



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**ELECTION PETITION NO. 2 OF 2017**

**JOHN MUGAMBI ANGAINA.....PETITIONER**

**VS**

**INDEPEDENT ELECTORAL AND**

**BOUNDARIES COMMISSION .....1<sup>ST</sup> RESPONDENT**

**WARIO IBRAHIM ALI R/O BUURI CONSTITUENCY.....2<sup>ND</sup> RESPONDENT**

**RINDIKIRI MUGAMBI MURWITHANIA.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

1. John Mugambi Angaine the Petitioner herein contested/vied for position of Member of National Assembly for Buuri Constituency in the General Election held on 8<sup>th</sup> August 2017 among 14 candidates including the 3<sup>rd</sup> Respondent Rindikiri Mugambi Murwithania. The results of the election were as follows:-

No	Name of Candidate	Valid votes in figures
1.	Angaine John Mugambi	15,887
2.	Gikandi Peter Gitonga	291
3.	Kaimenyi Josephat	10,547
4.	Kinoti Nicholas Magana	1,083
5.	Kinyua Stephene Mwenda	8,143
6.	Kirera James Kinoti	837
7.	Kirimi David	222
8.	Kithinji Dennis Kiambi	133

9.	Marete Lenisson Bundi	265
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10.	Mbuba Peter Rwanda	362
11.	Rindikiri Murwithania	Mugambi 17,480
12.	Ringera Stepehene Kiririmi	986
13.	Stephen Paul Bundi	122
14.	Wangaji Chris Kinyua	90

2. The 3<sup>rd</sup> Respondent having garnered the majority votes i.e 17,480 was declared the winner of the seat of National Assembly of Buuri Constituency. Being aggrieved by the declaration, the petitioner herein Hon Angaine John Mugambi filed this petition on the grounds on the face of petition and his affidavit sworn on 5.9.2017 as follows:-

a. The Buuri Parliamentary Election held on the 8<sup>th</sup> August 2017 was not administered in an impartial, neutral, efficient, accurate and accountable manner contrary to Article 81(e) (v) as read together with section 39, 44 and 44 A of the Election Act, the Regulations made there under, and section 25 of IEBC Act.

b. That it is a mandatory requirement and legitimate expectation that the data entered into KIEMS kits should be consistent, comparable and verifiable with the information recorded in the forms 35 A.

1. The Petitioner avers that in all polling stations within the Constituency the data entered into the KIEMS kits was not consistent with the information and data from the respective Forms 35 A.

2. The Petitioner avers that the data that was being displayed publically by the 1<sup>st</sup> Respondent at the Sub County Tallying Centre was not consistent with the information and data in the respective Forms 35 A.

3. As a result of the foregoing the 2<sup>nd</sup> Respondent did not administer the Buuri Parliamentary Election in an efficient, accurate and accountable manner as required under the law and in contravention of Article 81(e) of the constitution.

4. The information in forms 35 A is not consistent with the information recorded in Forms 35 B as required and legitimately expected.

5. Therefore, whatever Forms 35 B were purported to have been relied upon by the 2<sup>nd</sup> Respondent at the Sub-county Tallying Centre and on the basis of which the final result of the Buuri Parliamentary seat was declared were inaccurate as they inconsistent with the Forms 35 A which were the primary documents from which they are required by law to be created.

6. As a result of the immediately foregoing the Forms 35 B were not accurate and verifiable and consequently invalid;

7. As an ultimate result, the results declared by the 2<sup>nd</sup> Respondent on the basis of the impugned Forms 35B was rendered invalid and nullity.

i. The computation and tabulation of the results in a significant number of Forms 35B is not accurate, verifiable and internally consistent.

1. The additions and figures do not add up.

2. The petitioner aver that the nature and extent of the inaccuracies and inconsistencies in the tabulations is not clerical but deliberate and calculated

3. The Petitioner aver that the inaccuracies and inconsistencies affect and account for at least 10,000 votes.

ii. The Petitioner avers that in numerous instances the 2<sup>nd</sup> Respondent selectively manipulated, engineered and/or deliberately distorted the votes cast and counted in his favour thereby affecting the final results tallied.

iii. The Petitioner avers that in numerous instances the 2<sup>nd</sup> Respondent selectively manipulated, engineered and/or deliberately distorted the votes cast and counted particularly in favour of the 3<sup>rd</sup> Respondent thereby affecting the affecting the final results tallied.

iv. The Petitioner avers that in a substantial and significant number of instances the 2<sup>nd</sup> Respondent grossly inflated the votes cast in favour of the 1<sup>st</sup> Respondent thereby affecting the final results tallied.

v. The grounds, information and evidence detailed in the supporting affidavits are indicators of a deliberate and/or systemic and systematic interference and manipulation of the results of the Buuri Parliamentary Election by the 2<sup>nd</sup> Respondent.

vi. The effect of the systemic and systematic manipulation and distortion of the results renders it impossible to determine who actually won the Buuri Parliamentary seat and/or whether the threshold for winning the Election under the Constitution was met.

vii. The Purported results in the 1<sup>st</sup> Respondent's Forms 35 B are materially different from what the 1<sup>st</sup> Respondent publically relayed and continues to relay as at the time of filing in its website or portal.

viii. The Petitioner aver that the 1<sup>st</sup> Respondent abetted and allowed electronic media and news channels to relay and continue relaying the purported results, which the 1<sup>st</sup> Respondent was aware had no legal or factual basis. The Petitioner aver that this was deliberate and calculated to create a false narrative and national psyche in preparation to steal the election in favour of the 1<sup>st</sup> Respondent.

ix. Notwithstanding the foregoing averments in respect of Forms 35B, the Petitioners further aver that at the time of declaration of the result, the 2<sup>nd</sup> Respondent did not have most forms 34 B nor did it publically display or avail the same for verification. The declaration of the final result was therefore invalid and illegal

### 3. (B) Contraventions

**1. THAT** the 1<sup>st</sup> and 2<sup>nd</sup> Respondents conducted an election contrary to Articles 81 of the constitution of Kenya, 2010 provides the principles that the electoral system shall comply with, *inter-alia* freedom of citizens to exercise their political rights under Article 38.

