



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT LODWAR**

**HIGH COURT PETITION CASE NO. 4 OF 2017**

**EBENYO EKUWAM LYNUS.....PETITIONER**

**VERSUS**

**EKOMWA LOMENEN JAMES.....1<sup>ST</sup> RESPONDENT**

**JOSEPH LOTUKOI.....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL &**

**BOUNDARIES COMMISSION.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

The petitioner herein **Ebenyo Ekuwam Lynus Nakiporo** has by this petition challenged the election and or declaration of the election of the 1<sup>st</sup> Respondent **Ekomwa Lomenen James**, by the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent. This is in respect of the position of Member of Parliament for Turkana South Constituency, in Turkana County. The elections were themselves held on 8<sup>th</sup> August 2017. The declared results were as follows:-

1. **Ekomwa Lomenen James - 12,152 votes**
2. **Ebenyo Ekuwam Linus - 5,446 votes**
3. **Joseph Jumapil Elim - 4,590 votes**
4. **James Ekiru Kidalio - 335 votes**
5. **John Lokaale Aule - 263 votes**

Being dissatisfied with the declaration of the 1<sup>st</sup> Respondent as the winner of the elections, the petitioner filed this petition on 5/9/2017. On the petition filed, the following reliefs have been sought:-

1. **An order that he 3<sup>rd</sup> respondent do avail all materials, devices and equipment used for the Turkana South Constituency.**
2. **An order of scrutiny and audit of all the returns including forms 35A.**
3. **A declaration that the no-compliance, irregularities and improprieties in the election were**

**substantial and significant and affected the result.**

**4. A declaration that the elections in Turkana South on 8/8/2017 was not conducted in accordance with the constitution and the applicable law rendering the declared results invalid, null and void.**

**5. A declaration that the 1<sup>st</sup> respondent was not validly elected and that he declaration is invalid, null and void.**

**6. An order that the 3<sup>rd</sup> respondent do organise and conduct a fresh parliamentary election in conformity with the constitution and the elections Act.**

**7. A declaration that the respondents jointly and severally committed election irregularities.**

**8. The issue of costs.**

The respondents have duly opposed this petition and filed their respective responses. During the trial, eight (8) witnesses gave evidence for the petitioner as follow:

### **PETITIONER'S CASE**

The petitioner himself was PW1. His evidence was that the date of elections was publicised by the IEBC in the Gazette and also through electronic and print media. He had also passed the same message in his campaigns. On the incident at Katilu Baraza Park, his evidence was that it was Madaraka Day and 1<sup>st</sup> Respondent was not present was present, being 46-50km away in Lokichar.

The petitioner went on that he saw the 1<sup>st</sup> respondent campaigning on 6<sup>th</sup> and 7<sup>th</sup> in Katilu, though this is not in his affidavit. Neither did he report this. And on relief food, his testimony was that the 1<sup>st</sup> respondent distributed same on 6<sup>th</sup> and 7<sup>th</sup> only to Jubilee supporters. On this, he relied on information by his agents that the relief food was used to entice voters, same having been stored at the homes of MCAs and chiefs. He otherwise did not disclose the names of the MCAs and the chiefs or the government vehicle used.

He went further that he got information that money was being distributed from his agent. Also that his agents Calysters and Simon gave him the information that Jubilee MCA aspirant (Katilu) was distributing relief food and 500/= to influence voters.

On the allegation regarding Evans Kenonaudi, his evidence was that he was forcefully removed from the polling station, though this is not in the affidavit. The witness himself never saw the 1<sup>st</sup> respondent bribing voters and relied on information by his agents. He concluded that hunger has been in Turkana County all the time and relief food is still being distributed. But that distributing sane during electoral period would be electoral malpractice. On the date of the elections, his evidence was that illiterate voters were misdirected that the elections for Jubilee would be in 8/8/2017 while Nasa elections be on 9<sup>th</sup> and 10<sup>th</sup> August 2017.

