



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

ELECTION PETITION NO 8 OF 2017

IN THE MATTER OF THE ELECTION FOR THE MEMBER OF SENATE OF LAMU

AND

IN THE MATTER OF THE ELECTION ACT, 2011

AND

IN THE MATTER OF THE ELECTION (PARLIAMENTARY AND COUNTY ELECTION) PETITION RULES, 2017.

BETWEEN

ALBEITY HASSAN ABDALLA.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

(I.E.B.C).....1ST RESPONDENT

MOHAMED ADAN ALI.....2ND RESPONDENT

HON. ANUAR LOITIPTIP.....3RD RESPONDENT

WIPER DEMOCRATIC MOVEMENT PARTY.....4TH RESPONDENT

JUDGEMENT

1. The petitioner in this case, ALBEITY HASSAN ABDALLA (hereafter referred to as the petitioner) has filed this petition against four Respondents namely, The Independent Electoral and Boundaries Commission (IEBC), MOHAMED ADAN ALI, ANUAR LOITIPTIP and WIPER DEMOCRATIC MOVEMENT PARTY.

2. The 1st Respondent, the Independent Electoral and Boundaries Commission (hereafter referred to as the 1st Respondent) is a constitutional commission established under Article 88 of the Constitution of Kenya 2010 whose responsibility and functions are to conduct free and fair elections.

3. The 2nd Respondent, MOHAMED ADAN ALI (hereafter referred to as the 2nd Respondent) was the county Returning officer for Lamu County and who was the person in charge of the conduct of the election in Lamu County.

4. The 3rd Respondent, ANUAR LOITIPTIP (hereafter referred to as the 3rd Respondent) was one of the candidates for Senatorial position of Lamu County and he was the one who was declared the winner by the 2nd Respondent.

5. The 4th Respondent, WIPER DEMOCRATIC MOVEMENT PARTY, is a political party registered under the political parties Act 2011.

6. The grounds upon which the petition is grounded are as follows

(i) THAT Section 30 of the Elections Act, No. 24 of 2011 entitles a candidate to appoint one agent per polling station but the 1st Respondent denied the petitioner that entitlement thereby breaching article 38, 81 and 86 of the Constitution of Kenya, 2010.

(ii) THAT failure by the 1st Respondent to allow the petitioner to appoint an agent as per Section 30 of the Elections Act, No. 24 of 2011 breached the Petitioner's right to an impartial, transparent, efficient and accountable electoral system as per Article 81 (e) of the Constitution of Kenya, 2010.

(iii) THAT the conduct of the Senatorial Elections in Lamu County by the 1st and 2nd

Respondents was contrary to Article 88(h) and (5) of the Constitution of Kenya, 2010.

(iv) THAT therefore, the 1st and or 2nd Respondents conduct of the Senatorial Elections in Lamu County was wrong, unprocedural, unfair and or unjust to the Petitioner as it has denied him the right to fully participate, through a party agent, in the monitoring of the voting process therein.

7. The petitioner is seeking the following orders;

(i) A declaration that the 3rd Respondent, Lotiptip Anuar, was not validly elected as Senator for Lamu County.

(ii) A declaration that the Petitioner, Albeity Hassan Abdalla, was the candidate who was validly elected as Senator for Lamu County.

(iii) In the alternative to prayer 2 above, a declaration that no candidate was validly elected between the Petitioner and the 3rd Respondent and therefore a fresh election should be held.

(iv) A scrutiny and recount of votes in all Polling Stations in Lamu County be conducted to ascertain the validity of the votes and ascertain the correct number of votes each candidate obtained thereat.

(v) The 1st, 2nd and 3rd Respondents either jointly and or severally do pay the costs of this Petition.

(vi) Any other Order that this Honourable Court may deem just and fair to grant herein.

8. The petitioner deposed as follows in his supporting affidavit which he asked the court to adopt as his evidence in chief;

(i) THAT on the 8th of August, 2017, the 1st Respondent conducted General Elections in the Republic of Kenya and more specifically, Senatorial Elections were held in the County of Lamu, in which I and the 3rd Respondents were aspirants.

(ii) THAT I contested for the Senatorial seat as a candidate of the 4th Respondent, while the 3rd Respondent contested as a candidate of the Jubilee Party of Kenya.

(iii) THAT on the 11th of August, 2017 the 3rd Respondent declared results of the said election as follows:-

a) Albeity Hassan Abdalla 14,374

b) Lali Abdulrahman Aboud 2,123

c) Loiptip Anuar 14,432

d) Mohamed Muhdhar Ali 3,360

e) Salim Mohamed Hashim 6,950

f) Sheelali Abdallah Athman 2,965

g) Waihiga David Mwaure 4,889

Annexed hereto and marked "AHA 1" is a copy of the declaration of results Form 38C.

(iv) THAT I resolved to exercise my fundamental right and freedom under article 38 (2) (a) of the Constitution of Kenya, 2010 based on my trust that the 1st and or the 2nd Respondent shall discharge its or their duty under article 88 (4) particularly (h) and (5) of the Constitution, 2010 in a transparent, impartial and neutral manner as is provided by the constitution and the electoral laws of Kenya.

(v) THAT in its discharge of its duty under article 88 of the Constitution of Kenya, 2010 the 1st Respondent was to be guided by article 81 (a) (d) (e) (u) (iii) (iv) and (v) 84, 86 (d) and part XII and XIII of the Elections (General) Regulations, 2017.

(vi) THAT in particular, the 1st Respondent, was under a constitutional obligation to ensure that:

- a) I was free to exercise my political right of seeking to be elected as a Member of the Senate for Lamu County.
- b) It conducted a free and fair election based on universal suffrage and the free expression of the Will of the electors and which were free from improper influence or corruption and which- were transparent, accurate and accountable.
- c) It remained independent, impartial, neutral and or efficient.
- d) The electoral code of conduct was respected adhered to and implemented fully without fear or favor.
- e) The voting method or system used was accurate, verifiable, secure, transparent and accountable.
- f) It employs appropriate structures and mechanisms that eliminate electoral malpractices including the safe keeping of electoral materials.
- g) No person votes in a polling station other than that in respect of which that person is registered to vote.
- h) The candidate and authorized agents are not excluded from a Polling Station.
- i) The candidates or their agents who are present at the Polling Station are allowed to inspect the ballot papers provided for use at the Polling Station and to record the serial numbers thereon.
- j) Before issuing a ballot paper to a voter it requires the voter to produce an identification document which shall be the same document used at the time of registration as a voter.
- k) It calls out the number and name of the voter as stated in the polling station register.
- l) It requires the voter from the printed copy register to place his or her fingers on the finger print scanners and cross out the name of the voter once the image has been retrieved,
- m) In case the electronic voter identification device fails to identify a voter;
 - 1) It shall invite the agents and candidates in the stations to witness that the voter cannot be identified using the device.
 - 2) Complete verification Form 32A in the presence of agents and candidates.
 - 3) Identify the voter using the printed register of votes, and
 - 4) Once identified proceed to issue the voter with the ballot paper to vote.
- n) Where an assisted voter is not accompanied by a person who is qualified to assist him or she, the Presiding Officer shall assist such a voter in the presence of the agents.
- o) At the end of voting and after declaring the polling station closed the Presiding Officer shall proceed to seal the ballot boxes in the presence of the candidates or agents and observers at his or her polling station.
- p) Immediately after the close of the polling, the Presiding Officer shall make in the Polling Station Diary ([DSD] a written statements of:
 - 1) Number of ballot papers issued to him or her.
 - 2) Number of ballot paper other than spoilt papers, issued to voters.
 - 3) Number of spoilt ballot papers and
 - 4) Number of ballot papers remaining unused.
- q) Immediately after the completion of the statement, the Presiding Officer, in the presence of the candidates or agents shall seal in separate temper proof envelopes:-
 - 1) the spoilt ballot papers, if any,

- 2) the marked copy register, where necessary,
- 3) the counterfoils of the used ballot papers and
- 4) The statement referred hereinabove.

r) at the end of voting and before counting of the ballots and in the presence of candidates and agents, the Presiding Officer shall enter in the Polling Station Diary (DCD) the number of persons identified during polling using the printed register of voters.

s) It shall not allow a person whose name, address and authorization has not been submitted to it to attend at a counting.

t) It shall permit into the counting venue

- 1) a candidate
- 2) Agents appointed by the candidates or his or her party.

u) During counting of votes the Presiding Officer shall record the count of the votes in a tallying sheet in Form 33.

v) It provides each political party, candidate or their agents with a copy of the declaration of the results.

w) Where a candidate or agent requires the Presiding Officer to have the votes rechecked and recounted the Presiding Officer shall have the votes recounted

x) Upon completion of a count including a recount, the Presiding Officer shall seal in each respective ballot box.