**2. THAT** out of these actions the 1<sup>st</sup> and 2<sup>nd</sup> Respondents abdicated their role and duty to exercise, protect and safeguard the sovereign will of the people of Buuri Constituency.

**3. THAT** Section 83 of the Elections Act provides that where an election is not conducted in accordance with the Constitution and the written law, then that election must be invalidated notwithstanding the fact that the result may not be affected.

4. Even so, although the Petitioner aver that both the results and the conduct of the election were affected and rendered invalid, the Petitioners' position is that the non-compliance with the Constitution and the written law is by itself sufficient to invalidate the Parliamentary vote.

5. **THAT** the respondents have violated the provisions of the Constitution of Kenya, the Elections Act, The IEBC Act, Election (General) Regulations, 2012 Law of Kenya.

The Petition was also supported by affidavit of Petitioner sworn on 5<sup>th</sup> of September 2017 and the affidavits of 14 other witnesses.

4. Based on the grounds cited in the petition and the averments in the petitioner's affidavit as well as the averments in the witnesses' affidavit, the petitioner prayed for the following reliefs:

a. That this election court do order the recounting of all votes from all the polling stations within Buuri constituency in respect of the Parliamentary contest.

b. An order for scrutiny and audit of all the returns of the Buuri Parliamentary Election including but not limited to forms 35 A, 35 B and 35 C.

c. A specific order for scrutiny of the rejected and spoilt votes.

d. An order for scrutiny and audit of the system and technology used by the 1<sup>st</sup> Respondent in the Buuri. Parliamentary Election including but not limited to the KIEMS kits the server(s); Website/portal,

e. A declaration that the non-compliance, irregularities and improprieties in Buuri Parliamentary Election were substantial and significant that they affected the result thereof.

f. A declaration that the Buuri Parliamentary election held on 8<sup>th</sup> August 2017 was not conducted in accordance with the constitution and the applicable law rendering the declared results invalid, null and void;

g. A declaration that the 3<sup>rd</sup> Respondent was not validly declared as the Member of the National Assembly elect and that the declaration is invalid null and void;

h. An order directing the 1<sup>st</sup> Respondent to organize and conduct fresh parliamentary election in respect to Buuri constituency in strict compliance with the constitution and the Election Act.

i. A declaration that each and all the Respondents jointly and severally committed election irregularities.

j. Costs of the Petition; and

k. Any other orders that the court may deem just and fit to grant.

5. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a joint response to the petition dated 19<sup>th</sup> of September 2017 together with an affidavit sworn by the 2<sup>nd</sup> Respondent on 19<sup>th</sup> September 2017. They contended that they did not breach or contravene the provisions of the constitution, the Elections Act or Regulations in conducting the elections that were held on 8<sup>th</sup> of August 2017 and that the 3<sup>rd</sup> Respondent was validly elected as Member of National Assembly for Buuri constituency. They urged the court to dismiss the petition for lack of merit and order the petitioner to pay the costs.

6. The 3<sup>rd</sup> Respondent also filed his response dated 18<sup>th</sup> of September 2017 together with affidavit sworn on 18<sup>th</sup> of September 2017 in which at paragraph 7 particulars to the petitioners allegations were sought

to enable the 3<sup>rd</sup> Respondent respond to them and it was his view that the petition is an afterthought, misconceived, scandalous, frivolous, vexatious and an abuse of the court process and should be dismissed with costs because he was validly elected.

7. Before the hearing of the petition an application dated 5<sup>th</sup> September 2017 seeking for election materials to be supplied to the petitioner was heard and 17<sup>th</sup> October 2017 the court ordered the 1<sup>st</sup> and 2<sup>nd</sup> Respondent supplies forms 35As from all the polling stations together with forms 35 B and C in a flash disk. It was also ordered that the petitioner and 3<sup>rd</sup> Respondent to affix additional seals to all the ballot boxes. The Petitioner was on 16<sup>th</sup> October 2017 granted leave to file supplementary affidavits together with particulars requested for in paragraph 7 of the 3<sup>rd</sup> Respondents affidavit within 7 days. However, as at 4<sup>th</sup> December 2017 when the petition was coming up for hearing the court learnt that the Petitioner had just filed the supplementary affidavit on 1<sup>st</sup> December 2017 long after the lapse of the deadline which was supposed to be 23<sup>rd</sup> October 2017. The supplementary affidavit was therefore struck out for not having complied with the timelines given and for the reason that the said supplementary affidavit was introducing new evidence and thus expanding the scope of the petition without leave of the court and after pleadings had closed.

#### 8. Issues for determination

The parties in this matter did not frame issues for determination but I think from the pleadings and the testimonies in court the issues can broadly be framed as follows:-

1. Whether the elections held on 8<sup>th</sup> August 2017 for the position of Member of National Assembly for Buuri Constituency was conducted in accordance with the Constitution of Kenya, the Elections Act and Regulations.
2. Whether there was undue or improper influence, corruption and irregularities in the conduct of elections.
3. Whether the 3<sup>rd</sup> Respondent was validly elected as Member of National Assembly for Buuri Constituency.
4. Whether the results in Forms 35 As tallied with the results collated in Form 35 B JMA 4 used to declare results.
5. Who should bear the costs of the petition.

