



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

ELECTION PETITION NO 1 OF 2017.

**IN THE MATTER OF THE NATIONAL ASSEMBLY ELECTIONS FOR KITUI EAST
CONSTITUENCY**

BETWEEN

MILLITONIC MWENDWA KIMANZI KITUTE.....PETITIONER

VERSUS

1. INDEPENDENT ELECTORAL

AND BOUNDARIES COMMISSION.....1ST RESPONDENT

2. THE KITUI EAST CONSTITUENCY

RETURNING OFFICER.....2ND RESPONDENT

3. NIMROD MBITHUKA MBAI.....3RD RESPONDENT

JUDGMENT

INTRODUCTION

1. On 5th September 2017, the Petitioner herein, Millitonic Mwendwa Kimanzi Kitute, filed a Petition dated 4th September 2017 in this Court, wherein he challenged the election of the 3rd Respondent as the Member of the National Assembly for Kitui East Constituency in the general elections held on 8th August 2017. The Petitioner was one of the candidates who vied for the elective position of Member of National Assembly in the said constituency.

2. Nimrod Mbithuka Mbai, the 3rd Respondent herein, was declared the winner at the said elections and Member of the National Assembly for Kitui East Constituency after 14,330 votes were cast in his favour. The Petitioner was the runner up with 11,432 votes cast in his favour. There were three other candidates in the said elections namely Mulaimu Mavusyu, who had 9,975 votes; Marcua Mutua Muluvi with 5,655 votes; Kiili James Kyenza with 2,491 votes; and Joseph Kyavoa with 375 votes.

3. The said election was presided over by the 1st Respondent, the Independent Electoral and Boundaries Commission, which is an independent Commission established under Article 88 as read together with Articles 248 and 249 of the Constitution of Kenya, and the Independent Electoral and Boundaries Act No. 9 of 2011. It is constitutionally charged with the mandate and responsibility of conducting and/or

supervising referenda and elections to any elective body or office established by the Constitution, as well as any other elections as prescribed by the Elections Act. The 2nd Respondent was the Returning Officer appointed by the 1st Respondent for the elections held at Kitui East Constituency on 8th August 2017.

4. It is the Petitioner's contention that the said election was not conducted according to the laws governing elections in Kenya, that is the Constitution of Kenya, the Elections Act No. 24 of 2011 and the Elections (General) Regulations 2012. He particularly averred that the 1st Respondent did not conduct a valid election in the Kitui East Constituency on 8th August, 2017 as his agents were denied copies of Form 35A and 35B at the polling stations by the respective presiding officers. That as a result thereof, he was forced to source for results from the 1st Respondent's website and other sources in order to come up with an analysis of the results.

5. There was also a claim of physical assault. The Petitioner stated that after the election, the 3rd Respondent accompanied with his supporters took his firearm and Kenya Shillings (Kshs) 380,000/= as he was having lunch at Sunrise hotel in Sombe market. He further claimed that his motor vehicle, a Toyota Land Cruiser Registration Number KBY 367U, was without any cause detained by the Officer Commanding Police Division, Sombe Police Division for two weeks.

6. It is also the Petitioner's claim that the 3rd Respondent in a bid to woo votes, told residents during his campaign that a new District would be formed, three (3) weeks before elections. Subsequently, a new District namely Mutito North was created and gazetted within two weeks. Further, that on the election date, a polling clerk by the name Morris Mbuu, who was the 1st Respondent's agent, was arrested at Ndovoini Primary School Polling Centre for distributing ballot papers marked in favour of the 3rd Respondent.

7. The Petitioner further stated that the election was undermined by entering inflated results in favour of the 3rd Respondent; reporting and submitting fraudulent and doctored results in various polling stations that were particularised in the Petition, and intimidation of his agents by the presiding officers at various polling stations.

8. In addition, that there was widespread use, acceptance and submission of Forms 35A and Form 35B that were not signed by agents in the declaration of the results; that the 1st and 2nd Respondents and their agents declared voluminous rejected votes at the Petitioner's popular zones and denied the Petitioner's agents opportunity to participate in vote counting and tallying at various polling stations and tallying centre; that there was failure to display the results of the elections on the doors of the polling stations, contrary to the express and implied provisions of (inter alia) Regulation 79 (2) (d) of the Elections (General) Regulations, 2012; that there was refusal to address serious concerns and objections raised by the Petitioner and his agents in regard to the conduct of the vote counting and tallying process; and that the number of votes that were declared and announced exceeded the number of registered voters in Moi Primary school Polling Centre and Kanduti Primary School polling station.

9. The Petitioner averred that due to the foregoing, the counting of the votes cast was undertaken in contravention of section 38A of the Elections Act, Regulation 69(2) of the Election (General) Regulations 2012, and Article 81 of the Constitution of Kenya. Thereby, that the vote counting, tallying and declaration of results was not conducted in accordance with the principles laid down in the Constitution of Kenya 2010, and all and each of the foregoing breaches, violations, contraventions and non-compliance affected the outcome and result of the said election.

10. The Petitioner in his Petition sought an order for scrutiny and recounting of the ballots cast at the election in dispute; a declaration that the 3rd Respondent was not validly elected and that his election should be declared null and void; that fresh elections be held; and an order for costs of this Petition.

THE EVIDENCE

11. The hearing of the election Petition filed herein by the Petitioner commenced on 6th November 2017. The parties detailed out their respective cases during the hearing as follows.

The Petitioner's Case

12. The Petitioner (PW1) at the time of filing his Petition also filed a supporting affidavit he swore on 4th September 2017, which he adopted in Court during the hearing as his evidence, together with documents annexed thereto. He also filed a further affidavit on 24th October 2017 that he swore on the same date.

13. Upon adoption of the said affidavits, Ms. Mwinzi, the counsel for the 1st and 2nd Respondents, and Mr. Nyamu, the counsel for the 3rd Respondent, raised an objection to the admissibility of computer printouts annexed to the supporting affidavit. The Petitioner alleged that the said computer printouts were the results of the Kitui East Constituency elections as downloaded from the 1st Respondent's web portal. The Respondents main grounds of objection were that the said printouts did not meet the requirements of section 106B of the Evidence Act, and that there was no evidence linking the said documents to the 1st Respondent.

14. This Court in a ruling delivered on 6th November 2011 upheld the said objection on the grounds that the Petitioner had not shown any compliance with section 106B of the Evidence Act, and in particular had not produced any certificate showing such compliance and authentication of the documents he annexed to his supporting affidavit sworn on 4th September 2017 as "Annexures MMKK1 (a) to (f)" and "Annexures MMKK2 (a) to (d)". The said documents were thus found to be inadmissible as evidence.

15. The evidence by the Petitioner in his supporting affidavit was that he was duly nominated by the National Rainbow Coalition (NARC) Political Party to vie for the Member of Parliament for Kitui East Constituency elective position under Section 29(1) of the Elections Act, 2011. Further, that Kitui East Constituency was, and remains a duly created Constituency under the Article 89(1) of the Constitution.

16. The Petitioner reiterated the averments made in the Petition as set out in the foregoing, and particularised the polling stations where reporting and submitting of fraudulent and doctored results took place as Inyuu Polling Centre, Kitho Primary Polling Centre, Kanduti Polling Centre, Ngaaka Yakwa Primary School Polling Centre, Sombe Primary School Polling Centre, Kyamatu Primary School Polling Centre, Nditime Primary School Polling Station, Voo Primary School Polling Centre, Kawea Primary School Poling Centre and Kaumu Primary School Polling Centre.

17. He also particularised zones where he alleged he was popular, namely Nzambani Ward, Sombe Mwitikya Ward, Voo Kyamtu Ward, Kanduti Primary School Polling Station, Kitho Primary School Polling Station, and Muthungue Primary School Polling Station; where he alleged the 1st and 2nd Respondents and their agents while counting the votes declared voluminous rejected votes to deny the Petitioner winning the election, and that this was being done in favour of the 3rd Respondent. Further, that when the rejected and valid votes were added in the said polling stations they were more than the registered voters.

18. According to the Petitioner, the results declared by the 2nd Respondent in the tallying centre showed that a total of 1,383 voters voted for Members of National Assembly and never voted for the Members of the County Assembly, leaving the question of where the ballot papers for the Members of County Assembly are. That there is also a discrepancy on the total votes for the Members of the Senate Assembly in the Constituency which was 45,356 votes compared to the total votes for the Members of the National Assembly which was 46,693, and that the 1st and 2nd Respondent have a duty to this Court to show where the difference of 1,337 votes went.

