



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
ELECTION PETITIONS NO.1 & 4 OF 2017

HON. SILVERSE LISAMULA ANAMI.....1ST PETITIONER

ADRIAN MAMBILI MEJA.....2ND PETITIONER

VERSUS

1. INDEPENDENT ELECORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

2. HENRY BAHATI LUMITI

(Returning Officer, Shinyalu Constituency)2ND RESPONDENT

3. JUSTUS GESITO MUNGALI M'MBAYA 3RD RESPONDENT

JUDGMENT

1. *Hon Silverse Lisamula Anami*, herein referred to as the 1st petitioner, was a contestant in the seat for the Member of Parliament for Shinyalu Constituency as an Independent candidate in the August 8th 2017 general elections in which the returning officer, the 2nd respondent herein returned *Justus Gesito Mugali M'Mbaya* herein referred to as the 3rd respondent, the winner with 20,572 votes against 16,402 for the 1st petitioner. The 1st petitioner was dissatisfied with the manner the election was conducted and challenged the election of the 3rd respondent in *Kakamega High Court Election Petition No.1 of 2017*.

2. *Adrian Mambili Meja*, herein referred to as the 2nd petitioner, returned third in the said election with 9,813 votes. He was also dissatisfied with the conduct of the election and challenged the election of the 3rd respondent in *Kakamega High Court Election Petition No.4 of 2017*. The two petitions were consolidated for purposes of hearing and determination.

3. The 1st petitioner contends that the August 8th 2017 election for Shinyalu Constituency was not conducted in accordance with the provisions of the Constitution of Kenya 2010, the Elections Act 2011 and the rules and regulations made thereunder. That the 3rd respondent was involved in election malpractices both prior to the election date and on the election date. He further contends that the officers of the 1st respondent were also involved in malpractices and contravention of the law. He contends that there was harassment by the police to him, his family members and supporters.

Election irregularities and malpractices by the respondents:

4. The 1st appellant contends that:-

- (1) The 3rd respondent was not validly nominated by Orange Democratic Movement to run for the seat of Member of Parliament for Shinyalu constituency.
- (2) The 3rd respondent was involved in acts of bribery and treatment of voters before and on the election date.
- (3) The 3rd respondent conducted illegal fund raising (harambee) during the campaign period in contravention of the law.
- (4) The 3rd respondent had close personal friendship with the returning officer hence the returning officer showed open bias to the 3rd respondent.
- (5) The 3rd respondent and the Governor Kakamega County, **Hon Wycliffe Oparanya**, held several meetings with presiding officers at Rock Motel in Kisumu with a view to discussing modalities for rigging the election in Shinyalu constituency.
- (6) The 3rd respondent campaigned on the eve of the election date in contravention of the law.
- (7) The presiding officers of the 1st respondent assisted illiterate voters in the absence of agents for the contesting parties.
- (8) The 1st petitioner's agents were not allowed to witness the voting process, sealing of ballot boxes and counting of votes.
- (9) The counting, collation and tabulation of votes was done in an opaque and non-transparent procedure without allowing agents to verify the candidate in whose favour the vote had been cast.
- (10) That there was inordinance delay in counting, collation and tabulation of votes in some polling stations that was designed to facilitate rigging of the elections.
- (11) That there was inter-change of votes to the benefit of the 3rd respondent.
- (12) That the petitioner's agents were ejected from the tallying centre during the tallying.
- (13) That in some stations, agents for the 1st petitioner requested for recounts which were declined.
- (14) That the presiding officers declined to give the petitioners' agents copies of forms 35A.
- (15) That some forms 35A were not signed and others were not stamped by the presiding officers.
- (16) Harassment and intimidation by the police at the behest of the 3rd respondent.

Grounds in support of the petition by the 2nd petitioner:

5. The 2nd petitioner contends that:-

- (1) The 3rd petitioner incited people to violence in both the 2013 and 2017 parliamentary elections;
- (2) The 3rd respondent lacks integrity;
- (3) The 3rd respondent conducted fund raisings between December, 2016 and 8th August 2017 in

contravention of the provisions of the law;

(4) The officials of the 1st respondent failed to conduct the counting and tallying of ballots in a transparent manner;

(5) The polling officers aided illiterate voters to vote for the 3rd respondent;

(6) There were some irregularities in forms 35A some of which were not signed or stamped by presiding officers;

Both petitions were opposed by the respondents.

The response by the 1st and 2nd respondents:

6. The 1st and 2nd respondents denied the allegations made by the petitioners and stated that the election was conducted in compliance with the Constitution, the Elections Act and, the rules and regulations that govern the conduct of elections in Kenya. That if at all there were any errors, such errors were inadvertent and/or arithmetic and did not affect the outcome of the election. That such errors cannot override the will of the people expressed at the polling station.

The response by the 3rd respondent:

7. The 3rd respondent denied the allegations made by the petitioners. He stated that he was validly nominated by Orange Democratic Movement to run for the seat of Shinyalu constituency on the said party's ticket. Further that the election met all the parameters of an open and verifiable election. He asked the court to dismiss the petition with costs.

Case for the 1st petitioner:

8. The petitioner adduced evidence that the 3rd respondent was not validly nominated by Orange Democratic Movement (ODM) to run for the seat of Member of Parliament for Shinyalu Constituency. He stated that a letter from the Registrar of Political Parties indicated that at the time of nomination, the 3rd respondent was a member of Amani National Congress Party. He could therefore not participate in ODM nominations. That the Petitioner challenged the nomination of the 3rd respondent before the Political Parties Disputes Tribunal which agreed with him that indeed the 3rd respondent was not a member of ODM at the time the nominations were conducted. Consequently, the tribunal ordered the party to conduct fresh nominations in accordance with its Constitution. The party did not comply with the order of the tribunal but instead gave the 3rd respondent a direct nomination. The nomination had been issued under the name Justus Kizito Mugali. A member of ODM, Oscar Mwanzi then wrote to the returning officer asking him not to accept the nomination of the 3rd respondent. The returning officer went ahead and accepted the nomination of the 3rd respondent under the name Justus Gesito Mugali M'Mbaya, which is not the name that was in the nomination certificate. Mr Mwanzi challenged the nomination before the IEBC Disputes Resolution Committee. The committee heard the dispute and dismissed it in a judgment that the petitioner considered unreasonable.

The petitioner had in the time being consequently resigned from ODM and participated in the election as an independent candidate.

9. During the hearing, the 1st petitioner called witnesses to prove that the 3rd respondent was involved in acts of bribery prior to the election and on the election date. The witnesses said that they saw the 3rd respondent bribing voters at several places within the constituency on the 7th August 2017. That on the day of the election his known agents were also involved in acts of bribing voters. The 1st petitioner also called witnesses who testified on the various irregularities committed by the officers of the 1st respondent

during the election. He called witnesses who testified on police harassment during the election period. He called witnesses who were assaulted by supporters of the 3rd respondent.

Case for the 2nd petitioner:

10. The 2nd petitioner filed his petition on the 6th September, 2017. The petitioner was accompanied by statements of his intended witnesses but not affidavits of the said witnesses. The affidavits of the said witnesses were filed later on 26th October 2017.

11. The 2nd petitioner called 6 witnesses. Their evidence touched on the irregularities committed by the officials of the 1st respondent on the election date.

Case for the 1st and 2nd respondents:

12. The 1st and 2nd respondents called the constituency's returning officer and 6 returning officers. The witnesses denied the allegations made by the petitioners.

Case for the 3rd respondent:

13. The 3rd respondent called 7 witnesses. The witnesses denied the allegations made by the petitioners.

Submissions by advocates for the 1st petitioner:

14. The advocates for the 1st petitioner Mr Lubulellah while leading Miss Ngeresa submitted that the mandate of the Independent Electoral & Boundaries Commission (IEBC) is to conduct free, fair, impartial, transparent and verifiable elections. That impartiality means that the commission should not take sides in an election or set up any system that favours any candidate. That verifiable means that if the results are given, one can look backwards and verify the accuracy of the results. That where a result is declared and there are discrepancies that result cannot be said to be verifiable. That the 1st and 2nd respondents in this case submitted to the court many forms 35A that lack clarity. The conclusion is that the results are not verifiable.

15. Counsels submitted that the role of an election court is to conduct an audit of the election undertaken by the 1st respondent. That in the election conducted by the Commission on the 8th of August 2017 for Shinyalu Constituency, the results declared in form 35B were pre-dated 9th August, 2017 and declared on 10th August 2017 as attested by the signatures of the agents on form 35B on 10th August 2017. The question then is when the results were declared. If it was 9th, what was the consequence in face of the fact that the agents signed form 35B on 10th August 2017. That doubt leads to the invocation of the principle of verifiability. The doubt should be resolved in favour of the 1st petitioner.

16. Counsels submitted that at Musingu polling station votes meant for the 1st petitioner were interchanged with the votes of the 3rd respondent to the detriment of the 1st petitioner. That this cannot be said to be an error but is only an example of the incompetence that pervaded the entire election. Other examples were that presiding officers failed to sign many of forms 35A.

17. Counsels submitted that a petitioner has no duty to produce his own set of results. That duty is imposed upon the commission.

18. Counsels submitted that an election court has jurisdiction to hear and determine a dispute on a nomination of a candidate. That the jurisdiction of the election court as stipulated by **Article 105(1)** is to

“hear and determine any question of whether any person has been validly elected as a Member of Parliament.”