On his name, his testimony was that he had applied for a deed poll on change of name, but did not obtain a new identity card. He conceded that the official name is that appearing on the identity card. He otherwise confirmed presenting both the deed poll and the Gazette notice for the IEBC and was issued by nomination certificate by IEBC, but that he is yet to receive a new identity card in his new name. And on the forms filed by 2<sup>nd</sup>/3<sup>rd</sup> respondent he conceded that his agents signed the same. He could not say which polling stations his votes were reduced or those of 1<sup>st</sup> respondent added. He also did not name the agents who were not allowed to sign form 35As and that all the forms had security features and he had no particulars of discrepancies in form 35A. On the votes, his evidence was that he got 5,446, but lost over 5,000 because of the loss of his name Nakiporo.

On further cross-examination, he confirmed having voted at Korinyang Primary school, stream no. 3, but did not state any discrepancies of the polling station. He conceded that during ODM nominations, he was not known by the name Nakiporo, and that the ballot paper had the same names with which he had won the ODM nominations. He also confirmed that his picture was on the ballot paper together with his ODM party symbol. He also did not have any problem with any of the forms 35A. Neither did he have any alternative results. He also stated that 1<sup>st</sup> respondent campaigned outside the campaign schedule and that his agent Daniel; who claimed to have been intimidated, signed the results forms. Also Evans Kenonandi.

On re-examination, he confirmed that in several polling stations, ODM agents did not sign. On the food he stressed that same was selectively given to Jubilee supporters so as to entice ODM supporters.

The 2<sup>nd</sup> witness for the petitioner Marko Ekonon, a voter at Lokapel, testified basically that he voted on 8/8/2017 and that everyone knew the date of elections as it was published as 8/8/2017. Even ODM supporters. Also that when food was distributed on 6/8/2017, 1<sup>st</sup> respondent was not present, but that MCA Abei and Moses Eiton did the distribution. This witness confirmed that on 6/8/2017, the food was distributed to all those who came, both ODM and Jubilee supporters. And that later that day, he sat at the fence between him and his neighbour Moses Eiton to listen to what was going on there. He otherwise confirmed that he also campaigned for voters to vote in the 6 ODM candidates. He also heard people being told to vote Jubilee both at the home of Moses and at a rally on 5/8/2017. He did not remember hearing at any meeting that ODM elections would be on 9/8/2017.

And peter Lokoli (PW3), a resident of Katilu and a voter at Korinyang primary school and an ODM agent at stream 1, confirmed that he came to know about the date of elections through the radio, posters and campaigns. That he attended an ODM agents training on 6/8/2017. Also that she did not attend any of Cecilia's meetings on 6<sup>th</sup> or 7<sup>th</sup>. He also confirmed that people knew the date of the elections and that Hon. Lomenen was not present during the shooting incident, being away in Lokichar. On the voting itself, he confirmed that for assisted voters, agents would witness their voting in the presence of the presiding officer. However, to him it was not proper for the Jubilee agent to insist that it was enough for a voter to just declare "Jubilee" and not the name of the candidate. He signed all the forms on behalf of ODM, having no problems with the results. And Simon Ekadeli Emoru (PW4), recalled that on 1/6/2017 he had been with the petitioner at Lokichar and not Katilu where there was a fracas. That on 7/8/2017, at Namakat, he saw a meeting of about 500 people and there was maize. He never photographed it. Money was also being given to people and had gathered in groups. Again the 1<sup>st</sup> respondent was not at the meeting. At Zipporah's meeting, he heard people being told to vote only Jubilee. He however, did not identify anyone at the meeting as it was night. He confirmed that the dates of elections were advertised on radio and also by leaders to be 8/8/2017 and that he never heard 1<sup>st</sup> respondent say it would be on 9/8/2017. On his part, he had only got 1,000/= agency charges. That at Zipporah's home, there was cooked meat but he did not get away.

He went further that the date of elections had been advertised for 2-3 years, and he did not know of anyone who went to vote on 9/8/2017. At his station (Lomonyang) voting went on smoothly and he had no complaints.

And PW5, Rashid Ekai Egialan gave testimony that he heard Mama Dorcas tell people to vote Jubilee and not names as procedure required. He did not produce tangible evidence that Dorcas was an agent of 1<sup>st</sup> respondent. He later signed to confirm that the votes were proper. He signed as an agent of ODM. He otherwise did not report the Dorcas incident to any authority. And PW6, Denis Ekidom Ikacho, a voter at stream 2, Nalemsekon primary school, gave only a short evidence that he was ODM agent at station 2 and never left. His testimony was that he saw mama Dorcas talk to voters, but did not hear what she was telling them. Joyce is a voter at the station also. He later signed the form to confirm agreement with the results. He conceded that according to forms 35A presented, he had signed for stream 1 and not 2 as he had claimed earlier. And that process went on well including the counting. To her, it was improper for a voter to talk to other voters while on the line.