19. In addition that the total votes for Members of National Assembly in the constituency were 46,693, yet the total votes for the Governors were 45,518, which meant that 1,175 voters did not cast their votes for the governor's election. That from the foregoing, it is apparent that the elections for Kitui East

Constituency was marred with irregularities, and it was not fair, transparent and creditable and not conducted as per the Constitution of Kenya and Election Laws and should be declared null and void.

20. The Petitioner in his further affidavit denied that he became unruly, disconnected the communication system, or threatened the returning officer at the Constituency tallying centre. Further, that the 3rd Respondent in his affidavit had admitted taking a firearm from the Petitioner and taking it to the police station.

21. Upon cross-examination by Ms Mwinzi, the counsel for the 1st and 2nd Respondents, and Mr. Nyamu, the counsel for the 3rd Respondent, the Petitioner stated that he voted at Keine Primary School Stream 2 on the voting day. He acknowledged that he did not provide the names of the agents who was denied Forms 35A, or of the polling stations where the Forms 35A was denied. He also admitted that he had not presented any formal request or demand for the supply of Forms 35A & Forms 35B from any polling station or from the 1st Respondent, and stated that he asked for the same from the Presiding Officer at the tallying centre. He also stated that he did not know the date and time of declaration of results since he was chased away from the tallying centre, and that in his Petition he stated that the results were declared on 9th August 2017, and got to learn later that the results were declared on 10th August 2017.

22. He stated that he had not given the particulars of the polling stations with doctored results since he did not have the Forms 35As. The Petitioner was shown the Forms 35A of various polling stations during cross-examination including for Moi Primary School polling station, Kitho Primary school polling station, Inyuu Primary School polling station, Kanduti Primary school polling station and Muthungue Primary School polling station which showed that there were agents who signed the forms for NARC, the number of registered voters and a much lower number of rejected votes.

23. He further stated that the said information could not be confirmed since he had no agents at the polling station, and that the results were different from the ones in the 1st Respondent's web portal that were transmitted by KIEMS. Further, that the agents who have signed the forms have the same handwriting. He admitted that he had not presented any document that contradicts the results in the Forms 35A, but relied on the KIEMs results at the web portal.

24. When shown the Form 35B for Kitui East Constituency, the Petitioner stated that that the form is stamped by 1st Respondent. Further that that he did not know the agents by the names of Malombe David and Kimanga Kasyani who signed the form as NARC agents. According to the Petitioner, he knew he was supposed to forward the agents' names, addresses and appointment letters 48 hours before the election, but was not aware this applied to agents for the tallying centre. Further, that he was required to personally go with his agent to the tallying centre, and that he did not share a Chief agent with the Governor candidate of his party as each candidate was required to appoint their own chief agent.

25. He also stated that he attended some polling stations, about 100 in number, but that he could not be in all polling stations at the same time. Further, that he had a list of his agents to the polling stations, and that that their letters of appointment of were taken by the presiding officers of the 1st Respondent who did not give them back. He acknowledged he did not attach the list of his agents to his affidavit, and that he had no evidence to show that his agents were in every polling station other than his affidavit. He stated that some of his agents were denied access to the polling stations, and that the 2nd Respondent refused to give them badges.

26. With regard to his claim on the taking of his firearm and theft of Kshs. 380,000/=, the Petitioner stated upon cross-examination that he did not present the Occurrence Book (OB) extract reporting the assault, or a P3 form of any injuries he suffered, or proceedings with regard to criminal case No. 927 of 2017 arising from the alleged assault. Further, that the police officers denied him the OB and P3 form, and he could therefore not include them in his petition, and that he made a formal complaint at the police but did not have it by the time he filed the petition.

27. The Petitioner further stated that he is a holder of a firearm and a firearm license, and that he does not

know where the firearm that was taken is. He stated that it is the 3rd Respondent who took the license together with the firearm and his wallet, and that when he went to the police station to report the taking of the firearm, the police arrested and charged him. That the charge which was for displaying a firearm in public was later dropped by the Directorate of Public Prosecutions (DPP). The Petitioner clarified that it was not the 3rd Respondent who took him to court, but that he was taken by about thirty (30) police officers in three (3) motor vehicles led by the Division Criminal Investigating Officer of Zombe police station. Further, that he did not know if the 3rd Respondent was among them.

28. While still on cross-examination, the Petitioner stated that he was at Ndovoini primary polling station on the day the polling clerk by the name of Morris Mbuu was arrested, but arrived after the said clerk had already been arrested and learnt about it from the media. Further, that he did not know the materials the polling clerk was arrested with, and that he did not attach any ballots marked in favour of the 3rd Respondent. He stated that he was there when some agents were being intimidated, one of whom had sworn an affidavit.

29. Lastly, the Petitioner was cross-examined on a witness who filed an affidavit in support of his election Petition called Kitonga Kilungya. He stated that the witness was not his agent but a friend, and that the witness mistakenly signed the Form 35A for Muthungue Primary school polling station. Further, that the said Form 35A shows that there were only 2 rejected votes, however that he called the witness to demonstrate that the results as regards rejected votes at Muthungue Primary School polling station were contested.

30. Upon re-examination the Petitioner reiterated the averments in his Petition, and insisted that his agents were denied access to the polling stations and the Forms 35A and 35B, and he had to get the results from the 1st Respondent's website. Further, that he did not file the list of his agents or their appointment letters due to time constraints, and that he had listed the polling stations where there were doctored results in his Petition.

31. The second witness who testified in support of the Petition was Steere Muli Mbuku (PW2), who filed an affidavit on 5th September 2017 sworn on 4th September 2017, which he adopted as his evidence. He stated therein that he was a registered voter at Kavalula Primary School Polling Station, Nzambani Ward in Kitui East Constituency. Further, that he was the Petitioner's Chief agent in the material election.

32. PW2's evidence was that the 3rd Respondent organized goons who denied him and other agents access to the tallying Centre at Sombe Girls' Secondary School when the ballot papers started arriving. Further, that the results at the tallying centre were announced in the absence of the Petitioner and his agents, and none of the agents were given copies of the Forms 35A and 35B.

33. PW2 stated that he was present when the Petitioner was assaulted and his firearm stolen by the 3rd Respondent. Further, that he accompanied the Petitioner to Sombe Police Station to report the incident, but the police refused to take action and instead impounded the Petitioner's vehicle, which vehicle was released after the Petitioner obtained a court order. He also stated that he was present in Court when the Petitioner was charged in Kitui Chief Magistrates Court Criminal Case No. 929 of 2017.

34. On cross examination by Ms. Mwinzi and Mr. Nyamu, PW2 stated that on the voting day he voted at Kavalula Primary polling station and that the voting went on smoothly. He also stated that he was not allowed to get into the tally centre until he called the Petitioner who assisted him to get in. He denied that there was a disagreement between the Petitioner and returning officer at the tallying centre. PW2 further stated that he did not make any formal communication or complaint to the returning officer about being denied access to the tallying centre .

35. He admitted that he did not attach any document to his affidavit with respect to Criminal Case No. 929 of 2017 or any identification document to show that he was an agent for NARC party or for the Petitioner. He stated that he was an agent at the tallying centre, and that he had a letter from the Petitioner and a badge to access the Constituency tallying centre. However, that the said badge, appointment letter

and an oath of secrecy were not annexed to his affidavit. He further stated that he was not present at the tallying centre when the results were announced.

36. According to PW2, there were many people at the hotel in Sombe Market where the 3rd Respondent assaulted the Petitioner. Further, that the hotel was neighbouring the tallying Centre, and the two were 200 meters apart. He stated that the Petitioner's firearm was forcefully taken by the 3rd Respondent from the Petitioner's waistband at the said hotel, and he later learnt that the gun was taken to the police station. Further, that the incident occurred after voting was over and away from the tallying centre. He also acknowledged that the Petitioner was charged with respect to the number plates of his motor vehicle and released on bail, but that the case is still pending in court.

37. On re-examination, PW2 stated that after voting, he was to ensure that all other agents were at the polling stations and remained there while voting took place, and that they got copies of Forms 35A. That he left the tallying centre at 11 pm and while there, no argument ensued between the Petitioner and 2nd Respondent. He stated that the Petitioner was taken to court on 10th August 2017.

38. On his appointment as a chief agent, he stated that he was appointed two weeks to the election and given a badge at the tallying centre. He stated that he had an appointment letter which he presented to the 1st Respondent's official at the tallying centre. He however stated that the appointment letter was not returned to him. In addition that he was not present when the counting started or when the results were declared, and he never signed any documents at the tallying Centre. He confirmed that although he was allowed access to the tallying centre on 8th August 2017, he left at the some point and was not allowed back.

39. Kitonga Kilungya who was PW3 also filed an affidavit he swore on 4th September 2017, which he adopted as his evidence during the hearing. He stated therein that he was an authorised agent at Muthengue Primary School for Nzyoni Manguye, who was a candidate for Member of County Assembly elections. However, that he was also interested in the activities concerning the Petitioner who was his friend.