That the powers of **IEBC** in settlement of electoral disputes as provided in **Article 88(4)** of the Constitution are not exclusive to the powers of an election court as there is nothing in the provisions that says that an election court cannot deal with disputes arising out of party nominations. That if the court were to avoid enquiring into the question of qualification of candidates simply because there are alternative remedies for challenging nomination disputes, that would be dereliction of the election court's constitutional mandate. That the Political Parties Disputes Tribunal ordered ODM to conduct fresh nominations but the party failed to do so. That the direct nomination of the 3rd respondent by the party was in flagrant disobedience of the order of the tribunal. That this court cannot condone the act of disobeying the orders of a lawfully constituted tribunal as it is the duty of this court to uphold and defend the Constitution. The order was not appealed against and it therefore still stands. The act of giving the 3rd respondent a direct nomination was therefore null and void.

19. Further that the returning officer had a duty to satisfy himself that the name of the 3rd respondent was the same one in the register of voters. He had no powers to amend the name in the nomination certificate. That a candidate cannot run by any other name other than the one issued by the nominating party. That the returning officer did not find out whether the 3rd respondent was a registered voter. That the consequence of him not being a registered voter is that he could not run for election as provided by **Article 99(1)** of the Constitution. That the 3rd respondent was thereby disqualified by the Constitution. That when the nomination dispute was lodged before the IEBC Disputes Resolution Committee, the Committee gave an unreasoned judgment. Therefore that the court should find that the 3rd respondent was not validly nominated as a candidate in the said election. Counsels cited the case of **Wamboko vs Kibunguchi 2** (2008) EP 477 where the court held that an election court has jurisdiction to hear matters concerning nomination of a candidate.

20. On the allegations of bribery counsels submitted that the witnesses who were presented before court gave direct evidence that they saw the 3rd respondent giving bribes or his associates doing so. That their evidence was cogent and was not shaken in cross-examination. They made reliance on the case of **Moses Masika Wetangula vs Musikari Nazi Kombo & 2 others** (2014) eKLR where the Court of Appeal found that the appellant was guilty of an election offence of bribery and treatment of voters. They submitted that the standard of proof where an election offence is cited in an election petition is higher than on a balance of probabilities but lower than beyond reasonable doubt. They cited **Presidential Petition No.5 of 2013, Raila Odinga & 5 others vs Independent Elections and Boundaries Commission & 3 others** 2013 eKLR and **Bernard Shinali Masaka vs Boni Khalwale & 2 others** (2011) eKLR. Further that the **alibi** of the 3rd respondent that he was at Friend's Hotel in Kakamega town at the alleged time is not credible as he did not produce any documents to prove that he was at that hotel at the alleged time.

21. Counsels submitted that an election court is duty bound to consider all matters that come up during the hearing of an election petition whether they originated from the petitioner or from the respondents. That the court has to take a holistic approach to the appraisal of the evidence and not ignore election malpractices on the ground that they arise outside the pleadings and not from the petitioner's evidence – see **Musikari Nazi Kombo vs Moses Masika Wetangula & 2 others** (2013) eKLR.

22. Counsels submitted that the 1st petitioner has discharged the required standard of proof in that the malpractices and irregularities constituted contraventions of the electoral laws, regulations and the Constitution. That these contraventions affected the results of the election which is therefore for nullification.

Submissions by advocates for the 2nd petitioner:

23. Counsel for the 2nd petitioner, **Mr Khamati** submitted that vide a letter from the Registrar of Political Parties dated 5th September, 2017, the 3rd respondent was a member of Amani National Congress party and not Orange Democratic Movement. That the 1st respondent therefore illegally qualified the 3rd respondent to contest the election as an Orange Democratic Movement candidate. That this renders his candidature **null** and **void ab initio**.

24. Counsel submitted that agents of the 2nd petitioner were locked out of polling stations. That presiding officers declined to give copies of forms 35A to the agents of the 2nd petitioner and also that the 1st and 2nd respondent refused to release all forms 35A to him.

25. The advocate submitted that many of the forms 35A were not stamped. That stamping is vital for verifiability in the absence of which it means that the election was not free, fair, transparent and verifiable. The advocate also submitted that the 2nd petitioner has proved that the 3rd respondent fundraised in contravention of the law.

Submissions by Advocates for 1st and 2nd respondents:

26. The advocate Mr Juma instructed by **Mukele Moni & Co. Advocates** submitted that there is a presumption in law that elections are valid as conducted and the onus of rebutting the presumption is on the petitioner. That elections are conducted by human beings. That it follows that perfection cannot be attained. That minute errors should be ignored. That any irregularities in an election must be shown to have affected the results.

27. Counsel submitted that the decision of Independent Electoral and Boundaries Commission Disputes Resolution Committee in dismissing the application on nomination of the 3rd respondent was not appealed against. That the petitioners are trying to invoke the supervisory jurisdiction of this court over the decision of the said Committee contrary to the laid down procedure. They cited the case of **Jared Odoyo Okello vs The Independent Electoral and Boundaries Commission & 3 others** (Election Petition No.4 of 2013) where **Justice Muchelule** held that an election court has no jurisdiction over matters concerning nomination of candidates. The advocates submitted that where the law provides a procedure, then it is that procedure to be followed.

28. Counsel further submitted that the election was conducted in accordance with the law. That a petition is not a do-over of the elections as was stated by **Majanja J** in **Jackton Nyanungo Ranguma vs The Independent Electoral and Boundaries Commission and 2 others, Kisumu Election Petition No.3 of 2017**.

29. That the overriding interest of the election court is to ascertain the will of the people and give effect to it. That the error at Musingu polling station was admitted but the error cannot vitiate the election. The advocates urged the court to dismiss the petition.

30. On the petition by the 2nd petitioner the advocates submitted that the petition is defective in that it does not state the results of the election as required by **Rule 8(1)(c)** of the Elections (**Parliamentary & County Elections**) Petitions Rules, 2017. That the need for enumeration of results is not a procedural issue but a substantive demand that goes to the root of the dispute before the court.

That the petition was not accompanied by affidavits when filed as required by the law.

31. Counsel further submitted that failure by some agents to sign forms 35A and failure by presiding officers to stamp the said forms cannot invalidate an election. That this can only happen if it is shown that such irregularities affected the results of the election. They cited the case of **John Kiarie Waweru vs Beth Wambui Mugo** (2008) eKLR.

Submissions by advocates for 3rd respondent:

32. On the petition by the 1st petitioner, the advocates led by **Mr Ayuka** submitted that the 1st petitioner resigned from ODM on 7th May 2017 and became an independent candidate. That he filed the matter before the tribunal on 8th May, 2017. Therefore that by the time the tribunal ordered ODM to conduct fresh elections, the petitioner was no longer a member of the party.

33. Counsel submitted that there was no attempt to review the order of Independent Electoral & Boundaries Commission Appeals Committee with the High Court. Therefore that the issue cannot be litigated upon in this petition.

34. Counsel further submitted that no evidence was led to any infirmity in forms 35A as to the votes garnered by each of the candidates. That defects on the forms without showing how the defects affect the results is of no consequence. That the error at Musingu polling station was a human error that did not affect any other polling station and did not have any effect on the results.

35. The advocates further submitted that the election was a process. That counting could end on 9th and results declared on 10th. That it is only suspicion that there was tampering with the declaration form but there was no proof.

36. Further that the petitioner has selected only those stations where the 3rd respondent won and alleges that he suspects there was something wrong. That it was not peculiar to Shinyalu Constituency that the serial numbers on forms 35A were different. That there was no evidence that there was any other result, other than the ones declared by the 2nd respondent. The advocates urged the court to dismiss the petition by the 1st petitioner.

37. On issue of bribery the advocates submitted that the standard of proof is beyond reasonable doubt. They cited the cases of *Simon Nyaudi Ogari & another vs Hon Joel Omagwa Onyancha & 2 others* (2008) eKLR and *Musikari Nazi Kombo vs Moses Masika Wetangula* . They submitted that the witnesses who testified on the issue did not identify the particular persons who were being bribed and whether they were voters. That the witnesses did not report the offence anywhere. That the witnesses were either agents of the petitioner or participating candidates. That their evidence was not preserved in any manner. The advocates submitted that the evidence is made up. That the 3rd respondent has not been arrested or charged of any offence. The advocates urged the court to dismiss the allegations.

38. On the petition by the 2nd petitioner, the advocates submitted that there is no petition before the court as there are no results attached as required. That the petition was not received and acknowledged by the Deputy Registrar as required. That the documents attached to the petition are not identified by the Commissioner for Oaths by numbers. On the issue the advocates cited the case of *Francis Mbalanya vs Cecilia Waema (2017) eKLR* where *Angote J* held that failure to comply with the law on affidavits can only lead to expunging the documents from the record.

39. The advocates submitted that no evidence was led to prove any of the allegations made by the 2nd petitioner. They urged the court to dismiss the petition.

40. The advocates for the 2nd petitioner submitted that the 2nd petitioner's application dated 26th September, 2017 seeking to file further forms 35A and affidavits was allowed by the court. That the submission that there are no witness affidavits to support the petition is erroneous. That the affidavits in support of the petition are properly commissioned. That they are attested as a bundle. That the practice is proper and has been approved by the High Court. That it is erroneous to hold that each document should be attested by a commissioner for oaths.

Principles and the applicable law:

41. An election is required to be conducted in conformity with the Constitution, the Elections Act, 2011 and rules and regulations made thereunder.