- 1) Valid votes,
- 2) Rejected ballot papers sealed in a temper proof envelope.
- 3) Unused ballot papers sealed in a temper proof envelop.
- 4) Counter foils of used ballot papers sealed in a temper proof envelope.
- 5) Copy of Election Result Declaration Forms, and
- 6) Stray ballot papers in a tamper proof envelope

y) The Presiding Officer shall deliver to the Returning Officer

- 1) The sealed ballot boxes
- 2) the statements
- 3) Copy of the Register of voters, and
- 4) Polling Station Diary

(vii) THAT prior to the elections, the 1st Respondent directed that due to lack of enough space and for purposes of decongesting the Polling Stations only political party agents and agents of independent candidates would be allowed in a Polling Station and despite the law having allowed each candidate the right to appoint an agent such agent would not be allowed in any Polling Station.

(viii) THAT the said directive left myself with no choice but to rely on the party agents and I consulted the 4th Respondent on how my agents could be incorporated in its list and the 4th Respondent promised to do so.

(ix) THAT despite the aforesaid assurances, I was frustrated by the 4th Respondent and my list of agents was never considered or incorporated in the 4th Respondents list of agents a fact that prompted me to complain to the 1st Respondent.

Annexed hereto and marked "AHA 2" are copies of letters confirming the same.

(x) THAT I realized that despite the fact that I was nominated by the same party as the candidate for Wiper Democratic Movement Party (Wiper) for the position of Women Representative for Lamu County, and who is a Deputy Party Leader,

we had different political campaign strategies which were antagonistic and which caused a rift between us.

(xi) THAT I aver that due to the Lamu County voters voting dynamics which lay emphasis in individual candidate and not a political party, the Wiper Candidate for position of Women Representative for Lamu County appointed her own agents as the agents of the party and who had no loyalty to me and this affected me as I had no agents to represent my interest at all the Polling Stations in Lamu County.

(xii) THAT the issue of the agent was so emotive that a rift occurred between my agents and those of the wiper candidate for women representative in Lamu county resulting in some of them being arrested by police.

(xiii) THAT as a consequence of the aforesaid I was completely kept out of the voting process and was unable to witness, monitor and verify the voting, counting and declaration of results at the Polling Stations.

(xiv) THAT further, I aver that despite having no agents, I aware that, the sorting out, counting and declaration of votes at the Polling Stations were done and completed on 9th August, 2017.

(xv) THAT I was also aware that the votes for the position of Senator are counted and declared at the Polling Station before those of the Governor and Women Representative.

(xvi) THAT I was further aware that before the declared results at the Polling Station and the ballot boxes are transported to the County Tallying Centre, the said results are to be transmitted electronically to the County Tallying Centre and the Presiding Officer's from the various Polling Stations only task is to physically transport the ballot boxes and the results to the County Tallying Centre for Tallying.

(xvii) THAT I state that the counting, declaration and transmission of the senatorial elections was completed at the Polling Stations on 9th August, 2017 and when I went to the tallying centre the results on the IEBC screen and or public portal reflected that I had won by 196 votes but the 2nd Respondent delayed the announcement of the winner on grounds that there were two Polling Stations that had not submitted their results but he could not say which Polling Stations were those.

(xviii) THAT I therefore believe I am the person who won the election for senator in Lamu County but the results were illegally tempered with by the 1st and 2nd Respondents in favor of the 3rd Respondent.

(xix) THAT for the aforesaid reasons and in order to comply with the provisions of article 38, 81 and 86 of the Constitution of Kenya, 2010 I seek orders of scrutiny and recount of all the Polling Stations in Lamu County in order to determine the valid votes cast and therefore who was validly elected as the Senator for Lamu County.

(xx) THAT I aver that the above results were erroneous and or wrong as the 1st, and or 2nd Respondent failed and or neglected to ensure the electoral and or voting process was free and fair as follows:

a) The 1st Respondent, being mandated to conduct the general elections herein, denied access to the wiper party agents to several polling stations and therefore failed and or neglected to ensure that the Polling Stations in Lamu County had a political party agent for me who would observe, monitor and evaluate the elections as part of ensuring the said elections were conducted freely and fairly.

b) That the Polling Stations that did not have any Party Agent from the 4th Respondent are as follows:

a. Kizingitini Dispensary

b. Shanga Ishakani

c. Mtangawanda Primary

d. Bori Center

e. Myabogi Center

f. Mwangala Center

g. Patte Primary School

h. Kiunga Primary School.

i. Rubu Village

j. Milimani Primary

k. Kiangwe Primary

l. Mangai Primary

m. Basuba Primary

n. Mara rani Primary

o. Manda Yawi Nursery

p. Matondoni Primary

q. Kandahari Playground

r. Lamu Youth Polytechnic

s. Baragoni Primary School

t. Ndununi Mswakini

u. Safirisi Nursery

v. Kibiboni Primary

w. Kilimany Nursery

x. Bobo Primary

y. Hindi Dispensary

z. Koreni Primary School

aa. Mangu Primary School

bb. Mugomuiri Primary

cc. Hongwe Primary

dd. Minivalley Primary

ee. Sese Primary

ff. Msefuni Primary

gg. Heshima Primary

hh. Katsaka Kairu

ii. Moa Primary School

jj. Dide Waride Primary

kk. Pandanguo Primary

ll. Boko Primary

mm. Bahari Primary School

nn. Lake Amu Primary

oo. Swabaha Primary School

pp. Tewe Primary School

qq. Ngoi Primary School

rr. Lakeside Primary School

ss. Zikomani Primary School

tt. Bahati Primary School

uu. Kilimani Primary School

vv. Muungano Primary School

ww. Oceanview Primary School

xx. Mlei Nursery School

c) Thus the 1st and 2nd Respondent failed and or neglected to facilitate the observation, monitoring and or evaluation of the elections conducted in Lamu County.

d) Further, in the Polling Stations where the 4th Respondent had party agents, the said party agents maliciously failed and or neglected to act in accordance with and or protect the interests of the 4th Respondent, being their principal and by extension myself.

e) The 4th Respondent, being the Political Party fronting the Petitioner, failed and or neglected to take into consideration the legal responsibility bestowed on it to ensure that each Polling Station is manned by an agent who represented each of its candidates for the various positions thereby prejudiced me as I was denied the right to scrutinize and observe the voting process in the said Polling Stations.

f) Moreover, a number of Polling Stations had pre marked ballot papers and I was unable to ascertain whether those votes were valid or not.

g) I aver that many forms 38As were not signed by the Presiding Officers and their deputies and or were not stamped. In other Polling Stations no such forms were issued such as at;

a. Witu Primary School (01)

b. Witu Primary School (02)

c. Witu Primary School (04)

d. Hongwe Primary School (02)

e. Lake Kenyatta Primary School (02)

f. Lake Kenyatta Primary School (05)

g. Kizingitini Primary School (02)

h. Kizingitini Secondary School (02)

i. Kiunga Primary School (02)

Annexed hereto and marked "AHA 3" is a copy document confirming the same.

In fact I witnessed a Presiding Officer from Dide Wa Ride Daniel Kazungu Karisa filling form 38A at the Tallying Centre.

Annexed hereto and marked "AHA 4" is a CD confirming the same,

I aver that the votes cast for the different elections for President, Senator, Member of National Assembly, Women Representative and Member of County Assembly do not tally a fact that demonstrate that invalid votes were cast and for such votes to be identified a scrutiny of all the votes cast must be conducted.

Annexed hereto and marked "AHA 5" are copies of documents confirming the same.

h) I also aver that the Returning Officer for Lamu East Constituency and his deputy and the Deputy Returning Officer for Lamu West Constituency were colleagues, employees and or work mates of the running mate of the Jubilee party candidate for governor in Lamu County a fact that compromised their neutrality and or impartiality.

Annexed hereto and marked "AHA 6" are copies of documents confirming the same.

i) In any event the Deputy Returning Officer for Lamu West Constituency was gazetted to conduct election in Lamu East Constituency but she and her counterpart in Lamu West Constituency illegally exchanged their roles thereby rendering all the results declared by them illegal, null and void.

j) At Mbwajumwali Polling Station a clerk was arrested for allowing 16 people to vote without being verified by the KIEMS KIT which is a grave election offence.

k) As a consequence of the foregoing, the declaration of the 3rd Respondent as the duly elected Senator of Lamu County by the 2nd Respondent is unlawful.

