



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

ELECTION PETITION NO. 3 OF 2017

IN THE MATTER OF ELECTION OF MEMBER OF PARLIAMENT MBEERE SOUTH
CONSTITUENCY 2017

AND

IN THE MATTER OF PROVISIONS OF CONSTITUTION OF KENYA 2010

AND THE ELECTION ACT 2011

AND

IN THE MATTER OF ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS)
PETITIONS RULES

BETWEEN

NYUTU PETER KAMAU.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL

AND BOUNDARIES (IEBC).....1ST RESPONDENT

RETURNING OFFICER MBEERE SOUTH CONSTITUENCY..2ND RESPONDENT

MUTURI GEOFFREY KING'ANG'I.....3RD RESPONDENT

J U D G M E N T

1. The August 8th 2017 was another historic day in the election history of this country when General Elections were held in all elective posts in various parts of Kenya. The election process takes place every five years in Kenya and the electorates get the opportunity to elect their preferred leaders to lead them in various political offices to wit the Presidency, Gubernatorial, Senatorial, Parliamentary and County Representatives. This petition relates to election of member of National Assembly Mbeere South Constituency.

2. The results declared by the 2nd Respondent as per Form 35B in regard to the elections of Member of Parliament (National Assembly) though not specifically pleaded by the Petitioner were as follows:-

- (i) Erasmus Hesbon - 410 votes
- (ii) Mugoh Genesisio - 6,899 votes
- (iii) Muriuki Nerbat - 6,857 votes
- (iv) Musymi Mutara - 16,854 votes
- (v) Muturi Geoffrey King'ang'i (3rd Resp) - 18,028 votes
- (vi) Mwige Sarah Njiru - 213 votes
- (vii) Njeru Atanasio Njue - 2,957 votes
- (viii) Njuki Emily Thaara - 3,090 votes
- (ix) Nyutu Peter Kamau (Petitioner herein)- 2,767 votes

3. The 3rd Respondent with 18,028 votes was therefore declared the winner by the 2nd Respondent and subsequently thereafter became member of National Assembly for Mbeere South Constituency by virtue of having garnered the highest number of votes in that elections.

4. The Petitioner was aggrieved by the declaration of the above results by the 2nd Respondent and listed the following grounds as basis for presenting this petition namely:-

a. That the Petitioner is a registered voter in Mbeere South Constituency, Mbeti Ward, Embu County and as such was eligible for election as Member of Parliament for the said Constituency during the 8th August 2017 elections pursuant to the provisions of Article 101 of the Constitution of Kenya 2010.

b. That the Petitioner was deprived of his constitutional right under Article 38 (3) to be validly elected as the Member of Parliament in the August 8th 2017 elections as the 3rd Respondent in his view was invalidly announced as the winner. In his view the declaration made by the 3rd Respondent were not valid.

c. That the Petitioner's agents were denied copies of Form 35 A at the polling stations by the presiding officers in clear contravention of Regulation 79(2A) (c) of the Elections (General) Regulations, 2012 and Article 35 of the Constitution of Kenya 2010.

d. That the counting and tallying process was characterized by irregularities and fraud to wit rigging and other illegal maneuvering and machination in violation of Article 86(a) of the Constitution of Kenya 2010 and in particular abdication of constitutional and statutory obligation by the 1st and 2nd Respondent to ensure that whatever voting used, the system was simple, accurate, verifiable, secure, accountable and transparent

e. That the election for Mbeere South Constituency was neither carried out in accordance with the provisions of the law nor in accordance with principles of natural justice and law relating to elections to the detriment of the Petitioner.

f. That the checks and balance put in place to ensure integrity of the electoral process was violated by the 1st and 2nd Respondents by themselves and/or through offices and agents depriving the petitioner his legitimate expectation of a free and fair elections on 8th August 2017, an expectation, the Petitioner contends denied. The Petitioner pleads that the entire process was undermined in the following ways;

- (i) Entering of inflated results in favour of 3rd Respondent in particular stations like Rwika Technical Institute, Yonder Karwigi Primary School, and SDA Mariari Primary School polling stations.
- (ii) Swapping of results of the Petitioner at SDA Mariari Primary School in Form 35A hence reporting and submitting different figures against the correct and true position as reflected by counted ballots in the polling station.
- (iii) Amending of Form 35A at the tallying centers to reflect fraudulent and fictitious figures in favour of the 3rd Respondent.
- (iv) Intimidation of the Petitioner's agents by the presiding officers and the agents of the Petitioner at various polling stations contrary to the fundamental constitutional and statutory requirements of accurate verifiable, transparent and accountable electoral process.
- (v) Widespread use, and submission of Form 35 A and 35B that were not signed by agents in the declaration of the results for the Mbeere South Constituency election.
- (vi) Denying the Petitioner's agent the opportunity to participate in vote counting and tallying at various polling stations
- (vii) Accepting and including in the final tally/count Form 35 A and 35B that were not signed by all the candidates' agents contrary to the express and implied provisions of the Election Act and Regulations thereunder.
- (viii) Failing to display the results of the election on the doors of polling stations contrary to the express and implied provisions of the law.
- (ix) Refusing to address serious concerns and objections raised by the Petitioner and his agents in regard to the conduct of the elections and the Petitioner contends that the acts of omissions and commissions by the 1st and 2nd Respondents were rampant and flawed in so fundamental sense that it obliterated the possibility of discerning whether the results were a true reflection of the will of the voters in Mbeere South Constituency.

(g) That the 2nd Respondent by themselves and/or through offices and agents acting under them or under their control in his view committed election offence by breaching their official duties in the following ways:-

- (i) Omitting to prepare accurate and complete election returns and statutory documents.
- (ii) Filling the result declaration forms by the Presiding Officers at the tallying centre in the absence or without the agents for the candidates or political parties
- (iii) Misplacing or getting rid of the results declaration forms from polling stations.
- (iv) Announcing and declaring results that were unlawful fraudulent, fictitious and false.
- (v) Using and accepting fake, forged, unlawful and fraudulent election returns documents and results.
- (vi) That at several polling stations and tallying centre counting and tallying was undertaken using fake incomplete unsigned and unverified documents including Form 35A.

(h) The Petitioner also states that given the irregularities cited there should be scrutiny and recount in the following stations namely;

- (i) St Luke Primary School polling station
- (ii) Ngambari Primary School polling station
- (iii) Kiambere Primary School polling station
- (iv) SDA Mariari Primary School polling station
- (v) Makima Primary School polling station
- (vi) Karaba Consolate Primary School Polling station
- (vii) J.J.M Nyaga Primary School polling station
- (viii) Karuko Primary School polling station
- (ix) Makawani Primary School polling station
- (x) Wachoro Primary School polling station
- (xi) Rwika Technical Institute polling station
- (xii) Yonder Karwigi Primary School polling station and
- (xiii) Mbondoni Primary School polling station.

(i) That the results recorded by the Petitioner's agents showed further discrepancies.

(j) That the Presiding Officers at various polling stations showed open bias and favoritism by denying some agents access to polling stations and allowing others.

(k) The Petitioner contends that the actions of the Respondents were unconstitutional, illegal, unlawful, capricious, malicious, unjustified, unreasonable, irrational, discriminatory and against the national values enumerated in the constitution to wit the rule of law, human rights non discrimination, transparency and accountability

(l) That the 3rd respondent could not have been validly elected as the Member of Parliament for Mbeere South Constituency because in his view he benefitted from questionable results emanating from miscounting of votes in his favour from his perceived political strongholds.

(m) That the counting of the votes cast in the said elections was undertaken in contravention of section 38A of the Elections Act and Regulation 69 (2) of the Election (General) Regulations 2012 and Article 81 of the Constitution.

(n) That non compliance of the law by the 1st and 2nd Respondents in vote counting, tallying and declaration of results affected the outcome and the results of the election.

(o) That the Petitioner was unable to collate the election results as his agents were denied statutory Form 35A and barred from accessing polling stations in polling centres to wit Makima Primary School, Karaba Consolata Primary School, St Lukes Primary School, Mbondoni Primary School and Kanyonga Primary School polling stations and that the denial of access hindered his agents from executing their mandate and that the 2nd Respondent's officers' action amounted to an election offence under Section 13(1) of the Election Offence Act. No. 37 of 2016.

(p) That the non compliance with the constitution and electoral laws by the 2nd Respondent was to perpetrate electoral fraud and a complete violations of Article 38 of the constitution. The Petitioner contends that elections carried out in Mbeere South Constituency was not free and fair.

(q) That there was massive votes bribery experienced in Karuko Primary School polling station, Makawani polling station, Wachoro polling station and Munyori polling station carried out by five people acting on behalf of the 3rd Respondent and who were also his campaigners. The Petitioner contends that the act of bribery by 3rd Respondent amounts to an offence under Section 9 of the Election Offences Act No. 37 of 2016.

(r) That the 1st Respondent unlawfully allowed voting at St. Luke Primary School polling station, Ngambari Primary School polling station and Kiambere primary School polling station to continue beyond the 8th of August, 2017 despite having gazetted a notice indicating that the voting would be conducted on 8th August, 2017 between 0600 hours (6 am) to 0500 hours (5 pm)

(s) That there were discrepancies in the results declared in Form 35B by the 2nd Respondent when compared to results contained in 1st Respondent's Portal and the Petitioner has given the tabulation below showing discrepancies:

<i>CANDIDATE NAME</i>	<i>IEBC PORTAL</i>	<i>FORM 35B</i>
<i>Erasmus Hesbon Mwangi</i>	<i>400 votes</i>	<i>410 votes</i>
<i>Mugoh Genesisio Njagi</i>	<i>6,805 votes</i>	<i>6,899 votes</i>
<i>Muriuki Nebart</i>	<i>6,864 votes</i>	<i>6,857 votes</i>
<i>Musyimi Mutava</i>	<i>16,897 votes</i>	<i>16,854 votes</i>
<i>Muturi Geoffrey King'ang'i</i>	<i>18,225 votes</i>	<i>18,028 votes</i>
<i>Mwingi Sarah Njiro</i>	<i>207 votes</i>	<i>213 votes</i>
<i>Njeru Atanasio</i>	<i>2,593 votes</i>	<i>2,957 votes</i>
<i>Njuki Emily Thaara</i>	<i>3,119 votes</i>	<i>3,090 votes</i>
<i>Nyutu Peter Kamau</i>	<i>2,810 votes</i>	<i>2,767 votes</i>
<i>Valid votes</i>	<i>57,920 votes</i>	<i>58,075 votes</i>
<i>Rejected ballots</i>	<i>1,702 votes</i>	<i>Not indicated</i>

(t) That the 1st Respondent compromised the integrity and credibility of the elections and gave the 3rd Respondent undue advantage and benefit of the said electoral irregularities and unlawful actions.

