candidates or their agents. Under Regulation 82 the results that are transmitted in electronic form are provisional. Electronic transmission of the results as far as section 39 (1c) is concerned, is a preserve of the presidential election. The data presented by PW11 is not authentic. It is also contended that the petitioner's agents fully participated in the election process. The allegations that the presiding officer at Farakolen primary polling station was insisting on assisting voters was rebutted by the presiding officer who testified. The petitioner's agents were allowed into the polling stations as well as the tallying centres. At the Laisamis polling centre, the petitioner's agents walked away upon being denied the statutory forms. They were not ejected from the polling station. The statutory forms had been issued to the agents at the polling stations. There is no specific contention by way of evidence that the petitioner's agent was denied access to the polling station.

It is also submitted that the petitioner has attacked the statutory forms used to announce the results. FAP agents signed 285 out of 384 forms 39As representing 74% of the forms. Only 82 forms were not signed by FAP agents. Only 16 forms representing 4% were not signed by any agent. Counsels rely on the case of ***NATHIF JAMA ADAM V MOHAMMED & 3 OTHERS [2014]*** where it was observed as follows:

“From the foregoing passage, and from therecord, we find that the authenticity of the results was on the unsigned andunstamped Forms 35 and not been the subject of challenge ...”in this regard, thepetitioners did not lead any evidence that the look of signatures or stamp of the presiding officers in Forms 35 forthe above mentioned polling stations affected the outcome of the election. Further, the Petitioners did not even challenge theresults that were tallied and declared at those polling stations. It is not enough for the Petitioners to merely allege and indicate a failure on the part of the 1st and 2nd Respondent, but it was also essential for them todemonstrate that such failure affected the result of theelection.” (Emphasis added)

Counsels further rely on the case of ***MICHAEL GICHURU V RIGAHT GACHAGUA & 2 OTHERS, PET NO.2 OF 2017*** where the **High Court in Nyeri** stated as follows:

“The petitioner’s position on the forms that were not stamped was that the results which they represented were invalid and unauthenticated and were therefore unreliable. However, this argument is unsustainable for the simple reason that there is nowhere in the Elections Regulations where it is suggested that forms ought to be stamped; neither is there such a provision for stamping in the forms as prescribed under the scheduled to the Act.

With regard to assisted voters, it is submitted that regulation 72 (1) allows a presiding officer to assist voters. There is no evidence that a voter was disenfranchised. The voters were assisted in the presence of the party agents. The allegations by PW9 that assisted voters were coerced were not proved. The presiding officers for Saku Primary stream 1 and 2 testified and denied these allegations. DW13 was an agent for Maendeleo Chap Chap party. He confirmed that he participated in the process of assisting voters.

Regarding the appointment of Jaffer Galgalo as the returning officer for Laisamis Constituency, it is submitted that the officer testified that he comes from Isiolo and that is why he was transferred to Marsabit. The appointment was done in line with the principles enshrined in the constitution and the regulation. Counsels relies on the case of ***FRANCIS MWANGANGI KILONZO V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION& 2 OTHERS [2018] eKLR*** where the Court noted as follows:

“the next issue is whether the 2nd Respondent was validly and legally appointed as the Returning officer for the Yatta constituency election. The 2nd respondent testified, and it wasevident, that Lucy Mbithe John was gazetted on 5th May 2017 to conduct the Yatta constituency election, but that on 26th may 2017 there was a corrigenda by which the 2nd Respondent was appointed instead I find that the 2nd Respondent was validly and legally appointed to conduct the election in Yatta constituency. Have shown in theforegoing that the claim that he was partisan was not substantiated.”

Counsels for the 3rd respondent contend that an order to preserve the ballot boxes was made and all the boxes were found to be intact as per

the report of the Deputy Registrar. The fact that the mobile stations in North Horr were converged in one place did not affect the election as the results show that the voter turn out in those particular polling stations was 67%. No registered voter was turned away and those who could not vote were found not to be registered as voters. Possession of an acknowledgement slip is not proof that one is an registered voter. Counsels rely on the case of *James Gichuhi Wanyoike V Francis Obingo Were & 2 others [2013] eKLR* where the court held as follows:

“Furthermore, possession of a voters card is not perse evidence that such a voter’s name is in the register. Under section 6 of the Elections Act, voters are allowed to inspect the register within a given period and have their names confirmed to be in the register. There is no evidence that the four witnesses who swore affidavit in support of the Petition’s case ever verified their registration status. If their names were missing from the register as they deponed, the fault could well have been theirs.”

It is also submitted that the voter registers were brought to court and the petitioner did not verify whether those who purportedly could not vote were genuine registered voters. There was no denial to any voter the right to vote and the results show that the voter turn up was quite high. The allegations of bribery and undue influence were not proved. Such allegations are supposed to be proved beyond reasonable doubt but no evidence to that effect was adduced. In the case of *Mohamed Ali Mursal V Saadia Mohamed & 2 Others [2013] e KLR, Mutuku J* observed as follows:

“For instance, offences like bribery, forgery and undue influence in my view would attract a higher standard of proof than the one prescribed for electoral disputes. They are offences in the ordinary sense of that word. Forgery or bribery by any other name remains just that and there can be no difference between such an offence in an election petition and in a criminal case.”

The Petitioner also alleged that there was importation of voters in Moyale constituency but those allegations were not proved. No issues of the registration of voters was raised.

ANALYSIS AND DETERMINATION

There was no consensus on the issues raised by this Petition. I do find that the petition raises the following issues:-

- 1. Whether the Marsabit Woman Member of the National Assembly Elections conducted on 8th August, 2017 was muddled with irregularities and if so, whether the irregularities affected the outcome of the elections.***
- 2. Whether the election for Women Representative of the National Assembly was conducted in accordance with the constitution and electoral laws.***
- 3. Whether the respondents or their agents committed election offences.***
- 4. Whether the 3rd respondent was validly elected as the Marsabit Woman member of the National Assembly.***
- 5. What orders on costs.***

It is crucial to set out at this stage the Constitutional and statutory legislation governing the conduct of elections in Kenya. The constitution in its preamble states as follows:

We, the people of Kenya –

- RECOGNISING the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, Social Justice and the rule of law***
- EXERCISING our sovereign and inalienable right to determine the form of governance of our Country and having participated fully in the making of this constitution***

- *ADOPT ENACT and give this Constitution to ourselves and future generations.*

The preamble therefore clearly sets out the aspirations of Kenyans to exercise their Constitutional right to determine how they would like to be governed. Article 1 of the Constitution bestows sovereign power to the people of Kenya. Article 38 provides for political rights which include the right to:-

- **be registered as a voter**
- **Vote by secret ballot in an election or referendum.**

Article 81 provides for the general principles for the Kenyan electoral system. These include:

- *Freedom of citizens to exercise their political rights.*
- *Universal suffrages and equality of vote*
- *Free and fair election*
- *Elections to be free from violence, intimidation, improper influence or corruption and transparency in elections*
- *Elections to be impartial, neutral, efficient, accurate and conducted in an accountable manner.*

Article 83 provides for the registration of voters. Article 83(3) states as follows:-

(3) Administrative arrangements for the registration of voters and the conduct of elections shall be designed to facilitate, and shall not deny, an eligible citizen the right to vote or stand for election.