(xxi) THAT my claim is that the Senatorial Elections held for Lamu County on 8th August, 2017, by the 1st and 2nd Respondents and participated to by the 3rd and 4th Respondent was not free and fair and was unprocedural for the following reasons:-

(a) Section 30 of the Elections Act, No. 24 of 2011 entitles a candidate to appoint one agent per polling station but the 1st Respondent denied me that entitlement thereby breaching article 38, 81 and 86 of the Constitution of Kenya, 2010.

(b) Failure by the 1st Respondent to allow me to appoint an agent as per Section 30 of the Elections Act, No. 24 of 2011 breached my right to an impartial, transparent, efficient and accountable electoral system as per Article 81 (e) of the Constitution of Kenya, 2010.

(c) Conduct of the Senatorial Elections in Lamu County by the 1st and 2nd

Respondents was contrary to Article 88(h) and (SI) of the Constitution of Kenya, 2010.

(d) Therefore, the 1st and or 2nd Respondents conduct of the Senatorial Elections in Lamu County was wrong, unprocedural, unfair and or unjust to me as it has denied me the right to fully participate, through agents, in the monitoring of the voting process therein.

(xxii) THAT I pray that it be determined that:-

a) The 3rd Respondent, Lotiptip Anuar, was not validly elected as Senator for Lamu County.

b) i, Albeity Hassan Abdalla, was the candidate who was validly elected as Senator for Lamu County.

c) in the alternative to prayer 2 above, a declaration that no candidate was validly elected between me and the 3rd Respondent and therefore a fresh election should be held.

d) A scrutiny and recount of votes in all Polling Stations in Lamu County be conducted to ascertain the validity of the votes and ascertain the correct number of votes each candidate obtained thereat.

e) The 1st, 2nd and 3rd Respondents either jointly and or severally do pay the costs of this Petition.

f) Any other Order that this Honourable Court may deem just and fair to grant herein.

9. The petitioner said as follows in cross examination by counsel for the 1st and 2nd Respondent;

(i) That Nasa is a coalition of parties and that Wiper is in Nasa.

He said he voted at Witu primary school polling centre and did not have an agent at Witu primary school.

(ii) That he had a problem with his party and that is why he enjoined his party as the 4th Respondent.

He said he submitted a list of agents to the 4th Respondent but he did not disclose the names of the said agents in his Affidavit.

(iii) That he had a problem with the women representative which resulted to arrest of some people. He said IEBC was responsible for the arrest. He said his agents were not allowed into the polling stations.

(iv) The petitioner said his agent were not allowed into the polling stations and for that reason he does not have forms 38A and he cannot tell how many people voted for him. He said his problem with his party which did not help him get agents.

10. When cross-examined by counsel for the 3rd Respondent, the petitioner also stated as follows;

(i) That the law allows him to have agents. He said he did not have an agent at Witu primary school polling and he is the one who signed form 38A.

(ii) The petitioner also said there were wiper agents in some of the polling stations but they were not looking after his interest.

(iii) The petitioner said the absence of agents affected the elections because elections is a process, not an event. He said he does not have a problem with the way voting was done at Witu Primary School polling station where he voted but he has a problem with all the others.

11. DW1, MOHAMMED ADAN ALI deposed as follows in his Affidavit sworn on 19/9/2017 which he asked the court to adopt as his evidence in chief;

(i) THAT at all material time I was the County Returning Officer for Lamu County in the elections that were held on 08:08:17, fully conversant with the circumstances surrounding this Petition and duly authorized by the 1st Respondent to swear this Affidavit

(ii) THAT I have read and understood the contents of the Petition and the Affidavit filed in support thereof do hereby respond as thus.

(iii) THAT it is true that the Petitioner contested for the Senatorial seat as a candidate 4th Respondent while the 3rd Respondent contested as a candidate for

(iv) That it is true the outcome of the elections for the seat were declared by me as follows:

Albeity Hassan Abdalla 14,374

Lali Abdulrahman Aboud 2,123

Loitiptip Anuar 14,432

Mohamed Muhdhar AN 3,360

Salim Mohamed Hashim 6,950

Sheelali Abdalla Athman 2,965

Waihiga David Mwaura 4,889

and the Form 38C is annexed hereto and marked as exhibit "MAA1".

(v) THAT it is true that the Petitioner resolved to exercise his right in terms of Articles 38(2) (a) and 88(4)(h) and (5) of the Constitution and as set out at paragraph 5 of the supporting Affidavit.

(vi) THAT it is the duty of the 1st Respondent as well as myself under Article 88 of the Constitution of Kenya 2010 with the guidance of Articles 81(2) (a) (d) (e) (u) (iii) (iv) and (v) 84, 86(d), 88(4)(h) and (5) of the Constitution and the Elections Act and the Regulations set out thereunder.

(vii) THAT in response to the contents of paragraph 7 of the said Affidavit, it is true that the same comprise of the steps to be undertaken in the process of conducting an election and which steps I know of my own knowledge that I on behalf of the 1st Respondents, together with the Returning Officers, Presiding Officers and the other Polling officials undertook with diligence and a copy of the 4th Respondent's list of agents for the county is annexed hereto and marked as "MAA2"

(viii) THAT it is the discretion of the Presiding Officers as to the number of persons to be admitted into a polling station save that as per the Elections Regulations, those persons to be present thereat must include election officials, the candidates, authorized Party agents, independent party agents and member of the Commission, observers and duly accredited media persons.

(ix) THAT it is not true that every candidate for the different elective posts must have their own individual agents at the polling stations as alleged at para 8.

(x) THAT since the Petitioner was just one of nominee 6 posts and by the 4th Respondent and which Party had also nominated a Women's Representative candidate and duly appointed Party agents, the Petitioner did not have a right to demand to have his own extra agents to be allowed to the various polling stations across the County.

(xi) THAT the 1st Respondent is never involved in the processes undertaken by the respective political parties in appointing their agents for the various polling stations during elections and was not particularly involved in the elections subject matter of this Petition.

(xii) THAT I am a stranger to the allegations that the Petitioner underwent frustrations in the manner it was treated by the 4th Respondent and that his list of agents was not considered or incorporated in the 4th Respondent's list of agents and or that the Respondent complained to the 1st Respondent as alleged at para 10.

(xiii) THAT that I am unaware of the allegations that the Petitioner and the 4th Respondent's Women Representative for the County had different campaign strategies which were antagonistic and that there was rift between the two as alleged at para 11.

(xiv) THAT I am unaware of the alleged loyalties of the agents in favour of the 4th Respondent's Women Representative nominee as alleged at para 12.

(xv) THAT I am unaware of the alleged arrest of some of the agents of the Petitioner as alleged at para 13.

(xvi) That considering the afore going the Petitioner's interests was thus duly represented by the 4th Respondent's Party agents who were present in all the polling stations across the County.

(xvii) THAT it is true that the results of the poll were declared on 09.08.17 after the voting was completed and the counting and verification of the votes done, while the County results were declared by me on 11.08.17.

(xviii) THAT it is not true that once counting has been finalized and the results declared, the ballot boxes are transported to the County Tallying Centre and which is the only duty that the Presiding Officers undertake.

(xix) THAT the Presiding officers have the duty of preparation of the polling station before the opening of the station, ensuring that the voters and the election officials adhere with the law during the voting process, presiding over the counting of the ballots, announcing the outcome of the election at the polling stations, transmission of the results and sealing of the ballot boxes as well as keeping the records of all the activities undertaken during the process.

(xx) THAT it is not the results on the portal that are used in the declaration of the results but the aggregated entries in the Form 38Bs for the Senatorial elections.

(xxi) THAT the Petitioner has not laid any basis as to how he could possibly have won the election as alleged.

(xxii) "THAT the Petitioner has equally not laid a basis on which this Honourable Court can grant the orders for scrutiny and recount of all the polling stations in Lamu County in order to determine the valid votes cast in favour of every candidate.

(xxiii) THAT the results as declared were not erroneous and or wrong as alleged by the Petitioner as the polling officials did not fail and or neglect to ensure that the electoral process including the voting was free and fair.

(xxiv) THAT the 4th Respondent's party agents were present in the polling stations enumerated at para 21.11 of the Affidavit and copies of the respective Polling day diaries are annexed hereto in a bundle and marked as exhibit "MAA3".