40. PW3's evidence was that he had been shown the results for Muthungue Primary School polling station that were downloaded by the Petitioner, and that the same were not the true results as there were only 2 rejected votes and not 467 as shown by the Petitioner's results.

41. On cross-examination PW3 stated as follows. He voted on 8th August 2017 at Muthungue Primary School polling station and remained at the polling station since he was an agent. Further, that he had registered himself as an agent 3 to 4 days before the elections but that he did not have a badge. He acknowledged that he was an agent for Nzyoni Manguye, who was an independent candidate for Member of County Assembly elections in Voo Kyamatu ward, and stated that he was also representing the Petitioner as his friend.

42. PW3 confirmed the results as recorded in the Form 35A for Muthungue Primary School polling station, and stated that he was forced to sign the Form 35A. He however acknowledged that he did not indicate so in his affidavit. He also confirmed that he witnessed that it was 2 votes that were rejected at the said polling station as indicated in the Form 35A.

43. PW3 further acknowledged that he did not state in his affidavit that there were any malpractices in Muthengue Primary School polling station, and stated that he did not go to any other polling station. He also admitted that there was no independent candidate who stood for Member of Parliament for Kitui East Constituency at Muthengue Primary School. He initially claimed to have downloaded the results transmitted from KIEMS from his telephone, and later stated that it was the Petitioner who brought to him the downloaded results from the 1st Respondent's website to see.

44. PW3 stated that he gave the documents that showed he was an agent to the presiding officer, and was present during the counting of the votes at the polling station. Further, that it was the presiding officer

who told him to sign the 35A, but that he did not make any report to the returning officer that he was forced to sign the Form 35A. PW3 also stated that he knew the effects of signing the Form 35A and knew that he could refuse to sign. Lastly, that he signed the Form 35A as an agent for the Independent Candidate.

45. On re- examination, PW3 stated that he did not know the names of the other agents who were at the polling station, and did not find the agent for the Petitioner. He clarified that the Petitioner showed him the KIEMs results in soft copy and then proceeded to print them and showed to him the hard copy. He stated that he went to train as an agent before the elections were conducted, and was explained to about the Forms 34A, 35A and 37A.

46. The last witness who testified for the Petitioner was Nicholas Matuku Luvai (PW4), who filed an affidavit he swore on 4th September 2017 which he adopted as his evidence in chief during the hearing. After adoption of the affidavit, Ms. Mwinzi, the counsel for the 1st and 2nd Respondents, and Mr. Ombati, the counsel for the 3rd Respondent objected to the admissibility of a photograph the said witness had attached to his affidavit as “Annexure NML1”. The Respondents argued that the said photograph did not meet the requirements of section 106B of the Evidence Act. The objection was upheld by this Court which ruled on 23rd November 2017, that that no certificate had been produced showing compliance and authentication as required by section 106B of the Evidence Act in relation to the photograph.

47. PW4’s testimony was that he was a registered voter and voted at Kwa-Kinyai Polling Center in Nzambani Ward in Kitui East Constituency during the material elections. Further, that he was an agent for the Petitioner at the said polling station, and that he was denied access to the polling station and the tallying centre. That he was further not allowed to sign Forms 35A and 35B.

48. He stated that on 9th August 2017, after voting, he travelled with other supporters of the Petitioner to Sombe Market where the Constituency tallying centre was. On arrival they were stopped by the group of supporters of the 3rd Respondent and forced to lie down on the ground. That the police were then called and they were arrested and taken to Sombe Police Station and later charged with the offence of creating disturbance.

49. On cross examination, PW4 stated that he went to the polling station at 6am on the material day because he was an agent and he proceeded to vote with no difficulty, and that no problem were experienced during the voting. Further, that he did not go far from the polling station after voting because he was an agent for the Petitioner, and stayed within the compound up to 6.00 pm. He stated that he had been given a card by NARC political party to show he was an agent, but that he did not bring the card to court because he did not know it was required.

50. When cross examined on two agents who were shown to be the NARC agents at Kwa-Kinyai Polling Station 1 and Kwa-Kinyai Polling station 2, namely Benjamin Geoffrey and Damaris Muthami, he stated that he did not know the former, but knew the latter and also saw her at the polling station. He stated that he voted at Kwa-Kinyai polling station No.2. He later stated that he was an agent for the Petitioner and not for NARC.

51. PW4 further stated on cross-examination that he was trained as an agent on the process of voting, and how to assist those who may not know how to vote or read. He stated that he neither signed an oath of secrecy nor was he given any letter by the 1st Respondent, and that he showed the 1st Respondent’s officials his identity card and was told to stay outside the polling station as he did to have a letter of accreditation, and the badge he had was given to him by NARC. He also confirmed that he was not present when the votes were counted.

52. According to PW4, the problem started when voting was still on going when a group of youth who were supporters of the Petitioner came to vote and found policemen. They were then told they would cause trouble and they left.

53. On re-examination, PW4 affirmed that he was an agent and was given agent duties by the Petitioner. However, that he was not given any documents to show he was an agent and was told to go with his identification card. Further, that he was told to go outside the polling centre but not to go away. PW4 clarified that the youth who came to vote were about 50 to 60 in number and were mostly *boda boda* (motorcycle taxis) riders. He stated that they were prevented from entering the polling station by two armed policemen as they would cause trouble and they did not vote because they were afraid.

The 1st and 2nd Respondents' Case

54. The 1st and 2nd Respondents filed a response to the Petition on 14th September 2017, in which they denied the Petitioner's allegations. The 1st and 2nd Respondents maintained that the material election was free fair and credible, and the Petitioner lost fairly after tallying of votes cast in each polling station.

55. It was specifically denied that agents was denied copies of Forms 35A at the polling station or Form 35B at the Constituency tallying centre; that the 1st and 2nd Respondents received any formal requests for Forms 35A and 35B or had anything to do with creation of Districts; that the 1st Respondent caused any agent to be arrested, and that if there was any such arrest it was not in respect to ballot papers for the position of Member of National Assembly as alleged; that there was any objection raised by the Petitioner; and the declaration of the winner of the election was not done in accordance with the laid down legal procedures; that the record bears inflated altered or amended results; and/or that the Petitioner was intimidated.

56. They contended that all the agents present at the polling station upon completion of counting of votes were accorded an opportunity to sign Forms 35A including the Petitioner's party's agents. That Form 35B was availed to all agents present at the Constituency Tallying Centre at the end of the tallying exercise. They denied that no agent was denied entry to the polling stations, and stated that the Petitioner's chief agent was present at the tallying centre but left before conclusion of the exercise. It was further denied that there was a station where there were more than 700 registered voters, and it was stated that the tallying went well until the Petitioner switched off the electricity mains in a bid to stop the 1st Respondent from announcing the results.

57. Mwangi Kanyoria (DW1) who was the returning officer for the elections held on 8th August 2017 at Kitui East Constituency was the first witness called to testify by the 1st and 2nd Respondents. He adopted an affidavit he swore on 13th September 2017 and filed in Court on 14th September 2017 as his evidence, save for clarifying that there are 170 polling stations in Kitui East Constituency and not 184 as stated in his affidavit.

58. According to DW1, the elections were held according to the law, and in particular that all the polling stations had less than 700 registered voters as required by law, all the Forms 35A and the Form 35B were a true reflections of the voting process, and the results were displayed at the polling stations as required by law. Further, that the Petitioner's allegations of irregularities in this regard were unsubstantiated. DW1 annexed copies of all the Forms 35A from all the polling stations and the Form 35B from the Constituency Tallying Centre in Kitui East Constituency to his affidavit.

59. DW1 stated that all the polling stations had Party agents and/or individual agents all of whom had badges and whose detail the 1st Respondent had, and after the counting of votes, the Presiding Officers at the station filled the results in the Forms 35A which all the agents who were present signed. Further, that the information in the Forms 35A was keyed in the KIEMS kit and sent to the 1st Respondent's servers at the national tallying centre.

60. DW1 further stated that all the agents who were present were allowed to the polling stations and tallying centre and were not denied entry, and the Form 35B was availed to all agents present at the Constituency Tallying Centre. In addition that no agent or candidate claimed that they had not been issued with the Forms 35A and 35B and no formal requests for the same was made, neither were there any

reports of intimidation of the Petitioner's agents made to any of the 1st Respondent's officers at the polling stations.