5. By reasons of the above grievances the Petitioner in this petition is seeking for the following

declarations and orders;

A. An order for scrutiny of all election materials including the KIEMS that were used by the 1st and 2nd Respondents in Mbeere South Constituency on the 8th August, 2017.

B. An order for a recount of the votes cast in all the polling station in Mbeere South Constituency.

C. An order for scrutiny of all election materials including KIEMS that were used by the 1st Respondent in Mbeere South Constituency on the 8th August, 2017 in the following polling centres;

1. St. Luke Primary School Polling station
2. Ngabari Primary School polling station
3. Kiambere Primary School polling station
4. S.D.A Mariari Primary School polling station
5. Makima Primary School polling station
6. Karaba Consolata Primary School Polling station
7. J..J. M. Nyaga Primary School polling station
8. Karuko Primary School polling station
9. Makawani Primary School polling station
10. Wachoro Primary School polling station
11. Rwika Technical Institute polling station
12. Yonder Karwigi Primary School polling station
13. Mbondoni Primary School polling station

D. A declaration that the 1st and 2nd respondents were duty bound to observe the constitution and the law relating to the conduct of elections when they discharged their mandate on 8th August, 2017.

E. A declaration that the 1st and 2nd Respondent failed to comply with the constitution and the law relating to the election while conducting the election for the member of Parliament for Mbeere South Constituency on the 8th August, 2017.

F. A declaration that an election that is held in violation of the constitution and the election law is null and void.

G. A declaration to issue that Muturi Geoffrey King'ang'i the 3rd Respondent herein whose elections is questioned was not validly elected on 8th August, 2017 general elections as the Mbeere South Member of Parliament.

H. That the election of the 3rd Respondent as the Member of Parliament for Mbeere South

Parliamentary Seat be declared null and void.

I. That the Respondents be condemned to pay costs of and incidental to this petition.

J. Any other relief and redress that this honourable court may deem expedient in the course of determination of this petition.

6. The Respondents in their respective responses filed in this petition denied all the allegations made and leveled against them. The 1st and 2nd Respondent aver that the declaration of the 3rd Respondent as the duly elected member of the National Assembly for Mbeere South Constituency was in accordance with the applicable election laws and regulations and that such declaration was not in their view dependent on the approval or objection of the Petitioner or any other candidate.

7. The 1st and 2nd Respondent have pleaded that the counting of the ballots took place at polling stations in full glare of agents of the candidates and that counting of ballots and tallying was done in accordance with the law. They have denied that there was any rigging and averred that the vote tallying was devoid of any irregularities, fraud and illegalities. In their view they conducted the exercise in an impartial manner and the exercise carried out never benefited or disadvantaged any of the candidates. They aver that the elections were free and fair and none of the candidates was deprived of their rights.

8. The 1st and 2nd Respondent in response to the allegations of irregularities at SDA Mariari primary School polling station have averred that the results declared in that station by the Presiding Officer were final and that the results declared were a true and accurate reflection of ballots counted and declared thereof. They have denied that the results in Forms 35 A were swapped as between candidates.

9. The 1st and 2nd Respondent avers that they received no reports on "**fraudulent**" and "**doctored**" results as alleged at Rwika Technical Institute polling station, Yonder Karwigi Primary School polling station and SDA Mariari Primary School polling station. They have denied the allegation made that agents were denied access pointing out that the agents in the above cited polling stations signed Form 35A. They have further stated that contrary to the petitioner's claims, the petitioner's agents signed Form 35A in the following polling stations;

(i) Rwika Technical Institute stream 2.

(ii) SDA Mariari Primary school

(iii) Wachoro Dispensary Stream 1 and

(iv) Mbondoni Primary School.

In the above polling stations the 1st and 2nd Respondent have pointed out the respective Petitioner's agents who signed Form 35A and denied the claims that the Petitioner's agents were denied access or intimidated. The 1st and 2nd respondents aver that all agents were afforded an opportunity to participate in the proceedings at the polling stations to verify results at all polling stations.

10. The 1st and 2nd Respondent further deny amending any Form 35 A in order to reflect fraudulent or fictitious figures in favour of the 3rd Respondent. They aver that the result in Form 35A and 35B were a product of a process in which agents present took part and that the results of the election in each polling station were displayed on the doors of the polling stations concerned. In their view, the conduct of the election did not contravene any law and that the elections were transparent and verifiable.

11. The 1st and 2nd Respondent contend that the Petitioner has not laid a foundation for scrutiny and recount of votes and that the Petitioner cannot seek both scrutiny and recount at the same time and that no justification has been shown for the same.

12. The 1st and 2nd Respondents have denied any wrong doing attributed to them by the Petitioner and aver that the results declared were actual and accurate contrary to the Petitioner's claim that they were fake, fraudulent unlawful and "**manufactured**." They have denied claims of bias reiterating that the 3rd Respondent was declared winner within the legal framework and that the results declared were a true reflection of the will of the people of Mbeere South Constituency expressed on 8th August, 2017.

13. The 1st and 2nd Respondent day knowledge of any bribery at the alleged polling station and in their view the Petitioner has not presented cogent reasons to disturb the will of the people of Mbeere South Constituency. In their view, this petition does not meet the legal threshold. They hold the view that this petition is scandalous, frivolous and vexatious which ought to be dismissed.

14. The 3rd Respondent on his part denies all allegations attributed to him in this petition. He avers that he emerged the winner of the elections of member of National Assembly Mbeere South Constituency held on 8th August, 2017. He holds that he was validly elected in accordance with the law and subsequently gazetted as member of National Assembly for Mbeere South Constituency.

15. He avers that contrary to the Petitioner's claim the Presiding Officers in all the Polling stations accommodated all party agents, security team, observers and other stakeholders and that counting of votes was done in the presence of all stakeholders in a transparent manner and that the results were promptly announced. He avers that to his knowledge no objection or claim of any kind was raised by any agent at any polling station.

16. The 3rd Respondent denies the claims of bribery or any unlawful activity attributed to him and his agents stating that observers and security agents were present at all times and that it was not possible to engage in votes bribery or any other malpractice on the election date.

17. The 3rd Respondent further avers that in his view the election of 8th August, 2017 was conducted in strict adherence to the tenets and dictates of the constitution and the electoral laws and that the same was free, fair and transparent. He hold that the results announced were a true reflection of Mbeere South Constituency and to him the petition should be dismissed and the results declared be upheld.

18. It is against the above allegations and counter allegations that the respective parties adduced evidence or presented witnesses to the support of their respective positions with the Petitioner calling a total of 4 (four) witnesses while the 1st and 2nd Respondents called one witness and 3rd Respondent calling 6 (six) witnesses. I will start with the summary of the evidence adduced by the petitioner.

Petitioner's oral evidence

19. The Petitioner testified that as a candidate in the elections of 8th of August 2017 for member of National Assembly for Mbeere South Constituency. He told the court that he took part in the elections and was not happy in the manner the elections were conducted. In his view the elections were not free and fair and adopted the contents of his affidavit sworn on 6th September 2017 that contains details of his grievances against the Respondents.

20. The Petitioner accused the 3rd Respondent's agents and supporters for destroying his campaign posters and stated that he reported the matter to Kiritiri police station through OB No.42/49/07/2017. He also accuses the 3rd Respondent for causing harassment, violence and hostility to Petitioner's supporters and cites a case he reported at Kiritiri Police Station through OB No. 14/28/7/2017.

21. The Petitioner holds that the election process was flawed with irregularities from the beginning as the polling clerks and Presiding Officers were unlawfully appointed without any due procedure and that the appointment of Presiding Officers was not scrutinized by the aspirants aspirants as required by the Election (General) Regulations. He averred that most of the Presiding Officers were known supporters of the 3rd Respondent.

22. The Petitioner testified that all his agents during the elections had a letter of authority from him and that he had ferried them to various polling stations on the election date. According to him 17 of his agents called him later reporting that they had been denied access to the polling station and this in his view was a calculated move by the 1st Respondent to give 3rd Respondent undue advantage over him in the elections. The Petitioner however did not give the list of names of the 17 agents denied access and the affected polling stations. He added that his chief agent was refused entry to the tallying centre at Nyangwa Boys Secondary school allegedly for not having documents and wondered why agents of other candidates were allowed in when they only had photocopy of the letter of appointment.

23. The Petitioner testified that five people were confronted in the presence of his agents and that the five confessed that they were bribing on behalf of the 3rd Respondent before they were chased away at Karuko Primary School polling station, Makawani polling station, Wachoro polling station and Munyori polling station. On this claims of bribery the Petitioner presented a witness called **PETER MAGARA (PW2)** who testified that he was a campaigner and the chief agent of the Petitioner although he conceded that his name was not forwarded to the 1st Respondent as chief agent of the Petitioner. He testified that he heard about bribery but did not witness any in the stations he visited which he said were 177 stations across Mbeere South Constituency. **Kelvin Murimi (PW3)** told this court that he was among a group of youths from Mbeere South that were given between Kshs.500/- and 1000/- by the 3rd Respondent on 8th April 2017 as transport to attend a meeting at A.C.K. Church. He viewed the amount given to him of Kshs.1000/- as a bribe though he described it also as transport. James **Kimunja Njeru (PW4)** also testified that he attended a meeting at Kabondori Mbeti Academy on 22nd July 2017 and saw people being given meat and money. He did not know what the money was for but denied receiving any money himself.