And the next PW7, Julius Eyanae Edome, an agent of ODM and a voter at Kapese polling station,

testified that for assisted voters, the presiding officer ought to have read out the names of the candidates, pictures, symbols and party colours for the voter to make a choice, and not only to mention the name of the party. He signed the forms at stream 2 at Kapese polling station. This however turned out to be incorrect as the form was signed by his colleague. He further stated that one Samuel Lomodo Lokaale, a Jubilee agent, came and talked to the presiding officer who then announced that it would be sufficient to mention only the party name. In summing up, she went on that one Esther Lodeke, wife of Raphael Loperito had been openly bribing and coaching voters. He however, never saw her bribing votes at the polling station and he also never reported the activities of this lady. PW8, Peter Edom Achuka, on his part, testified that he was also an agent of ODM and that he saw Esther who was greeting voters on the line, but did not hear what she was telling them.

### **1<sup>ST</sup> RESPONDENT'S CASE**

The 1<sup>st</sup> respondent James Ekomwa Lomenen, the Member of Parliament for Turkana South, is the one declared the winner on 8/8/2017. His evidence in defence was that on 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> August 2017, he had been planning logistical issue with agents, and did not hold any rally since the last day of campaigns was 5/8/2017. He denied being at Kalemng'orok Baraka Park on 6/8/2017. He denied any knowledge of Hon. Abei holding a rally at Kalemng'orok on 6<sup>th</sup>. He otherwise conceded that it is true that during campaigns Abei had urged voters to vote for him and the 1<sup>st</sup> respondent as they were in the same party. He also urged voters to vote Jubilee Candidates. He denied any knowledge of any of his supporters or agents hosting people or distributing food. Just like the previous witnesses before court, he also confirmed that in Turkana County, there are challenges of drought and he has at times intervened with the national government for relief assistance. He gave the process of requisitioning for the relief food. Otherwise as Member of Parliament, he denied any involvement in the distribution except receiving confirmation of how much has been delivered in his area. And later, in exercise of his oversight role to ensure all get the food. On the elections date, his testimony was that this was disseminated as 8/8/2017 on radio and chiefs and in accordance with the constitution. He denied any knowledge of voters being told elections would be on 9/8/2017.

He confirmed that the results at paragraph 4 of the petition are correct results. He denied mandating anyone to give money on his behalf, nor that James Abei was his agent. He also denied using food to entice voters. Lastly he denied knowing Dorcas Akoi Ejore mentioned in the petitioner's affidavits, or any campaigns that Zipporah did on 6<sup>th</sup> and 7<sup>th</sup>.

The 1<sup>st</sup> respondent's 1<sup>st</sup> witness was Cecilia Ngetit, whose evidence was that she was a jubilee agent for the elections. That on 7/8/2017, she had slept at Korinyang at 1.00 p.m. That during voting in case of assisted voters. They would witness the marking by the presiding officer. To her, the presiding officer followed the correct procedure in assisting voters. She denied seeing Emmanuel coaching voters as his work was only to assist in dropping the ballots. The 2<sup>nd</sup> witness for 1<sup>st</sup> respondent, Zipporah Imoni, gave short evidence denying that there had been any function at their home on 7/8/2017. She had herself arrived home at mid-night and found everyone had slept and there was no evidence of any earlier gathering. She denied knowing Joseph Emmanuel. She confirmed that she signed Form 35A for Jubilee, while Lokuchar signed for ODM.

The 3<sup>rd</sup> witness for 1<sup>st</sup> respondent Lokaale Samuel Lomodo, similarly gave a short testimony that he was chief agent for Jubilee. That at Kamaresi polling station, issues that emerge were resolved and voting went on till 2.00a.m. And that the petitioner does not mention Kamaresi. He denied directing the presiding officer. He summed up that for ODM nominations; the petitioner had used 3 names Ebenyo Ekwam Lynus, and not Nakiporo.