61. In this respect DW1 responded to the testimony of two witnesses called by the Petitioner, namely Kitonga Kilungya (PW3) and Nicholas Matuku Luvai (PW4), and stated that PW3 was present and did sign the Form 35A at Muthungue Primary School Polling station, and that there were NARC agents who were present and signed the Form 35A in Kwa-Kinyai Polling Station 1 and 2, namely Benjamin M. Geoffrey and Damaris Kalele Muthami. In response to the affidavit by Steere Muli Mbuku (PW2), DW1 confirmed that the said witness was present at the Constituency Tallying Center at some point and no one denied him access therein, being the chief agent. However that he was not present when the process of tallying was concluded for him to sign the form 35B.

62. On the events at the tallying centre, DW1 contended that the Petitioner together with his chief agent accused him of being sent by Jubilee Party to steal elections. and that he then switched off the electricity from the power mains to bar DW1 from declaring the winner. Further, that the security officials handled the situation, whereupon the Petitioner then told DW1 to find alternative ways of exiting the tallying centre. In addition that the Petitioner sent a driver to collect a group of boys to interrupt the tallying process, but the boys were arrested before getting to the tallying centre.

63. DW1 indicated that he was aware that one Morris Mbuu, who was an officer of the 1st Respondent. was arrested for issuing extra ballot papers to a voter, but that the said ballot papers were only in respect to the position of Governor and County Women Representative to the National Assembly and not in respect to the position of Member of National Assembly as claimed. He attached a copy of the charge sheet and statements in the said case.

64. Lastly, DW1 averred that the voting process was by way of a secret ballot and the 1st and 2nd Respondents were not able to know the reasons why voters cast their ballots and voted for particular candidates. Further, that their concern and duty was only limited to conducting the election, counting and tallying of votes, and declaration of the results based on votes that were cast.

65. DW1 was cross-examined by Mr. Maanzo, the lead counsel for the Petitioner. On cross examination, DW1 stated that if a candidate does not nominate an agent there is nothing a presiding officer can do, as political parties and independent candidates are the ones to send the agent to the polling station and control the agents. He explained that an oath of secrecy can be given by the 1st Respondent of by a commissioner of oaths and the agents therefore come with the oaths of secrecy. He stated that he trained the agents who were brought by candidates on 7th August, 2017, and that he had informed the candidates beforehand that it was their onus to transport the agents to the training.

66. DW1 was also cross-examined on various Forms 35A including for Inyuu Primary school Polling station 1 of 2, which showed that it was signed by an agent for the independent candidate. He stated that there were six nominated candidates for Member of Parliament elections for Kitui East Constituency, and that there was no independent candidate in election. He explained that there were six elective positions in the general elections, and there were some independent candidates for Member of County Assembly. Further that all agents who were nominated by political parties and independent candidates are allowed irrespective of which party or how nominated to sign the forms for all the elective position so as to be part and parcel of the entire process.

67. DW1 acknowledged that some of the Forms 35A were either stamped twice or not stamped by the 1st Respondent, and explained that presiding officers were asked to stamp the forms but that this was administrative not mandatory. Further, that the presiding officers signed against alterations made on the forms and all agents present signed the forms.

68. DW 1 further stated that the presiding officer together with the agents are the ones who keyed in the information in the KIEMS and that he did not put in any information in KIEMs himself. Further, that the Form 35B is a collection of all Forms 35A and is done at the tallying centre, and that he is the one who

filled it and it is not sent by KIEMs but by email to the national tallying centre.

69. DW1 stated that the only documents he has and can vouch for are the Forms 35A he received and the Form 35B that he sent electronically, and that any information that does not come from the returning officer is not authentic. He further stated that he was not the administrator of the 1st Respondent's web portal, and he could not answer about any discrepancies in the portal neither had he been shown any such discrepancies.

70. DW1 further explained that the KIEMs has the registered voters of polling station, and cannot show more persons than the registered voters. Further, that that persons who were not registered were not likely to vote, and that there were systems of identifying registered voters who could not be identified by KIEMs.

71. DW1 denied that he got reports of any disruption at any polling station, and stated that he started tallying the votes cast at midnight on 9th August 2017 when all results came in, and remitted the results on 10th August 2017. DW1 reiterated during cross-examination that the Petitioner disrupted the tallying on 9th August 2017 at 2:30 am when he switched of the lights, and also threatened him, and that the disruption lasted for 15 minutes before the Officer Commanding the Police Division (OCPD) who was present in the tallying centre came and removed the Petitioner. Further, that the petitioner and his chief agent were not present when the results were declared.

72. DW1 stated that the Petitioner was not arrested in his presence, and that he only gave the Petitioner a last warning. That he learnt of the Petitioner's arrest when he came back on 11th or 12th August 2017 after taking the election results to Nairobi. He denied instigating the Petitioner's arrest. He stated that the Petitioner's agent was present when the tallying process commenced but he was not there when the results were announced.

73. According to DW1, there was no reports that people were prevented from voting at Kwa-Kinyai polling station and that the agents were well trained to report any such incident. He stated that one polling clerk was caught issuing more than one ballot paper for governor and county women representative, and that the matter is still under investigation. Further, that the said clerk was caught before the ballots were cast and the ballots are with the police as exhibits.

74. James Mwangi Kihara (DW2) testified as the second witness for the 1st and 2nd Respondents, and adopted as his evidence two affidavits he swore on 16th October 2017 and 18th October 2017 that were filed in Court. He stated that he works under the National Police Service as the OCPD of Nzambani Division, and during the elections of 8th August 2017 he was the operations commander for purposes of overseeing law and order in Kitui East Constituency.

75. His evidence was that during the tallying at the Constituency tallying centre, the Petitioner sought to know why there were many rejected ballots in his stronghold in Nzambani sub-county. Further, that the Petitioner confronted him and indicated that his votes were being stolen at the polling stations and that there was conspiracy to rig him out. DW2 stated that the returning officer thereupon advised the Petitioner that there were legal avenues for him to address his grievances. However, that the Petitioner became unruly and disconnected the communication system in the tallying hall, and threatened the returning officer that he should take a helicopter to leave the area.

76. Further, that while tallying was still on going, a firearm being a GLOK 19 GEN4 S/No. YBM 880 was handed over to the officer in charge at the main gate of the tallying centre by a member of the public, who reported that it had been taken from a person who was threatening people at the market. DW2 stated that he later learnt that the firearm belonged to the Petitioner, and instructed the Officer Commanding the Station (OCS) at Zombe police station to investigate the allegation and detain the firearm until completion of the investigation.

77. DW2 further stated that on 9th August, 2017, while at Kitui East Constituency tallying centre at

Zombe, he received information that a motor vehicle registration number KCH 349M, make Mitsubishi Canter was transporting youth from Kyuluni area to the Constituency tallying centre to cause chaos. The vehicle was intercepted by police officers on patrol along Kitui-Zombe road, and that it had 41 men on board who had been hired by the Petitioner to cause chaos at the tallying center on allegation of rigging.

78. He further stated that he was aware that an IEBC officer by the name Morris Mbuu was arrested for issuing extra ballot papers to a voter, but the said papers were in respect to the Governor and Women Representative position. That the election process was free and fair and the 3rd Respondent was validly declared winner. Further that the overall administration of voting, vote counting and tallying was conducted in a free, fair and orderly atmosphere, and that the Petitioner lost fairly.

79. Upon cross examination by Mr. Maanzo, DW2 stated that he was the officer in charge of the tallying centre at Zombe which is within Kitui East Constituency. Further that Zombe police station has an OCPD by the name Mr. Samwel Ndegwa who is of a lower rank than him, and who deputized him at Zombe for the purpose of the election operation. DW2 confirmed that he was at Zombe Secondary School during the entire tallying process which started on 9th and ended on 10th August 2015.

80. He stated that the Petitioner was merely informing him about the rejected ballot papers/votes but was not asking him to follow up. Further, that he did not follow up or make any efforts to find out about rejected votes. DW2 also clarified that the communication system the Petitioner disconnected was the public-address system, and that it was disconnected from the power point and the lights were switched off. DW2 stated that he warned the Petitioner that he was committing an election offence but did not take any further action.

81. DW2 further stated on cross-examination that he did not know who took the firearm from the Petitioner, and that it is not the Petitioner who handed the firearm over to the police officer at the main gate, but that it was handed over by a member of the public who was a civilian. Further, that he was not aware if the member of the public was the 3rd Respondent.

82. According to DW2, he then gave instructions to the OCS Zombe to investigate and detain the firearm. He denied having received any information that the Petitioner was assaulted by the 3rd Respondent and lost money, and stated that if he had been told he would have registered them for investigation. He stated that the matter of the firearm is pending and is being handled by the Criminal Investigations Department and has not been concluded.