24. The Petitioner in his evidence also accused the 3rd Respondent for engaging in acts of witchcraft which in his contention was manifested by the 3rd Respondent continuously giving the electorate cow meat that had been slaughtered and rituals performed on it. He called witnesses to support this allegation. Kelvin Murimi (PW3) testified that on 21st July 2017 at Kiritiri area near Mbeti Academy a meeting was convened where a bull was slaughtered. He further testified he saw two witchdoctors cut meat into small pieces and handed the pieces to the gathering who according to him numbered 3000. He however added that he did partake of the meat as he left shortly thereafter but added that those who partook of the meat were required to vote for the 3rd Respondent otherwise a bad omen would befall on them. PW4 James Kiringa contradicted what he deposed in his own affidavit by denying witnessing acts of witchcrafts on 22nd July 2017.

25. The Petitioner testified that according to his own calculations he had 14,000 votes and accused the 2nd Respondent for not properly tallying up his votes. He told this court he together with his chief agent were locked out of the tallying centre. He further alleged that at Karaba in Mwea Ward, his votes were stolen because according to him he was given only 1 (one) vote when he had accumulated 10 (ten) votes. In his view there was prior plans to deny him victory. He complained that he was the only candidate whose agents were denied access in some polling stations and that in some instances he found his agents outside the polling station and when pressed under cross-examination to name the polling stations he named St. Luke Primary School polling station.

26. The Petitioner accused the 1st and 2nd Respondent for not availing Form 35A to him or his agents and claimed that he only came across the forms in court through this petition. He also alleged that some form 35A were altered and named Form 35A in respect to Yonder Karwigi Primary School Polling Station as an example of where he alleges that there was alterations on the total number of votes and that no agent signed the form. He further faulted the 1st and 2nd Respondent for not presenting all Form 35A for all 177 polling stations alleging that the results declared did not reflect the will of the people of Mbeere South Constituency.

27. The 2nd Respondent Consolata Muthoni testifying as DW1 confirmed that she was the Returning Officer for Mbeere South Constituency in the general elections conducted on 8th August, 2017. She

confirmed that she oversaw election exercise of all the elective posts in that election in 177 polling stations across Mbeere South Constituency. She testified that on the polling day (8th August, 2017) all polling stations were opened at 6. am and all the polling stations were presided over by Presiding Officers and that elections went on smoothly with no complaint or incident being reported to her. She further stated that she received election results from all polling stations both in electronic form and hardcopies and this respective form 35As. Upon receipt of the elections results, she reportedly collated and tallied them at the tallying centre at Nyangwa Boys Secondary School and then declared the 3rd Respondent the winner with 18,028 votes. She also added that Mutava Musyimi came second with 16,854 votes while the Petitioner garnered 2,767 votes.

28. On why some Form 35A provided were different in that some were clearer while others appeared blurred, DW1 explained that when the copies were being prepared for purposes of this petition, different photocopiers were used and further that some copies were made from original form 35A while carbon copies were used in others. She further explained that while the process of photocopying was going on they ran short of ink and resorted to using black and white photocopier with the end result that some copies of Form 35A supplied were in colour while the others were in black and white.

29. The Returning Officer conceded under cross-examination that there were some alteration on the total number of valid votes in regard to Form 35 A for Yonder Karwigi polling station. She however added that she had no power to alter any results in Form 35A and that she simply entered the results as received. She further conceded to some alterations in Forms 35As in regard to Kilumini Primary School polling station, Makutano Primary School Karuku Primary School polling stations and other stations like Kanyonga Primary School, Mashamba Primary School, Makima Primary School, Mburutani Primary School, Mururu Primary School, Rianjeru Primary School, Mbita Primary School, Kiritiri polling station, Karura polling station and Mariari Primary School polling station. She however explained that the alterations were minor mistakes done by Presiding Officers and that the same did not affect the results she declared which in her view were variable. free and fair. She further added that the alterations noted did not prejudice any candidate as the results declared were accurate and variable.

30. The Returning Officer denied the Petitioner's claim that his agents were denied access stating that the Petitioner did not present anyone as his chief agent. According to her the Petitioner and his agents were absent at the tallying centre when she declared the results on 11th August, 2017.

31. On his part, the 3rd Respondent testifying as RW1 told this court that he had a christian background and was an elder in his church known as CHRIST IS THE ANSWER MINISTRIES (CITAM). He further denied engaging in any violence during the election period or any other period. He denied destroying any election materials of his opponents adding that he has never been summoned by the police to record any statement in that regard. He admitted having visited Nyangwa ACK Church but added that he had gone there for worship and denied going there to bribe voters.

32. The 3rd Respondent also testified that he was a respected retired colonel in the Kenya Defence Forces where he also served as a chaplain and a lay pastor in the Anglican Church. He denied getting involved in witchcraft rituals saying that the same was against his christian faith.

33. The 3rd Respondent called witnesses Faith Njoki Kithaka (RW2), David Ileri (RW3), Esther Munyi Murekio (RW4), James Kugoocha (RW5) and Beth Njeri Miringi (RW6) who were testified and denied the allegations of election malpractices and election offences attributed to the 3rd Respondent in the elections held in Mbeere South Constituency on the 8th August, 2017. Faith Njoki Kithaka (RW2) testified that she was a member of Nyangwa ACK Church and vehemently denied that bribery took place in their church during the election period or any other time. She further testified that she knew the 3rd Respondent as a respected man having served as Aide De Camp to the former President of the Republic of Kenya Hon. H.E Mwai Kibaki 4 years besides having been a Champlain in the army. David Ileri Njiru (RW3) testified that he was the chief agent of Jubilee Party during the August, 8th 2017 elections and that he presided at Mariari SDA polling stations where in his view elections went on smoothly in the presence of agent of all candidates who according to him all signed Form 35A. In his view the elections were

conducted in a free fair and transparent manner. The other witnesses testified and denied the allegations of election malpractices and claims of witchcrafts.

34. At the conclusion of hearing all the parties herein filed their respective written submissions and made oral submissions to highlight the main pillars of their respect submissions. I will consider the submissions made as I address the following issues for determination in this petition.

Issues of determination

35. At the close of hearing parties in this petition, framed up 11 issues for determination which I have summarized as follows:-

(i) Whether the 1st and 2nd Respondents violated the Petitioner's rights by denying access to his agents in the polling stations and the tallying centre.

(ii) Whether the 1st and 2nd Respondent acted impartially or subverted the will of the people of Mbeere South Constituency.

(iii) Whether the 1st and 2nd Respondent committed irregularities in the counting and tallying process and if so if such irregularities affected the results.

(iv) Whether the 3rd Respondent committed electoral malpractices.

(v) Whether the election held on 8th August 2017 for Member of National Assembly Mbeere South complied with the Constitution and electoral laws and whether the 3rd Respondent was validly elected. (v) Who should bear the costs and what should be the instructions fee on the petition.

36. Before I embark on the above agreed and summarized issues, there is another issue which though not pleaded cropped up during the hearing and was a subject of submissions and which requires to be determined *in limine*. The Petitioner's counsel raised an issue with the way the Respondent's witnesses had their affidavits commissioned stating that the affidavits were not properly commissioned before a commissioner for oaths and that the affidavits were incurably defective and urged this court to disregard the evidence tendered altogether because of non-compliance with **Rule 12(1)** of the Elections (Parliamentary and County Elections) Petition Rules 2017. It was contended that the affidavits cited did not conform with **Section 4 (1)** of the Oaths and Statutory Declaration Act (Cap 15 Laws of Kenya). It was further submitted that the cited defect was not curable under **Article 159** of the Constitution and the Petitioner's contention was that because the affidavits filed by the 3rd Respondent were defective, in their view there was no proper response to the petition herein and should therefore be allowed. He relied on the decision in *Ismael Suleman and 9 others -vs- Returning Officer Isiolo County, IEBC and 3 others [2013] eKLR.*

37. The 3rd Respondent in response contended that the Petitioner brought up the issue of affidavits as an afterthought because according to him the issue was not one of the agreed issues for determination in this petition. Mr. Mutuma learned counsel for the 3rd Respondent contended that the Petitioner should have applied formally to have the same struck out and that he did not give notice that he had any problem with the affidavits filed. He further contended that the qualification of the commissioner who commissioned the affidavits was not challenged and that the only question that cropped up at the trial was whether the witnesses knew the name of the commissioner for oaths. In his view the commissioner who commissioned the affidavits should have been summoned for cross- examination. He relied on the legal authorities in the cases of *WILSON MWANGOMBE MWAJIMA -VS-IEBC and 2 OTHERS [2017] eKLR, FRANCIS WAMBOGO MURITHI -VS- OWINO PAUL BABU [2017] eKLR* and *HAMSAN MUSURI KEVOGO -VS- IEBC and 3 OTHERS [2017] eKLR.* The 3rd Respondent contended that this court should admit the evidence contained in the affidavits as so long the evidence does not prejudice the Petitioner and that it would be draconian not to admit the evidence given that all the deponents of the affidavits were called and testified upon taking oath. Mr Mutuma argued that even if their affidavits were

found to be defective, the evidence tendered before court was valid since the veracity of their respective evidence were tested or subjected to cross- examination.

39. The 3rd Respondent further contended that there was no requirement under the Oaths and Statutory Declaration Act for a deponent to identify a commissioner for oaths they appear before and dismissed the Petitioner's contention in regard to how the affidavits were commissioned as hopeless.

40. Statutory declarations or written statements confirmed by oath or affidavits are made before a magistrate or a commissioner for oaths pursuant to the provisions of Section 8 of Oaths and Statutory Declaration Act. The appointment of commissioner for oaths is provided under sections 2 and 3 of the same Act and under Section 5 thereof there is a requirement that every commissioner for oath before whom an affidavit made must state at the jurat the place and date at which the affidavit is made.

41. Now looking at a glance the affidavits sworn by the 3rd Respondent and his witnesses as filed in this petition, the place where the affidavits were sworn are indicated to have been sworn is at Nairobi and the commissioner for oaths as per the rubber stamp thereof is one **KAUMA MUKIRA ADVOCATE** whose address is also given as NAIROBI. The Petitioner has not cast any aspersions on the qualification of **Kauma Mukira** as a commissioner for oaths. So on the face of the affidavits there is no irregularity but the Petitioner's counsel during cross-examination stage suggested to the witnesses that Kauma Mukira Advocate was based in Meru town and asked the witnesses whether they travelled to Meru to swear their affidavits to which they answered in the negative. It is at that stage that counsel for the Petitioner prodded the witnesses asking them whether they knew Kauma Mukira Advocate and the Respondent's witnesses also answered in the negative.