(xxv) THAT save for training of the agents about their respective expectations and availing them an opportunity to be present at the polling stations and tallying centers it was not the duty of the 1st Respondent and myself to facilitate the observation, monitoring and evaluation of the elections as alleged by the Petitioner.

(xxvi) THAT I am unaware of the alleged failure and neglect by the 4th Respondents agents to protect the interest of the Party and by extension those of the Petitioner.

(xxvii) 28. THAT I am equally unaware of the alleged failures and or neglect of the 4th Respondent in ensuring that the polling stations were manned by agents perceived to be prejudicial to the interests of the Petitioner.

(xxviii) THAT I am equally unaware of the alleged pre-marked ballot stations which in any event have not been named.

(xxix) THAT copies of the Form 38A's of the polling station enumerated at para 21 are annexed hereto and marked as exhibit "MAA4" and contrary to the allegations by the Petitioner there were agents present before and even at the announcement of the results.

(xxx) THAT I am a stranger to the allegations contained at para 21.VIII of the Petitioner's Affidavit and am further informed by our Advocates which I verily believe to be true that the annexure has no evidentiary value or at all.

(xxxi) THAT whatever the variances that might exist in the results of the other positions have no effect or at all in the results declared and annexed hereto and marked as exhibit "MAA5".

(xxxii) THAT to my knowledge the employees of the 1st Respondent are not engaged on the basis of their relationships with their other colleagues and this cannot be a basis for compromising or invalidating results

(xxxiii) THAT the elections were held in accordance with the provisions of the Constitution, the Elections Act Regulations and the results I declared are verifiable and accurate and it is not true that the same was in breach of the provisions of the

law as enumerated under para 22 of the Petitioner's Affidavit.

12. In cross –examination by the learned counsel for the 3rd Respondent, he stated as follows;

(i) That the agents are appointed by the party that appoints the candidates to represent the party. He said in the case of an Independent candidate, the candidate appoints the agents.

(ii) DW1 also said that all the forms 38A were duly signed but the copies availed to court were the 5th and 6th duplicates and the signatures were faint.

13. On cross – examination by the learned counsel for the petitioner, DW1 stated as follows;

(i) That the 1st Respondent accepted agents and further that NASA is not a political party. He said he received a letter from NASA which asked IEBC to accept NASA agents.

(ii) DW1 also said he had annexed a list submitted by NASA and that it was not discriminatory to allow agents appointed by NASA.

(iii) DW1 said he was the one who filled form 38C from 38Bs. He said he made some corrections in forms 38C but the votes as reflected on forms 38A were not tampered with

14. The 3rd Respondent testified as DW2. He also asked the court to adopt his affidavit as his evidence in chief. He has denied the assertions raised by the petitioner in the said affidavit sworn on 3rd of October 2017.

15. The 3rd Respondent said in cross examination that the difference between the votes which he garnered and those that the Petitioner garnered was 58 votes. He also said that at Kiangwe Primary school polling station, the number of registered voters was 213 and the total number of cast votes was 216 and there was one rejected vote.

16. The Petitioner filed his written submissions as follows;

(i) That the issues for determination according to them were as follows.

a) Was the Petitioner the person who won the election for senator in Lamu County in the election held on 8th August, 2017?

b) Were the results of the election for senator in Lamu County in the election held on 8th August, 2017 illegally tampered with by the 1st and 2nd Respondents in favor of the 3rd Respondent? .

c) Is the petitioner entitled to orders of scrutiny and recount of all Polling Stations in Lamu County?

d) Were the results of the election for senator in Lamu County in the election held on 8th August, 2017 erroneous and or wrong?

e) Were there pre-marked ballot papers in a number of Polling Stations?

f) Were there Form 38A's which were not signed and or not stamped by the Presiding officers and if yes what are the legal effects?

g) Did the Petitioner witness a Presiding Officer from Dide Waride one Daniel Kazungu Karisa fill Form 38A at the tallying Station?

h) Were the tally of the votes for President, Senator, Member of National Assembly, Women Representative and Member of County Assembly different and if yes is this proof that invalid votes were cast?

i) Were the Returning Officer for Lamu East Constituency and his Deputy and the Deputy Returning Officer for Lamu West Constituency, colleagues, employees and or workmates of the running mate of the Jubilee Party Candidate for governor in Lamu County, if yes did this compromise their neutrality?

j) Were the Deputy Returning Officers for Lamu East and West Constituencies respectively not gazetted to conduct election where they did? if yes what is the legal effect of the said act?

k) Was the Petitioner denied his right to appoint agents under section 30 of the Elections Act, 2017? If yes what is the legal effect of the said denial?

I) Is the Petition entitled to orders sought?

(ii) On the issue as to whether the Petitioner was denied his right to appoint agents under section 30 of the Elections Act. 20171 If yes what is the legal effect of the said denial, he submitted as follows;

(iii) That the Petitioner has proved that in 15 out of the 50 Polling Stations he listed in paragraph 27 (b) of his petition and 21 (ii) of his Supporting Affidavit that there were no agents at all either for the Petitioner or his Political Party the 4th Respondent herein. These Polling Stations are:-

I. IMwangala Centre.

II. Milimani Primary School.

III. Kiangwe Primary School.

IV. Mangai Primary School.

V. Basuba Primary School.

VI. Mararani Primary School.

VII. Manda Yawi Nursery.

VIII. Mangu Primary School.

IX. Bahari Primary School 1.

X. Zikomani Primary School.

XI. Bahati Primary School.

XII. Mlei Nursery School.

XIII. Ichakani Primary School.

(iv) The Petitioner has proved that in 24 out of the 50 Polling Stations he listed in paragraph 27 (b) of his petition and 21 (ii) of his Supporting Affidavit that the agents present were not the agents appointed by the 4th Respondent as per the list it sent to the 1st and 2nd Respondents. These Polling Stations are:-

I. Shanga Ishakani.

II. Bori Centre.

III. Kiunga Primary School.

IV. Rubu Village.

V. Matondoni Primary School.

VI. Kandahar Playground.

VII. Lamu Youth Polytechnic.

VIII. Baragoni Primary School.

IX. Ndununi/Mswakini Village.

X. Kibiboni Primary School.

XI. Hindi Dispensary.

XII. Koreni Primary School.

XIII. Hongwe primary School

XIV. Mini Village.

XV. Sese Primary School

XVI. Msefuni Primary School

XVII. Dide Waride

XVIII. Book Primary School

XIX. Lake Amu Primary School

XX. Swabaha Primary School

XXI. Ngoi Primary School

XXII. Lakeside Primary School

XXIII. Muungano Primary School

XXIV. Ocean View Primary School

(v) Before the election date, the Petitioner wrote on 2nd August, 2017 to the Respondent through the Registration Officer lodging a complaint about the dispute on appointment of agents by the Wiper Democratic Movement Party (Wiper) for Lamu County. This is the letter produced in evidence and marked "AHA 2" at page 30 of the Petition.

(vi) Under article 88 (4) (e) of the Constitution of Kenya, 2010 the 1st Respondent is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and in particular, for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequently to the declaration of election results.

(vii) Further section 74 of the Elections Act, 2011 echoes the above Constitutional Provisions. It was therefore a duty of the 1st Respondent to resolve the dispute on appointment of agents as it was directly related to the elections of 8th August, 2017. Failure to do so, as was admitted by the 1st and 2nd Respondents was an abdication of a Constitutional duty and hence a violation of the Supreme Law of the state rendering the electoral process not free and fair.

(viii) That section 30 (1) of the Election Act, 2011 gives a political party a right to appoint one agent for its candidates at each Polling Station. Subsection 2 gives that right to the candidate if his or her party does not nominate an agent under subsection (I) What happens if a political party nominate agents whose loyalty is to some of its candidates and out rightly against the interests of others like it was in this case? It is our humble submission that by virtue of article 88 (4) (e) of the Constitution and section 74 of the Elections Act the 1st Respondent ought to have given the Petitioner the right to appoint his agents in order to safeguard his interests. It is the candidate who shall suffer more prejudice if he is denied the right to appoint agents than the party.

(ix) Considering what Justice F.N. Muchemi held on the important role agents play for a candidate in an election in the case of *Bwana Mohamed Bwana -Vs- Silvano Buko Bonaya & 2 Others Election Petition No 7 of 2013* where she said:-

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

(x) Therefore it is clear that the Petitioner was denied an important right to appoint his agents.