Article 84 states as follows:-

In every election, all candidates and all political parties shall comply with the code of conduct prescribed by the Independent Electoral and Boundaries Commission.

Article 86 provides for the voting process and states as hereunder:-

At every election, the Independent Election and Boundaries Commission shall ensure that:-

- (a) Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;*
- (b) The votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;*
- (c) The results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and*
- (d) Appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.*

The Independent Electoral and Boundaries Commission (IEBC) derives its powers to conduct the election from Article 88(4). It is the sole body given the mandate to conduct Presidential, Parliamentary and County elections in Kenya.

Other than the Constitution, there is the Election Act, Act No.24 of 2011. The Act declares its objectives in the preamble as “**An Act of Parliament to provide for the conduct of elections to the office of the President, the National Assembly, the Senate, county governor and county assembly; to provide for the conduct of referenda; to provide for election dispute resolution and for connected purposes.**” Within the Elections Act there are the Elections (General) Regulations, 2012, the Elections (Registration of voters) Regulations 2012, Rules of procedure on settlement of disputes, Elections (Parliamentary and County elections) petition Rules 2013, the Elections (Technology) Regulations, 2017 and the Elections (Voter Education) Regulation 2017. Elections involve political parties which are governed by the political parties Act (No 11 of 2011). There is also the Election offences Act No.37 of 2016. Those aspiring to be elected as leaders are expected to fulfill the requirements of the leadership and Integrity Act, Act No.19 of 2012.

Those are the major Constitutional and statutory parameters governing the conduct of elections in Kenya. The main objective is to ensure that those who ascend to political offices genuinely represent the will of the Kenyans who vote them into those offices.

1. Whether the Marsabit Woman Member of the National Assembly Elections conducted on 8th August, 2017 was muddled with irregularities and if so, whether the irregularities affected the outcome of the elections.

The Petitioner has raised several concerns in relation to the election process.

(i) Difference in Results on the portal and on the forms

The Petitioner contends that she was denied the statutory forms by the 1st and 2nd respondents. She relied on the results on the portal which has big variance with those in the forms. The discrepancy cut across all the four Marsabit Constituencies namely Laisamis, North Horr, Saku and Moyale. The Petitioner maintains that the results transmitted to the 1st respondent's portal on account of the electronic transmission differ substantially with the results indicated in the forms 39Bs. Twenty five polling stations had no data entered on the portal. Six polling stations recorded a higher number of voters compared to the registered voters. In 246 polling stations there is a mismatch of results from the six elections conducted on the same day.

The responses by the respondents to these allegations are that the results on the portal are provisional and the primary results are contained in the statutory forms.

The transmission of election results is governed by the law. Section 39 of the Election Act No. 24 of 2011 states as follows:

(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 count 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.

Section 44 of the Election Act provides for the use of technology. The main purpose of technology is to be used during voter registration, voter identification and results transmission.

It is the evidence of PW1, Dr. Noah Akala that the Petitioners in the Raila Amolo Odinga case (Supra) were granted access to the IEBC servers. He was able to access the data in the server for Marsabit Women Representative Election. It is his evidence that the election was done in a manner that grossly infringes on Constitutional principles. It was not free, fair and verifiable.

Regulations 82 of the Elections (General) Regulation, 2012 states as follows:

(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. (emphasis added)

Regulation 83 provides for tallying of the results at the constituency tallying centre. The constituency Returning officer is supposed to deliver to the County returning officer the collated results for the election of the Governor, Senator and Women Representative. It is the County returning officer who is endowed with the powers to do the final tallying and declaration of the results for Women Representatives under regulation 87 (2).

DW5 ARNOLD MUTWIRI JABANI was the County Returning Officer. It is his evidence that he received the results from all the 384 polling stations. He also received all the forms 39Bs from the four constituency returning officers. He declared the results on 11.8.2017.

It is therefore clear and statutorily provided that the results for Women Representative which are transmitted electronically are only provisional. The word Provisional is defined in the Black's Dictionary as: "**Temporary**" "**Conditional**".

The provisional results are not used to declare the winner. The winner for the election of the Women Representative is declared at the County tallying centre by the County Returning officer. It is the form 39C which contains the final results of the election. Regulation 82(1) makes reference to the "**Actual Results**" while Regulation 82(2) refers to the electronically transmitted results as "**Provisional**." The results on the portal are therefore provisional.

It is not clear as at what time did PW11 access the IEBC servers. The documents annexed to his affidavit do not prove that indeed those documents were downloaded from the IEBC servers. The original statutory forms 39As, 39Bs and 39C were produced in Court. There is no single polling station where the results exceed the registered voters. PW11 testified that at Butiye polling station, 172 voters voted for the President but did not vote for the Women Representative. The results for Butiye Primary school polling stations 4 streams in Moyale constituency are as follows: Abdi Farhiya 7, Adan Safia 1,780, Halake Amina 188, Ibren Nasra 159, Pantoren Elizabeth 5, Seyere Christine 4, Shama Bernadetta 12.

The Petitioner and PW11 testified that in six polling stations, the votes cast exceeds the number of registered voters.