9. The petitioner in proving his grounds called 12 witnesses out of the 14 witnesses whose affidavits were filed together with the petition. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent called 2 witnesses and the 3<sup>rd</sup> Respondent also called 2 witnesses. The parties also filed written submissions at the conclusion of the case.

10. In consideration of the pleadings, the evidence on record and submissions received during the hearing of this petition as well as in consideration of the report by the Deputy Registrar in respect of the scrutiny and recount exercise ordered on 8<sup>th</sup> February 2018, this court is to determine whether the petitioner has proved his case to the required standards. The required standards in an election petition are different from the proof in normal civil cases because election petitions are suits of a special kind. Election petitions arise out of the expression of the will of the people to choose a representative pursuant to Article 1 (1) and (2) of the constitution of Kenya 2010 and the courts duty is to ascertain the intent of the voters and to give it effect to the fullest extent while upholding the principles that underlie a free and fair election. The burden therefore to establish that the elections were:-

- Not free and fair,
- That there was inconsistency in the data entered in the KIEMS kits and the data in the forms 35 A,

- That there were discrepancies in the data displayed in the county tallying centre and the data in the form 35 A,
- That there were discrepancies in the forms 35 A and form 35 B,
- That there was deliberate, calculated, systematic, systemic manipulation and distortion of election results in favour of the 3<sup>rd</sup> Respondent,
- That results were declared before receipts of forms 35A,
- That there was voter bribery and intimidation,
- That there was bribery and lack of neutrality on the part of IEBC officials and
- That the 1<sup>st</sup> and 2<sup>nd</sup> Respondent used form 35 B that is not prescribed in the schedule rests with the petitioner.

11. The court will not interfere with the results of the elections unless it is established to the required standards of proof that non-compliance, breaches and violations of the constitution, the law and regulations materially affects the elections.

12. The burden of proof and the standard of proof that is required of the petitioner has been set out in the **Supreme Court Presidential Election Petition of No. 5 of 2013 Raila & Others vs IEBC & 3 Others** where it was held

**“.....but at the same time a Petitioner is under the obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden. The threshold of proof should in principle be above the balance of probability though not as high as beyond reasonable doubt save that this would not affect the normal standards where criminal charges linked to an election are in question.”**

13. For the evidence in regard to discrepancies in the data in KIEMS kits and data in forms 35 A as well as the discrepancies between data displayed at the sub county tallying centre and data in forms 35 A the petitioner said it is only data in respect of his results that were being displayed and when he complained the display stopped. He didn't say what was displayed that was different from the data in the forms 35 A and he actually said that he only had access to 10 forms 35 As when he visited the polling stations and saw the forms that had been affixed to the door of the polling stations. He confirmed that as at the time of filing this petition he had not accessed the KIEMS kits and in fact it was by the order of this court on 17<sup>th</sup> October 2017 that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were ordered to avail the information to the Petitioner and 3<sup>rd</sup> Respondent in a flash disk.

14. The legal regime governing transmission of election results is found in **Article 86** of the Constitution **Section 39 (1A)(i)** of the **Elections Act and Regulation 82 of the Elections (General) Regulations 2012** as amended with **Legal Notice no. 72 of 2017**. There was clear interpretation of these provisions in the case of **IEBC vs Maina Kiai & 5 others** where the Court of Appeal held:

**“It is clear beyond peradventure that the polling station is the true locus for the free exercise of the voters will. The counting of votes as elaborately set out in the Act and Regulations with its open, transparent and participatory character using the ballot as the primary material means as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion. It sound ill that a contrary argument that is so anathema and antithetical to integrity and accuracy should fail from the appellants mouth.”**

15. It follows that if there were any results in the public portal at the sub county tallying centre then they were merely provisional results which could not be relied upon to tally the results for the constituency. The 2<sup>nd</sup> Respondent in his response to the petition and in his affidavit as well as evidence in court categorically said that he relied on the Forms 35 As from the polling stations to enter results in form 35 B. The petitioner confirmed he did not see the 2<sup>nd</sup> Respondent relying on the public portal to collate results into form 35 B.

16. The Petitioner's insistence that all results have to be transmitted by technology is also misconceived

because it is only Presidential Elections Results that are required to be transmitted electronically to the Constituency, County and National tallying centres under Section 39 (IC).

17. The petitioner annexed 2 forms 35 Bs JMA 4 & 5 to prove that the 2<sup>nd</sup> Respondent relied on inaccurate form because it was inconsistent with forms 35 A which were primary documents required by the law to be used in collating results into form 35 B. He stated that the forms 35 B JMA 5 were not accurate and verifiable and consequently invalid. JMA 5 is unsigned and unstamped and the 2<sup>nd</sup> Respondent said that he did not issue the Petitioner with form 35 B JMA 5 as it was a draft he used to verify that the information from forms 35 As had been correctly entered in form 35 B before he could sign, stamp and also have the agents or candidates sign and declare the results. In this respect he had 2733 entries to make for Buuri constituency and he had to verify those entries against the form 35 As to make sure there were no errors. He said that when verifying he came across 5 errors which he corrected and came up with form 35 B JMA 4 which he used to declare the results. The 2<sup>nd</sup> Respondent said by the time he was declaring the results the petitioner had left the tallying centre. The discrepancies that the petitioner is referring to between JMA 4 and JMA 5 are out-lined in the 2<sup>nd</sup> Respondents Affidavit at paragraph 9 page 3-5.