### **CASE FOR 2<sup>ND</sup> AND 3<sup>RD</sup> RESPONDENTS**

A total of four (4) witnesses testified for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as follows:

The 1<sup>st</sup> was Joseph Akutaa Lotukoi, whose evidence was that he was the returning officer, Turkana South. He received nomination certificates for all the 5 candidates. When shown a nomination certificate by the Advocate for the petitioner, he could not confirm if it was the one he issued. That he was only seeing the certificate in the name of Nakiporo Ekwam Ebenyo Lynus in court. His evidence was that he had explained to all the candidates that the name on the certificate would be the name on the National identity card, and the name Nakiporo and did not appear on the identity card of the petitioner. Also that the candidates' registration Management system only accept the name on the identity card and it would be the same name that would appear on the ballot paper. He denied knowledge of the fact that phones of agents were confiscated, and the same did not happen. Voting according to him went on smoothly and there was no issue of late opening due to rain. And no issues were brought to his attention.

On being re-examined, he went on that for nominations, the 2 mandatory requirements were the national identity card and proof that one was a voter. And that the Gazette notice came out with the 3 names of the petitioner who never complained. On the petitioner, he was not present at the tallying centre, but that his agent (chief) was present and signed the form.

The 2<sup>nd</sup> witness Jeniffer Nawoi, the presiding officer at Nalemsekon Primary school, stream 2 simply confirmed that they opened at 6.00a.m with all agents being present. She denied taking away their phones nor seeing DORcas engage in any electoral malpractice. To him, the affidavit of Rashid is dishonest.

And Pauline Ichuros, a presiding officer at Lokapel, stream 2, denied knowing Moses Ewoton. Neither did she confiscate agents' phones. That for assisted voters, the voter would name his candidate and the agent would witness. No agent protested against anything in his polling station. Lastly, the 4<sup>th</sup> witness Elemen Aloilo, the presiding officer at Kapese primary school, stream 3, stressed that he rejected a proposal that one would be allowed to vote only by coming with the party name. That one would vote based on name of candidate, party name, symbol and portraits and he would call out the names of the candidates.

That was basically the evidence tendered in court by the parties. I have considered the same in totality. I have also considered the submissions filed and highlighted by the parties and also the authorities cited. This was a long petition with many witnesses giving diverse evidence. In my view, the salient issues that have come up for determination are as follows:-

**i. Voter Bribery**

**ii. Use of relief food to influence voters**

**iii. Unlawful campaigns**

**iv. Date of elections**

**v. Alleged omission of the petitioner's name Nakiporo, on the ballot paper**

**vi. Whether the elections held on 8/8/2017 at Turkana South, were held in accordance with the constitution and the relevant electoral laws and reflected the will of the voters of Turkana South.**

**vii. Whether the 1<sup>st</sup> respondent was validly elected as the Member of Parliament for Turkana South.**

**viii. The issue of costs.**

I shall deal with these issues one after the other.

## a) The issue of voter bribery

The petitioner herein gave evidence of getting information from his agents that money was being distributed to voters at a homestead at Lokapel and Korinyang Primary school. This witness did not witness in person, money being distributed. His evidence went further, that his agents Calysters and Simon informed him that an MCA candidate, Mr. James Abei was giving out food and money to influence voters. Again, the petitioner himself did not witness these incidences of food and money (500/=) being given out to influence voters.

The next witness to testify on voter bribery was PW4 Simon Ekadeli Emoru. And his testimony was that on 7/8/2017, he saw money being given to people who had gathered in groups and that it was Abei MCA candidate who was giving out the money. He confirmed that in the gathering, the 1<sup>st</sup> respondent was not present. He otherwise did not identify anyone at the meeting.

The same issue of bribery also came up in the evidence of Julius Eyanae Edome (PW7), that at Kapese polling station, one Esther Lodeke was openly bribing and coaching voters inside the polling station. What came out of the evidence of this witness was that whereas at one time his testimony was that he witnessed the bribery, on being cross-examined by MR. Muyundo, he denied seeing or witnessing as the bribery took place. He never reported these incidences (if all) to either the IEBC officials or to the security agencies. And worth noting was the evidence of PW8, Peter Edem Achuka, who was present at Kapese primary school primary station (same as PW7), and who also saw Esther inside the polling station. This witness only saw Esther greet voters. He never testified as to witnessing her bribe the voters.