42. **Article 81** of the Constitution of Kenya, 2010 provides that: the electoral system shall comply with the following principles:

(a) – (d)

(e) free and fair elections which are

(i) by secret ballot,

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

(iii) conducted by an independent body;

(iv) transparent; and

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

43. **Article 86** provides that:

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

(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;

(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at the 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 malpractices are put in place, including the safekeeping of election materials.”

44. In *Raila Odinga vs IEBC & 3 others Election Petition No.5 of 2013* the Supreme Court set out the legal position regarding the question of burden of proof and the standard of proof in election petitions as thus:-

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

The standard of proof in election disputes is therefore higher than that of a balance of probability that is applicable in civil cases but lower than that applicable in criminal cases of proof beyond reasonable doubt.

45. In *Gitarau Peter Munya vs Dickson Mwenda Kithinji & 2 others* (2014) eKLR case the Supreme Court set out the guidelines applicable in election petitions where it held in paragraph 216-218 that:-

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

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

[218] Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election. In this regard, we stand on the same plane as the learned Judges in Morgan, Optitz and Nana.”

46. The court has to start from the presumption that the election conducted by IEBC on the 8th August 2017 was in accordance with the law. The burden to prove otherwise falls on the petitioner. The Supreme Court in Raila Odinga case at paragraph 196 re-affirmed this principle where it held thus:

“[196] ... This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies, all acts are presumed to be done rightly and regularly omnia praesumuntur rite et solemniter esse acta,. So the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the laws.”

Issues for Determination:

47. The issues for determination are:

- (1) whether the court sitting as an election court has jurisdiction to hear and determine the validity of the nomination of the 3rd respondent.
- (2) Whether there were irregularities and malpractices in the election and if so whether such irregularities or malpractices affected the outcome of the election.
- (3) Whether the petition of the 2nd petitioner is defective.
- (4) Whether the election of the Member of Parliament for Shinyalu Constituency was conducted in accordance with the law.
- (5) what orders are warranted in the petition.

(1.) The petition by the 2nd petitioner:

48. The petition was filed on the 6th September, 2017. It was supported by the affidavit of the 2nd petitioner and was accompanied by statements of witnesses whom the petitioner intended to call during the hearing. The petition did not declare the results of the election as required by **rule 8(1)(c)** of the Elections Rules. Neither was it acknowledged as received by the Registrar of the court. The 3rd respondent had filed an application to have the petition struck out but he did not prosecute the application. The petition went to full hearing. I will briefly address the issues raised by the respondents.

Failure to Declare Results:

49. The contents that are required in a petition are set out in **Rule 8** of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017** that provides that:-

“8(1) an election shall state –

- (a) the name and address of the petitioner;***
- (b) the date when the election in dispute was conducted;***
- (c) the results of the election, if any, and however declared;***
- (d) the date of the declaration of the results of the election;***

(e) the grounds on which the petition is presented; and

(f) the name and address of the advocate, if any, for the petitioner which shall be the address for service.”

Rule 8(5) states that –

The Registrar shall acknowledge receipt of the petition in form 2 set out in the first schedule.

50. The objective of the Elections Rules is provided for in **Rule 4(1)** of the rules which is to facilitate the just, expeditious, proportionate and affordable resolution of election petitions.

Rule 4(2) states that:

“An election court shall, in the exercise of its powers under the Constitution and the Act, or in the interpretation of any of the provisions in these rules, seek to give effect to the objective specified in sub-rule (1).”

Rule 5(1) states that:

“The effect of any failure to comply with these rules shall be determined at the court’s discretion in accordance with the provisions of Article 159(2)(d) of the Constitution.”

Article 159(2)(d) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by the following principles –

(a) –(c)

(d) justice shall be administered without undue regard to procedural technicalities; and

(e)

51. The question is whether failure to comply with the requirement to declare the results of the election and lack of acknowledgement of filing of the petition by the court’s registrar were defects that should have led to the petition being struck out or dismissed for non-conformity with the above said rules.

52. There has been two schools of thought in failure to comply with the provisions of **rule 8(1)(c)** of the Elections rules. Some High Court decisions have held that the provisions are mandatory and that non-compliance should lead to the petition being struck out. This was the view held in such cases as in ***Amina Hassan Ahmed vs Returning Officer Manderu County and two others*** (2013) eKLR, ***Jimmy Mkala Kazungu vs Independent Electoral & Boundaries Commission & 2 others, Mombasa High Court Election petition No.9 of 2017*** and ***Martha Wangari Karua vs Independent Electoral & Boundaries Commission & 3 others*** (2017) eKLR where the courts struck out the petitions for non-compliance with **rule 8(1)(c)** of the Elections Rules.

53. On the other hand there are High Court decisions that have held the view that failure to declare the results of the election is not fatal to the petition and that courts have discretion to allow the matter to go for full hearing and have the matter determined on merits. Examples are in ***Caroline Mwelu Mwandiku vs Patrick Mweru Musimba & 2 others*** (2013) eKLR, ***Washington Jakoyo Midiwo vs Independent Electoral and Boundaries Commission and 2 others*** (2017) eKLR and ***Shukra Hussein Gure vs Independent Electoral and Boundaries Commission & 2 others*** (2017) eKLR. In ***Caroline Mwelu Mwandiku vs Patrick Mweu Musumba & 2 others*** (supra) Majanja J stated that:

“39. The guiding principle in consideration of this matter is the overriding objective of the Rules which is stipulated under rule 4(1) of the Rules as “to facilitate the just, expeditious, proportionate and affordable resolution of election petitions under the Constitution and the

Act.” This objective is best realized by the Election court having regard to the purpose and mischief that the rule seeks to cure and the prejudice that would be occasioned by insistence on the strict compliance with form. Rule 5 further obliges this court and the parties to conduct proceedings before it to achieve the following aims, (a) the just determination of the election petition; and (b) the efficient and expeditious disposal of an election petition within the timelines provided in the Constitution and the Act.

40. Rules 4 and 5 are therefore a testament of the provisions of Article 159(2)(d) of the Constitution which obliges every court to dispense justice without undue regard to technicalities. The fact that elections are special disputes governed by special rules does not exonerate the court from this prime obligation to do substantive justice”

54. In *Washington Jakoyo Midiwo vs Independent Electoral and Boundaries Commission & 2 others* (supra) Maina J held that:

“... It is my finding that the omission to state the results in the petition and in the supporting affidavit do not call for its striking out. In my view the omission does not go to the root of the proceedings.”

55. I am persuaded by the view that failure to state the results of the election in a petition is not a serious defect in the petition that should automatically lead to the petition being struck out. This also applies to the lack of acknowledgement of the petition by the registrar of the court. An acknowledgement of receipt of filing of the petition by the registrar of the court is an administrative issue that does not go to the merits of the case. The court therefore had discretion to allow the matter to be determined on its merits in view of the requirement by the Constitution that justice should be administered without undue regard to procedural technicalities.

Witness affidavits:

56. The 2nd petitioner filed witness statements to accompany the petition instead of witness affidavits as required by **rule 12(3)** of the Election Rules that states:-

“Each person whom the petitioner intends to call as a witness at the hearing shall swear an affidavit.

Rule 12(4) states that:

“a petitioner shall, at the time of filing the petition, file the affidavits sworn under sub-rule (3).”

57. An election court has discretion to allow the filling of further affidavits and admit new or additional evidence under **rule 15(1)(h)** of the Elections rules. In *Raila Odinga v IEBC*, Supreme Court Election Petition No. 5 of 2013 the court gave the following guidelines on the filling of further affidavits and admission of new or additional evidence:

- the admission of additional evidence is not an automatic right but instead the election court has a discretion on whether or not to admit the evidence;**
- further affidavits must not seek to introduce massive evidence which would, in effect, change the nature of the petition or affect the respondent’s ability to respond to the said evidence;**
- the parties to an election petition should strive to adhere to the strict timelines set out in election dispute resolution laws; and**
- the admission of the evidence must not unfairly disadvantage the other parties to an election petition.**

58. In *Wilson Ng'ang'a Kimotho vs Independent Electoral and Boundaries Commission & 2 others* (2013) eKR where the petition had been filed without witness affidavits, the court held that:

“I understand rule 12 of the rules to mean that a witness affidavit is a fundamental component of the petitioner’s petition if the petitioner intends to call witnesses to support his petition; it is a crucial document because it contains the substance of the evidence on which the petition is provided. This is the evidence that must be brought to fore at the earliest opportunity possible to, inter alia, alert the respondents of the case against them and more importantly enable them reply to the petition substantively, from an informed point of view.”

59. The evidence that the 2nd petitioner intended to adduce in the petition was brought to the attention of the respondents though it was contained in witness statements. The 2nd petitioner filed an application dated 26th September, 2017 seeking to have the witness affidavits and the witness statements admitted as part of the petition. The court used its discretion and allowed the application.

60. Election petitions have to be heard and determined in timelines set by the law. The application to admit the affidavits was made in the early stages of the proceedings of the petition. The affidavits consisted of 7 short affidavits. The petitioner had only substituted what was in the statements into affidavits. The court had sufficient time to hear the matter even after admitting the affidavits. The respondents had sufficient time to respond to the matters raised in the affidavits. The affidavits did not raise any new matter. The respondents were not prejudiced by the evidence contained in the affidavits.

I have perused the affidavits. They are properly commissioned by a commissioner for oaths. I find that the affidavits are properly before the court.