42. Under cross-examination by Mr. Mwangi learned counsel for the Petitioner, the 3rd Respondent stated that he had never been to Meru Muslim Madarasa Building and further stated that he had never appeared there. The 3rd Respondent also stated that he lived in Nairobi and made his affidavit in Nairobi. It is therefore a matter of conjecture for the Petitioner to submit that the 3rd Respondent's affidavit in particular is defective because Kaume Mukira may not have commissioned it in Nairobi as indicated in the jurat. I agree with the 3rd Respondent's counsel that the petitioner should have applied to summon Kauma Mukira for cross- examination in order to shed more light on where he ordinarily practices and specifically where he commissioned the affidavits in this petition. This court finds that the 3rd Respondent's affidavit sworn on 23rd September 2017 in response to the petition competent and finds no basis to disregard it as urged. In the case of **HASMAN MUSURI KEVOGO -VS- IEBC & 3 OTHERS [2017] eKLR** cited by the 3rd Respondent, **Hon. Judge Sitati** made the following observations I find relevant herein;

"I do not think that swearing the affidavit in Nairobi and having it commissioned in Kakamega is either misleading or prejudicial to the applicant. This court also notes that in Kenya, there are no statutory limitations as to where a commissioner of oaths can take oath. He/she can do so in any part of the country. In the instant case, the oath was administered in Nairobi though the commissioner's stamp gives an address in Kakamega".

In the same breathe by virtue of the fact that the qualification of the commissioner for oaths in question has not been challenged, and the fact that both the form and the substance of the affidavit by the 3rd Respondent are in order, I find no defect in the said affidavit. That affidavit and the evidence of the 3rd Respondent complies with **Rule 12(5)** of the Election (Parliamentary and County Elections) Petitions Rule 2017 which provide as follows:-

"A response to the petition under rule 11 shall be supported by an affidavit sworn by the Respondent."

This court finds that contrary to the Petitioner's contention that there is no response to his petition, because there is a proper response from the 1st and 2nd Respondents and as I have found out there is also a

response from 3rd Respondent.

43. It is of course true that a party in an election petition is required by law to file affidavits of witnesses he/she intends to call as is provided under the provisions of **Rule 12** of the Elections (Parliamentary and County Elections) Petitions Rules 2017. The 3rd Respondent complied with this rule but the Petitioner has also faulted the affidavits saying that they are defective because they were not properly commissioned. He maintains that the witnesses never appeared before Kauma Mukiria Advocate. I find the contention a bit deficient because as I have observed there was no evidence tendered to show where Kaume Mukira Advocate ordinarily practices. The stamp appearing in the affidavits show an address in Nairobi. This court however is alive to what advocates routinely do in their offices which is to draw affidavits get their clients or witnesses append their respective signatures and send a clerk to a commissioner for oaths to commission and rubber stamp the affidavits. The deponents of those affidavits rarely appear before those commissioner for oaths. Ofcourse that practice is wrong and contrary to the provisions of **Sections 4 and 5** of oaths and Statutory Declaration Act but how many advocates pay attention to this?. A commissioner for oaths administering an oath can do so anywhere in Kenya and even the world but must state the place date on which the oath is taken. The deponent of an affidavit must therefore appear personally before the commissioner for oaths to swear the affidavit and affirm the contents thereof. So where there is evidence, like in this petition, that a deponent of an affidavit never appeared before a commissioner for oaths, there is always a risk that such affidavits would be declared incompetent and inadmissible in evidence. In the case of **DICKSON MWENDA GITHINJI - VS- PETER MUNYA & 2 OTHERS [2014] eKLR** the Court of Appeal upheld a decision to struck out an affidavit of a witness (Esther Kabebi Aritho) in an election petition because it was not properly commissioned. In that case the witness was categorical in her evidence in court that she never appeared before the commissioner for oaths who commissioned her affidavit.

44. On the basis of the above, this court finds from the evidence tendered that the affidavit of David Ileri Njiru, Esther Munyi Murekio, James Kugoocha and Beth Njeri Mirugi are defective and inadmissible because the said witnesses were categorical under cross-examination that they appended their respective signatures on the affidavits in presence of Mutuma Advocate in his office in Nairobi. This obviously contravened the provisions of **Section 4** of the **Oath and Statutory Declaration Act** which provides as follows:-

"A commissioner for oaths shall not exercise any of the powers given by this section in any proceedings or matter in which he is the advocate for any of the parties to the proceedings....."

Of course Mr. Mutuma did not append his signature on the said affidavits but the witnesses were categorical and clear in their mind as they expressly stated so under cross-examination that they appeared before none but Mr. Mutuma Advocate. The only witness who testified that he made her affidavit before another advocate was Faith Njoki Kithaka (RW2). She said she could not tell who the advocate was. I find her affidavit competent and admissible because there is no legal requirement that a deponent must know the name of a commissioner for oaths. Her evidence therefore before court was proper and admissible under the law.

45. Having determined the contentious question of affidavits and the evidence tendered thereof, this court shall now look at the other issues and as I do so it is important to set out the legal principles and the test to be applied in the determining the issues arising from this petition.

(1) General Principles governing elections

Kenya is a democratic Country with a vibrant constitution granting its citizen inalienable right to determine the form of governance and the right to democratically elect representatives through which they exercise their sovereign power to determine their political destiny. The right to make political choices is imbedded under **Article 38** of the Constitution. That right is an expression of the sovereign power which resides on the citizens of Kenya and it underpins the following general principles enunciated under **Article 81, 83, 84 and 86** of the **Constitution**. The principles are namely;-

- a. Freedom of citizens to exercise their political rights under Article 38.
- b. Gender parity (not more than two-thirds of the members of elective public bodies shall be of the same gender (which has been a tall order in Kenya)
- c. Fair representation of persons with disabilities
- d. Universal suffrage for fair representation and equality of vote (one man/woman one vote)
- e. free and fair elections
- f. right to be registered as a voter.
- g. compliance with code of conduct - by candidates and political parties.
- h. whatever voting method used, the system should be simple accurate, verifiable , secure, accountable and transparent.
- i. votes cast are counted, tabulated and the results announced promptly by Presiding Officer at each polling station.
- j. The results from the polling stations are openly and accurately collated and promptly announced by the Returning Officer.
- k. Appropriate structures and mechanisms to eliminate electoral malpractices.

46 (2) The test or standard of proof:

In civil cases, the standard of proof is normally "*on a balance of probability*" while in criminal cases the standards is "*beyond reasonable doubt*". There has been push and pull on the applicable standard of proof in election petitions. This is because ordinarily election petitions are in the category of civil suits where the standard of proof is on a balance of probability. But owing to the special nature and the potentiality of an election, schools of thoughts have emerged placing the test applicable to a hybrid test that is higher than balance of probabilities but slightly lower than beyond reasonable doubt. That standard is now settled due to the sensitivity of election petitions and the fact elections are in the first place an expression of the will of the people which as observed above is constitutionally provided and guarded. The Supreme Court of India in the case of *RAHIM KHAN -VS- KHURSHID AHMED & OTHERS 1975 AIR 290 1975 SCR (1) 643* expressed as follows:-

"An election is a politically sacred public act, not of one person or of one official but of the collective will of the whole constituency. Courts naturally must respect this public expression secretly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the court to uphold the corrupt practice alleged against the returned candidate is adduced. Indeed election petitions where corrupt practices are imputed must be regarded as proceedings of a quasi-criminal nature wherein strict proof is necessary. The burden is therefore heavy on him who assails election which has been concluded."

It is apparent therefore that where a Petitioner alleges election malpractices particularly that touch on election offences defined under the **Election Offences Act No. 37 of 2016**, the standard of proof is clearly elevated to the standard beyond reasonable. This court is guided by the Supreme Court's decision in the celebrated case of *RAILA ODINGA & 5 OTHERS -VS- IEBC & 3 OTHERS [2013] eKLR (RAILA 1)* where the court observed as follows:-

"..... this court should freely determine its standard of proof, on the bases of the principles of the constitution, and of its concern to give fulfillment to the safeguarded electoral rights.

As the public body responsible for elections, like other public agencies, is subject to the "national values and principles of governance" declared in the constitution (Article 10), judicial practice must not make it burdensome to enforce the principles of properly conducted elections which give fulfillment to the right of franchise. But at the same time, a Petitioner should be under an 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 standard where criminal charges to an election, are in question. In the case of data-specific electoral requirements (such as those specified in Article 138(4) of the constitution, for an outright win in the Presidential Election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt,"

47. It is apparent that the standard of proof applicable in election petition is higher than the civil standard of balance of probabilities and closer to the threshold required in criminal law, infact there is a thin line separating both standards in criminal law and election petitions. In the case of **RAILA AMOLO ODINGA & ANOTHER VS- IEBC & 2 OTHERS** (Presidential Petition No. 1 of 2017)- or **RAILA II**, the Supreme Court in 1 uphold its decision in **RAILA 1** observed as follows;-

"We, maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal nature or quasi criminal nature are made, it is beyond reasonable doubt. Consequently we dismiss the petitioners' submissions that the court should consider the new established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities. We recognize that some have criticized this higher standard of proof as unreasonable, however, as we have stated, electoral disputes are not ordinary civil proceedings hence reference to them as *suigeneris* . It must be ascertainable, based on the evidence on record, that the allegations made are more probable to have occurred than not."

It is important to note from the above decisions that a petitioner in an election petition is required to place before court firm, cogent and credible evidence to prove that the conduct of elections in a given area substantially violated the principles as laid down in the constitution and the electoral laws and the irregularities and illegalities cited was so much that the results declared lacked credibility.