18 In consideration of 2<sup>nd</sup> Respondents admission that he had a draft form 35 B which he confirmed was the one the petitioner annexed to his petition as JMA 5 and in consideration that the form 35 B marked JMA 4 in the petitioners petition was not filled completely and in consideration that the petitioner had prayed for a recount and scrutiny in his petition this court on 8<sup>th</sup> February 2018 made an order for partial recount and scrutiny of election materials in respect to the election of Member of National Assembly for Buuri Constituency. The results of the scrutiny and recount in respect to form JMA 4 were filed by the Deputy Registrar and it was confirmed that the results in forms 35 As from all the polling stations in Buuri constituency tallied with the results collated in form 35 B JMA 4.

19. The petitioner confirmed that indeed the candidate known as Kinyua Stephen Mwenda garnered 218 votes at Ntirititi polling station and not 2183 votes as shown in JMA 5, he thus concedes that the entry in JMA 4 tallies with form 35 A from Ntirititi polling station which is also confirmed by the scrutiny. The explanation by the 2<sup>nd</sup> Respondent as to the discrepancy between JMA 4 and JMA 5 is in the view of this court satisfactory. In any case a document that is not signed is a worthless document that cannot be relied on as was held by the Court of Appeal in the case of **Abdikhaim Osman Mohammed & Anor vs IEBC & 2 others 2014 eKLR**. The authenticity of a document and/or form was also discussed in the Raila Amolo Odinga case Supreme Court Presidential Petition No. 1 of 2017 where the majority decision was Supreme Court held:-

**“.....Why would a Returning officer or in that matter a presiding officer fail or neglect to append his signature to a document whose contents, he/she has generated? Isn't the appending of a signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such officer, that he stands by the numbers on that form?.....”**

The 2<sup>nd</sup> Respondent did not sign or stamp the form JMA 5 and he cannot be made to stand by the numbers on a form that he did not append his signature.

20. In regard to allegations by the Petitioner that at Mitoone it was claimed that he had no vote at all in one of the streams the results in forms 35 A for both streams 1 and 2 show that the petitioner had 183 votes in stream 1 and 191 in stream 2. These results are the same ones that appear in form 35 B JMA 4. The Petitioner's claim that his votes were stolen at Tutua polling station 1 of 2 was supported by evidence of PW3 who said that the petitioner's votes were 97 but the presiding officer indicated 47 in form 35 A. The scrutiny and recount of votes in this particular polling stations Tutua 1 of 2 discounts this allegation. The recount established that the Petitioner garnered 47 votes. At Kangaita polling station the petitioner said that his agent known as Mugambi reported to him that 175 votes that were due to him were awarded to the 3<sup>rd</sup> Respondent but the said agent did not swear an affidavit. The Petitioner also didn't know in which particular stream at Kangaita polling station this anomaly happened. Claims of stolen votes, superficial forms and discrepancies in forms 35 As and 35 B has therefore not been proved.

21. The petitioner and his witnesses made very serious claims that there was voter bribery and intimidation as well as lack of neutrality in the part of IEBC officials particularly at polling stations which are his strongholds and to a large extent spread thinly over the rest of the polling stations. Voter bribery and corruption are election offences under section 9 of Elections Act 2016 which provides:-

**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 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 results of an election.**

**Commits an offence.**

**9(2) a person who during an election period accepts or agrees to accept a bribe that is offered in the circumstances described in (1) commits an offence.**

**9(3) a person who commits an offence under this section shall be liable on conviction to a fine not exceeding Ksh. 2 Million or to imprisonment for a term not exceeding 6 years or to both.**

22. Where a claim of giving or receiving a bribe is made then it is incumbent upon the petitioner to establish beyond reasonable doubt that the offence was committed by the respondents or by any party associated with the respondents with their permission and knowledge. The findings in **Raila Odinga & others vs IBEC & 3 Others [2013] eKLR** and the findings in **Moses Masika Wetangula vs Musikari Nazi Kombo & 2 others [2014] eKLR** fortifies the requirement that if there are allegation of commission of election offences in an election the law requires that those allegations be proved beyond reasonable doubt. The petitioner did not specify any particular person he witnessed bribing or being bribed to vote or refrain from voting for a candidate or a particular party but he said he got the information from his agents on the ground.

23. The petitioners witnesses who gave evidence as to bribery and corruption were **PW2 Johnson Murithi** who said that he was PNU party agent at Ndurumuru polling station and that he was alerted that one Gichohi was taking voters ID cards on 8<sup>th</sup> August 2017 outside the polling station at the instructions of the 3<sup>rd</sup> Respondent but he said that the said Gichohi escaped and he was not able to get the names for the people whose ID cards had been taken. In the affidavit he only gave one name for Gichohi although he said in cross examination that Gichohi is also known as Jacob but that is not in his affidavit. The voter who gave him the report that the said Gichohi was taking voter ID cards was also not a witness.

24. **PW2** also claimed that the 3<sup>rd</sup> Respondent called for a meeting at Full Gospel church Kisima where the attendants were members of the Kikuyu community and he claimed that the Jubilee party leader had sent him to tell them to vote for Jubilee or else they will be evicted from the area. He also claimed that the 3<sup>rd</sup> Respondent gave out Ksh.10,000 shillings to representatives of each village so that they could go and convince those who did not attend the meeting to vote for Jubilee party. That those who were present at the meeting were also told to queue in pairs so that they could be given goodies. **PW2** said he did not queue as he didn't want to be seen because he had not been invited and he was a supporter of the Petitioner. The 3<sup>rd</sup> Respondent denied these allegations vehemently and said he never bribed anybody to vote for him. The evidence of **PW2** having been controverted by the 3<sup>rd</sup> Respondent and not being supported by any other independent evidence stands alone cannot meet the threshold of beyond reasonable doubt.