The sum total of the petitioner's case on bribery of voters is that whereas the petitioner himself did not witness any such incident and only relied on the information given to him by his agents, the same agents who testified in court only gave very general allegations on voter bribery. None of them testified as to the involvement of 1<sup>st</sup> respondent in the alleged bribery incidences. There was also no attempt or evidence to show that the person named i.e MCA Abei, Mama Dorcas and Esther acted at the behest or as agents of the respondent. For Abei, he was an aspirant in his own right.

A 2<sup>nd</sup> limb of this issue of bribery relate to the alleged meeting on the night of 7/8/2017 at the home of Zipporah where those in attendance were allegedly given meat and money. This was the evidence of PW4, Simon Ekadeli Emoru. This witness in his testimony did not identify anyone at the meeting as it was at night. He also did not hear what was said at the meeting.

Voter bribery is an offence under section 9 of the election offences Act. It is a serious offence attracting a penalty of up to 2 million or 6 years imprisonment courts have treated it as such. I find none other than finding of Matuku J in Mohamed Ali Mursal –vs- Saudia Mohamed & others Petition no. 1 of 2013 Garissa, cited by the 1<sup>st</sup> respondent, to be very apt on the issue;

**“Bribery is an electoral offence. It is also a criminal offence in ordinary life. Being such proof of the same must be by credible evidence and in my view, nothing short proving this offence beyond reasonable doubt will suffice”.**

I am in total agreement with the above finding, that being an offence of a criminal nature, proof of same must be beyond any reasonable doubt. Failure to meet their standard of proof therefore leads to the collapse of this ground.

In the Simon Nyaundi Ogari and Another –vs- Joel O. Onyancha and 2 others (2008) KLR, the court even went further to declare that where the allegation is that bribery took place publicly and in the presence of many people, the court cannot be satisfied by anything less than the best evidence, which is always direct evidence given first hand.

In our instant case, the cases of bribery are alleged to have taken place in public and in the presence of crowds of people. None in the crowd of those took the briber (if at all) ever swore an affidavit to give

evidence. The petitioner witnessed themselves also gave inconsistent evidence of bribery. And for the named polling stations and occasions where it was alleged bribery took place there were no other witnesses who testified to corroborate the evidence of these witnesses. And no such reports were ever made either to the IEBC or to security agencies for investigations. To me therefore the allegations of voter bribery at Lokapel, Romonyan (PW4), and Kapese Polling stations, were not sufficiently proved as required by the law. This ground must therefore and I so order.

#### **b) Use of relief food to influence voters.**

It was the case of the petitioner that the Jubilee side used the distribution of relief food selectively with a view to influence the voters to only vote Jubilee party candidates. According to the petitioner, the Jubilee aspirants distributed relief food to Jubilee supporters up and until 7/8/2017 thereby influencing the votes. He relied on information given to him by his agents and did not witness any such incidents. He specifically mentioned Kalemng'orok and Korinyang as the affected areas. And in terms of names of those responsible, he only mentioned the MCA aspirant James Ebei. Again this is information he got. The 2<sup>nd</sup> witness to have talked about distribution of relief food was PW2, Marko Ekonon. His evidence was that food was distributed on 6/8/2017, but that 1<sup>st</sup> respondent was not present. And that the food was given to all those who came, both Jubilee and ODM supporters. And that he did not attend the gathering at the home of Moses Eiton where food was distributed but stood watching from his compound. He did not mention anybody present at the gathering, not even the 1<sup>st</sup> respondent.