Analysis and findings

48. Having looked at the legal principles governing elections and the test applicable in determining issues raised in this petition this court shall now delve into the issues raised in this petition. But before addressing the main issues in this petition, I will address what I consider to be minor but the important issue in an election petition and that is pleading of the declared results. An election petition normally is a challenge of the results declared. A Petitioner in essence is contesting what the Returning officer declared and therefore it is imperative that the declared results are pleaded because after all that is the basis upon which the petition is filed. **Rule 8(1)** of the Elections (Parliamentary and County Elections) Petition Rules 2017 states as follows:-

"An election petition 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 elections, 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."

The importance of the above is shown and replicated under **Rule 12(1)** and **2** of the same regulation which state that a petition shall be supported by an Affidavit which shall set out facts and grounds relied on in the petition and such affidavit shall also state the results as declared and the date upon which those results were declared.

49. The Petitioner in this petition did not clearly plead in his Petition the results as declared by the 2nd Respondent. There was an attempt in paragraph 100 of the petition where he pleads that there were discrepancies in the results in Form 35B (which is actually declared results) and the information (data) on the IEBC portal. He however does not state which results are being contested in the table he has provided in his petition. In his Supporting Affidavit, he omits the matter altogether contrary to **Rule 12(1)** and **(2)** of the Elections (Parliamentary and County Election) Petition Rule, 2017.

The requirements though technical in nature goes into their substratum of the petition itself and in the past some courts have held that the omission to plead the results contested is fatal to the petition. In the case of *Amina Hassan Ahmed -vs- Returning Officer Mandera County and 2 Others [2013] eKLR* the court held that the requirement (then rule 10 of Election Petitions Rule 2013) were not mere technical requirements and observed this;

"If they are technical in so far as they are procedural and spell out the form and content of intended petitions, they nevertheless at the same time, are substantive and go to the root and substance of issues and matters prescribed upon."

In the recent decision of the case of *Martha Wangari Karua and Another - vs- IEBC and 3 others [2017] eKLR*, the court was faced with a similar situation where the petitioner omitted in her petition, the official results declared. The court in that case made the following observation.

" It is not sufficient to talk of results without giving numbers. It is an outcome based on numbers which made her come to court and the date when the results were declared. The omissions are fatal."

The Petitioner in this instance pleaded under paragraph 7 of his petition that the results of the election of member of Parliament Mbeere South Constituency were declared on 9th August, 2017 which of course is not true because the evidence tendered clearly show that the results were declared on 11th August, 2017. He also omitted that information in his affidavit in support of the petition which is also contravention of the rules I have noted above. Rules of procedure and requirements under the election rules are strict and compliance in my view is not an option. This is because of the strict timelines provided and the implications of such petitions. In the case of *Moses Mwigigi and 14 Others -vs- IEBC and 5 Others [2016] eKLR* the Supreme Court had this to say concerns compliance of rules and procedure in election disputes;

"This court has on a number of occasions remarked upon the importance of rules of procedure, in the conduct of litigation. In many cases procedure is so closely intertwined with the substance of a case, that it befits not to attribute of mere technicality. The conventional wisdom, indeed is that procedure is the handmaiden of justice. Where a procedural motion bears the very ingredients of just determination and yet it is overlooked by a litigant, the court would not hesitate to declare the attendant pleadings incompetent. Yet procedure in general terms is not an end in itself. In certain cases instance on strict observance of a rule of procedure could undermine the cause of justice. Hence the pertinent of Article 159 (2) of the Constitution which proclaims that "court and tribunals shall be guided (in Principle) that justice shall be administered without undue regard to procedural technicalities." *This provision, however is not a panacea for all situations befitting judicial intervention, and inevitably a significant scope for discretion devolves to the courts"*

The big question for determination is whether the requirements under Rule **8(1) and (2)** of the Election (Parliamentary and County Elections) Petition Rules 2017 are technical requirements and whether the omissions are fatal or curable under **Article 159(d)** of the **Constitution**. Before I render my decision on that I consider it fit and just to go into the main issues in this petition.

(1) Whether the 1st and 2nd Respondents violated the Petitioner's rights by denying him access and agents in the polling stations and the tallying centre.

Agents play a crucial role in the election process because apart from acting as eyes of their respective candidates they ensure that elections are conducted in a fair, transparent, accurate, variable and accountable manner as provided for under **Article 86** of the Constitution. Where there is any breach of law or any code of regulations by the election officials or anyone for that matter, it is the agents who are the first people to raise the red flag as it were and that is why their importance and roles in any given elections cannot be overlooked. Each and every candidate and a political party in any given elections under **Section 30** of **Elections Act**, is given the right to appoint an agent to represent the political party and/or the candidate in the polling station. Regulation 62 of Elections (General) Regulations 2012 makes it mandatory to presiding officers to admit agents to polling stations.

50. The claim by the Petitioner herein that his agents were denied access to some polling stations is serious because it is a contravention of the law and this court took the matter seriously. The Petitioner in his evidence in chief testified that presiding officers in some polling stations denied his agents access at the at the commencement of the voting exercise and gave the following polling stations as places where his agents were barred from entering in to do their roles as agents. The stations pleaded are namely:-

- (i) Ngambari Primary School polling station.
- (ii) Kiambere Primary School polling station
- (iii) St. Luke Primary School polling station
- (iv) SDA Mariari polling station
- (v) Makima Primary School polling station
- (vi) Karaba Consolata Primary School polling station
- (vii) J.J.M Nyaga Primary School polling station
- (viii) Karuko Primary School polling station
- (ix) Makawani Primary School polling station
- (x) Wachoro Primary School polling station
- (xi) Rwika Technical Institute polling station
- (xii) Yonder Karwigi Primary School polling station
- (xiii) Mbondoni Primary School polling station

51. The Petitioner further told this court that he received calls from agents in the above polling stations that they had been denied access and that his chief agent was also denied entry to the tallying centre at Nyagwa Boys Secondary School. He however was hard pressed under cross-examination by Mr. Nyamwea learned counsel for the 1st and 2nd Respondents as to why none of the said agents had filed any affidavit or come to court as a witness to support his allegations. He was further shown Form 35As in respect to Mariari Primary School polling station, Rwika Technical Institute polling station, Wachoro

primary School polling station and Mbondoni Primary School polling station and he confirmed that indeed his own agents had appended their signatures though he claimed that he was not sure whether the signatures appearing against the agents' names were theirs. He could not give names of specific agents denied access to any polling stations.

52. The Returning Officer, Consolata Muthoni in response to the Petitioner's claim of denial of access of his agents denied the allegations and testified all the accredited agents were allowed into the polling station and those who turned up participated fully and according to her no complaint was raised. She further testified that all agents were given an opportunity to witness and verify the results declared at the tallying centre.

53. This court has considered the Petitioner's claim on denial access and finds the claim handicapped on two fronts;

- a. want of proof
- b. Non compliance with regulations.

On the question of proof, it is trite law that whoever alleges must prove (Section 107 of the Evidence Act) and the standard of proof has already been observed above. The Petitioner himself conceded under cross-examination that in some cited instances where he had claimed that the agents were denied access, Form 35A of those stations gave contrary information. The Petitioner's agents had signed and raised no issue of being locked out of the polling station. Secondly, the Petitioner has failed to prove the allegations in any of the stations he has pleaded simply because none of the agents in those stations came to testify in court. The allegations are therefore devoid of any evidence.

The court further finds that the Petitioner failed to prove that he had complied with regulations requiring that all agents be accredited by the 1st Respondent to be allowed to take part in the elections. He told this court that he had a list of his agents sent to the 1st Respondent but no evidence was tendered to prove compliance with **Regulation 74** of the Election (General) Regulations 2017 which provide as follows:-

"No agent shall be deemed to be an agent for the purposes of counting unless, at least 48 hours before the close of the poll in that election, the candidate or political party as the case may be, has submitted to the presiding Officer;

- a. The name and address of the agent
- b. A letter of appointment of the agent."

A presiding Officer is in order to deny any unauthorized persons whether they claim to be agents or observers if such persons have not complied with the regulations provided to gain access. The regulations passed are meant to ensure orderly conduct of elections in order to meet the constitution thresholds under **Articles 81 and 86** of the Constitution. So for a party to successfully fault a Presiding Officer for denying access to his/her agents he/she must first establish that the agents were duly authorized to represent them in that polling station and had met all the guidelines provided under the law for agents. The Petitioner in this respect or front has also failed and no merit in his allegation that his agents were denied access in any of the polling station in Mbeere South Constituency.

54 (ii) **Whether the 1st ad 2nd Respondent acted impartially in the conduct of elections or had predetermined results in favour of any of the candidates.**

The Petitioner alleged in his evidence that he had reasons to believe that he was targeted in view of the fact that his agents were locked out of polling stations and denied Forms 35A. He also faulted a Presiding Officer, whose name he could not recall at Kikumini Polling station for having been a chief campaigner of the 3rd Respondent. The Petitioner however apart from failing to name and given the name of the

officer did not mention in his affidavit in support of the petition that the 1st Respondent had erred in the appointment of Presiding Officers by appointing a chief campaigner as an agent for 3rd Respondent. It is not enough to allege that the appointment of the Presiding Officers was irregular. The specific of irregularities ought to have been specifically pleaded and proved. The allegations of partiality and unfair treatment of the Petitioner by the 1st and 2nd Respondent in my view lacks in specificity and find that even in his written submissions the Petitioner has left out the issue altogether.

55. The Petitioner under cross-examination grieved that in each of the 177 polling stations in Mbeere South Constituency there was rigging and pointed out that in Karaba polling station he had 10 votes but was only assigned 1 vote and claimed that the polling officials gave the 3rd Respondent his 10 votes. In his affidavit in support of this petition, he failed to state this serious allegation. A failure to plead a serious allegation such as this is not a bar to this court from interrogating and determining the issue, as held in the case of *JUSTUS MONGUMBO OMITI - VS- WALTER ENOCK NYAMBATI OSEBE & 2 OTHERS [2011] eKLR*, where the court noted that a court cannot turn a blind eye on a serious issue even if the issue crops up during trial. The court observed as follows:-

"As such all issues raised in the petition and those which crop up during the hearing whether pleaded or not and which had the potential to affect adversely, the final result and indeed the will of the voters in a constituency must come under spotlight, scrutiny and interrogation..... in this case all illegalities and irregularities which impugn the credibility of the outcome of the elections..... have to be considered."