83. Upon further cross-examination, DW2 stated that he came to know that the firearm was the Petitioner's when the Petitioner demanded for the return of the firearm after the elections were over. That he also discovered that the Petitioner was licensed to have three firearms and he has two cases relating to two of the firearms including the one of Zombe. He stated that the circumstances in which the firearm was recovered showed that it was involved in an incident, although he could not say with certainty whether it was involved in a crime. DW2 clarified that the weapon was recovered at the market centre and not at the tallying centre, where everyone was searched before entry.

84. When cross-examined on the people in the lorry that was intercepted by police officers on the way to Zombe, DW2 stated that the said people were charged and none of them was an election agent. He further stated that they confessed that they were being ferried to cause chaos at the tallying centre. DW2 informed the Court that the 41 people were arrested on 9th August 2017 at about 400 meters from Zombe town, and sticks were recovered from them and were kept as exhibits. DW2 said he did not know if one of them was Nicholas Mutukia, and whether or not the said Nicholas was an agent and a witness in this case.

85. DW2 also explained that the Petitioner's motor vehicle registration number KBY 367 Y was detained after he took it to the police station as it had other traffic offences, and that he is not aware of any court proceedings against him or his officers as regards the motor vehicle. He denied that they planned to frustrate the Petitioner. He said that there was no scuffle at any time at the gate of the tallying centre

involving the Petitioner, and that the Petitioner was charged after investigation.

86. On re-examination, DW2 confirmed that he was in charge of security at Kitui East Constituency during the election period, and that the Petitioner was arrested by another OCPD. Further, that the Petitioner switched off the main electricity socket which shut down the communication system and other equipment like the KIEMs power bank and laptops. DW2 stated that he was present when the Petitioner had an exchange with the returning officer and that he did not effect any arrest at the time. Further, that there were no incidents between 8th -10th August 2017, and the only altercation was the one between the Petitioner and returning officer.

87. DW2 also clarified that the case on the Petitioner's firearm was handed over to the regional Criminal Investigation Department officers in Embu, as it was consolidated with other cases from Athi River. He stated he is not aware if charges have been preferred against the Petitioner with respect to the firearms at Athi River.

88. Lastly, as regards the people arrested in the lorry, DW2 stated that they did not indicate to the police officers on the ground that they were agents, and that the driver of the lorry indicated he was hired by the Petitioner to ferry the people, and did not know why. That the people who were questioned said they had been hired to cause chaos at the tallying centre because the Petitioner was being rigged out. Further, that none of them had documents to show they were agents.

The 3rd Respondent's Case

89. The 3rd Respondent filed a response to the Petition on 20th September, 2017, wherein it was contended that the allegations that the Petitioner was physically assaulted and Kshs. 380,000/- stolen from him are false. He denied the allegation in the Petition, and specifically the allegations of detention of the Petitioner's motor vehicle and framing of charges against the Petitioner at the 3rd Respondent's instructions, and of ballot papers allegedly found in possession of a person that were marked in the 3rd Respondent's favour.

90. The 3rd Respondent contended that the parliamentary election for Kitui East Constituency were free, fair and devoid of malpractices, and that the Petitioner was represented by agents appointed by his political party National Rainbow Coalition (NARC) who signed Forms 35A and Form 35B. Further, that contrary to the Petitioner's allegations, there were only 3 rejected votes at Moi Primary School Polling Station, and the registered voters in stream 1 of 2 were 648 while stream 2 of 2 had 648 voters. That the number of votes cast in stream 1 of 2 was 435 while 419 votes were cast in stream 2 of 2.

91. The 3rd Respondent testified during the hearing as DW3, and adopted an affidavit sworn on 18th September 2017 that he filed together with his Response as his evidence. He stated therein that he contested for Member of the National Assembly for Kitui East Constituency through the Jubilee Party, and was declared to have won the seat on 10th August 2017 by the 2nd Respondent. He annexed a copy of the Form 35B showing the results of the elections. Further, that the 1st Respondent conducted valid elections with respect to Kitui East Constituency Member of National Assembly on 8th August 2017, and that the said elections were free and fair.

92. According to DW3, the Petitioner's agents witnessed Forms 35A from different polling stations together with the Form 35B in Kitui East Constituency. That most of the Forms 35A were signed by agents of the Petitioner, which results were transferred to Form 35B which was witnessed by Malomar David from NARC.

93. In respect to the allegation that Moi Primary School had more than 700 registered voters, he stated that the number of voters therein were 648 and not 1308 as alleged, and that the number of rejected votes in Moi Primary School polling station were 3 votes. That the number of rejected votes at Voo Kyamatu ward was 42 and not 721 as alleged. That there was no rejected vote at Kanduti Primary School in Chuluni ward. That similarly in Kitho Primary School, there were no rejected votes. That in Muthungue

Primary School, the rejected votes were 2 and not 467.

94. DW3 also stated that the total number of votes cast for Member of National Assembly was 44,256 while that for Member of Senate was 45,356 which is actually more than the number of votes cast for the Member of National Assembly. That the number of votes cast for National Assembly was 44,256 while that of Governor was 46,693 contrary to the allegations made by the Petitioner.

95. In further response to the Petition, DW3 stated that the Petitioner had given one of his supporters a firearm, and that said supporter was terrorizing DW3's supporters. That his supporters informed him and after interacting with the Petitioner, DW3 confiscated the firearm and handed it over to the police. DW3 stated that the allegation of loss of Kshs. 380,000/- was false.

96. Further, that he was aware that Morris Mbuu, a polling clerk, was arrested at Ndovoni Primary School Polling Station for the offence of illegal distribution of ballot papers but the said ballots were not issued in his favour.

97. DW3 was first cross-examined by Ms Mwinzi, the counsel for the 1st and 2nd Respondents, and he stated that he reached the polling station at 9.00 am and left after 20 minutes after voting. Further, that there were agents and observers at the polling station who had badges identifying them. He also stated that he had agents in the constituency, and identified agents for each polling station and gave them appointment letters. He also took their oath of secrecy to the 1st Respondent who gave them accreditation letters.

98. DW3 stated that he only had one instance where an agent was barred from entering a polling station, and acknowledged that the error was his as the agent got the appointment letter late. That no other agent of his was barred by the 1st Respondent from accessing the polling stations.

99. He informed the Court that he got to the tallying centre at around 7 pm on 8th August 2017 and was there from 7 pm on 8th August 2017 to 3 pm on 10th August 2017. Further, that there were various presiding officers who brought election material from their polling stations and the exercise of tallying went on smoothly. DW3 stated that he also drove to various polling stations before he went to the tallying centre, and the voting was going on smoothly, the officials were there, as well as ballot materials and security. In addition that none of his agents reported any incident.

100. He stated that he had been in public service as a police officer for 13 years and an administrator for 4 years. That he has not been involved in the creation of any new districts, and did not have anything to do with a new district being created in Kitui County as alleged by the Petitioner.

101. DW3 also stated that he got to know about the case of Morris Mbuu, the polling clerk who was issuing extra ballot papers, from the Petitioner's affidavit. That he was not present when the incident occurred. Further, that he did not issue any of his supporters with pre-marked ballot papers. He also stated that he did not make any report leading to the Petitioner's motor vehicle being impounded, and only saw the allegation in the Petitioner's affidavit. DW3 denied organizing goons to intimidate the Petitioner's voters and being at the Sunrise Hotel at any point during the election period. He further denied assaulting the Petitioner.

102. On cross examination by Mr. Maanzo, DW3 stated that his agents were appointed by himself and not by his political party. Further, that he got information and reports from his agents that all the agents of the other candidates signed the Forms 35A.

103. DW3 confirmed that the Form 35A for Kyamato primary school was signed by 2 agents and that there was no independent candidate for Member of National Assembly. He confirmed further that the NARC agent did not sign the said Form 35A. With regard to the Form 35A for Voo Kyamatu Primary school, he stated that only 2 agents signed. Further, that the NARC agent did not sign it. DW3 admitted that some Forms 35A were not signed even by his own agents.

104. DW3 acknowledged that he knew the returning officer personally but did not know the OCPD who was in charge of his polling station. He however said he knew the OCPD of Zombe. He stated that he was not at the tallying centre where there were skirmishes, and that he took breaks while at the tallying centre. Further, that he did not witness any skirmishes inside or outside the tally centre. He denied that his supporters burnt any tyres outside the tallying centre or were hostile to the Petitioner.

105. He stated that he never participated in the creation of a new district, although he is aware of Mutito North District, and he cannot recall if there was a handing over ceremony for the district, and was not present when it was being handed over.

106. On the firearm issue, DW3 stated that the incident happened outside the tallying centre which is where his supporters were. He acknowledged confiscating the firearm from the Petitioner. He stated that he was with many people, and he took the action as a result of his training as a police officer. He denied using force and stated that he was not armed. He denied harassing or intimidating the Petitioner, who handed over the gun to him voluntarily. DW3 also stated that he did not arrest the Petitioner, and that although he wrote a statement on the case he has not been called as a witness.