The results for the six polling stations which are alleged to have exceeded the number of registered voters as per the forms 39As are as follows:

NO	POLLING STATION	TOTAL NO. OF REGISTERED VOTERS	TOTAL NO. OF VALID VOTE CAST	TOTAL NO. OF VOTES FOR THE PETITIONER	TOTAL NO. OF VOTES FOR THE 3 RD RESPONDENT
1.	Anona Nursery School 1 of 1	156	130	0	130
2.	North Horr 1 of 4	648	481	290	6
3.	North Horr 2 of 4	649	456	259	12
4.	North Horr 3 of 4	648	460	288	7
5.	North Horr 4 of 4	648	498	275	6
6.	Losikiriash Pry. School 1 of 1	216	199	50	149
7.	Gatab Pry School 1 of 1	440	369	142	224
8.	Malabot Pry. School 1 of 1	450	362	153	0
9.	Uran Nursery 2 of 2	415	334	10	319
10	Uran Nursery 1 of 2	414	341	08	327
Total		4,684	3,630	1,475	1,180

From the above table, there is no proof that in any of the polling stations the votes cast did exceed the number of registered voters.

There are also allegations that twenty five polling stations did not post any result. The polling stations are evaluated as follows:

NO.	LAISAMIS, NORTH HERR, SAKU POLLING STATION	TOTAL NO. OF REGISTERED VOTERS	TOTAL NO. OF VALID VOTES	TOTAL NO. VOTES FOR THE PETITIONER (NASRA)	TOTAL NO. OF VOTES FOR THE 3 RD RESPONDENT (SAFIA)
1.	SERIMA MOBILE 1 OF 1	277	147	50	3
2.	KURKUM PRIMARY 1 OF 1	199	170	4	108
3.	KOROS WATER POINT 1 OF 1	128	114	0	0
4.	NGURUNIT PRIMARY SCHOOL 1 OF 1	665	541	2	3
5.	ELBAROK PRIMARY SCHOOL 1 OF 1	219	178	69	2
6.	MERILE PRIMARY SCHOOL 1 OF 2	445	305	20	19
7.	MERILLE PRIMARY SCHOOL 2 OF 2	445	323	18	13
8.	YAA ALGANA 1 OF 1	3	0	0	0
9.	ELGADE PRIMARY 1 OF 2	422	317	165	1
10.	ELGADE PRIMARY 2 OF 2	423	330	174	3

11.	CHALBI PRIMARY 1 OF 2	385	280	175	5
12.	CHALBI PRIMARY 2 OF 2	385	289	178	3
13.	DARADE AP POST 1 OF 1	9	0	0	0
14.	DUB GINDOLE NUR SCHOOL 1 OF 1	237	221	8	188
15.	TAQWA INTEGRATED MADRASSA 1 OF 3	645	465	141	196
16.	TAQWA INTEGRATED MADRASSA 2 OF 3	646	467	143	197
17.	TAQWA INTEGRATED MADRASSA	645	443	131	178
TOTAL:6,1784,5901,278919					

NO.	MOYALE – SOLOLO POLLING STATION	TOTAL NO OF REGISTERED VOTERS	TOTAL NO OF VALID VOTES	TOTAL NO.OF VOTES FOR 3 RD RESPONDENT (SAFIA)	TOTAL NO OF VOTES FOR PETITIONER (NASRA)	TOTAL NO OF VOTES FOR 3 RD RESPONDENT (SAFIA)
1.	MADO ADI PRIMARY SCHOOL 1 OF 1	497	412	325	13	325
2.	SOLOLO WOMEN GRP. CENTRE 1 OF 2	522	416	271	43	271
3.	SOLOLO WOMEN GRP. CENTRE 2 OF 2	522	410	276	34	276
4.	GODA LOKO VILLAGE CENTRE 1 OF 1	240	209	161	9	161
5.	SOLOLO MADRASA 1 OF 2	564	447	297	25	297
6.	SOLOLO MADRASA 2 OF 2	565	447	326	31	326
7.	MOYALE GIRLS SECONDARY SCHOOL 1 OF 2	667	517	416	73	416
8.	MOYALE GIRLS SECONDARY SCHOOL 2 OF 2	668	494	376	86	376
9.	HEILU SOCIAL HALL 1 OF 2	688	517	473	15	473
10.	HEILU SOCIAL HALL 2 OF 2	689	529	471	26	471
11.	MOYALE PRIMARY SCHOOL 1 OF 2	543	330	203	92	203
12.	MOYALE PRIMARY SCHOOL 2 OF 2	543	338	220	71	220
13.	HAMBALO DISPENSARY 1 OF 1	95	74	60	1	60

14.	HOGA MOBILE 1 OF 1	449	348	274	24	274
15.	HEILU NURSERY SCHOOL 1 OF 4	535	368	329	9	329
16.	HEILU NURSERY SCHOOL 2 OF 4	536	388	344	10	344
17.	HEILU NURSERY SCHOOL 3 OF 4	536	408	371	11	371
18.	HEILU NURSERY SCHOOL 4 OF 4	535	386	353	14	353
19.	MANYATTA BURJI MADRASSA 1 OF 3	507	374	119	145	119
20.	MANYATTA BURJI MADRASSA 2 OF 3	507	368	120	145	120
21.	MANYATTA BURJI MADRASSA 3 OF 3	507	370	120	150	120
22.	KARBURURI PRIMARY 1 OF 1	171	153	135	4	135
23.	HEILU PRIMARY SCHOOL 1 OF 3	487	410	24	377	24
24.	HEILU PRIMARY SCHOOL 2 OF 3	488	427	10	409	10
25.	HEILU PRIMARY SCHOOL 3 OF 3	488	427	10	408	10
	Total	12,549	9,567	6,084	2,225	

The above information show that in those twenty five polling station there were 18,727 registered voters. 14,157 voted. There is no indication as per each form 39A that a single polling station had more voters than those registered.

It is my finding that the alleged discrepancy on the results on the portal and those in forms 39B or 39C cannot be a ground to annul the election results. Indeed the allegation of discrepancy has not been proved. The documents relied upon to establish the alleged discrepancy are from unknown source. The statutory forms were produced and the petitioner did not make comparison between the forms and the allegations in the petition. No single agent from a polling station testified that the results in any form 39A were not correct. I do find that this ground fails.

II. Discrepancy of results in the six polls

Paragraph 43 of the petition states that 246 polling stations had a mismatch in the total number of votes cast for each of the six elections. This affected the Women Representative tally by a total of 99,787 votes. The mismatch is tabulated in the petition as follows:

(a) 112,399 voters voted for the Presidential candidates

(b) 103,514 voted for the Governor election.

(c) 108,948 voted for the Senator election.