Nomination of the 3rd respondent:

61. This is dealt with below in the petition by the 1st petitioner. The same reasons stated therein apply to the petition by the 2nd petitioner.

Violence:

62. In paragraph 2 of the petition, the 2nd petitioner alleged that the 3rd respondent contravened provisions of the Election Offences Act 2011 in that he incited people to violence and destruction of property during the 2013 and 2017 general elections. However, there were no particulars of incidents of violence or the dates when they took place. It is the duty of the petitioner to plead his case with specificity so that the respondent can offer a reply to a specific issue. This was not done here. No evidence was adduced to support the allegations. The allegation is thereby dismissed.

Integrity of the 3rd respondent:

63. The 2nd petitioner wanted to produce newspaper reports and video recording to impeach the integrity of the 3rd respondent. However, the evidence was not produced as there was no compliance with **section 106(B)** of the Evidence Act which requires such evidence to be accompanied with a certificate identifying the electronic record from which the material was made and describing the manner in which it was produced - see *Nonny Gathini Njenga & Another vs Catherine Matitsa & Another* (2014) eKLR. Consequently there was no evidence adduced to put into question the integrity of the 3rd respondent.

Fundraising and bribing of voters:

64. In paragraph 4 of the petition the 2nd petitioner alleged that the 3rd respondent conducted fundraising between December, 2016 and August 2017 and bribed voters in contravention of the Elections Offences Act 2011.

Again there were no specific incidents given of the fundraising and the people who were bribed. There was no evidence offered in support of the allegations. The allegations were thereby not proved.

Irregularities in the manner the election was conducted:

65. In paragraph 5 of the petition, the 2nd petitioner pleaded that the 2nd respondent failed to ensure that the ballot boxes at Lugose Primary School polling station were sealed before counting, tallying and transmission process ended and that he ordered the agents of the petitioner to close the polling station before the end of counting, tallying and transmission.

The 2nd petitioner did not call his agent at Lugose polling station to testify on the truthfulness of the said allegations. In the premises the said allegations were not proved.

66. In paragraph 6 of the petition, the 2nd petitioner pleaded that at Museno Primary School polling station, the 2nd respondent barred the petitioner's agents from witnessing the voting process and if need be assist the petitioner's voters.

Again no witness was called from the said polling station to prove the allegations. The allegations were thereby not proved.

67. In paragraph 7 of the petition, the 2nd petitioner pleaded that the 2nd respondent denied his agents opportunity to witness the voting process at the following polling stations – Shivakala, Lirhanda, Shabwali, Mwilitsa, Madala, Muleche, Lihovero, Shilalyo and Sigalagala. In paragraph 8 he pleaded that in majority of these polling stations, the polling officers aided illiterate voters to vote for the 3rd respondent.

Again no witness was called from any of these polling stations to testify on the matters pleaded. It was not pleaded with specificity the particular polling stations where polling officers aided illiterate voters to vote for the 3rd respondent.

68. The witnesses who testified for the 2nd petitioner as to irregularities that occurred at polling stations, witnesses No.2, 3, 5, 6 and 7 testified on irregularities that took place at Shidodo, Shiswa, Lunyu and Mugomari polling stations. These were not among the polling stations that were pleaded to have had irregularities. It is trite law that a party is bound by his pleadings and should not adduce evidence not based on pleadings. The court is bound to reject such evidence. In **Mahamud Muhumed Sirat v Ali Hassan Abdirahman & 2 others** Nairobi Election Petition No.15 of 2008 (2010) eKLR, Kimaru J stated that:

“From the outset, this court wishes to state that the petitioner adduced evidence, and even made submissions in respect of matters that he had not specifically pleaded in his petition. It is trite law that a decision rendered by a court of law shall only be on the basis of the pleadings that have been filed by the party moving the court for appropriate. In the present petition, this court declined the invitation offered by the petitioner that required of it to make decisions in respect of matters that were not specifically pleaded. This court will therefore not render any opinion in respect of aspects of the petitioner's case which he adduced evidence but which were not based on the pleadings that he had filed in court, and in particular, the petition.”

I am in agreement with the holding of the learned judge. The evidence of the above said witnesses was therefore not based on pleadings. Their evidence is therefore disregarded.

69. In paragraph 9 of the petition the 2nd petitioner pleaded that there were many irregularities in relation to forms 35A “which the petitioner will point out at the hearing ...” He further pleaded that 59 of the forms were unsigned by the agents of the petitioner as the results were rejected by the agents who were not allowed to witness the voting. That only 52 of the forms were approved by his agents and 23 of the forms were not availed to the petitioner.

70. Again this was not proper pleading. There were no particulars of the forms which were not signed by his agents. The petitioner did not call any witness to testify that he/she refused to sign the form because he/she was not allowed to witness the voting process.

In the foregoing, it is apparent that the petition failed to give particulars of the allegations complained of. The petition made general allegations to which no evidence was adduced to support them. It is clear that there was no seriousness in filing this petition. In *Joho vs Nyange & another (No.4) (2008)* 3KLR (EP), *Maraga J* (as he then was) stated that:

“Election petitions are no ordinary suits. Though they are disputes in rem fought between certain parties, election petitions are nonetheless disputes of great public importance ... Generalised allegations as the ones made in the petition are therefore not the kind of evidence required to prove election petitions. As I have said, they should be proved by cogent, credible and consistent evidence.”

There was no such evidence to proof the allegations made in the petition by the 2nd petitioner. The petition is for dismissal.

(2.) The petition by the 1st petitioner:

Nomination of the 3rd respondent -

71. The question before the court is whether this court as an election court has jurisdiction to determine whether the 3rd respondent was validly nominated by Orange Democratic Movement Party to run for election. The issue of the 3rd respondent’s nomination was dealt with by the Political Parties Disputes Tribunal and the Independent Electoral and Boundaries Commission Disputes Resolution Committee. The advocates for the respondents submitted that this court has no jurisdiction to hear a matter that is reserved for the two bodies. That if the petitioner was dissatisfied he should have made an appeal to the High Court or for orders of judicial review. The advocates for the 1st petitioner on the other hand submit that the court has the jurisdiction.

The 1st petitioner admitted in his evidence in court that at the time that he filed the dispute Political Parties Disputes Tribunal he had already bolted out of ODM and was running in the election as an independent candidate.

72. **Article 88(4)(e)** of the Constitution lists one of the responsibilities of Independent Electoral and Boundaries Commission to be:-

“the settlement of electoral disputes including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.”

Section 74(1) of the Elections Act 2011 is couched in the same words.

Article 105 (1)(a) gives an election court power to determine whether a person has been validly elected as a Member of the National Assembly.

73. In *Jared Odoyo Okello vs Independent Electoral and Boundaries Commission & 3 others* (2013) eKLR, where *Muchelule J* was faced with a similar situation as in this case referred to the decisions in the cases of *Republic vs The National Alliance Party of Kenya* and *Another ex-parte DR Billy Elias Nyonge* (2012) eKLR and *Diana Kethi Kilonzo & Another vs Independent Electoral and Boundaries Commission & Others* (2013) eKLR where the High Court had discussed the meaning to be attached to the **Article [88(4)]** and the **section [74(4)]** and concluded that it is only the Commission that has the exclusive mandate to resolve any dispute in relation to the electoral nomination exercise; that it is only after **IEBC** mechanism has been exhausted that a party may go to the High Court to challenge the process; and that such challenge would be through invoking the supervisory jurisdiction of the court

under **Article 165(6)** of the Constitution. In the case before him *Muchelule J* held that:

“the petitioner did not move to the High Court to challenge the determination of the (Independent Electoral and Boundaries Commission) Committee. This court is an election court which is not sitting to supervise the decision of the committee. It is sitting to determine the validity of the election that was conducted on 4th March 2013. The petitioner lost the opportunity to challenge the decision and cannot be heard to raise the issue here. In short he cannot contest the validity of the nomination in this petition.”

74. In *Alfonse Mulandi Welile & Another vs Mutula Kilonzo Junior & 2 others* 2013 eKLR the court held that where issues surrounding a nomination have been determined by the High Court they cannot be re-opened by the same High Court sitting as an Election Court.

75. In *Wamboko vs Kibunguchi* (supra), the High Court held that an election court has jurisdiction to hear matters concerning nomination of candidates.

76. Mabeya J in *Ahmed Abdullahi Mohamad & Another vs Hon Mohamed Abdi Mohamed & 2 others*, Nairobi Election Petition No.14 of 2017 (Gubernatorial Elections for Wajir County) held that an election court has jurisdiction to audit the entire electoral process and that **Article 84(4)** does not preclude an election court from determining whether a person was validly elected.

77. One of the cardinal principles of natural justice is that a person should not be condemned unheard. **ODM** is the party that issued a nomination certificate to the 3rd respondent. It was a party in the proceedings before the Political Parties Disputes Tribunal. It is not a party to these proceedings. This court cannot delve into issues why ODM gave the 3rd respondent a direct nomination when the party is not a party to these proceedings. To do so would be to condemn them unheard which is against the rules of natural justice. In *Stanley Otieno Okello vs Daniel Okinde Majiwa & 2 others* (2017) eKLR where the candidates whose nomination was being contested were not a party to the constitutional reference matter, *Mativo J* held that:

“I find that allowing reliefs directly affecting persons who are not parties before the court would amount to condemning the persons to be likely affected without giving them an opportunity to be heard ...