107. DW3 denied taking the Petitioner's money during the incident, and stated that he did not ask the Petitioner if he was licensed firearm holder and whether the firearm moved from him to another person.

108. DW3 also denied that Morris Mbuu was working for him or that he knew him personally. He denied that he went to Sunrise Hotel and that he had anything to do the detention of the Petitioner's MV KBY 672 land cruiser. That he was not aware of any arrest of 42 youth. He stated that he never saw the Petitioner's motor vehicle at the Zombe Police station or instructed the police to charge him and detain the motor vehicle.

109. DW3 stated that got the information about the election results from the Forms 35A and believed that the results in Form 35B tallied with the Forms 35A results. He stated that his chief agent verified the results and informed him, and that he got the Forms 35A from his chief agent.

110. On re-examination by Mr. Nyamu, DW3 stated that he had agents at various polling station and they told him the votes he had garnered as against his opponents, and he received the copies of the Forms 35A from them. Further, that his chief agent told him that the results from Forms35A were recorded in Form 35B and were reflected correctly. He reiterated the evidence in his affidavit and during cross examination as regards appointment of agents, and stated that he has not seen any appointment letter to show that the Petitioner had agents at any of the polling station.

111. On the incident involving the Petitioner's firearm, DW3 stated that the same is alleged to have occurred on 9th August 2017 when the voting had already taken place, and the place was 100 metres from the tallying centre and was not in any way connected with the voting exercise or election process. Further, that the Petitioner did not show any firearm licence at the time or explain why he exchanged the firearm with another person.

112. He stated that he knew the returning officer of Kitui East because he had interacted with him during the nomination process as did the Petitioner and other candidates. That there were no chaos at the tallying centre, and that other than the documents struck out by the court, he has not been shown any document to show the results were other than those presented by the 1st Respondent, and that there is nothing that renders the election illegal.

113. Lastly, DW3 stated that he did not work for the provincial administration and that his last place of employment before the material elections was the county government of Machakos. About Morris Mbuu, he stated that he had never met him and never went to the polling station where he was arrested during the polling day. Further, that the report he got from the agent at the polling station where the arrest took place is that the ballot papers were marked in favour of the Governor and Women Representative.

THE APPLICABLE PRINCIPLES

114. Before arriving at a determination of the issues raised in this Petition, I find it necessary to lay out the applicable principles of law when an election for Member of National Assembly has been challenged on the basis of irregularities. These principles are primarily provided by Articles 81 and 86 of the Constitution, and section 83 of the Elections Act. Article 81 of the Constitution provides for the principles that apply to the electoral system, including the principle of free and fair elections which are to be held as follows:

- a) by secret ballot;
- b) free from violence, intimidation, improper influence or corruption;
- c) conducted by an independent body;
- d) transparent; and
- e) administered in an impartial, neutral, efficient, accurate and accountable manner.

115. Article 86 further stipulates the manner of carrying out elections and referenda, and the voting processes as follows:

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

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

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

116. There are various election legislations that have been enacted and/or amended with a view to implementing these principles. The key legislation is the Elections Act and the Rules and Regulations made thereunder. Specifically with respect to the threshold to be met in election petitions, section 83 of the Elections Act provides 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 that the non-compliance did not affect the result of the election.”

117. The Supreme Court of Kenya in **Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & 2 Others**, SC Election Petition No.1 of 2017 (herein after referred to as “the 2017 **Raila Odinga Case**) interpreted the threshold set by section 83 of the Elections Act as follows:

[211] In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove *either* of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election

was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.”

118. The Supreme Court was in this regard of the view that an election has to be both quantitatively and qualitatively in accordance with the Constitution.

119. The issue of the burden of proof and standard of proof required to meet this threshold were also extensively discussed in the 2017 **Raila Odinga Case**. The Court held that a petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities that affected the results, bears the legal and evidentiary burden from the onset of the trial of proving to the required standard his/her allegations of breach and that an election should be nullified.

120. However that, once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election.

121. Lastly, on the applicable standard of proof or extent of proof that is required, the Supreme Court reiterated the position in previous decisions that where no allegations of a criminal or quasi-criminal nature are made in an election petition, an ‘intermediate standard of proof’, one beyond the ordinary civil litigation standard of proof on a ‘balance of probabilities’, but below the criminal standard of ‘beyond reasonable doubt’, is applied.

122. The Court also reiterated that the rationale for this higher standard of proof is based on the notion that an election petition is not an ordinary suit concerning the two or more parties to it, but involves the entire electorate in a ward, constituency, county or, in the case of a presidential petition, the entire nation.

THE DETERMINATION

123. The parties were directed to address the legal arguments raised by the Petition by way of written submissions. The Petitioner’s counsel filed submissions on 7th December 2017 of the same date. The 1st and 2nd Respondents filed submissions on 14th December 2017 of the same date, while the 3rd Respondent sought leave to file their submissions at a later date, on 18th December 2017. This Court in this respect noted that the bulk of the 3rd Respondent’s submissions were on the applicable principles that govern election petitions in Kenya, and on the burden and standard of proof, which have been summarised in the foregoing.

124. From the pleadings filed in Court and evidence adduced by the parties, there are four issues that fall for determination:

- 1. Whether the Petitioner’s agents were denied access to polling stations and Forms 35A and Form 35B by the Respondents during the election for member of National Assembly held at Kitui East Constituency on 8th August 2017.*
- 2. Whether the results of the election for member of National Assembly held at Kitui East Constituency on 8th August 2017 are credible, verifiable and accurate.*
- 3. Whether the Petitioner was intimidated and assaulted by the Respondents during the election for member of National Assembly held at Kitui East Constituency on 8th August 2017.*
- 4. Whether the Petitioner is entitled to the reliefs sought.*

On whether the Petitioner’s agents were denied access to polling stations and Forms 35A and Form

35B.

125. While this issue was raised by the Petitioner in its pleading and evidence, the Petitioner did not make any submissions on the legal principles and authorities he relied on for this Court to make a determination in his favour. The bulk of his submissions appears to have been on irregularities in the Forms 35A that were supplied by the 1st Respondent, which shall be addressed at a later stage in this determination.

126. The 1st and 2nd Respondents on the other hand did make detailed submissions on this issue as follows. It was submitted that the Petitioner has not established his presence in all polling stations and at the tallying center. That he has not produced any copies of appointment letters for the persons he alleged were his agents. Further, that despite testifying that he could read and write, he indicated that he asked for Forms 35As for various polling stations orally. It was submitted that section 8 and 9 of the Access to Information Act lays down a procedure for application for any information sought from a public officer such as the 1st and 2nd Respondents herein.

127. It was further submitted that from the evidence of the Petitioner, PW2 and PW3 it emerged that the voting and counting process was peaceful and flawless. That PW2 confirmed that he was not barred from accessing the tallying centre, but that he was not present during tallying of votes and could therefore lead no evidence with that regard. That PW3's evidence corroborates the Form 35A for Muthungue Primary School Polling Station which is a confirmation that the results in the form was a reflection of what transpired at the said polling station.

128. Therefore, that the Petition herein is merely speculative since there is non-disclosure of material particulars. Further, that the Petitioner confirmed during his cross examination that the following information was not disclosed in his petition or affidavit:

- a. Names of agents who were denied Forms 35A and 35B.
- b. Names of polling stations in which the said agents were denied access of Forms 35As.
- c. Names of presiding officers who refused to give the unknown agents Forms 35As.
- d. No information on when the alleged demand for Forms 35A and 35B was made.
- e. No particulars as to how the reports were doctored.
- f. No information on what particular records were inflated and from which polling stations.
- g. No names of particular agents who were allegedly intimidated.
- h. No information on which particular polling stations did not have the results displayed at the doors.
- i. No information on the particular polling stations where the unnamed agents were denied an opportunity to participate in the counting.

129. Lastly, it was submitted on the issue that the failure or refusal of an agent to sign Form 35A or 35B does not invalidate the counting process. Regulation 79 (6) and (7) of the Elections (General) Regulations 2012 and the decision in **Peter Kimori Maranga & Another vs Joel Omagwa & 2 others (2013) e KLR** were cited in reliance.

130. The 3rd Respondent on his part submitted that the Petitioner had failed to prove that his agents were denied access to the polling stations and to Forms 35As, as there are no agents who have sworn affidavits to this allegation, and also because most of the Forms 35A were signed by agents from the NARC party which was the Petitioner's party. Reliance was also placed on Regulations 79(6) and (7) of the Elections

(General) Regulations 2012.