(xi) To compound, the above violation, the 1st and 2nd Respondent did not even allow the agents appointed by the Wiper Democratic Movement Party in 15 Polling Stations inside their Polling Stations Neither the Party nor the Candidate were represented in those Polling Stations.

(xii) Further, in 24 Polling Stations, the 1st and 2nd Respondent appointed agents for Wiper Party other than those appointed by the Party which is even a bigger violation of the right to appoint an agent.

(xiii) Lastly, to demonstrate the fact that the 1st and 2nd Respondent were out rightly biased against the Petitioner they appointed agents for the National Super Alliance Coalition (NASA) which was neither a political party, a candidate appointed by a Political Party or an independent candidate in complete breach of the provisions of section 30 of the Elections Act, 2011. The NASA agents were appointed in the following Polling Stations:-

1. Kizingitini Dispensary Polling Station 1 And 2

2. Shanga Ishakani Nursery School
3. Mwangala Centre
4. Kandahar Play Ground
5. Baragoni Primary School
6. Ndununi Mswakini Village
7. Mangu Primary School
8. Hongwe Primary School
9. Mini Valley Primary School
10. Moa Primary School
11. Dide Waride Primary School
12. Zikomani Primary School
13. Mkomani Girls Primary School

(xiv) The 1st and 2nd Respondent denial of the Petitioner's right to appoint his agents had a ripple effect and led to further violations of the Constitution and the law.

(xv) Article 81 (e) (iv) and (v) of the Constitution, 2010 provides that it is a general principle for the electoral system in Kenya to have free and fair elections, which are transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

(xvi) The elections cannot be said to have been conducted transparently as the Petitioner and his party had no agents in 15 Polling Stations to witness the voting. In addition the Petitioner had no agent in 22 of the other Polling Stations to witness the voting as the party agents were against him.

(xvii) The fact that the 1st and 2nd Respondent allowed NASA to appoint agents and deny the Petitioner and some Polling Stations his party, the said right, is clear proof of that they were not impartial or neutral in the conduct of the elections.

(xviii) The aforesaid fact robs the election of the element of efficiency and or accuracy because this could be so if the agents of the petitioner participated in the election and endorsed it.

(xix) Thus the election cannot be said to be accurate and accountable as the Petitioner's agents were not allowed to witness and confirm that the process was accurate.

(xx) Again article 86 of the Constitution of Kenya, 2010 requires that:- "At every election, the IEBC shall ensure that:-

- a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent,
- b) The votes cast are counted, tabulated and the results announced promptly by the Presiding Officer at each Polling Station.
- c) The results from the Polling Stations are openly and accurately collated and promptly announced by the Returning Officer, and
- d) Appropriate structures and mechanism to eliminate electoral malpractices are in place, including the safekeeping of election materials."

(xxi) The Petitioner could not witness whether the system used by the 1st and 2nd Respondent was simple, accurate, verifiable, secure, accountable and transparent because he was not represented in any of the Polling Stations.

(xxii) Further he cannot confirm that the votes cast were counted, tabulated and the results announced promptly by the Presiding Officer at each Polling Station.

(xxiii) The Court of Appeal in Civil Appeal No. 105 of 2017 IEBC VS Maina Kiai and 5 Others explained the importance of the voting at the Polling Station and stated;

"It is clear beyond peradventure that the Polling Station is the true locus for free exercise of the voters will. The counting of the votes as elaborately set out in the act and regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the count there is clothed with finality not to be exposed to any risk of variation or subversion."

(xxiv) The court further stated:-

"The only other verification or confirmation that we can envisage and is in fact conceded by the appellant itself in paragraph 53-57 of the submissions relate to accountability of the ballot. For instance, the number of ballot papers issued out to the constituencies, the number of ballot papers issued to and correctly used by voters, the number of spoilt ballot papers and the number of ballot papers remaining unused which process is verified against Form 34. Any change to what was counted, confirmed and verified at the constituency level before transmission is manifestly outside his powers and competence. It could well be tantamount to a serious assault on the will of the people of Kenya and an impermissible breach of the constitution."

(xxv) The High Court in a three judge bench case of National Super Alliance (NASA) Kenya V/S IEBC and 2 others Petition No. 328 of 2017 stated:-

"The process of accounting and verification in an election is closely intertwined with the concept of transparency and accountability. This promotes free and fair elections. Any electoral regulations should therefore ensure that only registered voters who present themselves at polling station participate in the poll and that each vote is accounted for."

(xxvi) The Supreme Court in the case of Raila Amolo Odinga and Another V/S IEBC and Other Presidential Election Petition No. 1 of 2017 in stressing the importance of verifying the results before declaring them stated that:-

"The critical element hence is the duty placed upon the commission to verify the results before declaring them. To ensure that the results declared are the ones recorded at the Polling station. Not to vary, change or alter the results.

"The duty to verify in article 138 is squarely placed upon the IEBC. This duty runs all the way, from the polling station to the constituency level and finally to the National Tallying Centre. There is no disjuncture in the performance of the duty to verify. It is exercised by the various agents or officers of the 1st Respondent, that is to say, the presiding officer at the Polling Station, the Returning Officer at the constituency level and the chair at the National Tallying Centre.

The verification process at all these levels is elaborately provided for in the Election Act and the regulations there under."

(xxvii) These Regulations are 73 (2) which provides for recording in the Polling Station Diary (PSD):-

- i. The number of ballot papers issued to him or her.
- ii. The number of ballot papers, other than spoilt ballot papers issued to voters.
- iii. The number of spoilt ballot papers, and
- iv. The number of ballot papers remaining unused.

Regulation 79 (2A) (a), 81 (1) & (2), 83 (1) (d) (h), 86 (1) 87 (1) (a) (2) (a) (b) (c) (d)

On the issue as to whether the results of the election for senator in Lamu County in the election held on 8th August. 2017 were illegally tampered with by the 1st and 2nd Respondents in favor of the 3rd Respondent, the petitioner submitted as follows;

(xxviii) That the 1st and 2nd Respondents annexed Form 38C and 38B in the Replying Affidavit of Mohamed Adan Ali. The Petitioner and the 3rd Respondent have also annexed the Form 38C. An analysis of the two Forms show the following:-

i. At Mbwajumwali Primary School Polling Station 2 the valid votes cast as per Form 38B for Lamu East are 388 while in Form 38C they are 408. This is an addition of 20 votes. This is clearly proof of manipulation of results by altering the results that were collated and tabulated at the Constituency Tallying Centre. Unfortunately, the Petitioner or was denied a right to appoint an agent to the Polling Station I le could not get a copy of Form 38A for the Polling Station neither could he verify the results at the Polling Station. The 1st and 2nd Respondents have not produced the said Form 38 A in court to confirm the results. The Petitioner's application for the production of the said Form was dismissed. Therefore the results cannot be verified thus with this clear evidence of manipulation of results, the entire results for Mbwajumwali Primary School Polling Station 2 should be nullified.

ii. Similarly the results for Tchundwa Primary School Polling Station 1 were altered. Form 38B for Lamu East show valid votes as 363 while 38C show 362 which is 1 vote less. This clearly show a reduction of one vote and for reasons

explained in (i) above these results are to be nullified.

iii. The case is the same with Tchundwa Primary School Polling Station 2. Form 38B for Lamu East show the valid votes cast as 363 while Form 38C show them as 366. This is an addition of 3 votes. For the reasons given in (i) above, these results must also be nullified.

iv. At Siyu Primary School Polling Station 1, Form 38B show valid votes as 289 while Form 38C show 287 which is less by 2 votes.

v. At Siyu Primary School Polling Station 2, Form 38B show valid votes as 304 while Form 38C show 302 which is again less by 2 votes.

vi. The situation is the same in the following Polling Stations as shown in the table above.

i. Shangarubu Primary School

ii. Shangarubu Ishakani Nursery School

iii. Pate Dispensary 1 &2

iv. Mtangawanda Primary School

v. Bori Centre Mobile

vi. Myabogi Centre

vii. Kizingitini Secondary School 1

viii. Kizingitini Primary School 2

ix. Mwangala Centre

x. Rasini Girls Primary School

xi. Faza Health Centre 1 and 2

xii. Siyu Social Health Centre

xiii. Pate Primary School

xiv. Mbwajumwali Nursery School

xv. Ndau Dispensary

xvi. Ishakani Primary School

xvii. Kiunga Primary School 1 and

xviii. Kiangwe Primary School.

(xxix) A Further analysis of the two Forms will show you that 149 votes were added and 82 subtracted or removed which gives a total of 231 votes. Considering that the margin of victory is only 58 votes, this illegal addition and subtraction of votes clearly affected the results and the election should be nullified.