78. The Constitution and Acts of Parliament have set the law applicable in party nominations. The jurisdiction to do so has been donated to the Political Parties Tribunal and IEBC Disputes Resolution Committee. An election petition is a creation of a special legislation **vide** the Elections Act and the Elections Petitions Rules. Where the law provides a procedure for redress, it is that procedure that should be followed. In *The Speaker of The National Assembly vs Karume* (2008) 1 KLR, the Court of Appeal held that:-

“Where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or any Act of Parliament the procedure should be followed.”

79. I am of the considered view that it is the **Political Parties Disputes Tribunal** and the **IEBC** Disputes Resolution Committee that have the mandate to determine issues of nomination of candidates. Any party dissatisfied with their decision should either file an appeal or seek a review with the High Court. **Section 74(3)** of the Elections Act 2011 require **IEBC** to determine all disputes relating to nominations and elections before the date of the nomination or election in issue. This is for good measure, meant to ensure that all disputes relating to nominations and elections are finalized before elections are held. This also means that any preferred appeal should be finalized before the nomination or election in issue. In this case the decisions of the **IEBC** Disputes Resolution Committee and the Political Parties Disputes Tribunal were not appealed before the High Court. The 1st petitioner cannot raise the validity of the nomination of the 3rd respondent in this election court. I therefore find that this court has no jurisdiction to deal with the matter raised in the petition concerning the nomination of the 3rd respondent.

Whether there were irregularities and malpractices in the election:

80. The 1st petitioner alleged that there were many irregularities and malpractices committed by officers of the 1st respondent and the 3rd respondent both prior to the voting day and on the voting day. I will therefor consider the allegations on these irregularities.

Denial of entry of agents into the polling centres

81. At paragraph 25 of the petition the 1st petitioner pleaded as follows:

In a number of polling stations the agents of the majority of the candidates were denied entry during the voting exercise for several hours. The petitioner's agents were not allowed into the polling stations at the time of poll opening and were only admitted in the afternoon at 2.00 pm meaning that they did not witness a substantial part of the polling. The petitioner's agents were not allowed access into the following polling centres; Shidodo , Lubao, Bulovi, Sigalagala and Shivakala New Primary School polling centres.

82. The only polling centre agent for the 1st petitioner who claims to have been denied entry into the polling centre was **Elisha Liyengwa**, 1st petitioner's witness No.26 who was deployed at **Shivakala** polling centre. He however did not state the reasons why he was denied entry into the polling centre. He did not state whether he had all the requisite documents for an agent. He stated that he was let in at 7.30 am after intervention by his election co-ordinator, one **Joseph Musonye**. The chief agent for the 1st petitioner **Manoah Siema** witness No.5 however stated in his evidence that the agent was let in at 9.00 am after he went to the polling centre and personally intervened. The witnesses have thereby given contradictory evidence as to the time the agent was let into the polling centre and at whose intervention. This contradiction creates doubt into the credibility of the two witnesses.

83. **Benson Ambani**, 1st petitioner's witness No.16 who was a co-ordinator for one of the candidates **George Muteshi** in Murhanda ward, claimed that at Itenyi polling centre most of their agents were not let in into the voting streams. That they were eventually let in at about noon while at Senyende they were let in at 10 am. However no agents from these polling stations testified to support this allegation. The witness has not identified the names of agents who were denied entry. In any case Itenyi was not one of the polling stations that the 1st petitioner complained that his agents were let in late.

84. **John Amboko**, 1st petitioner's witness No.25 claimed that two of their agents, **Godfrey Masharia** and Jennifer, were not allowed entry into their polling stations at Mugomari polling station. However the two agents did not testify to support the evidence. The witness did not state whether or not the agents had all the requisite documents. In the absence of the evidence of the agents themselves this evidence is not credible. Furthermore Mugomari polling station is not one of the stations that the 1st petitioner alleged that his agents were let in late.

The 1st petitioner himself contended that agents were allowed into the polling stations as late as 2 pm. He did not call any evidence to support that allegation. I find no evidence to prove the allegations made in paragraph 25 of the petition.

Complaint on assisted voters:

85. At paragraph 26 of the petition, the 1st petitioner complained that in 5 polling stations – Shidodo, Lubao, Bulovi, Sigalagala and Shivakala – the presiding officers assisted more than 60% of the voters alone and away from the agents of candidates without maintaining a record of assisted voters. Regulation 72 of the Elections (General) Regulations, 2012 states that:

“72(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."

86. The witnesses for the 1st petitioner who gave evidence on assisted voters were his agent at **Maruna** polling centre **Elisha M'mudi**, witness No.8, an observer with Catholic Church at **Mugomari** polling centre witness No.12 and a supervisor for 1st petitioner **John Mutsotso** witness No.25. **Mr M'mudi** stated in his evidence that between 200-300 people were assisted to vote at his centre yet 270 people voted there. That would mean that everybody was assisted to vote. That in all fairness cannot be true. It is not possible that all the voters at that polling station were illiterate. The witness himself signed form 35A. He did not make any complains. His evidence is therefore not credible.

87. **John Mutsotso** stated that he went to Mugomari polling centre and saw **IEBC** officials assisting voters. That he saw 3 people who were known to him being assisted by the **IEBC** staff to vote. However the three people were not witnesses in the case. Though the 1st petitioner had two agents there, they did not testify. I do not believe the evidence of the witness.

88. The observer for the Catholic Church testified that she was deployed at Mugomari stream 2. That she went to vote in stream 1 and saw **IEBC** officers assist 7 people to vote with only one agent observing. However in her affidavit that was filed with the petition she stated that she saw the 7 people being assisted by the **IEBC** officials in stream 2. That it is in stream 1 that she witnessed an assisted voter being told who to vote for by the presiding officer. In face of the glaring contradictions in the evidence of the witness, the evidence cannot be true.

89. The complaint on assisted voters that was pleaded in the petition was in respect to Shidodo, Lubao, Bulovi, Sigalagala and Shivakala polling stations. No agent was called from any these polling stations to testify on the issue. The illiterate voters were also not called. As stated earlier in this judgment a party should confine his evidence to matters that are pleaded.

In view of the above there is nothing to prove the allegation that presiding officers assisted voters in the absence of agents in the above pleaded polling stations.

Opaque Counting and tabulation of votes:

90. In paragraph 27-33 and 38 and 41, the 1st petitioner complained that during the counting, collation and tallying of votes on 30 or so centres mentioned in paragraphs 27, 29, 30 and 32 of the petition, the officials of the 2nd respondent were not allowing the agents present to verify the details in the ballot papers in order to ascertain the candidate in whose favour the ballot papers had been cast or to confirm whether they could be validly rejected. Further that the malpractice is evident that the candidate's vote, as garnered and recorded at the polling station differed from those recorded at the tallying centre. That the process of counting and tabulation was inordinately delayed in some of those polling centres so as to facilitate the rigging of the elections. That there was widespread improper acceptance and rejection of votes due to the above said malpractices. Further that the collation and tallying of votes was not prompt. That the 1st petitioner's agents in those polling centres requested for recounts but the same were denied. The petitioner further pleaded that in the stated polling stations his agents were not allowed to participate or witness the opening of ballot boxes, the voting process, the sealing of ballot boxes and in other areas, the counting of votes. That at Mashindu polling centre the 3rd respondent's agents maliciously communicated with voters to the effect that the petitioner had withdrawn from the political context and that the centre was closed while votes were still on the queue.

The allegations were denied by presiding officers at Maluna, Cherobani, Mugomari and Bulovi polling centres who stated that polling, counting and tabulation went on smoothly.

91. In spite of the 1st petitioner making such serious allegations, he did not adduce evidence to prove them. The complaint was touching on about 30 polling stations. Among those ones he only managed to call two witnesses from two polling stations – **Chirobani** and **Marluna**. The two witnesses did not raise any issue touching on the complaints made by the 1st petitioner. Both witnesses signed their respective forms 35A. In cross examination both agents stated that they were satisfied with the conduct of the election at their respective polling stations. Therefore the complaint relating to the opening of ballot boxes, counting, collation and tabulation of votes contained in the above stated paragraphs of the petition have not been proved.

Forms 35A not signed by presiding officers:

92. In paragraph 40 of the petition, the 1st petitioner complains that several forms 35A were not signed or stamped by presiding officers.

The importance of signing election petition forms was emphasized by the Court of Appeal in **Moses Masika Wetantula vs Musikari Nazi Kombo & 2 others (2014)** eKLR where the court stated that:

“79 ... when a document is not signed by its author, it means that the author does not own it. It follows therefore that a presiding officer who does not sign form 35 does not own such a form. Doubt is cast on the authenticity of such a form and the same cannot be relied upon and that affects the results of the election it relates to. If the exclusion of the votes on such form would affect the magic number or make it indeterminate, the result of such an election are also affected.”

93. The Supreme Court in the Presidential Petition No.1 of 2017, **Raila Amolo Odinga & Another vs Independent Electoral & Boundaries Commission & 2 others** at par. 377 also emphasized the importance of signing the said forms by presiding officers when it stated that appending a signature to a form bearing the tabulated results is the last solemn act of assurance to the voter by the returning officer or presiding officer that he stands by the numbers on that form. At the same time the court stated that stamping of the said forms cannot be said to be unimportant.