This court however, has not found any evidence to support the Petitioner's allegations of rigging or subversion of the will of the voters in Mbeere Constituency. As I have observed above **"he who alleges must prove."** The Petitioner states in evidence that his agent in Karaba in Mwea would later come to give his evidence concerning **"rigging"** in that station but that unnamed agent did not appear before me. The Petitioner failed to furnish this court with any evidence of any rigging in any of the polling station so he cannot be expected to be taken seriously in his allegations that the 1st and 2nd Respondent were against him and/or acted to unfairly favour the 3rd Respondent or contravened the provisions of **Article 38(2)** of the Constitution of Kenya 2010 which provide as follows:-

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

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

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

- a. any elective public body or office establish under this constitution; or**
- b. any office of any political party which the citizen is a member.**

(3) Every adult citizen has the right, without unreasonable restrictions;

- a. to be registered as a voter**
- b. to vote by secret ballot in any elections or referendum and**
- c. to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office."**

The Petitioner has not established instances where any of his political rights as noted above or other provisions of the constitution or the law were breached by the 1st and 2nd Respondent.

56 (iii) **Whether there were irregularities in the counting of votes and tallying process and if such irregularities affected the results.**

The Petitioner as I have noted in summary of his grievances above alleged that the 1st and 2nd Respondent manipulated such that though the people of Mbeere South Constituency voted, the result was not a true reflection of the counting and tallying process and that the Petitioner was unfairly deprived of a fair opportunity and chance to be elected as member of National Assembly for Mbeere South Constituency. By reasons of this he has prayed for scrutiny and recount of votes as a relief in this petition. I will first address the timing of this relief and its merits before I take a look at the other allegations of irregularities

(iv) (a) **Scrutiny and recount**

According to Cambridge Advanced Learner's Dictionary (Cambridge, University Press, Third Edition, 2008) scrutiny is defined as;

"the careful and detailed examination of something in order to get information about it." while recounting is to count something again."

Recount thus entails establishing the number of votes a candidate garnered while scrutiny deals with the question of validity of the said votes. **Section 82 (i) of the Election Act No. 24 of 2011** provides as follows:-

"(i) An election court may, on its motion or on application by any party to the petition during the hearing of an elections petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine" (Emphasis added).

The above provision of law indicates that the timing of the reliefs sought by the petition is belated. Although the above provision does not state expressly the stage of proceedings at which a prayer for scrutiny and recount should be made a number of decisions appear to hold the view that application for scrutiny and/or recount should be entertained just after hearing but before final submissions are entertained. That way a court would be in an informed position to determine the merits for scrutiny and/or recount and if it orders for the same the parties would be in a position to make representations on the outcome to such scrutiny and/or recount before such a court finally determines the petition. In the case of **JUSTUS GESITO MUGALI MBAYA - VS- IEBC & 2 OTHERS eKLR, Ogola J** for quoted with approval the decision of **Justice Luka Kimaru in RASHARD H.A AMANA -VS- IEBC & 2 OTHERS;**

".....the recent trend is that scrutiny can only be ordered where the Petitioner lays sufficient basis. Such basis can only be laid after the Petitioner has adduced evidence during the actual hearing of the petition. The Petitioner cannot therefore demand that there be scrutiny and recount of votes before commencement of trial. The Petitioner may do so after his or her witnesses have testified. The ideal situation however is that such an application for scrutiny should be considered by the court after all the witnesses of the Petitioner and the Respondents have testified. At that stage of the proceedings, the court will be in a position to properly assess the veracity of the allegations made by the Petitioner that there is need for scrutiny."

In my considered view it is desirable, practical and fair to entertain a prayer for scrutiny and/or recount before the final submissions. It is impractical at this stage of making final judgment to entertain the prayer for scrutiny and recount and to be fair to the Petitioner, he has not put much weight in his submissions on this prayer in the petition.

57. Going into the merits of the prayer for scrutiny and recount, the provisions of **Rule 28 and 29 of Election (Parliamentary & County Elections) Petitions Rules, 2017** provide as follows:-

"A Petitioner may apply to an election court for an order to-

a. recount votes; or

b. examine the tallying, if the only issue for determination on the petition is the count or tallying of votes received by candidates;

1. The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

2. On an application under sub-rule (1) an election court may if it is satisfied that there is sufficient reason, order for scrutiny or recount of the votes."

The Petitioner failed to lay any basis for either recount or scrutiny of votes. He also did not move this court during the hearing of the petition for such prayers. This court found no reasons to invoke the provisions of **Section 82** of the **Elections Act** during or after the trial and certainly there are no sufficient reasons to order for it at this stage both for lack of merit and the timing of the same.

58. The Petitioner alleged that the counting and tallying at both the polling station and tallying centre showed discrepancies and that the counting and tallying was conducted in contravention of the law under **Section 38 A** and Regulation 69 (2) of the Election (General) Regulations 2012. Regulation 69 provides for voting procedure and subsection 2 provides or how a voter should cast her/his vote in a multiple elections in a polling station. Section 38 A provides that in every polling station the number of voters should not exceed 700 for purposes of an effective and efficient elections. The petitioner apart from citing the above provisions failed to cite any incident leave alone proof that the 1st and 2nd Respondent breached the cited provisions of law. He did not cite any polling station in Mbeere South where registered voters who voted were more than 700 voters nor an incident where voters did not vote in accordance with the law and regulations. The petitioner cannot just state that there were irregularities and illegalities and expect that because such allegations have been pleaded scrutiny and/or recount would be ordered for purposes of establishing the same. In *Peter Gichuki Kingara -vs- IEBC and 2 others [2013] eKLR* Justice Jairus Ngaah made the following observations:-

"..... the law on scrutiny and recount that I have addressed hereinbefore suggests that scrutiny and recount in a petition such as the present one is not..... a gambling exercise that sets the court rummaging through ballot boxes to see whether any scintilla of evidence of electoral malpractice or irregularity can be found. If the petition is based on any particular malpractice or irregularity that would warrant scrutiny or recount of votes, the malpractice of irregularity must be pleaded and the evidence of such malpractice must be laid out or established prior to an order for scrutiny or recount; the court must be satisfied that, on the basis of evidence before it, it is necessary to call for scrutiny and recount, if not for anything else, to confirm the truth of that particular evidence. Asking for scrutiny or recount where there is no evidence or basis for such an exercise would be more or less engaging the court on a mission searching for evidence where none exists, a practice that would not only be prejudicial to the Respondents but would also be deprecatory in a legal system that believes in fair and impartial administration of justice."

It is imperative for Petitioner seeking nullification of elections results on grounds of irregularities, illegalities or malpractices to lay before court material facts and full particulars as pleaded stating the irregularities in counting of votes or other malpractices that may have affected the credibility of elections. I do not find this in this petition. What is apparent in this petition in so far as Irregularities and malpractices are concern, are just general accusations levelled against the 1st and 2nd Respondent but the same specifics are lacking. He has stated that election there was swapping of results in SDA Mariari Primary School polling station and that results were doctored at Rwika Technical Institute and Yonder Karwigi Primary School. But he has totally failed to table any evidence before this court to establish the stated malpractices. He has also stated no proper counting and tallying of votes was done but he did not adduce any evidence either of his agents or himself showing how his votes were 14,000 and not 2,767

votes as declared by the 2nd Respondent.

59. The Petitioner in his written submissions has submitted the 1st and 2nd Respondent failed to conduct the elections in strict compliance with the law and this is on the basis of the testimony by the Petitioner that his agents were not given Form 35A and that there were some alterations in those Forms and in his view the elections should not be allowed to stand because they are founded on manufactured, altered and doctored Form 3 5A which are primary documents, used to generate data transposed to Form 35B. The 2nd Respondent told this court that some copies of Form 35A supplied to the Petitioner were copies of carbon copies and that explains why the copies appear lighter in colour than copies of original. She also told this court that she was forced to use 3 photocopiers including a black and white one in order to beat the deadline in supplying the Petitioner with all the copies of Form 35A from all polling stations in Mbeere South Constituency. This court found the explanation by the 2nd Respondent in regard to different colour print of Form 35 As supplied to be sound and credible. This court is not convinced that just because Form 35As supplied to the Petitioner were different in colour and texture, it does not mean that the credibility of the elections held on 8th August, 2017 in Mbeere South Constituency for member of National Assembly was affected.

60. I have looked at the alterations referred to this court in respect to Yonder Karwigi Primary School polling station and noted that as explained by the 2nd Respondent, the alterations seen on Form 35A is minor and is only in respect to total number of valid votes cast. A simple mathematics of addition reveals that there was nothing fishy about the alteration. The fact that the presiding officer never countersigned the alteration does not invalidate those results. A mere rectification of a clear mathematical error even in the absence of a signature does not affect the credibility of that document especially where there is an explanation offered like in the present instance. The same can be said of the results in Form 35A in respect to Riunga Primary School polling station, AIC Gachuriri Primary School polling station at page 135 and 136 of the response made by the 2nd Respondent. I found that the explanations on the minor alterations on Form 35A of Kikumini Primary School, Makutano Primary School, Karuku Primary School on pages 34 and 35 of the response satisfactory. In Karuku Primary School polling station, the number of votes garnered by a candidate by the name of Muriuki Nebart Benard was altered to read 20 votes and the earlier figure of 56 votes cancelled. There was no complaint filed by that candidate or agent stating that he was unfairly denied votes. The alterations of Form 35A in respect to Kanyonga Primary School is in regard to total number of valid votes. The 2nd Respondent explained that the Presiding Officer countersigned against the alteration. The same was replicated in Form 35A in respect to Mashamba Primary School as clearly seen on page 71 of the response. The alteration of Form 35A at page 88 in regard to Mburutani Primary School affected the votes garnered by Mugo Genesio Njagi. Again that candidate or his agent did not come to court or complain that the explanation given by the 2nd Respondent was not correct or that there was bad faith on the part of the said election official.