17. The 1st and 2nd Respondents filed the following written submissions;

(i) That the principle of the sovereignty of the people of Kenya articulated under Article 1 of the Constitution, 2010 is realised through the electoral process.

(ii) Article 38 underpins this sovereignty as it guarantees every citizen the political rights among others to free, fair and regular elections based on universal suffrage, the free expression of the will of the electorate and to every adult the right to be registered as a voter and to vote in any election.

(iii) To achieve the enjoyment of those rights through voting, Article 81 makes provisions for general principles for the system of elections and to the effect that the elections shall be free, fair, transparent and administered in an impartial,

efficient, accurate and accountable manner by an independent body.

(iv) Article 86 makes provisions for the manner of voting and requires the 1st Respondent to ensure certain minimum standards for voting to the effect that whatever the voting method used is simple, accurate, verifiable, secure, accountable and transparent, the votes cast are counted, tabulated and results announced promptly at the polling stations, that the results from the polling stations are openly and accurately collated and promptly announced by the Returning Officer and that there must be safekeeping of electoral materials.

(v) Article 88 establishes the 2nd Respondent and gives it the mandate inter alia to conduct elections and other related processes including continuous voters registration and regular revision of the voter register, regulation of processes of nomination of candidates, facilitation of the observation and monitoring of elections.

(vi) Sec 30 of the Elections Act provides that a political Party can only appoint one agent for its candidates who shall therefore have a right to be admitted to a polling station and that only when the political party fails to do so will the candidate be at liberty to appoint his own agent.

(vii) Sec. 75 of the Elections Act provides that a question as to the validity of an election shall be determined by the High Court.

(viii) Sec. 83 of the Elections Act prior to the amendment of 02.11.2017 by the Elections Laws (Amendment) Act, 2017 (Act No. 34 of 2017) is applicable to this case and sets out the circumstances under which the election Court will invalidate an election and reads as follows:

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

(ix) That the issues for determination as framed on behalf of the 1st and 2nd Respondents are as follows:

a) Whether the Lamu Senator election was conducted in accordance with the Constitution, written law and regulations?

b) Whether the 1st Respondent's non-compliance with the Constitution, the law and Regulations if any, affected the validity of the results of the Lamu Senate election?

c) Whether the 3rd Respondent was validly elected as the Senator for Lamu County?

d) What are the appropriate orders to be made by this Court?

e) Who should bear the costs of this Petition?

Whether the Lamu Senate election was conducted in accordance with the Constitution, written law and regulations

(x) It behoved upon the Petitioner by the aid of his pleadings and body of evidence to satisfy this Court that whatever he had presented before it met the statutory threshold set by Sec. 83 of the Elections Act prior to the amendment of 02.11.2017 by the Elections Laws (Amendment) Act, 2017 (Act No. 34 of 2017) to nullify the declaration of the election of the 3rd Respondent for not having been conducted in accordance with and in compliance with the Constitution, written law and regulations.

(xi) In Ksm HC E.P. No. 3 of 2017 Jackton Nyanungo Ranguma vs IEBC and others Hon Majanja J in a decision rendered on 03:01.2018 observed that :

" (14)...the burden of establishing the allegations of non-compliance with the Constitution and the law, electoral malpractice and misconduct which would result in the election being declared invalid rests with the Petitioner. The Court will not interfere with the results of the elections unless it is established to the required standard of proof that such compliance with the Constitution and the law, the irregularities and electoral malpractices complained of render the said elections invalid..."

(xii) Hon Majanja J at para 15 in the said decision cited with approval the principles of the burden of proof enunciated in Raila Amolo Odinga v. IEBC and 3 others the Supreme Court Petition No. 5 of (2013) to wit:

(196)...this emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter esse ata, all acts are presumed to be done rightly and regularly. So the Petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the laws...

The role of the Court is to examine within the context of the petition before it, whether a disputed election meets those Constitutional expectations and the Electoral Laws and to determine the implications of non-compliance...

(xiii) In EP No. 5 of 2017 Elizabeth Ongoro Amollo vs Francis Kajwang' & others Hon. Mwongo J. in a decision of

16.01.2018 had this to say :

"(30)...but to what standard is the party who seeks to prove a fact in a petition to be held ?..."

...(31) Thus every allegation of the Petitioner in this case must be subjected to these standards for the Petitioner to be able to disprove the legal presumption that the public authority acted rightly and regularly...

...(32) the Petitioner bears the burden to establish not only that there were irregularities, illegalities, violations, omissions and malpractices in the conduct of the ...elections, but that these affected the outcome or result of the election. It must be proved that these alleged irregularities, illegalities, malpractices and violations did in fact affect the result in such a manner that they did not reflect the will of the people. Only upon establishing the foregoing to the satisfaction of the Court, will the evidentiary burden shift to the respondents to establish the contrary...

(xiv) In *Besigye v Museveni & Another* (Election Petition No. 1 of 2001) [2001]

UGSC 4 (6 July 2001) the Court observed :

"...the phrase "affected the results in a substantial manner" means that the votes that the candidates obtained would have been substantially different if not for the non-compliance with the written law..."

(xv) On the standard of proof, the Supreme Court in *Raila Amolo Odinga v.*

IEBC and others the Supreme Court Presidential Petition No. 1 of

2017(2017) eKIr, (hitherto annexed to the bundle of the authorities filed by

the Petitioner together with this Petition) the Court reiterated that the

Petitioner is bound to prove the case he has pleaded and held that :

"(203)...the threshold of proof should, in principle, be above the balance of probability..."

(xvi) The Court cited with approval the decision in *Gatirau P. Munya vs Dickson Mwenda Kithinji and others* SCK Petition No. 2B of 2014 (2014) eKIr (hitherto annexed to the bundle of the authorities filed by the Petitioner together with this Petition) and stated that :

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

...(217) if it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Elections Act, then such election is not to be invalidated only on the grounds of irregularities...

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

...(219) where an election is conducted in such a manner as demonstrably violates the principles of the Constitution and the law, such an election stands to be invalidated..."

(xvii) It was therefore incumbent upon the Petitioner to demonstrate how the sovereignty will of the people of Lamu County was not realised in the electoral process and that the declaration of the 3rd Respondent as the winner was a culmination of the violation among others of their rights to free and fair elections and that the outcome was therefore not the free expression of their will and resultant from every adult's right to be registered as a voter and to vote in any election as articulated in Article 1 read with Article 38.

(xviii) Equally, it behoved upon the Petitioner to bring credible and tangible evidence to convince the Court that the 1st and 2nd Respondents violated the provisions of Article 81 which stipulates that the elections shall be free and fair, transparent and administered in an impartial, efficient, accurate and accountable manner by an independent body.

18. The 3rd Respondent also submitted as follows;

(i) The issues for determination were as follows;

a) Whether this Honourable Court has jurisdiction to hear or determine a dispute between a member of a political party and a political party?

b) Was the Senatorial Election held in Lamu County on the 8th day of August, 2017 free, fair and credible and held in accordance with the Constitution of Kenya, 2010 and all relevant provisions of the law?

c) Were there any irregularities and/or malpractices in the conduct of the aforesaid Senatorial Elections? If so, did this materially affect the outcome or result of these elections?

d) Was the 3rd Respondent validly declared elected as Senator of Lamu County?

e) Costs of the Petition.

(ii) We shall now proceed to submit on the issues as hereunder:

1. Whether this Honourable Court has jurisdiction to hear or determine a dispute between a member of a political party and a political party?

(iii) One of the issues for determination is whether this Honourable Court has jurisdiction to hear or determine a dispute between a member of a political party and a political party. By definition, and as was held by Anyara Emukule, J in his judgment delivered on the 25th day of September, 2013 in *John Kipng'eno Koech & 2 others v Nakuru County Assembly & 5 others* [2013] eKLR:

"8.03 Jurisdiction is the practical authority granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. It is the scope, validity, legitimacy or authority to preside or adjudicate upon a matter. In the case of *OWNERS OF MOTOR VESSEL "Lillian S" vs. CALTEX OIL (K) LTD (1989) KLR* the court defined jurisdiction thus -

"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision."

(iv) The question of a court's jurisdiction or otherwise is the beginning and the end of. Any matter as stated by Nyarangi JA (as he then was) in *The Owners of Motor Vessel*

"*Lillian S*" versus *Caltex Oil Kenya Limited (1989) KLR* as follows:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that is without jurisdiction".