(d) 106,094 voted for the Women Representative

This court did not see the results for the other elections but had the advantage of dealing with the gubernatorial petition.

The forms 37C and 39C for the two elections of Governor and Women Representative give the results as follows:

Governor:Total Valid votes 110,683

Rejected votes323

111,006

Women Representative: Total valid votes110,628

Rejected330

110,958

The above tabulation gives a comparison of the two elections. The "C" series forms give a difference of 48 votes for the entire county. More people are shown to have voted for the Governor than for the Women Representative. The difference is minimal, the difference can be attributed to stray votes that were deposited in the wrong ballot boxes. The prisoners voted for the President only and that led to more voters for that poll. The petitioner's tabulation on the polls for the governor and Women member of National Assembly is incorrect. The results in the forms C series give a small margin of 48 votes. That cannot be regarded as an irregularity which should call for the nullification of the election. The source of the results for the other polls is not known. The Court cannot rely on those figures as they were not provided by the IEBC.

From the above analysis, it is clear to me that there is no 99,787 votes affected. The number of votes cast are almost the same. The minor difference can be attributed to stray ballots. Even if we allocate the 48 votes which is the difference between the two polls to the Petitioner, that will not affect the results. I do find that the allegation on discrepancy of results has not been proved.

III. Petitioner's agents were denied their right to participate in the Election

The Petitioner contends that her party agents (FAP) were denied the right to participate in the election on account of not belonging to Jubilee Party. They were not allowed into the polling stations. After the votes were counted, the petitioner's agents were not allowed to obtain the forms 39As from the polling stations. That is why she relied on the results from the portal.

PW9 DAUDI KIFILE DANCHE was the FAP agent at Saku primary polling station. His evidence is that the two presiding officers in that station favoured Jubilee candidates. He fully participated in the election. He was allowed to witness the voting process involving assisted voters. It is his evidence that the results in the form 39A are correct.

The importance of a party agent cannot be over emphasized

Section 2 (a) of the Elections Act defines ***an agent as a person duly appointed by a political party or an Independent candidate for the purposes of an election.*** It is obvious that a candidate in an election cannot be in all the polling stations during the election period. A political party appoint agents to be their representatives during the elections. Agents are recognized by the law. Section 30 of the Elections Act provides for the appointment of party agents. If the political party does not appoint an agent, a candidate is allowed to appoint his/her own agent. In the book **DOABIA & DOABIA, laws of ELECTIONS AND ELECTION PETITIONS** by Justice T.S. Doabia, former High Court Judge of India, 5th edition, the author explains an agent as follows:-

Meaning of "election agent". The word "election agent has not been defined. Generally speaking, a person who manages the business of the election contest, may be termed as an election agent. The object of appointing one is that the affairs of the election should be carried on in the light of day; that there should be a respectable and responsible man, responsible to the candidate and to the public who shall be responsible effectively for all the acts done in procuring the election and who can be made responsible for conducting and managing the election affairs.

In the case of **BWANA MOHAMED BWANA –VS- SILVANO BUKO BONAYA & 2 OTHERS [2013]eKLR**, the Court had this to say on party agents:

“The role of an agent in a polling station is a legal requirement which must not be taken lightly. A vigilant polling agent would detect some wrongful acts at a polling station. He could initiate a complaint at the polling station or tallying centre within minimum delay. Providing the agents with Form 35 makes their work easier and tallying process manageable. An agent without results is like a blind mouse as he goes to the tallying centre. The empowerment by the Commission is critical to the work of the agent. An agent ceased to be of any use to his candidate or party if he lacks the tools.”

Doabia (Supra) states that a candidate should be very careful while selecting his/her agent. The author states as follows:-

“The candidate must take reasonable precautions to see that he selects a proper person as his election agent, who has not been guilty of any corrupt or illegal practices and who will not commit these offences in the future. The candidate by seeking election seeks an office of trust for the benefit of the public and so it is his duty that he should engage a trustworthy agent who should be a respectable and responsible man. The candidate should know that his fortune, his position and his character are entrusted to a great extent to his election agent whose ignorance or carelessness may give rise to serious consequences. Consequently, the election agent should be a man of position, responsibility and experience in the conduct of elections and must have a good deal of knowledge of the election laws. He should be a man of sufficient strength and character, and should be capable of resisting the temptation of commission or attempt to commit election offences and corrupt practices. On the other hand, he should be capable of putting a stop to the various illegal practices in an effective manner.”

No agent testified that he was denied the form 39A. I am of the same view that apart from seeing through the voting process and counting of the votes, an election agent does great deservice to his candidate if he/she goes away from the polling station without a copy of the form used to declare the results. Ordinarily, agents are paid by their appointing parties or candidates. It would be proper for the political party or candidate to insist on being supplied with the results declaration form by the agent before settling the agent’s dues. The whole essence of having agents is to ensure that the results announced at the polling station remain the same results at the constituency tallying centre and County tallying Centre. Sending the results by way of text messages can only be a temporary measure just like transmitting results by the presiding officer electronically. The physical forms are the most crucial documents. If a candidate can obtain all the forms from the polling stations, he/she will be able to know the outcome of the election by making his/her own tally.

Going back to the Petitioners’ issue, it is clear to me that the FAP agents were greatly involved in the election process. In some polling stations, two FAP agents signed the form 39As. An agent who signs the forms does confirm that he/she was present when the results were announced. It can therefore not be alleged that such agents were denied the right to participate in the election or were evicted from the polling stations.

I have evaluated all the forms 39As for Marsabit County Women Representative Election. The following table shows how the forms 39As were signed.

Constituency	Forms Signed by FAP Agents	Not Signed By FAP Agent but signed by other agents	Not Signed By Any Agent
LAISAMIS	49	28	2
SAKU	50	15	3
NORTH HERR	79	11	10
MOYALE	107	28	1
TOTAL	285	82	16

The above information show that 74% of the petitioner’s party agents were present when the results were declared at the polling station and signed the forms 39As. The forms 39A’s contain a declaration to the effect that those who append their signatures were present when the results were announced and that the specific form gives the accurate count of the ballots in that specific polling station.