25. PW12 also claimed that the 3<sup>rd</sup> Respondent visited Mujujune polling station stream 2 of 2 at 9.00 PM and went aside to talk to the presiding officer and that he also gave each of the agents at the station Ksh. 1000 shillings. He says they were 5 agents in this particular polling station but he doesn't say why they received the alleged Ksh. 1000 and no other agent has sworn an affidavit to confirm this allegation and he has not said what effect the alleged giving of Ksh. 1000 to agents had on the results at the polling station. If it is true he received Ksh 1000 as a bribe from the opponent of his principle then it is him who has integrity issues and the law abhors the giver and the taker of a bribe in equal measure.

26. PW6 Silas Kithinji Mathenge also testified that 6 people who hired his car from Makutano to Ruiri and whom he claimed were Presiding officers were also bribed by supporters of Kaimenyi so that they could mobilise voters to vote for Kaimenyi as he hailed from Buuri District which had been split from Timau. He said that the supporters of Kaimenyi gave the 6 people a brown envelope which he claimed was a bribe. This particular witness confirms he didn't know what was in the envelope, he doesn't know the names of the people he carried, he doesn't give the names of the patrons he allege told him that his six passengers were talking with Kaimenyi supporters and he has not given the names of the said supporters. He has not given the name of the person he claims he found working at Ruiri as a Presiding officer and he did not report to the police that a person he witnessed being bribed was a Presiding officer at Ruiri. His accusations were not directed at the 3<sup>rd</sup> Respondent and Kaimenyi whom he refers to is not a party in this Petition. His evidence is not only irrelevant but is also uncorroborated and unreliable. The 2<sup>nd</sup> Respondent said he did not get any report that Presiding officers or any IEBC officials were bribed to manipulate elections.

27. The 7<sup>th</sup> witness Erick Murithi Muthinja was PNU party agent at Kiirua Technical Polling station. And he said he signed form 35 A because voting at the polling station was free and fair. He however claims that prior to the election date he mobilised youths on behalf of Michael Igweta RW4 who was buying voters cards from voters who were perceived to be followers of the Petitioner. He said that Michael Igweta bought about 800 cards but he gave only two names of the youths whose cards were allegedly bought. He didn't know how much each ID card was going for and he did not have records of ID cards that were bought. He said that for purposes of buying cards he was a Jubilee agent although he had no evidence of such agency. He said that he didn't know that he had committed an offence.

28. With all due respect to PW7 he is a dishonest witness whose evidence cannot be relied upon to find that the 3<sup>rd</sup> Respondents witness Michael Muriuki Igweta bribed voters and bought their Identity cards. RW4 Michael Igweta swore an affidavit on 18<sup>th</sup> September 2017 and denied these allegations and he was not cross examined on the issues that PW7 has alleged. Apart from failing to prove these allegations beyond reasonable doubt PW7 has not connected the allegations against RW4 to the 3<sup>rd</sup> Respondent. If it is true that PW7 could be an agent both for the petitioner's political party and also an agent to Jubilee party then he is a danger for growth of democracy in this country.

29. Andrew Riungu PW10, voted at Kithithina Primary School and he said that Muriithi Francis and John Kiriinya were giving bribes of 200 shillings to people whom they convinced to go and pretend that they were illiterate so that they could be assisted to vote for Jubilee party candidate. He said that this happened at Timau and Pyrethrum and that 4 people who pretended to be illiterate were assisted to vote for Jubilee but didn't give the names of the people who were assisted to vote. He didn't also see anyone being given the bribes and he was not in the meeting where 200 shillings was allegedly being given as a bribe. He claims that those who were in the meeting were the ones who gave him the report that 200 shillings was being given by Muriithi and Kiriinya to bribe voters. The results at Kithithina primary school were signed by Daniel Maasai, Kennedy Mutembei and Lucy Kinya. PW10 was not an agent at Kithithina primary school polling station and he doesn't explain how he saw four voters being assisted to vote for Jubilee. The allegations that PW10 is making should have been raised by the agent at Kithithina primary school polling station and supported by any of the voters who were assisted to vote.

30. The witness claimed that Mr Murithi is the Headteacher at Subuiga primary school but on cross examination it was confirmed that that was not true. The witness confirms that his testimony is hearsay and hearsay evidence is inadmissible. Tied to the evidence of PW10 is the evidence of PW3 Julius

Mwangi Nchebere who was a PNU agent at Tutua polling station. He claimed that the Presiding Officer and Deputy Presiding officers did not call agents to witness illiterate voters who wanted to be assisted. He said there were more than 5 agents at polling station but he doesn't say which voters were assisted in the absence of agents and why they didn't complain. PW3 did not annex his letter of appointment and oath of secrecy to the affidavit and form 35 A for Tutua polling station stream 1 does not have his name as an agent for PNU but scrutiny of the polling station diary confirms he signed in upto the closure of counting but did not sign at the tallying of votes. The claims by PW10 and PW3 are in respect of separate polling stations and are not corroborated by any independent evidence that there was bribery of voters by either the 3<sup>rd</sup> Respondent or by any other person associated with him to influence voting in a certain way. PW3 confirmed that in all the 3 streams at Tutua polling station it is Kaimenyi who garnered the majority votes and not the 3<sup>rd</sup> Respondent. This fact is not consistent with PW3's allegations that they were kept 5 metres away from the tallying table and therefore they could not distinguish the ballot papers that were being counted as belonging either to the petitioner or 3<sup>rd</sup> Respondent.