131. I agree with the Respondents submissions that the Petitioner did not discharge his burden of proof on this issue. In the first instance, the Petitioner did not provide any particulars and evidence as to the appointment of agents to the polling stations, and whether he met the requirements of Regulations 5 and 62 of the Elections (General) Regulations 2012 as regards the appointment of agents, who are also required to make an oath of secrecy before being admitted to attend a polling station.

132. Secondly, the alleged agents who testified in Court namely PW2, PW3 and PW4 also did not provide any evidence of such appointment, and on the contrary did testify that they were allowed entry into the polling stations to vote or into the tallying centre as the case may be. PW3 in addition testified that he did see and sign the Form 35A at Muthungue Primary School polling station, where he was an agent for an independent candidate.

133. Thirdly, the Petitioner did not bring any evidence by any duly appointed and authorised agent who were denied admission to a polling station, nor of the polling stations that they were denied such entry.

134. Lastly, it is my finding that the paucity of the Petitioner's evidence on this issue is further watered down by the provisions of Regulations 79(6) and (7) of the Elections (General) Regulations 2012 that the refusal or failure of an agent to sign, or the absence of an agent at the signing of a declaration form or at the announcement of results shall not of itself invalidate the results.

Whether the results of the election were credible, verifiable and accurate.

135. It was the Petitioner's submission that although under obligation to conduct election in a simple, accurate, verifiable, secure, accountable and transparent manner as required under Article 85 (5) and Article 86 of the Constitution, the 1st Respondent generated preconceived results thereby subverting the will of the people.

136. The Petitioner also submitted that 175 Forms 35A supplied by the 1st Respondent had fatal and irredeemable irregularities. That nineteen of the said Forms 35As lacked the commission's authentication stamp, some were not signed by the candidates agents and no reasons were given for that failure, several were altered and tampered with, some were not clear; failing to display election results on the doors; failing to give party agents copies of forms 35A and 35B; and including results in the final count that were not signed by the recognized candidate agent contrary to Regulation 79 of the Election (General) Regulations 2012. Further, that although the 2nd Respondent acknowledged knowing the Petitioner's chief agent, whoever signed the Form 35B was not the Petitioner's chief agent.

137. The Petitioner also submitted that there is a difference in the results as tabulated in forms 35As and those displayed in the 1st Respondent's public portal. Further, that from his scrutiny of the Forms 35As provided by the 1st Respondent he noted the following:

- i. That in Kaangu Primary School, both the presiding officer and deputy presiding officer did not sig form 35A and the total number of registered voters in that polling station were 431.
- ii. In Makutano Primary School, the presiding officer did not sign form 35A and the total number of registered voters therein were 269.
- iii. In Ikisaya Primary School, the deputy presiding officer did not sign form 35A and the total number of registered voters were 498.
- iv. In Makuka Primary School, the deputy presiding officer did not sign form 35A and the total number of registered registered voters were 591.
- v. In Kimani Primary School, the deputy presiding officer did not sign form 35A and the total

number of registered voters were 153.

vi. In Utwini Primary School the deputy presiding officer did not sign form 35A and the total number of registered voters were 536.

vii. In Kwa Wewa Primary School the deputy presiding officer did not sign form 35A and the total number of registered voters were 360.

viii. In Kiongwe Primary School the deputy presiding officer did not sign form 35A and the total number of registered voters were 385.

ix. In Kwa Kinyai Center the deputy presiding officer did not sign the form 35A and the total number of registered voters were 457.

138. It was further submitted that the above forms constituted a total of 3,680 registered voters and that the margin of victory between the Petitioner and the 3rd Respondent was 2,898 votes. That it is therefore clear that the aforesaid irregularities affected the outcome of the results and it is hard to ascertain who accurately won.

139. Lastly, it was submitted that most Forms 35A were signed by agents from ODM, Independent Candidates, NASA, NCC, MCCP, CHAP-CHAP, CCU, KIBATI, MUSILA, PTP, NZYONI MAGUYE, NPK, MAZINGIRA GREENS, CMD, IDD, PPK, NARK, MCPK, FREDRICK MWILU, PDU, and PICG, while the 2nd Respondent confirmed that the candidates contesting the election were from NARC, FORD KENYA, MUUNGANO, NDK, JUBILEE AND WIPER and that the parties were to submit their list of agents.

140. The 1st and 2nd Respondents in their submissions faulted the Petitioner for raising and submitting on matters not pleaded. They submitted that parties are bound by their pleadings, and the Petitioner could not depart from his complaints in the Petition to new stations mentioned in the submissions which he had not presented for trial to warrant a formal response by the Respondents. The decision in **Ferdinand N. Waititu vs IEBC and others, Nairobi Election Petition No. 1 of 2013** that parties are bound by their pleadings was cited in this regard.

141. Further, that the Petitioner's allegation that he did not have in his possession the relevant material necessary to proof his case implied that his petition is based on speculation.

142. The 3rd Respondent submissions on this issue were that the Petitioner's allegations were false, as all the results in the Forms 35A are a true reflection of the results in Form 35B. Further, that agents from NARC witnessed all the Forms 35A and the Form 35B, and that the Petitioner's allegations on rejected votes were not substantiated.

143. This Court's findings on this issue are three. Firstly, that the evidence relied upon by the Petitioner for the allegations he made on the results of the elections held for the Member of National Assembly for Kitui East Constituency not being credible, were computer printouts from a website which were annexed to his supporting affidavit, that this Court found inadmissible as explained in the section on the Petitioner's case of this judgment.

144. Secondly, the Court of Appeal in **Independent Electoral and Boundaries Commission v. Maina Kiai & 5 Others, Civil Appeal No. 105 of 2017** held that the primary document in ascertaining results is the declaration form set out in the Elections Act and Regulations, which cannot be altered by way of electronic transmission and opined as follows in this regard:

“... the polling station is the true locus for the free exercise of the voters' will. The counting of the votes as elaborately set out in the Act and the Regulations, with its open, transparent and participatory character using the ballot as the primary material, means, as it must, that the

count there is clothed with a finality not to be exposed to any risk of variation or subversion.”

145. The Petitioner in this regard never produced any evidence of the Forms 35A which is the relevant declaration form at the polling station provided for by section 39(1) and (1A) of the Elections Act, and in Regulation 79(1) and (2) of the Elections (General) Regulations of 2012. Section 39(1) and (1A) regulates the determination and declaration of results as follows in this regard:

“ (1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.

(1A) The Commission shall appoint constituency returning officers to be responsible for—

(i) tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;

(ii) collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly; and

(iii) submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.

146. Under Regulation 79, the prescribed declaration forms that are to be signed are provides as follows:

“(1) The presiding officer, the candidates or agents shall sign the declaration in respect of the elections.

(2) For purposes of subregulation (1), the declaration for—

(a) Presidential election results shall be in Form 34A set out in the Schedule; and

(b) National Assembly, County women representatives, Senator, Governor and county assembly elections shall be in Forms 35A, 36A, 37A,38A, and 39A set out in the Schedule.

(2A) The presiding officer shall—

(a) immediately announce the results of the voting at the polling station before communicating the results to the returning officer;

(b) request each of the candidates or agents present to append his or her signature;

(c) provide each political party, candidate, or their agent with a copy of the declaration of the results; and

(d) affix a copy of the declaration of the results at the public entrance to the polling station or at any place convenient and accessible to the public at the polling station.

(3) Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.”

147. It is also notable in this regard that the information required from the Kenya Integrated Elections Management System (KIEMS) is provided for under section 44 of the Elections Act as follows:

“(1) Subject to this section, there is established an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results. “

148. The KIEMS integrates the three components required by section 44 (1), namely the biometric voter registration, electronic voter identification and electronic transmission of results. On the polling day, the KIEMS only records the electronic voter identification and electronic transmission of results, as the biometric voter of registration can only take place prior to the voting day.

149. Specifically on the electronic transmission of the results using the KIEMS, section 39(1) C) of the Elections Act provides as follows:

(1C) For purposes of a presidential election the Commission shall —

(a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;

(b) tally and verify the results received at the national tallying centre; and

(c) publish the polling result forms on an online public portal maintained by the Commission.

150. Under section 39(1C) of the Act, electronic transmission and publication of results from polling stations, to tallying centres and the publication of the said results in a public portal is only a statutory requirement for the Presidential election. In all other cases, including the election of Member of National Assembly, the transmission of results under section 39(1A) and (1B) of the Act is that the votes at the Polling Station are counted and recorded in Form 35A which is forwarded to the Constituency Tallying Centre. After tallying the votes are subsequently then recorded in Forms 35B at the Constituency tallying centre. The 1st and 2nd Respondents did in this regard provide the Forms 35A from all polling stations in Kitui East Constituency, and the Form 35B showing the results that were cast, collated and declared in the said election, which showed that the 3rd Respondent was the winner with 14,330 votes cast in his favour.