Apart from PW9, there is the evidence of **PW8 JULIUS LEKOROLE**. He was the FAP Chief agent for FAP in Laisamis constituency. It is his evidence that he was ejected out of the Laisamis tallying centre after having been denied the forms that were used to declare the results. It is clear that six polls take place at the same time. The ballot boxes and the statutory forms for each poll are taken to the Constituency Returning officer. It is not possible for such an officer to part with the forms 39As. PW8 testified that they requested the returning officer to allow them to take pictures of the forms using their phones or to have the results beamed on the screen. At the constituency tallying centre, all the results of the six polls are tallied. Laisamis constituency has 79 Polling stations. That number multiplied by six polls gives a total of 474 forms “A” series. The results are announced at the polling stations. The party agents are expected to obtain copies of the forms 39As from the polling stations. It would be quite difficult for a constituency returning officer to give the form he/she uses to declare the results to party agents at the tallying centre. What would happen if one form gets lost. The constituency Returning officer is supposed to take all the “A” series forms for all the elections for President, Women Representative, Senator and Governor to the County tallying centre. How possible would it be for one to beam all those forms on the screen or to part with them for photocopying purposes. The constituency returning officer

announces the results from the polling stations so that if anyone has different results, he can compare with those in the form 39A. The returning officer is not supposed to change the results on the forms 39A but can indicate any anomaly. It was therefore not possible for DW2, Jaffer Galgalo, to grant the request by PW2 and PW8. In any case what was being announced as per the evidence of the two witnesses was the first five results from the polling stations. Most of the results had not reached the tallying centre and the two witnesses could have checked with their agents. Majority of the agents signed the forms 39As and therefore knew the results. There was no partisanship or elements of bias on the part of DW2.

The video taken by PW10 **SAMUEL NJUGUNA MWANGI** was played in Court and there is no indication that PW2 and PW8 were ejected from the Laisamis tallying centre. The video shows the two leaving on their own after an exchange of words with someone who is seated on his desk who is presumably the returning officer. No security officer touched the two FAP officials.

From the evidence on record, no single FAP agent was denied the right to participate in the elections. **DW7, MICHAEL LOSIMARE LESAIGOR** was a FAP agent. He testified that he was stationed at Farakoren Primary school in Laisamis Constituency. He fully participated in the election process. There were other FAP agents and the form 39A is signed by a FAP agent. **DW13, HUSSEIN BURJE SAGO** was a Maendeleo Chap Chap agent at Saku primary school. He fully participated in the electoral process and was not discriminated. Daudi Kifile, the Petitioner's agent at Saku Primary School confirmed that the results for that station are correct and a FAP agent signed the form 39A.

Given the evidence on record, I do find that the FAP agents fully participated in the elections for Women representative in Marsabit County. The Petitioner's allegations are not proved.

IV. Assisted Voters

The Petitioner's complaint is that assisted voters were coerced to vote for Jubilee party candidates. The Petitioner's agents were not allowed to witness the process of assisting illiterate voters. According to the petitioners, where a voter opted to vote for the Jubilee Presidential candidate, the presiding officer marked all the other ballots for the other polls in favour of the Jubilee candidates.

Regulation 72 states 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 regulations.*
- (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.*

The petitioners maintain that the sacrosanct principle of secret ballot was violated. The assisted voters were made to cast their votes openly and this violated the concept of secret ballot. It is also submitted that the presiding officers declined to allow those voters who had their own assistants to be assisted by them. Instead, the presiding officers insisted on assisting all those voters who required assistance. Finally, the voter registers were not marked where the voters were assisted.

The presiding officers of the concerned polling stations testified. The polling stations that were specifically mentioned were Farakoren in Laisamis and Saku Primary school in Saku. DW23, DW24 and DW25 were all at Farakoren polling station. None of them testified that the process of assisting voters was made loudly to the extent that all those in the voting room heard the voter's choice. With regard to Saku primary, the evidence of Daudi Kifile that presiding officers marked all the ballots for Jubilee whenever an assisted voter opted for the Jubilee Presidential candidate cannot be true. He was at the polling station and never raised that complaint. The constituency and County returning officers never heard of those complaints.

There is the issue of marking the voter register. Mr. Walukwe has been very passionate about this. The voter registers were produced. There is no single voter register that was used as a case in point that the presiding officer failed to mark it in relation to assisted voters. The evidence is to the effect that most of the voters were assisted. It is not expected that all the assisted voters went to the polling stations with their own assistants. The presiding officer does not sign the form 32 when he/she assist a voter. Out of the 111,006 people who turned up, over 50% were assisted. That would mean having 50,000 other people to assist the voters.

Assuming it is true that some presiding officers did not mark the voters registers after assisting voters, in my view, that cannot be a good ground to nullify the results. The provisions of section 83 of the Elections Act would effectively cover that anomaly. The assisted voters voted for all the six polls. It cannot be held that it is only the governor's election that was affected by a failure to mark the voter's register. I am not convinced that the registers were not marked. I do find that such an irregularity does not vitiate the results of the election. It is not known who the assisted voters voted for. The election was by way of secret ballot.

2. Whether the Election for Women Representative of Marsabit County was conducted in accordance with the Constitution and Electoral laws.

The Petitioner's description of the election is that it was a sham. The election was riddled with several irregularities. Some voters were issued with multiple ballot papers. In her stronghold such as Baraza park and Al Huda, the polling stations were opened late and closed early. The 1st and 2nd respondents' agents were partisan and biased in favour of Jubilee party candidates. Voters were denied the right to vote while others were turned away and told the time was over. Other voters were turned away as they could not be identified through the use of the Kiems Kits. Other voters were told to buy versaline and go back so that they could be identified. After the court ordered for the election materials to be preserved, some ballot boxes had no seals or the seals were broken. Some had their lids interchanged. At Al Huda polling station, a clerk advised voters to vote for jubilee candidates. The forms used to record the results are fake.

Apart from the petitioner, PW11 Dr. Noah Akala Oduwo also painted a gloomy picture of the election process. It is his evidence that the electronically transmitted results on the portal should tally with the results on the statutory forms. Some polling station did not post the results for Women representatives to the public portal. Six polling stations exceeded the number of registered voters. The public portal had some results for the Women Representative elections while the servers had no results.

The respondents maintain that the election complied with the law. No voter was turned away. All the registered voters were allowed to vote. There was no preference given to any political party. All the agents were allowed to participate in the election and were issued with the statutory forms.

The evidence of **DW1 JASON MBUGUA** who was the Moyale Returning officer is that all registered voters were allowed to vote. He tabulated the results for the constituency using the forms 39As.