It is a conceded fact that relief food has been distributed in Turkana County over many years and is ongoing. The distribution has been done even when there are no campaigns or elections looming. For this ground to succeed, it was incumbent upon the petitioner to first prove that food was distributed on the alleged dates and that the food was relief food. Apart from the uncorroborated oral evidence of the petitioner's witness (witnesses), the petitioner failed to either show during this period or that the food distributed was relief food. The petitioner himself did not witness any incident of relief distribution. And whereas the evidence of the petitioner was that he got information that food was given only to Jubilee supporters, his own witnesses, PW2 Marko Ekonon, contradicted this by insisting that he food was distributed to everyone, both Jubilee and ODM (NASA). To me, this was a material contradiction that goes to the credibility of the 2 witnesses. In any case, if indeed food was used to entice voters, I do not see how this goal would be achieved if the food is selectively given. I also do not see how the ones distributing the food would distinguish who is Jubilee and who is ODM (NASA) as to give the food only to one side of supporters. Otherwise, t he one undisputed fact in all this is that the 1<sup>st</sup> respondent never participated in any such food distribution. Neither was he sighted at such venues of food distribution. I accordingly therefore find that the petitioner had failed to sufficiently prove first, that relief food was distributed on the alleged dates, that the food distributed was relief food meant to entice voters and lastly and most important, that 1<sup>st</sup> respondent was himself involved in the said distribution of food. This ground of the petition therefore fails.

#### **c) Unlawful Campaigns**

It is on record that the official campaign period as directed by the IEBC was to end on 5/8/2017. It is however, the petitioner's case that the respondent conducted illegal campaigns well past the date set. The petitioner testified that he saw first respondent campaign at Katilu on 6<sup>th</sup> and 7<sup>th</sup>, but that he did not photograph the same. Neither did he report the incidents. None of the other witnesses of the petitioner alluded to any campaigns being held after 5/8/2017. This left the evidence of the petitioner on this point without any corroboration. Further, the petitioner himself, a part from testifying that he saw 1<sup>st</sup> respondent campaigning, he gave no evidence that these were campaigns. What did the 1<sup>st</sup> respondent say in the meetings? Who attended? And how long did the meeting take? No such details come out, leaving a gap as to whether these were campaigns.

Both sides have confirmed that all the aspirants submitted their campaign scheduled. They also signed the Electoral Code of conduct binding them on issues including campaigns time and period. And under section 20 of the Election Offences Act, breach of the code of conduct is a criminal offence. It is

therefore a serious electoral malpractice to campaign outside the time set.

In this case, it is the petitioner who stated that he witnessed the campaigns. As a candidate the petitioner obviously knew and understands the seriousness of the illegal campaigns. However, even after personally, witnessing the same, he chose to take no action. He never reported the incidence to either the IEBC or any investigative agencies. No other witness corroborated his own evidence on this fact. On my part, I do not believe, that the petitioner, being an aspirant himself, would have chosen to take no action if he really witnessed the malpractices.

#### **d) Omission of the petitioner's name Nakiporo on the ballot paper**

On this ground, it was the evidence of the petitioner that his full name is Ebenyo Ekwam Lynus Nakiporo and that he is popularly known by the last name Nakiporo. That in the ballot paper, the name Nakiporo was missing, making him loss many votes. The petitioner further testified that whereas the name on his Identity card is Ebenyo Ekuwam Lynua, he had taken steps to obtain a deed poll in the name of Nakiporo and had the same gazetted. Also that he had obtained the ODM certificate which included the name Nakiporo and which he presented to the IEBC and was duly accepted by the IEBC and cleared. He was only to later learn that the name Nakiporo was not on the ballot paper.

The constitution of Kenya guarantees the right of a name from birth (Article 53). This shows how crucial a name is and the same is the position even adulthood. I am therefore not and in any doubt, that the name of a candidate on the ballot paper is of utmost significance in the electoral process. It is agree by all sides that the petitioner indeed obtained a deed poll to reflect the name of Nakiporo. The same was duly gazetted. So was this the end of the process of change or addiction of the name?

The registration of person Rule under the Registration of persons Act, cap 107 laws of Kenya, gives a guide on this. Rule 7 states;

- 1) Where a registered person changes his name he shall without undue delay attend before a registration officer, give him the particulars if the change in the form in the 5<sup>th</sup> schedule.**
- 2) The registered person shall at the time surrender his identity card and permit his photograph to be taken for the purpose of enabling a new identity card to be issued to him.**
- 3) The registration officer shall thereupon fill in and sign a certificate in the form in the fourth schedule, on which the registered person shall permit his left thumb impression to be recorded, and issue the certificate to the registered person.**
- 4) The registration officer shall without delay forward the form, the photograph and the surrendered identity card to the principal registrar who shall record the changes in the register, cancel the surrendered identity card and issue a new identity card in accordance with the new particulars.**

The above provision simply mean that obtaining a deed poll and having the same gazetted are only but a step towards change of name. The petitioner did not complete this process. He still retains his identity card with the 3 names. Obviously, he conducts businesses using the same identity card. In court, he showed no evidence that he got his own party's nomination certificated in the name Nakiporo. He also showed no proof that even his campaign postures; brochures or any other material bore the name Nakiporo.