61. The Petitioner has contended that some Forms 35A supplied did not bear the official stamp of the 1st Respondent and that results in Form 35A at page 93, 107, 163 and 183 should be nullified on that account. The explanation given by the 2nd Respondent was that the forms in those pages are photocopies of carbon copies and therefore the impressions of IEBC stamp cannot be seen. She stated that the results in those forms were not contested by any of the candidates or their agents. That in my view was sufficient explanation and in any event lack of IEBC stamp in Form 35A does not invalidate that form or the contents thereof as was decided in the case of **JOHN MURUMBA CHIKATI -VS- RETURNING OFFICER TONGAREN CONSTITUENCY & 2 OTHERS [2013] eKLR**. There is no legal requirement that Form 35A and 35B must be stamped to be valid. In my view so long as the Form is duly executed by the Presiding Officer on the declaration part, the Form would be valid for all purposes. It is also important for all purposes. It is also important to note that the Presiding Officer in a polling station has the power to rectify any clerical error pointed out to him/her by an agent, a candidate or any other accredited person. A Returning Officer is not in a position in law to rectify Form 35A but can only rectify Form 35B so long as the alterations is not aimed at misleading.

62. The Petitioner has failed in my considered view to prove that any of the alteration pointed out during

hearing by the 2nd Respondent were meant to mislead and/or prejudiced him or affected the credibility and transparency of the elections. The results at the polling stations and the tallying centre were unaffected by the alterations noted at the trial herein. In any case, the Petitioner is not complaining that he lost some votes due to the cited alterations. All he says was that credibility of the elections was affected but as I found out that certainly is not correct.

63. (iv) Whether the 3rd Respondent committed electoral malpractices/offences

The Petitioner alleges that the 3rd Respondent committed an offence by bribing voters, treating voters and using undue influence under **Sections 62, 63 and 64** of the **Elections Act 2012**. In the first place those cited sections were repealed by No. 37 of 2016 but I will get back to that shortly. The Petitioner called 2 witnesses (PW2 and (PW3) to support this bribery allegations. Peter Magara (PW2) however stated that he did not personally witness any bribing but only heard about it. PW3 Kelvin Murimi was not sure whether the money given to him was for transport, bribe or both. In an election petition, when a party alleges that a criminal offence was committed by any of the Respondents, the standard of proof is elevated from a standard applicable in Election Petitions to beyond reasonable doubts. The Petitioner in such claims has to raise the bar in the standard of prove. A mere allegation of bribery even by people or voters who come to court and claim to have been bribed by a victor in elections would not suffice otherwise what would prevent a loser in the elections from gathering some few supporters as witnesses of an alleged bribe. So, there has to be a strict prove beyond reasonable doubt because to accuse someone of a criminal conduct, you must have tangible evidence that proves beyond doubt that an offence was indeed committed. That is not to say that a Petitioner cannot successfully raise that ground where evidence exist. In the case of *Moses Masika Wetangula -vs- Musikari Kombo & 2 Others [2014] eKLR* the court held that:-

"any elections marred by acts of corruption or any illegal practice flouts the principles set out in our constitution and election law. And, as we have stated we would accept that proposition when the acts of corruption are those of a candidate agent(s) not when they are those of candidate himself. As a matter of fact in some jurisdictions like UK and Zambia, even one of corruption of a candidate's agent suffices to avoid an election."

Courts take allegations of bribery seriously but when the allegations are not backed with concrete evidence, like in this petition, the court would not as I am not persuaded beyond reasonable doubt that the 3rd Respondent bribed voters. Although as I observed above, the Petitioner cited an obsolete section in his submissions, the correct section dealing with that offence is actually now found in **section 9** of the **Election Offences Act No. 37 of 2016** which provides as follows:-

" 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 even of a political nature or in some other manner lending support to or for a political party or candidate.

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

(c) directly or indirectly, in person or by any person on his behalf in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates, commits an offence..... a person who commits an offence under this section shall be liable on conviction to fine not exceeding 2 million or to imprisonment for a term not exceeding 6 years or to both."

It is a serious offence to bribe voters because the consequences are dire. I am however, based on evidence tendered, unable to find that the 3rd Respondent bribed voters. The evidence tendered by the Petitioner in regard to this offence and attributed to the 3rd Respondent simply does not meet the threshold set by the law. The law requires that allegations of bribery be proved by clear and unequivocal evidence. In **TWAHER ABDULKARIM MOHAMED -VS- MWATHE THE ADAMSON KADENGE & 2 OTHERS**, the High Court in Malindi in Election Petition Application No. 1 of 2014 cited Halsbury's Law of England and gave the following summary on the threshold required on the allegations of bribery;

"Due proof of a single act of bribery by or with the knowledge and consent of the candidate or by its agents, however insignificant that act may be, is sufficient to invalidate the election, the Judges are not at liberty to weigh its importance, nor can they allow any excuse, whatever the circumstances may be such, such as they can allow in certain conditions in cases of treating or undue influence by agents. For this reason, clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of the person alleged to have been bribed is not conclusive..... A corrupt motive must in all case be strictly proved. A corrupt motive in the mind of the person bribed is not enough....."

The above observations in the above decisions to a large extent captures the position of this court and the circumstances obtaining in so far as the issue of bribery is concerned in this petition.

64. On the allegations of violence and witchcrafts and undue influence, this court finds that this allegation too requires a higher standard proof because it is also a criminal offence under **Section 10 of the Election offences Act No. 37 of 2016**. As I noted above **Section 63 of Election Act 2011** cited by the Petitioner was repealed by legal notice No. 37 of 2017. The relevant section dealing with the Petitioner's allegation of witchcrafts is **Section 10 of Election Offences Act** which states:-

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

- a. inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election;**
- b. Inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate; or**
- c. Impeding or preventing a person from being nominated as a candidate or from being registered as a voter, commits an offence of undue influence".**

65. The Petitioner contends that the 3rd Respondent use witchcrafts to influence or "**bind**" voters to vote for him. According to him the 3rd Respondent fed supporters or voters with some "**treated meat**" after some rituals had been performed by unnamed witchdoctors. The evidence on witchcraft was tendered by PW3 (Kelvin Murimi) and PW4 (James Kiminja Njeru). Kevin Murimi (PW3) told this court he attended an occasion that was held at a place known at Kiritiri near Mbeti Academy on 21st July, 2017 where a bull was slaughtered at night and cut to small pieces by 2 witchdoctors. According to him the witchdoctors bewitched the meat before serving it on people. He however stated that he left "**when the ritual was starting**" at around 11 pm and that he did not partake of the meat. Pressed to name the people who ate the meat he stated:-

"I do not know who took the meat that had been bewitched."

James Kiminga (PW4) on his part denied witnessing that incident contrary to contents of his affidavit

sworn on 6th September 2017. When the contents of paragraph 10 of that affidavit was read to him he answered that though he signed the affidavit he did not understand English. He was categorical;

"It is not true that I was present when the bull was slaughtered or bewitched. I did not know what transpired at night."

The Petitioners' claims of witchcrafts thus rested only on the evidence of Kelvin Murimi (PW3) whose evidence I must say was shaky and inconsistent. In his affidavit, he deposed that the witchdoctors performed their rituals on the meat at 6 am but in his oral evidence on oath in court he stated that the rituals were performed at 11 pm and that he left before it started. I also observed him closely when he testified and he appeared quite uncomfortable and fidgety when answering simple questions put to him. In the first place he stated that he did not know the "**witchdoctors**" or the people who gathered to eat the "**treated meat**". If he did not know witchdoctors, how could he tell that they were witches in the first place. Secondly if he left before the ritual started how can he claim to have witnessed the "**treatment**" of the pieces of meat. Third and most important if he could not tell who had gathered to partake of the "**bewitched**" pieces of meat, how can the Petitioner claim that the voters of Mbeere South Constituency particularly those who voted in favour of 3rd Respondent were influenced or induced to vote for him on account of eating the "**treated**" meat? I ask this question because as I have observed above, the standard of proof applicable in situations where criminal allegations are made such as in this instance, is higher. It is beyond reasonable doubt. So given the inconsistent and contradictory evidence tendered by the Petitioner in regard to witchcrafts attributed to the 3rd Respondent, I find that these allegations have failed the test. The evidential burden on this score was never discharged by the Petitioner.

66. The Petitioner also accused the 3rd Respondent for use of violence during the election period. The use of force or violence during an election period is outlawed and coded under **section 11** of the **Election Offences Act**. It is a serious election offence and anyone found guilty is liable to a fine of **Kshs.2 million shillings**, or imprisonment for upto **6 years** or both. According to the Petitioner, his posters were destroyed and though he did not directly attribute it to the 3rd Respondent he accused bodyguard of 3rd Respondent causing violence and disrupting his campaigns. He testified that he reported the incident at Kiritiri Police Station and gave a OB No. 14/28/7/2107. However the Petitioner failed to adduce evidence concerning the OB in order to establish and prove that the report he made, if at all, related to violence perpetrated by the 3rd Respondent or his agents. He also failed to tender any evidence regarding the action the police took if at all against the perpetrators of the violence. On his part, the 3rd Respondent denied being summoned by the police on any criminal allegations made against him. So who knows whether OB No. 14/28/7/2107 really exist and if so whether it related to the activities of the 3rd Respondent? I do not see why the Petitioner omitted tendering in court at the very least, certified copy of the OB extract to prove that his campaign posters were destroyed by the supporters of the 3rd Respondents or that his campaigns were violently disrupted. Citing an OB No.42/29/7/2017 in my view is certainly not enough given the test applicable and standard of proof required in such claims. **Kelvin Murimi (PW3)** testified that the 3rd Respondent called for a meeting on 8th April, 2017 and told those who attended to be ready to use violence if the Petitioner were to win the elections. He further stated that he later switched sides and supported the Petitioner and question is why did he not make a report to the police concerning preparation to commit a crime if at all what he stated regarding a meeting of 8th April, 2017 was factual? This court finds that the allegations of witchcrafts and violence cannot stand the test of law. The Petitioner had the burden to discharge and prove to this court beyond reasonable doubt that these offences were committed by 3rd Respondent but as I have observed he has simply failed to discharge that burden rendering the claims mere allegations.

67. (v) Whether the elections held on 8th August, 2017 for member of National Assembly Mbeere South complied with the Constitution and electoral laws and whether the 3rd Respondent was validly elected.