(v) As provided for in Paragraph 2.4.0.1 at page 17 of the Bench Book on Electoral Disputes

Resolution, 2017 the Kenyan Electoral Disputes Resolution framework is characterized

by a continuum of hierarchical institutions, each of which has a specific jurisdiction. These institutions include political parties, the Political Parties Disputes Tribunal, the Independent Electoral and Boundaries Commission, magistrate's courts, the High Court, the Court of Appeal and the Supreme Court.

Sections 40 and 41 of the Political Parties Act, Cap 7B of the Laws of Kenya provides as hereunder:

"40. Jurisdiction of Tribunal

(1) The Tribunal shall determine—

(a) disputes between the members of a political party;

(b) disputes between a member of a political party and a political party;

(c) disputes between political parties;

(d) disputes between an independent candidate and a political party;

(e) disputes between coalition partners;

(f) appeals from decisions of the Registrar under this Act; and (g) disputes arising out of party primaries.

(2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.

41. Determination of disputes

- (1) The Tribunal shall determine any dispute before it expeditiously, but in any case shall determine a dispute within a period of three months from the date the dispute is lodged.
- (2) An Appeal shall be from the decision of the Tribunal to the High Court on points of law and facts and on points of law to both the Court of Appeal and the Supreme Court.
- (3) A decision of the Tribunal shall be enforced in the same manner as a decision of a Magistrates Court.
- (4) The Tribunal shall apply the rules of evidence and procedure under the Evidence Act (Cap. 80) and the Civil Procedure Act (Cap. 75), with the necessary modifications, while ensuring that its proceedings do not give undue regard to procedural technicalities."

Section 74 of the Elections Act, 2011 provides as hereunder:

"74. Settlement of certain disputes

- (1) Pursuant to Article 88(4)(e) of the Constitution, the Commission shall be responsible for the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.
- (2) An electoral dispute under subsection (1) shall be determined within ten days of the lodging of the dispute with the Commission.
- (3) Notwithstanding subsection (2), where a dispute under subsection (1) relates to a prospective nomination or election, the dispute shall be determined before the date of the nomination or election, whichever is applicable."

(vi) At the outset, we wish to point out that the jurisdiction of the High Court in Electoral Disputes Resolution is a special jurisdiction conferred by the Constitution of Kenya, 2010 and Electoral Disputes Resolution Laws. This special jurisdiction is not conterminous, and should not be confused, with the High Court's unlimited jurisdiction in civil and criminal matters or the High Court's supervisory jurisdiction over inferior bodies and tribunals. This position was affirmed by the Supreme Court (Coram: K.H. Rawal, DCJ & Vice-President; P.K. Tunoi, M.K. Ibrahim; J.B. Ojwang; S.C. Wanjala; and N.S. Ndung'u, SCJJ) affirmed this position at Paragraphs 82 and 83 in its judgment of the 6th day of August 2014 in Lemanken Aramat v Harun Meitamei Lempaka & 2 others [2014] eKLR. The Supreme Court at Paragraphs 82 and 83 of its judgment held as thus:

"[82] The original jurisdiction of the High Court in criminal and civil matters, by Article 165(3) (a) of the Constitution, is unlimited. In addition, the High Court has a special jurisdiction in electoral matters, conferred by the Constitution, and given effect under the Elections Act: this is the jurisdiction to determine any question as to whether a person has been validly elected as a Member of Parliament (Article 105(1) (a) of the Constitution). This jurisdiction is activated upon a declaration by the authorized electoral body (IEBC) that a particular person has been returned as Member of Parliament, when there is a challenge to that electoral declaration (Article 87(2) of the Constitution).

[83] By those terms of the Constitution, it is clear that the High Court's special jurisdiction is time-bound. The Court's jurisdiction has practical meaning only in the context of the prescribed timelines."

(vii) It is our submission that this Honourable Court has supervisory jurisdiction on electoral disputes that fall within the ambit of the Independent Electoral & Boundaries Commission; and appellate jurisdiction over decisions of the Political Parties Disputes Tribunal on points of law and fact. It is our submission that this Honourable Court shall not entertain an electoral dispute which falls within the jurisdictional competence of the Independent Electoral & Boundaries Commission or any other body or Tribunal. This position was affirmed by D.S. Majanja, J in his ruling of the 22nd day of August, 2012 in Francis Gitau Parsimei & 2 others v National Alliance Party & 4 others [2012] eKLR where he held as thus:

"At the core is whether this court should intervene to stop the electoral process so that a party who claims that his or her rights have been infringed can agitate his rights before the court. To determine this issue, the Constitution must be read a whole. On the one hand there is the Bill of Rights which protects, inter alia, the political rights of the petitioners. These rights are enforceable under the provisions of Article 22. Article 22 offers the petitioners direct access to the High Court to enforce fundamental rights and freedoms. There is also Article 258 which entitles any person to move the court where the Constitution is contravened or is threatened with contravention. The petitioners have exercised the option to invoke these provisions to move the court.

(viii) On the other hand, it must be clear that political rights are exercised through a political process involving many actors: the citizens and institutions. This is the process provided for under the provisions of Chapter Seven of the Constitution titled, "Representation of the People." These provisions are operationalized by the Independent Electoral and Boundaries Commission Act, 2011, the Elections Act, 2011 and the Political Parties Act, 2011. Individual political rights and the electoral process cannot be divorced from one another but must go hand in hand. It is therefore proper that political rights are realized within a structured process that takes into account the larger interests of the society and the need for a free and fair election which is enhanced by a self-contained dispute resolution mechanism underpinned by the Constitution itself and statutes enacted to give effect to its provisions.

(ix) It is against this background that the Court of Appeal established the principle that where the Constitution and or statute establish a dispute resolution procedure, then that procedure must be used. Within the rubric of the electoral process, this principle has been emphasized time and again in a long line of cases; *The Speaker of The National Assembly v The Hon James Njenga Karume*, Civil Application No 92 of 1992 (Unreported), *Kipkalya Kiprono Kones v Republic & Another ex-parte Kimani Wanyoike & 4 Others*, (2008) 3 KLR (EP) 291, *Wanyoike vs Electoral Commission of Kenya (No. 2)* (2008) 2 KLR (EP) 43.

(x) A reading of these cases will demonstrate that the circumstances of the petitioners are hardly novel. More recently, we have a controlling precedent from the Court of Appeal. In the case of *Interim Independent Electoral Commission and Another v Paul Waweru Mwangi CA Civil*

Application No. 130 of 2011 (Unreported), the Court of Appeal discharged an injunction issued by the High Court restraining the then Commission from conducting of the Kamkunji by-election on account of allegations of the breach of fundamental rights and freedoms during the nomination stage.

(xi) In my view, this insistence of a specific procedure is not inconsistent with the Bill of Rights: it is recognition that election disputes require special rules for determination. These rules are justifiable in a democratic society and the Constitution itself contemplates that the electoral process is a special process.

THE COURT'S FINDING

19. I have carefully considered the evidence on record in this case together with the submissions filed by the parties. I have also considered the authorities relied upon and my findings are as follows;

(i) The grounds upon which this petition is brought are as follows;

1. THAT Section 30 of the Elections Act, No. 24 of 2011 entitles a candidate to appoint one agent per polling station but the 1st Respondent denied the petitioner that entitlement thereby breaching article 38, 81 and 86 of the Constitution of Kenya, 2010.

2. THAT failure by the 1st Respondent to allow the petitioner to appoint an agent as per Section 30 of the Elections Act, No. 24 of 2011 breached the Petitioner's right to an impartial, transparent, efficient and accountable electoral system as per Article 81 (e) of the Constitution of Kenya, 2010.

3. THAT the conduct of the Senatorial Elections in Lamu County by the 1st and 2nd Respondents was contrary to Article 88(h) and (5) of the Constitution of Kenya, 2010.

4. THAT therefore, the 1st and or 2nd Respondents conduct of the Senatorial Elections in Lamu County was wrong, unprocedural, unfair and or unjust to the Petitioner as it has denied him the right to fully participate, through a party agent, in the monitoring of the voting process therein.

(ii) Each of the parties filed issues for determination which I have considered and I have come up with the following issues which I consider important for determination in this petition;

a) Whether the Petitioner was denied his right to appoint agents under section 30 of the Elections Act, 2017 and If yes what was the legal effect of the said denial.

b) Whether this Court has jurisdiction to hear or determine a dispute between a member of a political party and a political party.

c) Whether the Senatorial Election held in Lamu County on the 8th day of August, 2017 was free, fair and credible and held in accordance with the Constitution of Kenya, 2010 and all relevant provisions of the law.

d) Whether there were any irregularities and/or malpractices in the conduct of the aforesaid Senatorial Elections and if so, whether that materially affected the outcome or result of the said elections.

e) Whether the 3rd Respondent was validly declared elected as Senator of Lamu County.

f) Who pays the costs of the Petition?