The ballot paper on election date has been agreed to have shown the photograph of the candidates, party name, symbols and colours. The voters use this to vote for the candidate of their choice. For the case of the petitioner, there is no evidence on record to suggest that these particulars were missing. There is also no evidence on record of anyone being mistaken as to the identity of the candidate to vote for. I dare add that in Kenya, persons are known and identified by the names on the identity cards. I have no experience of anyone being identified and being able to transact in any way using a gazetted deed poll. The national

identity cards remains the only official document by which a person is known. And this remains so until the same is replaced. It is for this reason that I agree with the respondents that it would have been unlawful to include the name Nakiporo on the ballot paper. This ground must therefore fail.

**e) Date of elections;**

Regarding this ground, the petitioner gave that illiterate voters were told that Jubilee elections would be on 8<sup>th</sup> August, 2017 while NASA elections would be on 9<sup>th</sup> and 10<sup>th</sup>. The petitioner however, did not disclose the source of this information. Who uttered the words, when and where? Was he himself present? These questions remained unanswered by the petitioner. The other witness who gave evidence on this was PW4 Simon Ekadeli Emoru whose testimony was that it was James Abei who kept telling people that the elections would be on 9<sup>th</sup>. He also gave no particulars of when, where and in what circumstances that said James Abei said the elections would be on 9<sup>th</sup>.

Otherwise, it was the evidence of all witnesses for the petitioner including the petitioner himself, that the date of elections was extensively published on radio, and leaders meetings. And that there was no mistaking the date. No evidence came up of persons who turned up to vote on 9/8/2017.

The date of a general election including that of Member of Parliament is no longer a secret weapon in this country the way it was under the old constitutional regime. Article 136 (2) states;

**“An election of the president shall be held;**

**a) On the same day as a general election of members of parliament being the 2<sup>nd</sup> Tuesday in August in every fifth year.**

With this constitutional provision, there should be no doubt the mind of any Kenyan on the date of elections especially with the extensive civic education that the IEBC admittedly conducted, and the campaigns both sides carried and where the message on the date of elections was the same. That the elections would be on 8/8/2017. I am therefore not convinced that any votes of Turkana South were successfully misled into believing that the elections would be held on 9<sup>th</sup> August 2018 and not 8<sup>th</sup> August 2017. Just like the others this ground totally lacked any feet or legs to stand on. It similarly fails.

A number of salient issues came up during trial and it is only fair, proper and just for this court to consider the same. First the issue of failure of agents to sign the results forms. In our case, the agents in the polling station mentioned in the petition signed the forms in agreement with the result declared. All the petitioner’s agents who testified in court confirmed having signed the forms. There is no law that makes it mandatory for agents to sign and there could be numerous reasons that could lead to agents’ failure to sign the forms. Agents are the eyes of the aspirants at the polling stations and it is their responsibility to safeguard the interests of their principal the best way possible. Failure to do so for one reason or another can therefore not be blamed entirely on the respondent.

The Elections (General) Regulations at Regulation:

“The presiding officer, the candidates or agents shall sign the declaration in respect of the election”

At sub-Regulation 6

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

The second issue that also came up was the campaigns being conducted on the basis of “Votes only Jubilee”. This was the evidence of the petitioner’s witnesses, who in their evidence did not give any examples of any voters who were influenced by this campaign mode. None of the voters also testified as

to this. The petitioner himself in his evidence confirmed that in his own campaigns, being a member of ODM party, he urged voters to only vote for ODM candidates.