DW2 JAFFER GALGALO was the returning officer for Laisamis constituency. No incident of voters being chased away from the polling stations were reported to him. He tallied the results and prepared the form 39B. DW5, the 2nd respondent tallied all the results from the 384 polling stations and announced the winner. The petitioner got 41,019 votes while the 3rd respondent got 35,340 votes.

The law on the conduct of elections in Kenya has been explained herein above. Apart from the results declaring the winner, the election process has to be transparent, free, fair, verifiable and conducted in an atmosphere which accords the voters conducive conditions to exercise their constitutional political rights. This is the only period the political candidates appear before the electorate and beg for votes. It is done once in every five years and therefore has to be properly conducted so that those who are declared the winners represent the true will of the electorates.

There were 141,708 registered voters in Marsabit County during the 2017 general elections. There were 110,628 valid votes and 330 rejected votes. This gives a total votes cast of 110,958. This amounts to voter turn out of 78% for the County. It is quite difficult to expect a 100% voter turn out in an election. I do find that a majority of voters in Marsabit County did exercise their rights to elect their political leaders by turning up at the polling stations and cast their votes.

I have already explained how the petitioner's agents participated in the election and signed the forms 39As at the polling station. No voter who was found to be eligible to vote was turned away. The results from the polling stations do not give any discrepancy. No polling station posted results which exceeded the number of registered voters. In essence therefore, the 1st respondent did put a mechanism which enabled the registered voters exercise their voting rights with ease. It is not unusual to have cases of some voters not appearing on the voters register. That can be attributed to human errors and unless it can be established that the EBC had a deliberate policy to stop some voters from exercising their constitutional rights, the court cannot make any adverse inference with regard to those who could not be identified and therefore could not vote. The interests of the County supercedes those of the few individual voters.

It is my finding that the election was free, fair and in line with constitutional and statutory provisions. The 1st respondent did fulfill its mandate as provided under Article 88 of the constitution and deserves to be commended instead of being vilified.

3. Whether the petitioners have discharged the burden of proof to the required standard

The Petitioner raised several issues on alleged irregularities. These range from discrepancies in results on the portal and the forms, agents being discriminated, assisted voters being coerced to vote for Jubilee party candidates, registered voters not being allowed to vote, some polling stations registering more voters than the registered ones, the returning officer for Laisamis constituency having been irregularly appointed, presiding officers failing to mark the voter registers, election materials not being properly secured, bribery of voters among other complaints. It is my finding that all the above allegations as explained in this judgement have not been proved to the required standard. The petitioner has failed to discharge the burden of proof. The petition remains to be mere allegations without evidence to support them.

4. Whether the 1st and 2nd respondents or their agents committed election offences

The petition has made reference to Sections 6, 9, 10 and 11 of the Election offences Act No.37 of 2016. Section 6 provides for offences by members and staff of the Commission. Section 9 deals with bribery while Section 10 deals with undue influence. Section 11 is concerned with the use of force or violence during the election period.

The Petitioner in her entire testimony did not make any allegations that there was bribery during the election period or on the election day. There is no contention that there was violence during the election day which affected the voter turnout or violence which affected her campaigns. Election offences are criminal in nature and anyone making allegations that someone committed an election offence has to adduce evidence to that effect. Such allegations require proof to the standard of beyond reasonable doubt.

In the case of **MAHMUD SIRAT V ALI HASSAN ABDIRAHMAN & 2 OTHERS [2010] eKLR** there were allegations of bribery and the Court held as follows:

“The petitioner and his witnesses did not adduce any evidence to connect the persons who were allegedly bribing voters with the 1st respondent. The credibility of the petitioner’s case on the allegation of bribery would have been boosted if the petitioner procured a voter or voters to testify in support of his case in regard to the allegations of bribery. Having evaluated the evidence adduced in this regard this court is of the considered view that the allegations of bribery of voters by the 1st respondent was not proved.”

In the case of **SIMMONDS V KHAN [2008] EWHC 84** the court applied the standard of proof of beyond reasonable doubt where allegations of bribery were involved. The Court stated as follows:

“Thus the Court will apply-

(a) the criminal standard of proof to the charges that Mr. Eshaq Khan and/or his agents have been guilty of corrupt or illegal practices;

(b) the criminal standard of proof to the question of whether there has been general corruption.”

Similarly, in the case of **KARURI V MBOGO & ANOTHER (2008) 1KLR (EP)**, allegations of bribery were made. The court held as follows:

Paragraph 2: this dealt with allegations of bribery by the 2nd respondent and his agents. On this ground we heard the evidence of the petitioner that he saw 2nd respondent throw money in the air so that people could vote for him. The petitioner testified that he saw the 2nd respondent throw a bundle of shs.10,000/= in the air and people scrambled for it. We heard the evidence of one Kailanya (PW13) and Kamencho (PW15). All this was, of course denied by the respondent and his witnesses. We have carefully examined the evidence in respect of this ground and we are of the view that this being a serious allegation connecting those involved with election offences a court would require a high standard of proof. We also find it odd that the 2nd respondent would throw a bundle of shs.10,000/= in the air for people to scramble for it. We are not satisfied that there is enough evidence to support this ground.

VI. Whether the Petitioner has discharged the burden of proof

In the case of **RAILA ODINGA & 3 OTHERS V IEBC & 3 OTHERS; PETITION No.5 of 2013[2013] eKLR**; the Supreme Court stated as follows:

PW9, Daudi Kifile testified that he saw some people being bribed outside Sauk Primary Polling station. His contention is that those who were bribing the voters were agents of the governor. He does not know who was being bribed or the names of those agents. This cannot be sufficient evidence that there was bribery. The evidence is mere allegation and does not establish anything.

Mr. Walukwe contends that failure to mark the voter’s register that a voter has been assisted is an offence. The voters registers were produced in Court. The Court cannot make a generalized conclusion that all the voters registers were not marked and therefore all the presiding officers were at fault.

I am satisfied that no one committed an election offence. The signing of the form 39Bs and C by the same party agents is not criminal. There is no regulation which makes it a crime if an agent signs more than one statutory form.