94. The returning officer in this petition admitted that there were instances where the presiding officers failed to sign or stamp forms 35A. I have gone through the forms 35A in the IEBC response. I have noted three forms that are clearly not signed by either the presiding officer or the deputy presiding officer – Vihulu primary School, Mukhonje primary School stream 2 and Itenyi Primary School stream 1 polling stations. From the clear documents of the 1st petitioner I have noted two forms that are not signed by either – Muraka primary School 2 and Vihulu primary School polling stations. This means that failure to sign the forms was not widespread. No adverse comments can be deduced from this inaction.

95. The test where the presiding officers have not signed or stamped the forms is whether the failure to do so had any effect on the results of the election. This was affirmed by the Supreme Court in **Nathif Jama Adam vs Abdikhaim Osman Mohamed & 3 others Election Petition No.13 of 2014** where the court held that:

“[90] From the foregoing passage, and from the record, we find that the authenticity of the results on the unsigned and unstamped forms 35A, had not been the subject of challenge. But there had been an irregularity in the handling of statutory forms from the polling station. There was no explanation of how that irregularity affected the results of the election.”

96. The court affirmed the decision of the trial judge where the Judge had held that:-

“[91] In this regard, petitioners did not lead any evidence that the lack of signatures or stamp of the presiding officers in forms 35A for the above mentioned polling stations affected the outcome of the election. Further, the petitioners did not challenge the results 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 to demonstrate that such failure affected the result of the election.”

97. The petitioner did not particularize the polling stations where the presiding officers did not sign or stamp the forms. He only pleaded that they were several. The Supreme Court in ***Raila Odinga Election Petition No.5 of 2013*** emphasized the need to particularize the polling stations being complained of. In addition the petitioner did not challenge the results that were declared in the forms not signed or stamped by the presiding officers.

He did not show the number of votes in these polling stations and whether they had any effect on the result. It has not been shown that failure by IEBC officers to sign a few of the forms had any effect on the result of the election.

Failure by presiding officers to provide copies of forms 35A to petitioner’s agents and failure to allow them to record reasons for refusal to sign them:

98. In paragraphs 36, 37 and 39 the petitioner pleads that presiding officers failed to provide forms 35A to his agents. That in several instances the forms were not signed by the candidates’ agents or the statutory comments inserted as required due to the 2nd respondents failure to avail the forms for that purpose. That the 1st and 2nd respondents declined to give the petitioner or his agents forms 35A despite oral and written requests. That the forms 35A submitted were not signed by the petitioner’s agents because their requests for recounts were not granted.

99. The 1st petitioner stated that he had agents in all the polling centres but then only one witness, his agent at ***Vikutsa*** polling station stated that the presiding officer refused to issue him with a copy of form 35A. It is not known whether the other agents were at their polling centres at the close of the whole exercise and that the presiding officers deliberately refused to issue them with the said forms. No witness stated that he/she demanded for a recount and it was declined. There are many forms in the 1st petitioner’s bundle that are signed by his own agents. His witness’s No. 7, 8 and 13 are among the agents who signed the forms. There is thereby no truth in the allegation that all the agents of petitioner refused to sign the forms because their requests for recount were declined.

100. ***Regulation 79(3)*** of the Elections (General) Regulations, 2012 require each of the candidate or agent to sign the declaration of results, if he or she is present when the presiding officer announces the results at the polling station. A candidate or agent who refuses or otherwise fails to sign the declaration form is required to record the reasons for his refusal or failure. When a candidate or his agent does not give any reason for refusal or failure to sign the declaration form, the presiding officer is supposed to record the fact of the said refusal or failure. ***Regulation 79(7)*** however has a rider that:-

“The refusal or failure of a candidate or an agent to sign a declaration form under sub-regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub-regulation (2)(a).”

101. The fact that agents for the 1st petitioner had not signed forms 35A cannot render the results from the affected polling stations invalid.

The 2nd petitioner’s agents were issued with copies of forms 35A that the 2nd petitioner filed with the petition. How come that not a single agent of the 1st petitioner was issued with a copy of the form? This allegation is doubtful. There is no sufficient evidence that presiding officers refused to issue copies of forms 35A to the agents of the 1st petitioner.

Unclear/illegible forms 35As supplied to the 1st petitioner:

102. The petitioner pleaded in paragraph 36 of the supporting affidavit that there were forms from 14

polling stations that the 2nd respondent either deliberately or knowingly omitted to supply to him and/or the copies provided were not legible. The affidavit does not state as to how many of the 14 forms were not provided to him or how many of them were not legible. He stated that they would be asking the court to compel the 2nd respondent to produce the said forms.

98. The 1st and the 2nd petitioners filed their own sets of forms 35As when they filed their respective petitions. The 1st and the 2nd respondents thereafter filed their set of the forms when they filed their response. The 3rd respondent filed his set when he filed his response. On 6th December 2017, the 1st and 2nd respondents filed another bundle of the forms because some of the forms they had filed in the response were unclear/illegible.

103. I have perused the forms filed by **IEBC** in their response and those they filed on 6th December, 2017 together with the forms filed by the 1st petitioner. Of the 14 forms complained of, the forms for 8 polling stations were clear in the bundle filed by IEBC in their response. These are for Shianda, Lirhanda, Shibuye 3 & 4, Muleche, Lirhembe, Mukhuni and Musingu polling stations. I have not seen the form for Kisia market polling station in the **IEBC** response bundle. That leaves 5 forms that were not clear. These are for Khayega stream 4, Mukumu BG stream 2, Sigalaga stream 2, Kwirenyi and Muraka polling stations.

Upon studying the forms my findings are as follows:

104. Kisia market – Code No.076 – The one filed on 6th December, 2017 is clear.

Mukumu BG stream 2 – code 052 - The form filed by **IEBC** in their response is not clear while the one they filed on 6th December, 2017 bearing the same serial number is clear.

Sigalagala Stream 2 – code 053 - The one filed with the response S/No.01013 is not clear while the one filed on 6th December, 2017 is clear but of a different serial No.01009.

Khayega stream 4 – code 051 - The form filed with the response serial No.0966 is not clear. The one filed on 6th December, 2017 is clear on the part of the votes obtained by candidates but with serial number 0965. The form filed by the 1st petitioner for the same polling centre is serial No.0965. The votes garnered by the petitioner in both forms are indicated as 218 while those for 3rd respondent are indicated as 196.

Kwirenyi – code 057 - The one filed with the response is serial No.1114. The votes garnered by the candidates are clear but the part meant for agents signatures is not clear. The one filed on 6th December, 2017 has a different serial No. 1105 but the votes indicated therein are the same as those in S/No.1114. The part for agent's signatures is clear.

Muraka stream 2 – code 090 - The one filed by **IEBC** in their response serial No.1662 is not clear while the one they filed on 6th December, 2017 is clear but has a different serial No.1657.

105. It is then clear that of the 14 polling stations complained of **IEBC** did file clear documents as requested by the 1st petitioner in his petition except that they filed documents bearing different serial numbers. The returning officer, **IEBC's** witness No.7 explained to the court that a booklet of form 35A has six leaflets all of which have different serial numbers. He explained that of the six leaflets three of them are sent to the returning officer. That one copy is inserted in the ballot box and the rest are issued to agents. It would then mean that a presiding officer may use more than one booklet. A second booklet would have different serial numbers. The results indicated in the two sets of forms filed by IEBC were the same though the serial numbers were different. There was no challenge on the said results. There was thereby no irregularity in the forms filed by IEBC on 6th December, 2017. **In Nathif Jama Adam vs Abdi Khaim Osman Mohamed & 3 others** (supra) the court held that it is not enough to point out

irregularities in a petition but one has to show how the irregularities affected the results. The production of documents with different serial numbers has not been shown to be an irregularity and if so, how it affected the results.

106. The advocates for the 1st petitioner attempted to show in their submissions that there were 18 polling stations with a total registered voters of 9,601 whose results cannot be verified. This was however not pleaded in the petition. It was not brought out in evidence. This would amount to amending the petition by the back door. A petitioner is not permitted to make a case outside the pleadings and his affidavits. The testimony must be consistent with and support the case pleaded. In ***Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and 2 others*** SCK Presidential Petition No.1 of 2017 [2017] eKLR, the Supreme Court quoted with approval the Supreme Court of India in ***Arikala Narasa Reddy v Venkata Ram Reddy Reddygari and Another*** Civil Appeal Nos. 5010 - 5711 of 2012 [2014] 2 SCR where it stated that;

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

(see Jackton Nyanungo Ranguma vs The Independent Electoral and Boundaries Commission and 2 others Election Petition No.3 of 2017 (supra))

The court will not consider submissions on matters not pleaded.

Error at Musingu Polling station

107. At Musingu Polling Station, 200 votes belonging to the 1st petitioner as indicated in form 35A were credited to the 3rd respondent when the votes were transported to form 35B. The respondents argue that this was a human error. The 1st petitioner argues that this was an example of the many irregularities that pervaded the election.

108. It is to be noted that no other station had such an irregularity. If the act was deliberate, it could have affected some other polling stations. I therefore agree with the advocates for the respondents that this was a human error. The question is whether the error had any effect on the results of the election.

The difference in the final tally between the 3rd respondent and the 1st petitioner was 4,170. If the 200 votes are to be deducted from the votes garnered from the 3rd respondent, there will still be a difference of 3,970 votes.

The error therefore did not have an effect on the result of the election.