151. Lastly, the Petitioners submissions on this issue introduced matters not pleaded in his Petition as regard the irregularities in the Forms 35A, and also introduced polling stations that were not particularized in his Petition and affidavits. In the 2017 **Raila Odinga Case**, the Supreme Court cited with approval the Supreme Court of India in **Arikala Narasa Reddy –v- Ventaka Ram Neddy Reddygari & Another**, Civil Appeals Nos. 5710 -5711 of 2012 [2014] 2SCR in which the said court stated as follows on parties being bound by their pleadings:

“In the 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 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.”

152. This Court is accordingly bound by the Supreme Court’s decision and cannot make a finding on the issues the Petitioner raised in his submissions on fresh irregularities he alleged he noted in the Forms 35A in various polling stations that were not pleaded in his Petition and/or affidavits, and particularly with regards to the Forms 35A not being signed by the presiding officers or by agents from other political parties.

Whether the Petitioner was intimidated and assaulted by the Respondents

153. On improper influence, misconduct and undue influence, it was the Petitioner's submission that 3 weeks prior to the elections and during his campaigns, the 3rd Respondent told the residents that a new district was being created and indeed 2 weeks to the elections the Mutito North district was created and gazetted to woo voters. That the 3rd Respondent further influenced the police within the constituency to constantly harass and intimidate the Petitioner, his agents and supporters, by frequently arresting him, his agents and supporters, and detaining his property that had nothing to do with the election.

154. The submissions on the part of the 1st and 2nd Respondents on the issue at hand were that the Petitioner and his witnesses were not at Ndovoini Primary School polling station, and they would not know the facts surrounding the arrest of Morris Mbuu. It was submitted that none of the Petitioner's witnesses proved that they were agents. That none of the witnesses testified that they were denied access to the tallying center save for PW4. Further, that none of the witnesses indicated that they were intimidated by any officer of the 1st and 2nd Respondents.

155. Further, that the Petitioner testified that he relied on the information that was transmitted to him by his agents who were not named. On the claim of assault, it was submitted that the Petitioner has not established the case by furnishing court with a P3 form, and that he has not made any formal complaint for criminal proceedings to take its course.

156. The 3rd Respondent on his part submitted that the Petitioner had failed to prove his allegation of intimidation as he did not produce an OB extract on the same, and the alleged events occurred after the elections and would not have affected the results of the election. Further, that the Petitioner failed to prove that the arrest and charging of Morris Mbuu, the 1st Respondent's polling clerk, for distribution of ballot papers at Ndovoini Primary School polling station affected the results in the Respondent's favour.

157. The question that this Court needs to answer is whether the Petitioner did provide proof of his allegations of intimidation and assault. This Court in this regards notes that other than the charging of the polling clerk found distributing ballot papers at Ndovoini Primary School polling station, which fact was admitted by the 1st and 2nd Respondents, the Petitioner did not provide any other evidence of such intimidation or assault, and particularly after a photograph relied on by his witness (PW4) to show that his supporters were arrested was found to be inadmissible.

158. In addition, the Petitioner's evidence was controverted to the required standard by the Respondents, who brought evidence to show that the alleged acts of intimidation occurred outside polling stations and after the voting was over, and which also showed that in some of the instances the Petitioner was the aggressor rather than the victim.

159. Lastly, taking all these factors into account I find that any of the alleged acts of intimidation and/or violence did not materially affect the results of the election for Member of National Assembly for Kitui East Constituency.

Whether the Petitioner is entitled to the reliefs sought.

160. It was the Petitioner's submission that there was non-compliance, irregularities and improprieties that affected the results. The Petitioner urged this Court to apply the provisions of Article 10, 81 and 86 of the Constitution to effectuate the purpose of the electoral process in Kenya. The petitioner in this regard referred to the 2017 **Raila Odinga Case**, and submitted that the Supreme Court found that the 8th August 2017 General Election was marred with irregularities, including in some polling stations in Kitui East Constituency. The Petitioner urged this court to make the same holding and nullify the material election.

161. It was on the other hand submitted on behalf of the 1st and 2nd Respondents as follows. That the petitioner must lay a basis to justify an order for scrutiny since the applicable law requires sufficient reason which entails sufficient evidence. It was submitted that the Petitioner did not satisfy the court that there exists sufficient reason to warrant such an order being issued as provided under rule 29 of the

Elections (Parliamentary and County Elections) Petitions Rule, 2017.

162. Further, that a party cannot pray for scrutiny and recount at the same time owing to the discernible distinction between the two as was observed in **Justus Gesito Mugali M'mbaya v. Independent Electoral & Boundaries Commission & 2 others (2013) eKLR**. That while recount has the end result in determining the number of votes a candidate garnered in an election process, scrutiny concentrates on the validity of votes so cast.

163. The 1st and 2nd Petitioners contended that the Petitioner has not established a *prima facie* case and has not set out the parameters of scrutiny.

164. It was thus submitted that the election was conducted within the legal framework and the Petitioner is not entitled to any relief, and that the 3rd Respondent was thereby validly declared the winner. Lastly, that the Petitioner having not established his case, costs should be awarded to the Respondents.

165. The 3rd Respondent was of the view that the Petitioner did not discharge his burden of proof, and that his Petition is unsubstantiated and should be dismissed.

166. The Petitioner sought the following reliefs in his Petition:

- a) **An order for scrutiny and recounting of the ballots cast at the election in dispute.**
- b) **A declaration that 3rd Respondent was not validly elected and that his election should be declared null and void.**
- c) **That fresh elections be held**
- d) **An order for costs of this Petition.**

167. The applicable law on scrutiny and recount of votes is Section 82 of the Elections Act No. 24 of 2011 as read together with rules 28 and 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017. Section 82 of the Act provides as follows;

“An election Court may on it’s own motion or on application by any party to the petition, during the hearing of an election petition order for a scrutiny of votes to be carried out in such manner as the election Court may determine.”

168. Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 in addition provides as follows on scrutiny;

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

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

With regard to recount, **Rule 28 of the said Rules provides** as follows:

“A petitioner may apply to an elections Court for an order to recount the votes; or examine the tallying, if the only issue for determination in the petition is the count or tallying of votes received by the candidates”.

169. The relief of scrutiny and recount was discussed at length by the Supreme Court of Kenya in the case of **Gatiratu Peter Munya vs Dickson Mwenda Kitiinji & 2 others [2014] eKLR**, where it was held as follows:

“The right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition. The trial Court is vested with discretion under Section 82(1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for the order for scrutiny or recount.

The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.

Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules”

170. It is clear from the foregoing that where an application for scrutiny and recount is made, the court must be satisfied that an order for scrutiny and recount has been justified by the party applying, and secondly, that the order is necessary for the just resolution of the election Petition. In addition, the Supreme Court also held that an application for scrutiny and recount must be couched in specific terms, and clothed with particularity as to which polling stations within a constituency are to attract such scrutiny.

171. The findings by this Court set out in the foregoing on the issues the Petitioner raised in his Petition show that the Petitioner largely failed to prove his allegations. A scrutiny or recount is in the circumstances not only unmerited, but will also add no value. In addition, the Petitioner having failed to prove his case, is not entitled to the declaration he seeks that the 3rd Respondent was not validly elected and that his election should be declared null and void. In the premises no other consequential orders can issue.

172. As regards costs, it is an accepted principle that they follow the event. In election petitions, however, the Courts in awarding costs in addition have to balance the rights of parties to access electoral justice with the work undertaken by the successful parties in preparation and conduct of the Petition.

173. I accordingly find that the Petition herein lacks merit, and order as follows:

1. The election for the Member of National Assembly for Kitui Constituency held on 8th August 2017 was conducted in a free, fair, credible and transparent manner and substantially in accordance with the Constitution and the electoral laws, and the results declared reflected the will of the people of Kitui East Constituency.

2. Nimrod Mbithuka Mbai was validly elected as the Member of the National Assembly for Kitui East Constituency at the general election held on 8th August 2017. Accordingly, the certificate of court as to the validity of the election, pursuant to section 86 of the Elections Act, shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly.

3. The Petitioner’s Petition is dismissed with costs to the Respondents, which are capped at Kshs. 3,000,000/= to the 1st and 2nd Respondents, and Kshs.3,000,000/= to the 3rd Respondent.

4. Such costs as may be recovered from the security deposit, shall be deducted therefrom, and may

be paid to the 1st and 2nd Respondents and the 3rd Respondent in equal shares.

Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2018

P. NYAMWEYA

JUDGE