31. The 5<sup>th</sup> Witness said that he had received reports that elderly and illiterate voters were being misled by the IEBC clerks who were assisting them to vote. He went to Ex-Lewa primary school polling station and said that he needed assistance to vote and that when he told the IEBC officer that he wanted to vote for the petitioner the IEBC instead ticked the box for the 3<sup>rd</sup> Respondent. That he complained and was issued with another ballot paper but the one that had been ticked erroneously was still cast in the ballot box by the officer. He said he lied that he didn't know how to write and read so that he could confirm if the allegation that had been made that the elderly and illiterate voters were being misled was true. He said that Jonah Ruthiru told him elderly and illiterate voters were being misled to vote for the 3<sup>rd</sup> Respondent. He said he didn't know the names of the elderly and illiterate voters who were being misled and he did not know if they were witnesses in this petition. The PNU party agent at Ex-Lewa authenticated the results in form 35 A by appending the signature.

32. The claims that illiterate and elderly voters were misled by the presiding officers at Kithithina, Tutua and Ex-Lewa polling stations are uncorroborated. Single witnesses have made these claims without substantiating the same with independent evidence.

33. PW11 Carolyne Kendi voted at Kirimba polling station. She said that she found Raymond and Muriuki giving people money and telling them to vote for Jubilee candidate i.e. the 3<sup>rd</sup> Respondent. She said she was not given money because she had not voted for Jubilee. She said a bribe of 50 shillings was being given by the 2 people and that they went to a restaurant and continued giving out money. She said this happened 300 metres away from the polling station but she didn't report the incident and she didn't give the name of the people who were bribed. The evidence of Caroline Kendi stands unsupported as she has not identified the people she claims had been bribed and she was alone when she allegedly saw people being bribed to go and vote for the 3<sup>rd</sup> Respondent.

34. The other ground upon which the Petitioner relied in support of his prayer that the court declares the Buuri Parliamentary Elections held on 8<sup>th</sup> August 2017 was not conducted in accordance with the constitution and applicable law rendering the declared results invalid null and void was the evidence of PW8 Lucy Makena who was a PNU party agent at Kiirua primary school polling station stream 3. She said that voting started at 9.00 am in 2 streams because the KIEMS kit had failed but voting was extended to 9.00 pm to compensate for the lost time. She confirmed that she was present when clerks were counting the votes after voting and complained that after the counting the ballot boxes were left without seals as the Presiding officer was filling forms and it was not until PW10 the PNU coordinator visited the station at 5.00 a.m that the boxes were sealed. PW8 also claimed that the 3<sup>rd</sup> Respondent went to the polling station during voting and spoke to the Presiding officer. She said that there was no agent who escorted the ballot boxes to the tallying centre and that she was not given form 35 A to sign. She didn't know where the unused ballot papers were taken to by the Presiding Officer. She confirmed in cross-examination that she was awake during and after counting of votes and that she did not see anyone interfere with the ballot boxes. She confirmed that she did not sign the form but she was with Carolyne who signed the form. Scrutiny of the polling station diary for Kiirua stream 3 revealed that the agent who signed in as representing PNU was Stella Mwari who signed in at arrival, opening of the station, closure

of the polling station and affirmation of seals at the closure of counting. The report of the DR is that agents were not consistent in signing the polling station diary. It is noted that the agents who signed in the morning were not necessary the agents who signed at the end of the day.

35. PW9 Mercy Ntinyari was PNU party coordinator of Kiirua- Naari ward. She said that because of failure of KIEMS kit at the polling station at Kiirua primary school she met some voters going away without voting and she pleaded with them to go back and vote and after the KIEMS kits were repaired by 9.00 am voting proceeded. She said that PW8 reported to her that ballot boxes had remained unsealed for sometime and that the said agent only managed to get a copy of the form 35 A from a Jubilee agent. PW9 said she doesn't know if the results in form 35 A were entered in the presence of the PNU agents. She confirmed that the PNU agent at the polling station was Makena PW8, she also confirmed that the ballot papers were sealed but could not give the names of the people she found going away during voting. She confirmed that Carolyn Kagwiria was the PNU agent who signed the form 35 A at Kiirua primary school station 2 of 3 and that it is the Petitioner who won in all the streams. She said that delaying in starting to vote because of failure of KIEMS kit affected the results but did not explain how. A look at the form 35 A bearing results for Kiirua Primary school polling station 3 of 3 shows there were 617 registered voters with 388 valid votes and 31 rejected votes.

36. The 2<sup>nd</sup> Respondent RW1 and RW2 Jane Mat Omuruga the Presiding officer confirmed the delay as a result of the failure of the kits in the two streams but they were able to intervene by sending ICT officers from the county tallying centre who rectified the situation and voting went on uninterrupted from 9.00am to 8.30 pm. She said she ensured the election process went on well and clerks did their roles as assigned and agents of particular parties witnessed the voting process as provided by the law. She said that voters were being identified by KIEMS and National identity card before being allowed to vote and no malpractice was noted during the voting process. That there was no political aspirant who entered the polling booths to assist the voters in the voting process. She said that the illiterate voters, who could not read and write came with people to help them in voting process and those who didn't have anyone to assist were assisted by the agents. That voting was extended up to 8.30 pm to accommodate those who were on the queue at 5.00 pm without any hitch. That she was present when counting started at 9.30 pm and ensured votes for respective candidates were correctly counted and captured and recorded in forms accordingly and transmitted to the tallying centre.