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

The Petitioner raised several alleged irregularities in relation to the election. There are allegations that the results on the public portal are different from those on the forms 39Bs. The Petitioner's evidence confirms that the results on the public portal indicate that the 3rd respondent is the winner. The response to this allegation is that the results on the public portal were not used to declare the winner. Those results are derived from the electronic transmission from the polling stations. There is no guarantee that all the results transmitted to the public portal from the 384 polling stations reached the public portal or IEBC servers. Marsabit County is quite vast and the problem of network is common knowledge. That is why the law under regulation 82 makes a difference between the results which are transmitted electronically, which are categorized as “provisional”, and those which are physically taken to the tallying centres which are referred to as the “actual results”. The Black's Law Dictionary (8th edition) defines the word “Provisional” as **Temporary or Conditional**.

There is the alleged irregularity involving the assisted voters. There is no single assisted voter who testified. Even the petitioner's own witness Daudi Kifile testified that he witnessed the illiterate voters being assisted although he added a rider that in instances that one opted for the Jubilee Presidential candidate, then the other ballots were marked for the other Jubilee candidates. This is a mere allegation which is not proved. At Saku Primary school there were two streams. The petitioner got 160 and 168 votes in the two streams respectively. The 3rd respondent got 119 and 100. Seyere Christine Koreya got 149 and 159 votes respectively. The votes were fairly balanced amongst the three candidates.

The allegation that the petitioner's party agents were prevented from participating in the elections have also not been proved. Daudi Kifile was not removed from the polling station. **DW 7 Michael Logimare Lesargor**, a FAP agent, testified that he participated fully in the election process. No FAP agent testified that he was discriminated upon by the IEBC officials. That allegation is not proved.

The Petitioner contends that some voters were disenfranchised. PW4 Hussein Issa Woche, PW5 Sharu Aya Ghacho, PW6, David Gamate Shamo and PW7 Adan Mahulo Shame testified that they could not vote at St. Mary's and Fatul Bahr polling stations. They testified that they were registered voters in those polling stations. It is evident that some of the people indicated in the list of PW3's affidavit are not registered voters. The complaints were mainly raised in relation to St. Mary's, Fatul Bahr, Baraza Park and Kulafa Rashidin polling stations in Moyale constituency. No other voter from the other polling stations testified. I do find that this allegation has not been proved. The four witnesses presented their identification documents and were not found in the voters register. They could not be allowed to vote.

The other allegations involve differences in results of the six polls. I have already explained that the results of the gubernatorial and Women Representative does not give any difference. This cannot be a ground to nullify an election. It is quite difficult to create a balance sheet showing same number of voters; valid votes and rejected votes for all the six polls. If there is a very huge difference, then that can call for interrogation. However, there is no other data for the other polls for comparison. In any case, the petitioner did not produce the actual results in form of the C series for the Presidential, Senate and member of National Assembly for comparison. There is no request by the petitioner to produce those results. The Petitioner cannot allege that it was upon the 1st and 2nd respondents to produce those results. I am satisfied that the Petitioner has not discharged her burden of proof even to the ordinary civil case standard of on a balance of probabilities.

VII. Was the 3rd Respondent validly elected as the Marsabit Women member of National Assembly

The evidence of the 2nd respondent is that all the forms 39As, and 39Bs for Marsabit County were forwarded to him. He tabulated the results from the forms 39As and declared the 3rd respondent as the winner. The 3rd respondent got 41,019 votes against the Petitioner's 35,340 votes giving a difference of 5,679. Those are the results of the election. There are no other results. There is no allegation that the results in the forms were altered, changed or manipulated. The petitioner's **285 FAP** agents signed the forms 39As at the polling stations acknowledging that the results in those forms are correct. Those results sufficiently and clearly represent the will of the Marsabit people. No electoral malpractices can be attributed to the 3rd respondent. The 3rd respondent won fairly. The production of the statutory forms, voter registers and SD cards by the 1st respondent clearly demonstrates the manner in which the election was conducted fairly, and transparently and it can be verified through examination of those forms. It is not illegal to vote after 5.00pm. There is no evidence that the 1st respondent deliberately continued to keep the polling stations open even after the voting time of 5.00pm had lapsed. Those who voted after 5.00pm were on the queue at that time and are eligible to vote.

I do find that the 3rd respondent was validly elected as the Marsabit Woman Member of the National Assembly. There were seven candidates

and the 3rd respondent emerged the winner. No single witness made any personal allegations against the 3rd respondent.

FINAL ANALYSIS

An election is a long process and not a single day event. Before the voters appear at the polling station to cast their votes, there are several activities which are undertaken by both the IEBC, the candidates and the voters in preparation of the election. The IEBC conducts voter education, prepares the election materials and recruits extra staff for purposes of conducting the election. The political parties are expected to carry out their party nominations for their candidates. There is a period where campaigns are conducted. Candidates themselves are expected to meet the requirements necessary for their respective positions. The candidates have to present their nomination papers. The voters do participate in the voter registration exercise and verification of their registration status. They also participate in voter education and attend the political rallies. Ultimately on the election day the IEBC prepares the many polling stations and voters go to exercise their Constitutional rights to elect their political leaders. The votes are counted at each polling station and the results for each respective poll are announced. Party agents append their signatures on those forms confirming the results. The Presiding officers physically carry the forms used to tabulate the results to the 290 constituencies in Kenya. The Constituency returning officers physically carry the forms to the 47 County tallying centres. The result for the President, Governor, Women Representative and Senator are declared at the County tallying centre. That is our democratic process which enables Kenyans exercise their free will. Each vote is similar. The votes are not classified. One man one vote.

In short, the election process is quite protracted and in all stages statutory provisions are put in place to ensure that there is compliance by all the stakeholders.

Since human errors cannot be ruled out, those not satisfied with the process and the results, are permitted by the law to proceed and petition the courts to nullify the election. The general presumption is that the election was conducted in accordance with the law unless the contrary is established.

In realization of the hectic process of conducting elections, the legislators came up with Section 83 of the Elections Act which states 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.

Section 83 of the Elections Act is not unique to Kenya. It establishes a very old principle that no election is to be voided due to non-compliance with any written law if the results are not affected. This is derived from the simple fact that it defeats logic to conduct elections which involve a very long process, costs and is labour intensive only for purposes of rigging the elections in advance. That would defeat the whole concept of democracy. Several cases have dealt with the principle that elections should not be voided for non-compliance with the law if the results are not affected. It is true that an election encompasses both qualitative and quantitative elements. However, an election is a contest and if it is shown that all the candidates entered the election in an equal footing and the institution conducting the election was impartial, then the purity of the election has to be jealously protected.