This issue has previously come up. In the case of Jared Odoyo Okello –vs- IEBC & 3 others (Kisumu Petition 1 of 2013), where the honourable Judge ruled that it is not unfair for a leader of a political party to urge voters to elect only candidates vying on the political party's ticket. And that court cannot nullify an election merely because the leader of a party urged electors to adopt the so-called "six piece" approach. In total therefore, this court is not convinced that the petitioner tendered sufficient evidence that the canvassing happened at any of the named polling stations. And if this mode of campaigns took place during the official campaigns, same was not illegal or unlawful.

#### **f) Burden and standard of proof.**

This is a purely legal issue. He who alleges must prove. This legal position places a duty and burden on the petitioner to prove the allegations contained in the petition. And this burden does not shift. Section 83 of the Elections Act gives a declaration:

**“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 elections 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”**

The supreme court has adopted this approach in the case of Jackson Nyanungo Ranguma –vs- The IEBC and 2 others, Election Petition No. 3 of 2017, by principally lording that mistake would inevitably occur in elections, but that in order to succeed in annulling the election, the petitioner must establish either that there was non-compliance with the constitution and electoral laws and that the irregularities were of such magnitude that they substantially and materially affected the results.

And on the issue of standard of proof required in election petition, no other than the Supreme Court of Kenya has given directions on this. In the 2013 case of Raila Odinga –vs- IEBC and 3 others Election Petition No. 5/2013, the court declared that in election petitions, the standard of proof required of the petitioner of discharge is above the balance of probabilities but below beyond any reasonable doubt.

It is noted that the respondents have denied all the allegations of the petitioner.

So, has the petitioner discharged this burden? This court has already made observations on the various issues in this petition. I shall not venture into reiterating the same. Suffice it to add that the petitioner never challenged by any form of evidence or at all the declared results. The witnesses of the petitioner who gave evidence in court and who had acted as petitioner's agents at the various polling stations, all signed the results declaration forms. And in court, they all confirmed that the elections went on smoothly and they had no problems with the results declared. In the declared results, 1<sup>st</sup> respondent led with 12,152 votes with the petitioner coming second with 5,446. For the IEBC, no evidence was tendered at all about any irregularity on the part of the commission or its agents

Taking into account the above observations, the evidence as tendered by the petitioner, I am sincerely not convinced that the petitioner discharged his burden sufficient as to enable this court interfere with the outcome of the election held on 8/8/2017, in Turkana South Constituency, Turkana County.

#### **VERDICT**

In all therefore, I make the following declaration;

- i. That the elections of Turkana South Constituency held on 8/8/2017 was held in accordance with the constitution and the relevant electoral laws.**
- ii. That the elections were free and fair and the results reflected the will of the voters of**

**Turkana South.**

**iii. That the 1<sup>st</sup> respondent was validly elected as Member of Parliament Turkana South, in a free and fair election.**

**iv. This petition challenging the election of the 1<sup>st</sup> respondent, lacking in any merit is hereby dismissed wholly with costs.**

**v. No electoral offences of criminal nature or otherwise was committed by the party.**

On the issue of costs, I have considered the presentations of the parties on the same. Costs would ordinarily follow the cause. In this case, taking into consideration the circumstances of the case, I penalise the petitioner to pay to the respondents costs of kshs. Three (3) million.

The said costs of Ksh. 3 million shall be shared out on 50:50 basis as between the 1<sup>st</sup> respondent on the one hand 1.5 million and the 2<sup>nd</sup> and 3<sup>rd</sup> respondent on the other 1.5 million. The security sum deposited in court may be shared between respondents in the ratio above. Orders accordingly.

**SIGNED**

**D.O. OGEMBO, JUDGE**

**9/2/2018**

**Court:** Judgement ready court in open court in the presence of the parties Mr. Odhiambo for Nyachoti for the Petitioner, Karanja for the 1<sup>st</sup> respondent and Mr. Muyundo for 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

**SIGNED**

**D.O. OGEMBO, JUDGE**

**9/2/2018**

**Karanja:** We thank the court most sincerely on the manner the petition was fast tracked and handled. We really appreciate.

**Muyundo:** We also appreciated the effort the court has made.

**Court:** Comments of counsel are noted. Appreciated also in deep and relevant research that the counsel made.

**SIGNED**

**D.O. OGEMBO, JUDGE**

**9/2/2018**