Date of Declaration of Results:

109. The form for declaration of results, form 35B, is dated 9/8/17, being the date when the results were declared. The agents for the parties who signed the form endorsed the date when they signed the form as 10th August 2017. The petitioner said that the results were declared on 10th August 2017 at 5 am. The returning officer said that he completed the form on 9th August 2017 at 10 pm but declared the results on 10th August 2017 at 4:13 am.

110. It is then apparent that there is an error as to the date when the results were declared. The returning

officer admits that the results were declared on 10th August 2017 and not 9th August 2017. The question is whether this was a human error or whether the result was pre-rigged in favour of the 3rd respondent such that the returning officer even prepared form 35B well in advance.

111. I am inclined to believe that the form was dated 9th August 2017 in error. It was admitted by all the parties that the results were announced on 10th August 2017. The error as to the date the elections were announced had no effect on the results.

Other complaints:

112. The 1st petitioner alleged that his agents were ejected from the tallying centres but he did not adduce any evidence to prove so. His Chief campaigner who was at the tallying centre never mentioned of such an incident.

113. The petitioner alleged that the Returning officer and the 3rd respondent were bosom friends and that the returning officer favoured the 3rd respondent in the election. He alleged that his written and oral complains to **IEBC** on the impartiality of the returning officer had been ignored. He alleged that the returning officer held private meetings with the 3rd respondent.

114. The returning officer denied that he had a close personal friendship with the 3rd respondent. The petitioner admitted in his evidence in court that he did not lodge any written complaint with **IEBC** before the election date complaining on the impartiality of the returning officer. He did not tender in any evidence that the returning officer and the 3rd respondent had held private meetings.

115. The petitioner complained that the returning officer and his presiding officers held a meeting with the Governor of Kakamega County at **Rock Motel** in Kisumu to plan on methodologies of rigging the Shinyalu election. He did not adduce any evidence to prove that such a meeting ever took place.

The fact that the petitioner did not have evidence on any of these allegations is a clear indication that the allegations were a fiction of his mind.

116. The 1st petitioner complained that the returning officer refused/failed to issue him with copies of forms 35A after the election. This was proved to be true as the forms were issued later after several letters were written to the Commission. However this was after the election had been finalized and therefore it had no effect on the results of the election.

Allegations of Bribery:

117. The Elections Offences Act No.37 of 2016 provides as follows:

9(1) A person who, during an election period –

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

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

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

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

(c)

(2)

118. The legal position is that where there is an allegation of commission of an election offence, the offence has to be proved beyond all reasonable doubt – **Raila Odinga vs Independent Electoral & Boundaries Commission & 3 others** 2013. A petitioner who alleges bribery in a petition must adduce cogent and definite evidence for a court to find a respondent guilty of bribery.

119. In **Muliro vs Musonye & another** (2008) 2KLR, the court held that it is not necessary to prove the amount of bribe. That it should suffice if it is shown that with intention to influence voters to vote for a given candidate, bribes were given to voters.

120. I am also persuaded by the holding in Ugandan case in the **Presidential Election No.1 of 2001, Rtd Col. Dr. Kizza Besigye v Y.K. Museveni and Electoral Commission** that the offence of electoral bribery is not committed unless the gift, money or other consideration is given or received by a person who is proved to be a registered voter. Justice Katurebe JSC stated that:

“... It is therefore not enough for a Petitioner or any person to merely allege that agents gave money to voters; a high degree of specificity is required: the agent must be named, the receiver of the money must be named and he/she must be a voter. The purpose of the money must be to influence this voter.”

For an offence of bribery to be established in an election petition, the act itself must be proved as well as a corrupt motive on the part of the giver and the receiver. The evidence adduced must establish that bribes were given to voters as a result of which they were influenced or with an intention to influence them. It is only then that the court can safely arrive at the conclusion that the voters did not exercise their free will but were unduly influenced and consequently the integrity of the election was compromised.

121. The petitioner alleged that the 3rd respondent bribed voters on 7th August 2017 and on 8th August 2017. He called 7 witnesses who said that they saw the 3rd respondent bribing voters on the 7th August, 2017 and 4 witnesses who said that they witnessed agents of the 3rd respondent bribing voters on the day of the election.

122. **Zippora Vuloro**, 1st petitioner’s witness No.3 testified that on 7th August, 2017 at around 4 pm she saw the 3rd respondent giving money to a group of about 700-800 people at the home of a person called **Christopher Murunga** in Lunyu village.

123. **Fredrick Ashiundu**, 1st petitioner’s witness No.4 testified that on 7th August, 2017 at 3 pm he was distributing letters on behalf of the petitioner within Isukha East ward when he found the 3rd respondent and his wife having gathered people at their home and they were dishing out money to them. That later at 4 pm he found the 3rd respondent’s vehicle parked at the home of **Christopher Murunga** at Lunyu village with the 3rd respondent giving people money.

124. **Elisha Mmudi**, 1st petitioner’s witness No.8 stated that on 7th August 2017 at 5.30 pm he saw the 3rd respondent and his wife giving money to people at Kisia market. That the 3rd respondent proceeded further but his wife remained behind and gave 2 ladies Kshs.200 and told them to vote for the 3rd respondent on the following day.

125. **Robert Khabaha**, 1st petitioner’s witness No.9 testified that on 7th August 2017 at 4.30 pm he saw the 3rd respondent giving money to people at Mukhonje market. That there were more than 200 people gathered at the place. He was giving each Kshs.100/- and telling them to vote for him. That he followed the 3rd respondent to Lukusi market. The 3rd respondent stopped his vehicle at **Mzee Makonga’s** homestead where there were about 300 people gathered. The 3rd respondent gave each Kshs.100/-.

126. **Elizabeth Shitume**, 1st petitioner's witness No.11 stated that on 7th August 2017 at 10 pm she was at her home when she heard a commotion outside. She came out and found the 3rd respondent in the company of one **Robert Lutatwa** (then MCA) giving money to people.
127. **Peter Marema**, 1st petitioner's witness No.13 stated that on 7th August, 2017 at 6 pm he saw the 3rd respondent in the company of the then MCA Samuel Mwanzi. That the 3rd respondent was giving out money to people, Kshs.50/- per person. That the 3rd respondent went towards Vikutsa and Sokomoto. He had followed him on a motor cycle.
128. **Philip Luseno**, 1st petitioner's witness No.14, stated that on 7th August 2017 at midnight he saw the 3rd respondent at the home of one **Salim Shibanda** at Shibuye village. That the 3rd respondent was giving people money. That there were more than 500 people gathered and each was being given Kshs.100/-.
129. **Martin Manyengo**, 1st petitioner's witness No.15 stated that on 7th August, 2017 at about midnight he saw the 3rd respondent at the home of **Salim Shibanda** where he was giving Kshs.100/- to each of about 800 people who were gathered there.
130. On the election day, i.e. on the 8th August, 2017 **Maurine Mushira**, 1st petitioner's witness No.7 testified that she was an agent for the 1st petitioner at Chirobani polling station when a certain person called **Mbina** complained that someone was giving voters money at the gate. She went to the gate and found **Bernard Shitiabayi** giving money to people and telling them to vote for 3rd respondent. That on 7th August 2017 she had witnessed the 3rd respondent giving money to people at Chirobani market at Kshs.1000/- per person.
131. **Jotham Asenahabi**, 1st petitioner's witness No.10 testified that she saw one lady by named **Merciline Khalachi** in company of other women giving money to voters at the gate to Khayega polling station telling them to vote for **Herbert Sore, Kizito** (3rd respondent) and **Oparanya**. He reported to the presiding officer who sent a security police officer to check. He went with the security officer who chased the women away.
132. **Benson Ambani**, petitioner's witness No.16 who was an election co-ordinator for **George Muruli** testified that on the election day he went to Itenyi polling station and saw some youth whom he did not know their names but he used to see them around giving money to people and telling them to vote for **Kizito**, the 3rd respondent. That the voters were being given Kshs.100/- each.
133. The 3rd respondent denied these allegations and stated that on 7th August 2017 he was holed up at Friend's Hotel in Kakamega town where he was organizing the logistics for the following day. He stated that he did not set foot in the Constituency on that day. He called some witnesses to support his case. **Samuel Mwanzi**, 3rd respondent's witness No.3, who was said by **Peter Marema**, to have accompanied the 3rd respondent when bribing voters at Vikutsa denied the allegations. **Bernard Shitiavayi** the 3rd respondent's witness No.4 denied that he was seen bribing voters at Chirobani polling station. **Wellington Muganda** 3rd respondent's witness No.5 who was the chief agent for Orange Democratic Movement in Isukha South Ward testified that on the election day he was visiting polling centres to check on how voting was progressing. He denied that they had stationed agents outside polling stations to bribe voters. **Florence Matitsa**, 3rd respondent's witness No.6 and **Fredrick Imbayi** 3rd respondent's witness No.7 stated that on 7th August 2017 they were with the 3rd respondent at **Friend's Hotel** in Kakamega town where the 3rd respondent was meeting his agents. This evidence however came out during cross-examination in court and was not stated in their affidavits that they had filed in court. Mr **Imbayi** in his affidavit stated that on 7th August 2017 he was at Lunyu.
134. **Samuel Cherolyi**, 3rd petitioner's witness No.8 stated that he was the Orange Democratic

Movement chief agent in Isukha East location. That on 7th August, 2017 from 4 pm to 3 am he was with the 3rd respondent at Friends' Hotel n Kakamega town where the 3rd respondent was dispatching appointment letters for agents. He denied that the 3rd respondent was at Kisia market on that day.