The Petitioner contends that the 1st and 2nd Respondent failed to conduct the elections in strict compliance with the law and has cited the issues ranging from agents being denied access, the failure by

the 1st and 2nd Respondent to provide his agents with Form 35A, alterations of Form 35As to manipulation of results. He has cited the case of *William Kabogo Gitau - vs- George Thuo & 2 others [2010] eKLR* where the court held inter alia that Form 17A that the 3rd Respondent relied to declare the results of Juja Parliamentary Election was riddled with irregularities that could not be considered in the premises to constitute a statutory form that could stand up to legal scrutiny and that the irregularities and electoral malpractices witnessed were of such magnitude that results of Juja Parliamentary Elections held in the 2002 could not stand the credibility and integrity test. The court went on to hold that the Petitioner had established to the required standard that there were indeed massive irregularities and electoral malpractices in the conduct of that election that negated and voided the said results. This court was told that the above decision was later overturned in the Court of Appeal but what is more important here is the fact that the court in the above decision was able to find that election malpractices like the use of violence among other malpractices had been proven unlike in this present petition where the finding of this court is on the contrary.

68. This court is persuaded by the 1st and 2nd Respondents' contention and submissions that in reality there is never a perfect election and that the law does anticipate glitches of human error, mistakes and oversights in various stages of the electoral process. A look at the Provisions of **Section 83** of the **Elections Act** gives an insight into the letter and principle behind the incidents of non-compliance with the law. It states:-

"No election shall be declared 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 that written law or that the non-compliance did not affect the result of the Election." (emphasis added)

A Petitioner is required to establish in the first instance that election officials failed to comply with some provision of the law or some regulation and that secondly (and this important), the non compliance actually affected the results of the election. These two elements are lacking in this petition. The Petitioner has not proved to the required standard that the 1st and 2nd Respondents failed to comply with any written law and secondly, that the non compliance affected the results of election of Mbeere South Constituency as declared by the 2nd Respondent. In the case of *Moses Masika Wetangula -vs- Musikali Kombo & 2 others [2014] eKLR* the court reached a similar finding that ;

"no election can be voided for non-compliance with any written law relating to that election unless it is demonstrated inter alia that the non-compliance affected the result of that election."

69. The Petitioner's counsels went to some lengths in cross-examining the 2nd Respondent substantially on issues relating to self-explanatory alterations on some form 35As most of which had not even been pleaded in the Petition. In those instances where the Petitioner identified some errors, mistakes or alterations, he did not go ahead to show how those infractions affected the results of the election or its credibility. The Petition failed to discharge that evidential burden placed on him under **section 107** of the **Evidence Act**.

70. The Petitioner faults the 1st and 2nd Respondent on the declaration of results and that she breached the law to announce the 3rd Respondent as the winner. **Regulations 83** of the Elections (General) Regulations 2012 provides for how tallying and announcement of election results should be conducted. It states:-

"Immediately after the results of the poll from all polling stations in a constituency have been received by the Returning Officer, the Returning Officer shall, in the presence of candidates, or agents and observers, if present-

a. the tally from each polling station in a constituency for the election of a member of the National Assembly and members of the County Assembly;

b. disregard the results of the count of a polling station where the total valid votes exceeds the number of registered voters in that polling station;

c. disregard the results of the count of a polling station where the total exceeds the number of voters who turned out to vote on that polling station;

d. collate and public announce to the person's present the results from each polling station in the constituency for the election of the President, County Governor, Senator, County Women Representative to the National Assembly....."

The 2nd Respondent pleaded that she complied with the law and filled the relevant forms before declaring the winner notwithstanding the absence of the petitioner and his agent at the tallying centre. The Returning Officer in my view was perfectly in order to do so though this court finds that she failed to exhibit in this court the gazette notice declaring the winner published in compliance with **Regulations 87(3) of the Election (General) Regulations 2017**. This court however assumes as there is a rebuttable assumptions that the 1st Respondent complied with that regulation because in any event the 3rd Respondent would not have been currently sitting in a Parliament as member of National Assembly representing the people of Mbeere South. The Petitioner did not also make any allegations that the results were not gazetted. So it is not really an issue here.

71. Finally, this court wishes to state here and now that it is not the business of courts to decide who an elected representative in a given electoral area and office should be. The work of courts only kicks in when an election petition is filed and its role is to determine if the election process adopted met the constitutional and statutory thresholds. If the process was such that the will of the people were captured in accordance with the Constitution and the Election Laws, the court have no business interfering with the will of the people. The will of the people is supreme and election courts endeavour to protect and defend it. In the Supreme Court of India in the case of **RAHIM KHAN -VS- KHURSHIP AHMED & OTHERS 1975 AIR 290, 1975 SCR (1) 643** the court expressed itself as follows:-

"An election is a politically Sacred Public Act, not one person or of one official, but of the collective will of the whole constituency. Courts naturally must respect this public expression sacredly written and show extreme reluctance to set aside or declare void an election which has already been held unless clear and cogent testimony compelling the court to uphold the corrupt practice alleged against the return candidate is adduced."

Further closer home, in the case of **HASSAN JOHO -VS- NYANGE & 4 OTHERS [2007] eKLR** the court held as follows:-

" Election Petitions are no ordinary suits but disputes in rem of great public importance. They should not be taken lightly and generalized allegations are not kind of evidence required in such proceedings. Election Petitions should be proved by cogent, credible and consistent evidence."

72. This court has already said enough and having analyzed all the issues before me, the evidence, the law and the legal authorities I must say that this Petition can and must only head to one direction. It must fail for lack of merit. Apart from lacking in merit this court also adds that the Petitioner failed to comply with rule 8(1) and 12(1) and 2 of the Election (Parliamentary and County Elections) Petitions Rules 2017. These rules of procedure in my considered view goes beyond technical requirements of what an election petition must contain. The legal requirements contained under the above rules goes into the substratum of a petition because really it is a basis upon which a Petitioner comes to court in the first place and therefore the omission to clearly plead the officials results declared and the actual date of when such results were declared renders a petition incompetent. This petition is incompetent to that extent and is liable to be struck out even on that ground alone. By and large this court finds that the 3rd Respondent was duly elected as Member of National Assembly for Mbeere South Constituency and the election results declared by the 2nd Respondent are hereby upheld. This Petition for the reasons I have given above is dismissed for lack of merit and is liable to be struck out for the reasons I have also given but because it

can only suffer one fate I hereby dismiss it with costs.

73. On costs, it is trite that costs follow the event. **Section 84** of the **Election Act No. 24 of 2011** provides that;

"An election court shall award costs of and incidental to a petition and such costs shall follow cause."

Further to this provision, Rule 30 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 provide as follows:-

"The election court may at the conclusion of a petition make an order specifying the total amount of costs payable, maximum amount of costs payable, the person who shall pay the costs and the person whom costs payable..... shall be paid."

This court has the power to assess and make an award on costs and it was on that basis that I invited counsels appearing in this petition to make representations on the amount payable on the instructions fees. Both counsels for the Respondents submitted that instructions fees of Kshs.5 million should be awarded to the winning party. The Petitioner's learned counsel Mr. Ndegwa on his part was a bit guarded on the amount instructions fee payable and contended that the matter should be left to the discretion of this court. I have considered this issue and I am well guided by the Supreme Court decision in the case of **JASPER SINGH RAI & 3 OTHERS -VS- TARCOCHAN SINGH RAI & 4 OTHERS [2014] eKLR** where the court noted as follows:-

" It emerges that the award of costs would normally be guided by the principle that "costs follow the event" the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting preference, is the judiciously exercised discretion of the court, accommodating special circumstances of the case, while being guided by ends of justice. *The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior- to, during and subsequent to the actual process of litigation.*"

The capping of costs is intended to promote the right to access justice under **Article 48** of the constitution so as to not invoke fear to genuine Petitioners who would wish to challenge flawed elections and to this end this court does agree with the sentiments expressed by the Petitioner's counsel. Taking everything into consideration including the number of witnesses summoned by the parties in this petition during trial to resolve the issues in this petition I will accordingly cap instructions fee for 1st and 2nd Respondents at Kshs.1 million (one million shillings only) while the 3rd Respondent's instructions fee is capped at Kshs.1 million (one million shillings only). The other incidental costs shall be taxed and certified by Deputy Registrar.

74. Finally I wish to appreciate and thank all counsels in this petition for their input and service to their respective clients and the administration of justice in general. I also wish to thank the parties for conducting themselves with decorum and last but not least the court staff for their sacrifices to ensure that this petition was timely disposed off despite the challenges of space.

75. **Final orders:**

The final orders of this court for avoidance of doubt are as follows:-

- a) The petition herein is dismissed with costs for lack of merit.
- b) The Respondents herein are awarded costs as follows:-

- (i) Instructions fee for 1st and 2nd Respondents is capped at one million shillings

(Kshs.1,000,000/-)

(ii) Instructions fee for the 3rd Respondent is capped at **Kshs.1,000,000/-** (one million shillings only).

c) The total costs payable shall be taxed and certified by the Deputy Registrar of this court.

d) The money deposited in court as security shall be applied in payment of the taxed costs on a *pro-rata* basis.

e) A certificate of this determination in accordance with **Section 81 (1)** of the **Election's Act** shall issue to IEBC (Independent Electoral and Boundaries Commission) and the Speaker of National Assembly.

Orders accordingly.

Dated, signed and delivered at Embu this 14th day of February, 2018.

R. K. LIMO

JUDGE

14/2/2018

Before Hon. Justice Limo- (J)

CC Philip

Mutuma for 3rd Respondent present

Mutuma also holding brief for Mamboleo for 1st and 2nd Respondent

Guantai holding brief for Ndegwa for Petitioner present

Court:

Judgment signed dated and delivered in the presence of Guantai Advocate holding brief for Ndegwa and Mwangi for Petitioner and Mr. Mutuma for 3rd Respondent and also holding brief for Mamboleo for 1st and 2nd Respondent.

R.K. LIMO

JUDGE

14/2/2018

Guantai:

I apply for certified copy of proceedings and leave to appeal.

Court:

A copy of certified copy of the proceedings and Judgment be supplied to the Petitioner. He also has Right of Appeal within 30 days.

R.K. LIMO

JUDGE

14/2/2018