37. Ballots boxes were sealed in the presence of the agents who recorded the seal number of all the boxes and they were taken to the constituency tallying centre together with other election materials and presented to the 2<sup>nd</sup> Respondent. She said that she kept the agents and voters informed of what was going on and she also informed them she was to compensate them for the time lost. She said she registered a voter turnout of over 70% in her stream. The time lost having been compensated after the KIEMS kits were restarted and PW9 having been able to convince the voters she alleged were leaving the polling station to go back and vote this court finds that the failure of KIEMS kit for the few hours did not affect the elections at this particular polling station at all. That failure cannot be a basis for nullifying the elections for Buuri constituency.

38. PW4 witnessed two instances where the IEBC clerk attempted to issue voters with two ballot papers in respect of one elective position and he confronted the offending clerk who said it was a mistake that was not intended. He said that when it happened the 2<sup>nd</sup> time he reported to the presiding officer who in turn reported to the Returning Officer the 2<sup>nd</sup> Respondent herein and the 2<sup>nd</sup> Respondent went to the polling station with two police officers who arrested the two offending clerks. When PW4 reported this incident, the Presiding officer did what a reasonable officer could do by stopping the voting exercise until the two offending clerks were replaced by the Returning officer. PW4 signed form 35 A for Maritati polling station to authenticate the results. He said the ballot papers issued by the offending clerks did not benefit the petitioner or the 3<sup>rd</sup> Respondent. Had it been that the 1<sup>st</sup> and 2<sup>nd</sup> Respondent were part of the conspiracy with the offending clerks the 2<sup>nd</sup> Respondent would not have admitted this allegations and would not have taken the steps that were taken to enable the elections to go on smoothly. The conduct of the presiding officer and the Returning officer shows that they recognized the roles of the agents at the polling station to ensure free and fair elections.

39. In regard to allegations of intimidation of voters and agents the evidence relied upon was that of PW2 Johnson Murithi who said that the 3<sup>rd</sup> Respondent on 7<sup>th</sup> August 2017 convened a meeting at Full Gospel church Kisima where members of Kikuyu community attended and while speaking in Kikuyu language told them he had been sent by the leader of Jubilee to vote for Jubilee or else they would be evicted. His evidence is that of a sole witness without corroboration of the alleged facts as the 3<sup>rd</sup> Respondent denied these allegations and none of the persons who attended the alleged meeting were called as witnesses.

40. PW3 claimed that voters were threatened by Jubilee agents at Tutua polling station that if they didn't vote for Jubilee the new district which had been created would not be given to them. He is also a sole witness who does not give the names of the Jubilee agents he is referring to and he doesn't say how many voters voted for Jubilee on account of the alleged intimidation or threats.

41. At Kinyenyere polling station the Petitioner said the Presiding officer was intimidating PNU party agents but we did not have any of the agents swearing affidavits or testifying to that effect. That allegation is left hanging and unsupported. In this particular polling station it is Josephat Kaimenyi who garnered the majority of votes and not the 3<sup>rd</sup> Respondent.

42. In paragraph 18 of the petitioners affidavit he averred that the 3<sup>rd</sup> Respondent who was a candidate of the ruling party influenced for subdivision of the larger Buuri sub-county into Timau and Buuri sub-counties which provided other candidates with propaganda that he had now moved to vie as a candidate in Timau subcounty. This averment is not one of the grounds of the petition and when the petitioner was cross-examined by the 3<sup>rd</sup> Respondents advocate on the issue of creation of two sub-counties he said he and the 3<sup>rd</sup> Respondent come from Timau and that he had not specified how the creation of the two sub counties influenced the election in favour of the 3<sup>rd</sup> Respondent or how the 3<sup>rd</sup> Respondent influenced the subdivision of the two sub counties. The other candidates he alleges peddled the propaganda are not named. He confirmed that the 3<sup>rd</sup> Respondent has never worked for the Ministry of Interior and Coordination of National Government to be in a position to influence subdivision of administrative regions/sections.

43. The 12<sup>th</sup> Petition witness claimed that 3 agents at Mujujune polling station were sent out of the polling station by the presiding officer in stream number 2 when counting was going on. That it was the Presiding Officer in stream 1 who intervened and they were allowed back into the hall after 1 hour. He is the only one who has made this claim and the other 2 agents he alleged were thrown out with him have not testified. PW12 said that they complained to the Presiding Officer and a recount was done which established that the petitioners 1 vote had been put on the side of the 3<sup>rd</sup> Respondent that conduct of a Presiding Officer is not consistent with allegations of intimidation of agents. He admitted in cross examination that the polling clerks, the Presiding Officer and the Deputy Presiding Officer together with two observers and the agents were 24 in number and could not have fitted on the table that was being used for sorting and counting of ballot papers or the results and that is why they were told to step aside to give room to the election officials to do their work. Out of scrutiny of rejected votes at Mujujune polling station stream 2 it came out that 4 of the votes which were marked as rejected were improperly done so and ought to have been awarded to the 3<sup>rd</sup> Respondent whereas 1 vote out of the votes that were marked as rejected was ascertained to have been improperly rejected and ought to have been awarded to the petitioner. The allegations of PW12 that the rejected votes were awarded to the 3<sup>rd</sup> Respondent are therefore unfounded and are not pleaded in PW12's affidavit. The averment at paragraph 8 that other agents overheard that more votes belonging to other aspirants were given to the 3<sup>rd</sup> Respondent is also not substantiated and recount of votes at Mujujune stream 2 shows no variance in the number of votes for each candidate as shown in form 35 A except that the 3<sup>rd</sup> Respondents votes increased by 1 after recount.