135. I have carefully considered the evidence adduced in court on the allegations of bribery and that the 3rd respondent campaigned after the official campaign period had ended. I have considered the defence adduced against the allegations. It is to be noted that none of the witnesses who made the allegations of bribery went to the police station to lodge an official complaint with the police nor was any complaint made to **IEBC**. The allegations only came up when the petitioner filed the petition. The witnesses who testified were agents for the petitioner and/or his supporters. They were therefore not independent witnesses. The petitioner made general allegations that the 3rd respondent gave out money to members of the public. There were no specific names of the people who received the money. There was no evidence that the people were voters. There was no evidence that voters were influenced after receiving money from the 3rd respondent or his agents. In **John Kiarie Waweru vs Beth Wambui Mugo** (2008) eKLR the court held that:

“In the present petition, it was evident that the petitioner failed to establish to the required standard of proof that the 1st respondent indeed bribed voters and that the said bribery was so persuasive that it influenced the voters to vote in favour of the 1st respondent.”

This is also the case in this petition.

136. The burden of proving that the alibi raised by the 3rd respondent was false was on the petitioner. In **Kiarie vs Republic** 1984 KLR 739, the court held:-

“An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it is sufficient if an alibi introduces into the mind of the court a doubt that is not unreasonable.”

The petitioner has not dislodged the **alibi** put up by the 3rd respondent.

137. Upon appraising the evidence adduced on allegations of bribery I find that there is no sufficient evidence to prove the allegations to the required standard. I therefore dismiss the evidence that the 3rd respondent was involved in acts of bribery before the election date and on the election date.

Violence and Police Harassment:

138. In paragraph 47-52 of the petition, the first petitioner pleads of police harassment, unlawful arrest by the police of himself, family members and supporters, assault of his brother by the police and unlawful arraignment in court of his family members and supporters. He alleges that the police harassment was engineered by the 3rd respondent.

139. Where violence in an election petition is alleged the court is obliged to consider whether this affected the election and this would be so if it prevented voters from choosing a candidate of their choice. In **Muliro vs Musonye & Another** (2008) 2KLR (EP) the court held thus:

“To the contrary, if any election is characterized and marred by violence of any kind to the extent of disenfranchising the voters this court shall consider whether or not the overall effect was such as to make that election a sham.

140. The petitioner stated in his supporting affidavit that on two occasions he was confined at Kakamega police station without charges being preferred against him.

141. Two members of the petitioner's campaigner team – **Martin Manyengo** witness No.15 and

Valentine Manyeso witness No.17 stated that on 15th July 2017 they and the petitioner were arrested in Kakamega town and locked up without any reason. That they were released without charges. That on the election day a policeman threatened to have the two of them shot.

142. A brother to the petitioner witness No.18 stated that on 4th August 2017 at 10.30 pm policemen attacked him at his home where they had gone to arrest his son Allan and son to the petitioner, **Rodney**.

134. Allan witness No.20 and Rodney witness No.19 testified that they were arrested on 21st May 2017 and arraigned in court with preparation to commit a felony. Allan further testified that on 4th August 2017 he was again arrested and charged with robbery with violence. The complainant in the case was the wife to the 3rd respondent. That he did not vote on 8th August 2017 as he was in custody.

144. **Lichoti**, petitioner's witness No.21 and **Colfer's** witness No.22 stated that they were members of the petitioner's campaign team. That on 4th August 2017 he and seven other people were in the vehicle of a person called **Casper** when they were arrested by policemen and taken to Kakamega police station. They were locked up. They were taken to court on 7th August 2017 when charges were not read to them. They were taken back to court on 9th August 2017 and charged with preparation to commit a felony. They were granted bail but could not raise it and they were remanded in custody. That they did not vote on 8th August 2017 as they were in custody.

145. **George Okunya** witness No.23 testified that on 6th August, 2017 at 2 pm he and his 4 brothers were attacked by three people who were known to him as campaigners of the 3rd respondent. The people injured him and damaged his motor cycle. He reported the incident to the police.

150. The 3rd respondent denied that he was behind the arrest of the petitioner and his witnesses.

151. The criminal charges by the police against those who were arraigned in court are still pending. This court has not heard the evidence behind the arrests. Though some witnesses for the petitioner did not vote on the 8th August, 2017 because they were in remand custody after being arrested by the police, it has not been shown that the arrests were unjustified. It has not been shown that failure by the remanded people to vote manifestly affected the result of the election. It was the duty of the police to keep law and order during the campaign period. The court cannot thereby categorically say that the arrests amounted to police harassment and intimidation. It has not been shown that the 3rd respondent colluded with the police to effect the arrests. There was no evidence that the people who attacked and assaulted **Mr Lichoti**, petitioner's witness No.21 were members of the 3rd respondent's campaign team. There was no evidence of voter intimidation, harassment and violence as a result of which the voters were prevented from voting for the candidate of their choice and the will of the people was subverted.

The allegations of police harassment have thereby not been proved and they are accordingly dismissed.

Whether the election was conducted in accordance with the law:

152. **Section 83** of the Elections Act No.24 of 2011 provides that:

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

153. In **Gatirau Peter Munya** case (supra) the Supreme Court stated that where it is shown that an election was conducted substantially in accordance with the Constitution and the Elections Act, such an election is not to be invalidated only on grounds of irregularities. However that where it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. The court added that procedural or administrative irregularities are not enough, by

themselves, to invalidate an election.

154. The court continued to say that:

“205A. We would state as principle of electoral law, that an election is not to be annulled except on cogent and ascertained factual premises. This principle flows from the current democratic theme of the Constitution, which safeguards for citizens the freedom “to make political choices” [Article 38(1)]

155. In **Manson Oyongo Nyamweya vs James Omingo Magara & 2 others** (2009) eKLR **Musinga J** (as he then was) when considering whether an election was free and fair stated that:

“The court has to consider whether the grounds as raised in the petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not transparent, free and fair. It is not a question of who got more votes than the other. It cannot be said that the end justifies the means. In a democratic election the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind. It must be demonstrated that there existed favourable circumstances or a fair election and that no party was prejudiced by an act or omission of an election official.”

156. **Maraga J** in **Joho vs Nyange** (supra) held that:-

“... because it (election) is conducted by human beings, there are bound to be errors which can be explained. There is no election which can be perfectly conducted. However, it is only when such errors, which constitute non-compliance with the law, materially affects the outcome of the results that the court will have no option other than to nullify the said results.”

157. It is then clear that an election can only be vitiated if it was conducted in non-conformity with the law. However it is only when errors in an election materially affect the result of the election that can lead to the election being vitiated.

158. In this petition the court has noted some irregularities that were committed during the election. These are:

(1) Forms 35A that were not signed by the presiding and deputy presiding officers. The number of the forms that were not signed by the said officers were not pleaded with particularity. There was no evidence that such unsigned forms had any effect on the result of the election.

(2) Error at Musingu polling station where votes belonging to the 1st petitioner were erroneously credited to the 3rd respondent. This error however had no effect on the final out-come of the election.

(3) Date of declaration/announcement of the results – form 35B indicates that the results were declared on 9th August 2017 when it was in fact declared on 10th August 2017. There was no evidence that such an irregularity affected the result of the election.

159. In conclusion I find that the proven irregularities had no effect on the vote out-come of the election. The said irregularities were not of such a magnitude that they called into question the integrity of the election conducted in Shinyalu Constituency. I hold that the election for Shinyalu Constituency was conducted substantially in conformity with the Constitution, the Elections Act, 2011 and the rules and regulations made thereunder. The petitioners did not discharge the burden placed on them to establish the allegations that they made against the respondents. The constituents of Shinyalu were given an opportunity to elect a representative of their choice in a free, fair and transparent election. They elected the 3rd respondent. The court cannot interfere with the free will of the people of Shinyalu in the absence of credible and cogent evidence that the election was marred with malpractices and non-conformity with

the law. I accordingly return a verdict that the 3rd respondent was validly elected Member of Parliament for Shinyalu Constituency.

In the foregoing and for the above said reasons, I find that the two petitions filed against the respondents have no merits and are accordingly dismissed.

Costs:

160. Costs follow the event. I award the costs of the petitions to the respondents. All the parties herein were represented by advocates. The advocates are based in Nairobi except **Mr Kubebea** from the firm of **Mukele Moni** which firm was appearing for the 1st and 2nd respondents. The lead counsel in the petition from the said firm was **Mr Juma** who is based in Nairobi.

161. The petition was hotly contested. It involved lengthy submissions, especially by the advocates for the 1st petitioner and the advocates for the respondents. A lot of time must have gone into the preparation of the petitions. I cap the maximum amount of costs payable to the respondents at Kshs.5 million with the petitioners sharing the burden equally. The 1st and 2nd respondents on one hand and the 3rd respondent on the other hand to have equal share of the costs payable. The Deputy Registrar of the court shall tax the costs of the respondents. The deposit with the court shall remain so deposited pending taxation.

162. Pursuant to **section 86(1)** of the Elections Act 2011, a certificate of this court's determination is to issue to the Speaker of The National Assembly.

Delivered, dated and signed at Kakamega this 19th day of February, 2018.

JESSE NJAGI

JUDGE

In the presence of:

Mr Mutubwa and Miss Ngeresa for 1st petitioner

Miss Ngeresa H/B Mr Khamati for 2nd petitioner

Mr Kubebea for 1st and 2nd respondents

Mr Ayuka for 3rd respondent

George court assistant