(iii) On the issue as to whether the Petitioner was denied his right to appoint agents under section 30 of the Elections Act, 2017, the said Section provides as follows;

30. Appointment of agents

(1) A political party may appoint one agent for its candidates at each polling station.

(2) Where a political party does not nominate an agent under subsection (1), a candidate nominated by a political party may appoint

an agent of the candidate's choice.

(3) An independent candidate may appoint his own agent.

(iv) I find that the Petitioner's case is that the 4th Respondent failed to take his interests into account while appointing the agents and that the agents who were appointed were in favor of the women Representative. The Petitioner stated as follows in his supporting affidavit;

1. "THAT prior to the elections, the 1st Respondent directed that due to lack of enough space and for purposes of decongesting the Polling Stations only political party agents and agents of independent candidates would be allowed in a Polling Station and despite the law having allowed each candidate the right to appoint an agent such agent would not be allowed in any Polling Station.

2. THAT the said directive left myself with no choice but to rely on the party agents and I consulted the 4th Respondent on how my agents could be incorporated in its list and the 4th Respondent promised to do so.

3. THAT despite the aforesaid assurances, I was frustrated by the 4th Respondent and my list of agents was never considered or incorporated in the 4th Respondent's list of agents a fact that prompted me to complain to the 1st Respondent.

4. THAT I realized that despite the fact that I was nominated by the same party as the candidate for Wiper Democratic Movement Party (Wiper) for the position of Women Representative for Lamu County, and who is a Deputy Party Leader, we had different political campaign strategies which were antagonistic and which caused a rift between us.

5. THAT I aver that due to the Lamu County voters voting dynamics which lay emphasis in individual candidate and not a political party, the Wiper Candidate for position of Women Representative for Lamu County appointed her own agents as the agents of the party and who had no loyalty to me and this affected me as I had no agents to represent my interest at all the Polling Stations in Lamu County.

6. THAT the issue of the agent was so emotive that a rift occurred between my agents and those of the wiper candidate for women representative in Lamu county resulting in some of them being arrested by police."

(v) I find that the Petitioner ought to have raised this issue with the 4th Respondent and not with the 1st, 2nd and 3rd Respondents herein. Although the 4th Respondent was enjoined as a party to this petition, there is no evidence that he was ever served with this petition and I find that the 1st, 2nd and 3rd Respondents were not privy to the wrangles between the petitioner and his party.

(vi) The petitioner ought to have taken his dispute to the political parties dispute Resolution Tribunal since the said issue arose prior to the general elections on 8/8/2017.

(vii) On the issue as to whether this Court has jurisdiction to hear or determine a dispute between a member of a political party and a political party, I find the mandate of the 1st and 2nd Respondents does not include appointment of agents. The petitioner did not present any list of agents who were rejected by the 1st and 2nd Respondents and I find that an issue between a candidate and his political party cannot be classified as an election petition. I find that this is not the right forum for the dispute between the petitioner and the 4th Respondent. I find that section 30 of the Elections Act, 2017 is very clear that it is only a political party that may appoint an agent for its candidates and that a candidate can only be allowed to nominate one where the party fails to do so. The petitioner was not an independent candidate and therefore he was required to nominate his agents through the 4th Respondent.

(viii) On the issue as to whether the Senatorial Election held in Lamu County on the 8th day of August, 2017 was free, fair and credible and in accordance with the Constitution of Kenya, 2010 and all relevant provisions of the law, I find that the petitioner stated as follows in his supporting affidavit;

1. THAT further, I aver that despite having no agents, I was aware that, the sorting out, counting and declaration of votes at the Polling Stations were done and completed on 9th August, 2017.

2. THAT I was also aware that the votes for the position of Senator are counted and declared at the Polling Station before those of the Governor and Women Representative.

3. THAT I was further aware that before the declared results at the Polling Station and the ballot boxes are transported to the County Tallying Centre, the said results are to be transmitted electronically to the County Tallying Centre and the Presiding Officer's from the various Polling Stations only task is to physically transport the ballot boxes and the results to the County Tallying Centre for Tallying.

4. THAT I state that the counting, declaration and transmission of the senatorial elections was completed at the Polling Stations on 9th August, 2017 and when I went to the tallying centre the results on the IEBC screen and or public portal reflected that I had won by 196 votes but the 2nd Respondent delayed the announcement of the winner on grounds that there were two Polling Stations that had not submitted their results but he could not say which Polling Stations were those.

5. THAT I therefore believe 1 am the person who won the election for senator in Lamu County but the results were illegally tempered with by the 1st and 2nd Respondents in favor of the 3rd Respondent.

6. THAT for the aforesaid reasons and in order to comply with the provisions of article 38, 81 and 86 of the Constitution of Kenya, 2010 I seek orders of scrutiny and recount of all the Polling Stations in Lamu County in order to determine the valid votes cast and therefore who was validly elected as the Senator for Lamu County.

(ix) I find that apart from the said assertions in the supporting affidavit, the petitioner did not call any witnesses in support of the petition. I also find that the petitioner did not challenge any results and neither did he adduce any evidence that any witness was denied an opportunity to vote for him.

(x) In the circumstances I find that the petitioner has not adduced evidence in support of this petition and his prayers herein including an order seeking "scrutiny and recount of all the Polling Stations in Lamu County in order to determine the valid votes cast and therefore who was validly elected as the Senator for Lamu County" amount to a fishing expedition and cannot be granted as the petitioner is not specific in his prayers and neither did he point out specific irregularities or specific polling stations where he was disputing the results.

(xi) On the issue as to whether there were any irregularities and/or malpractices in the conduct of the aforesaid Senatorial Elections and if so, whether that materially affected the outcome or result of these elections, I find that in his petition and supporting affidavit, the petitioner did not specify any irregularity or malpractices. In cross examination of DW1 on forms 38C, DW1 said that they had errors which were topographical in nature and the same did not change the results for each candidate.

(xii) I also find that on the issue that more votes were cast at Kiangwe Primary School Polling Station than the registered voters, the said issue which was not raised by the petitioner in his petition or affidavit cannot be raised at the submission stage as that would amount to amending the petition.

(xiii) The petitioner stated as follows in his submissions on the said issue;

"Further, the Form 38C which was used to declare the results show that at Kiangwe Primary School Polling Station the registered voters were 213 while the valid votes cast were 216 plus one rejected vote. This clearly shows that the voters who turned out to vote were more than the registered voters and by virtue of Regulation 83 (1) (b) the results are to be disregarded. If the same happens the legal effect is that all the 216 votes are nullified and the status will be such as those voters never voted. This would have not affected the final outcome if the margin was more than 213 because even if all the registered voters vote for the candidate who was second he could not still have won. However, in the situation of this case where the margin is only 58 votes and if all of them voted for the Petitioner then he wins then the entire results have to be nullified and another election is to be held to determine the winner".

(xiv) I find that the petitioner did not even raise the said issue in his list of issues for determination and therefore the same was a non-issue to him and further, I find that the petitioner did not comply with the directions of the court on timelines in filing the submissions as the petitioner's submissions were filed after the Respondents had already filed theirs and therefore the Respondents did not have an opportunity to respond to the said issue.

(xv) In the case of *Jackton Nyanungo Ranguma v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR the court held as follows;

"Related to the burden of proof is that fact that the petitioner is bound to prove the case it has pleaded. A petitioner is not permitted to make a case outside the pleadings and his affidavits and testimony must be consistent with and support the case pleaded. In *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and 2 Others* SCK Presidential Petition No. 1 of 2017 [2017]eKLR, the Supreme Court quoted with approval the Supreme Court of India in *Arikala Narasa Reddy v Venkata Ram Reddy Reddygari and Another* Civil Appeal Nos. 5710 -5711 of 2012[2014] 2 SCR where it stated that; In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings."

(xvi) In the circumstances, I find that the 3rd Respondent was validly declared elected as Senator of Lamu County. The petitioner is not entitled to the orders he is seeking and I accordingly dismiss this petition.

(xvii) However, I order that each party bears its own costs of this petition.

Malindi this 9th February, 2018 in the presence of the parties.

ASENATH ONGERI

JUDGE.