44. In relation to the allegations of intimidation of voters and agents the conclusion that can be made from the evidence so far adduced is that there was no corroboration and substantiation of the allegations and they cannot stand as a ground to nullify the elections.

45. The Petitioner claimed that most forms 35 A were not signed by his agents and PW2 was surprised

that results for Ndurumuri polling station does not have his name as the PNU agent. PW3 Julius Nchebere also claimed he signed form 35 A for Tutua stream 1 of 2 and PW8 claimed that he was not allowed to sign the form. The Petitioner did not have a list of the agents that either he or his party appointed in the various polling stations within Buuri constituency. However, the complaint in the evidence of the witnesses who testified as either having signed the forms and their names missing in the result forms or having been denied access to the form to sign alarmed this court as to the transparency and accountability of the Presiding and Deputy Presiding officers at those polling stations. Consequently when the order for scrutiny and recount was made on 8<sup>th</sup> of February 2018, it was also ordered that the polling station diaries be scrutinized to confirm who were the polling agents at Ndurumuru polling station 1 of 1, Tutua polling station stream 1 of 2, Kiirua primary school stream 3. The report by the DR is that both the petitioner and 3<sup>rd</sup> Respondent agents were not consistent in signing of the polling station diaries. It was noted that the agents who signed in the morning when the station opened were not necessarily the same agents who signed at different times in the course of the polling. The Presiding officers cannot therefore be faulted for failure of the agents to sign when it is not known whether the agents were aware of their obligation to remain at the polling station throughout the exercise.

In conclusion and in consideration of the pleadings the evidence on record, the submissions, the Deputy Registrars report on scrutiny and recount as well as further submissions regarding the scrutiny and recount this court finds that the petitioners claims of bribery during the elections, allegations of delay of opening the polling station at Kiirua primary school, allegations of intimidation and harassment, allegations of misleading of voters, allegations of discrepancies between forms 35 A and 35 B and allegations that the agents were not allowed to access forms 35 A and sign them have not been proved to the required standards. The evidence of PW6 was not relevant to this petition, the accusations were against Josephat Kaimenyi who is not a party in this petition and therefore irrelevant. PW5 and PW7 were not credible witnesses. Explanation as to delay in opening the Kiirua primary polling station was satisfactory and the delay was mitigated by compensating the time lost. The DR's report on agents signing of forms found that the agents were not consistent and different agents signed at different times for different parties and/or candidates. Although Form 35 B JMA 4 was not in the form and format in the schedule, the contents were consistent with the results in all the forms 35 A bearing the primary results from all the polling stations in Buuri constituency. The variances established by the scrutiny and recount exercise were negligible and were in favour of the 3<sup>rd</sup> Respondent. The scrutiny and the recount did not affect the votes garnered by the 3<sup>rd</sup> Respondent which confirmed that he garnered the majority votes. In the circumstances this court finds that the elections conducted on 8<sup>th</sup> August 2017 for Member of National for Buuri Constituency were conducted in accordance with Articles 1(2), 38, 81 and 86 of the constitution as well as the Elections Act and Regulations. This court finds that the 3<sup>rd</sup> Respondent was duly and validly elected as Member of National Assembly for Buuri constituency.

A certificate shall therefore be issued to the speaker of the National Assembly and any other relevant authority to that effect. Concerning costs of the petition Section 84 of Elections Act provides that:-

**“An election court shall award costs of and incidental to a petition and such costs shall follow the cause”**

Regulation 30(1) provides

The Election court may at the conclusion of an election petition make an order specifying

- a. A total amount of costs payable
- b. The maximum amount of costs payable.
- c. The person who shall pay the costs under paragraph (a) or (b)
- d. The person to be paid.

The parties did not address this court on the issues of the amount expected but in consideration of the Law that the deposit for security is pegged at Ksh.500,000 this court is of the view that the costs assessed as instructions fees should not be so much higher than the Security deposited and in view of the not so complex petition herein and in view of other awards made in the recent past this court caps the instruction fees for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly at Ksh. 1,000,000 and for the 3<sup>rd</sup> Respondent at Ksh. 1,000,000. The Deputy Registrar shall tax other attendant costs and issue a certificate to that effect.

The security that was deposited in the court to be used to pay part of the cost to the Respondents. Orders Accordingly.

**HON. A. ONG'INJO**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT MERU THIS 15<sup>TH</sup> DAY OF FEBRUARY 2018**

**In the presence of:-**

Mr Gitonga Advocate for Petitioners

Mr Muthomi for 3<sup>rd</sup> Respondent

Mr Mwangela for 1<sup>st</sup> and 2<sup>nd</sup> Respondent

**HON. A. ONG'INJO**

**JUDGE**

**Mr. Gitonga Advocate**

On behalf of the bar I wish to express my gratitude to the court in hearing and determining the petition. I pray that we be supplied with certified copies of the judgment and today's proceedings.

**Mr Mwangela Advocate**

We are grateful in the manner proceedings were conducted and courtesy extended to us and litigants.

**Mr Muthomi Advocate**

I join Mr Gitonga in thanking the court for working very long hours to ensure that the petition is concluded. I thank my colleagues for behaving in an exemplary manner. We have no objection for either party. This was not one of the petitions where parties and lawyers fought.

**Order**

Certified copies of the judgement and proceedings to be supplied to the parties advocates.

This court is grateful for the opportunity to preside over the petition and the courtesy and co-operation of the advocates and litigants throughout the proceedings. I extend my gratitude to my Court Assistant, the Deputy Registrar, the body guard and all stakeholders.

**HON. A. ONG'INJO**

**JUDGE**