The Petition and the evidence has made reference to specific polling stations. These are Al Huda, Baraza Park, Kinisu, Welensu Taka, Uran, Anona, Funan Ndimbo, Ramole, Losikirish, Gatab, Korr, Bulah, Tirrim, , Nomad, Halisirwa, St. Mary's, Fatul Bahr, Khulafa Rashidin, Butiye, Saku Primary school and Manyatta Hellu. The forms 39As for all these polling stations were brought before the court. There is no polling station whose results are disputed.

The contentions by Dr. Noah Akala that the IEBC portal gave different results can only be taken to be his own opinion and his subjective view. Dr. Akala reiterated the same allegations before the Machakos gubernatorial election Petition and in other Petitions in Nairobi. At one time as the proceedings will show, we had to proceed with the respondents' case as Dr. Akala was testifying in Nairobi. The documents he produced as a back up to his contentions have no bearing at all to the elections apart from the names of the polling stations. The Court cannot reject the results contained in the statutory forms that were signed by party agents in favour of the alleged results posted on a public portal. The form 39C is the statutory form used to declare the results and as well announce the winner. The portal is not used to declare the winner. The contentions that some polling stations had more rejected votes on the portal than on the forms 39Bs has been displaced by way of production of the statutory forms 39As, Bs and C. The contention that some polling stations had more voters than the registered voters has equally been displaced by the statutory forms.

The petition initially did not raise any issue of violence, unstamped and unsigned statutory forms or extended voting time. The allegation on stamped forms is derived from the scrutiny of the SD cards. The statutory forms produced in court were stamped. Other forms were found to be carbon copies but they were duly signed and stamped. The explanation is that the original form was put in the ballot box. The forms 39As are filled in counterparts. Each set has a specific number of forms. The petitioner's agents signed most of the forms. It is not a requirement that all agents of a political party participating in an election must sign the statutory forms. The forms produced in Court are not fake or inauthentic. The petitioner has not raised any complaint on the contents of the results in any single form. How can the court then conclude that the election was badly conducted or that the results are not the outcome of the election.

The results for the election in the four constituencies are as follows:

CONSTITUENCY	ABDI FARHIYA YARROW	ADAN SAFIA SHEIKH	HALAKE AMINA GUYO	IBREN NASRA IBRAHIM	PANTOREN ELIZABETH PIUS	SEYERE CHRISTINE KOREYA	SHAMA BERNADETTA OKOTU
MOYALE	271	26,330	2,793	12,567	565	764	545
NORTH HERR	186	658	156	15,793	5,597	956	388
SAKU	128	12,218	610	4067	2877	1771	161
LAISAMIS	106	1806	152	2909	10765	5445	44
TOTAL VOTE FOR EACH CANDIDATE	691	41,012	3,711	35,336	19,804	8,936	1,138

From the above analysis, it is clear that the 3rd respondent got most of her votes in Moyale and Saku. She got 658 votes in North Horr and 1,806 votes in Laisamis. How could she have influenced the IEBC officials in those two constituencies (Laisamis and North Horr) yet she got those minimal votes. Jaffar Galgalo did not play any role in the election process. If he was biased, how comes the 3rd respondent performed poorly in Laisamis constituency.

The report by the Deputy Registrar does not raise any doubt on the security of the election materials. The report in respect of this election gives the following picture.

CONSTITUENCY	No. of Ballot Boxes	No. of Ballot Boxes found Intact	No. of Ballot Boxes with more than one Broken seals	No. of Ballot Boxes with one Broken seal.
SAKU CONSTITUENCY	68	68 Intact	NIL	3
NORTH HERR CONSTITUENCY	101	101 Intact 1 Polling Station no voter turn out.	NIL	4
LAISAMIS CONSTITUENCY	79	79 Intact	Nil	4
MOYALE CONSTITUENCY	136	136 Intact	Nil	7

The allegations that voting materials were scattered in Saku has not been established. All the ballot boxes were found to be intact. Contentions that voters were told to go and buy versaline before they could be identified are mere allegations. No voter testified to that effect part from the petitioner. The issue of nullifying an election has been dealt with by very old cases.

In the case of *WOODARD V SARSONS (1875) LR, 733* it was held as follows: ***“it has been so conducted that the tribunal which is asked to avoid it is satisfied, a matter of fact, either that there was no real electing at all, or that the election was not really conducted under the subsisting election laws, that is that the constituency have not in fact had a fair and free opportunity to electing the candidate which the majority might prefer, or that there is reasonable ground to believe that a majority of the electors may, by reason of the irregularities in the mode of conducting the election, have been prevented from electing the candidate they preferred.”***

Given the above scenario, I do come to the irresistible conclusion that the election was free, fair, transparent, credible, accountable, verifiable and done in accordance with the constitution and electoral laws. The results can easily be discerned from the statutory forms. All the petitioner's allegations have been disproved. This petition lacks merit and is hereby dismissed with costs.

What orders on Costs

Election petitions have become part of our election culture. Once the results are announced, the election battle now moves to the courts. Although I have not conducted research on election petitions in other African Countries, it is evident that we could be the leading Nation in election petitions in Africa. Several cases involving election petitions have been filed both before and after the promulgation of the constitution in 2010.

It is lawful to file these cases. The petitioners cannot be condemned as disgruntled contestants who come to court trying to fault the election for no good reasons so as to be given a second chance. It is the petitions which have been filed in court which have developed and shaped the Kenyan election jurisprudence. Those who lose election petitions should not be condemned by way of heavy legal costs.

I am aware that Marsabit is quite far from Nairobi. All the advocates handling this matter had to travel all the way from Nairobi. However, that alone cannot be a basis for invoking a heavy penalty in form of costs. Taking into account the time taken by the respondents' counsels and their clients to prepare for the case and see it all through, I do assess costs at Ksh.2,500,000 for 1st and 2nd respondents and Ksh.2,500,000 for the 3rd respondent. This is the full costs of the petition and not instruction fees.

The Petition lacks merit and is hereby dismissed with costs. In line with the provisions of section 75(3) of the Elections Act, this Court does declare and confirm that the 3rd respondent, **SAFIA SHEIKH ADAN** was validly elected as the Marsabit Woman member of the National Assembly. A certificate of this court as to the validity of the election to issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly.

Dated, Signed and Delivered this 19th day of February, 2018

S. CHITEMBWE

JUDGE