



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**ELECTION PETITION NO. 1 OF 2017**

**BETWEEN**

**WAVINYA NDETI.....1<sup>ST</sup> PETITIONER**

**PETER MATHUKI.....2<sup>ND</sup> PETITIONER**

**AND**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION (IEBC) .....1<sup>ST</sup> RESPONDENT**

**THE MACHAKOS**

**COUNTY RETURNING OFFICER .....2<sup>ND</sup> RESPONDENT**

**ALFRED NGANGA MUTUA..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. Following the general election held on 8<sup>th</sup> August 2017, the 3<sup>rd</sup> respondent Alfred Nganga Mutua was declared elected as the governor for Machakos County by receiving 249,603 votes. The 1<sup>st</sup> petitioner Wavinya Ndeti came second by getting 209,141 votes. Her running mate was the 2<sup>nd</sup> petitioner Peter Mathuki. The other contestants were Muia Jeremiah Lemi (6,657 votes) and Benard Muia Tom Kiala (4,006 votes). The election was conducted by the Independent Electoral and Boundaries Commission (IEBC) (1<sup>st</sup> respondent) whose County Returning Officer was Joyce Makhanu Wamalwa (2<sup>nd</sup> respondent). Machakos County has 8 constituencies:-Kangundo, Yatta, Mwala, Kathiani, Mavoko, Machakos Town, Masinga and Matungulu. The county had in all 1332 polling stations.

2. The petitioners were aggrieved by the conduct of the election and the declaration of the results. They filed this petition on 5<sup>th</sup> September 2017 to challenge the same. The petition sought the following reliefs:

(a) a determination that the 3<sup>rd</sup> respondent was not validly elected as governor for Machakos County on 8<sup>th</sup> August 2017;

(b) a declaration that the 3<sup>rd</sup> respondent is not and was not eligible to contest in the 8<sup>th</sup> August 2017

election having knowingly aided in contravention of **section 15(1)** of the **Election Offences Act (No. 37 of 2016)**;

(c) a declaration that there were cases of non-compliance, irregularities and improprieties that substantially and significantly affected the results of the election;

(d) a declaration that the election was not conducted in accordance with the election principles under **Article 81** of the Constitution thereby rendering the election void;

(e) a declaration that the 3<sup>rd</sup> respondent was not validly elected as governor, and, instead it was the 1<sup>st</sup> petitioner who was validly elected;

(f) in the alternative, an order do issue directing the 1<sup>st</sup> respondent to organize and conduct fresh gubernatorial election for Machakos County in strict conformity with the Constitution and the **Elections Act (No. 24 of 2011)**; and

(g) costs of the petition.

3. The grounds upon which the petition was based were:-

a) irregular appointment of Machakos county government workers as returning officers, presiding officers and election clerks;

b) inconsistencies and anomalies in Forms 37A;

c) missing Forms 37A;

d) Forms 37B that were lacking in security features;

e) deliberate omission in vote counting and transmission of results;

f) variance in the number of total votes cast;

g) admission of more than one agent for the 3<sup>rd</sup> respondent at polling stations and tallying centres, and where only the 3<sup>rd</sup> respondent's agents were admitted;

h) Forms 37A that were not duly stamped or closed to prevent tampering after declaration;

i) non-participating candidates' agents signing declaration of results;

j) Forms 37A not signed by candidates or agents;

k) alteration and tampering of Forms 37A; and

l) ungazetted and undesignated returning officers or presiding officers conducting the election.

4. Further, the petitioners alleged that election offences were committed during the election as follows:-

(a) the 1<sup>st</sup> respondent's polling clerk at the Kenyatta Stadium polling station stream 2 was caught on camera having issued more than one ballot paper to voters;

(b) at Athi River Primary polling station, the 3<sup>rd</sup> respondent's agents were caught on camera bribing voters using vehicle Reg. No. KBN174U in contravention of **section 9** of the **Election Offences Act**;

(c) on 10<sup>th</sup> August 2017 at Vocational Training Centre Tallying Centre in Athi River, three presiding officers were found with ballot books each of 50 ballots from three polling stations, and that the ballot books were unsealed and outside the ballot boxes, contrary to the requirements of the law;

(d) presiding officers were found with two ballot books Nos. 7659 and 7657 for gubernatorial election, and that several ballot papers remained in the books but were marked in favour of the 3<sup>rd</sup> respondent, and this incident was reported at Athi River police station vide OB No. 37/10/8/2017;

(e) voter bribery and undue influence; and

(f) the use by the 3<sup>rd</sup> respondent of 10 Machakos county government vehicles during his campaigns.

5. The respective respondents filed responses to deny all the allegations in the petition. The alleged commission of illegalities, irregularities, and improprieties was denied. The alleged commission of election offences was also denied. It was the case of each respondent that the election was free, fair and credible and that the results reflected the will of the people of Machakos County. It was pleaded in response that the election accorded with the Constitution and the elections laws, and therefore that the results declared were valid. It was sought that the petition be dismissed with costs.

6. The petitioners were represented by Mr. Willis Otieno, Mr. Mulwa Gitonga, Hon. Otiende Amolo, Hon. Daniel Maanzo and Mr. Stephen Ligunya. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were represented by Mr. Kimani Muhoro and Mr. Daniel Muchoki, and the 3<sup>rd</sup> respondent by Mr. Waweru Gatonye, Mr. Benjamin Musau, Mr. Wilfred Nyamu, Mr. Dennis Mungata, Mr. Bernard Mungata, Mr. Leonard Rono and Mr. Nthiwa.

7. On 18<sup>th</sup> October 2017 counsel agreed to have the following to be the issues for determination:-

a) were there irregularities and illegalities committed in the gubernatorial election? If they were, were they substantial enough to affect the validity of the elections?;

b) were the principles laid down in the Constitution violated during the election?;

c) were election offences committed during the election, and how did they affect the validity of the election?;

d) was the 3<sup>rd</sup> respondent qualified in terms of **section 15** of the **Election Offences Act** to contest the gubernatorial election?;

e) penultimately, was the 3<sup>rd</sup> respondent validly elected?; and

f) who shall pay costs, if at all, and how much?

8. Before considering the evidence that was called to support the petition, and to determine whether or not a case was made out for the nullification of the victory that was declared in favour of the 3<sup>rd</sup> respondent, it is important to outline the constitutional and legal principles that govern the conduct of elections and the resolution of election disputes in Kenya. In doing this, I acknowledge the fact that all counsel, in their written submissions, agreed on these principles, and how the courts have interpreted them in various decided cases.

9. The principles governing elections spring from the fact that Kenya is a sovereign and democratic country based on the values of democracy, human rights and the rule of law. The Constitution in **Article 1(2)** provides that people may exercise their sovereign power either directly or through their democratically elected representatives. The rights of the people to participate in the establishment of their

government is entrenched and protected. These rights include the right to be registered as a voter, the right to vote by secret ballot in any election or referendum, and the right to be a candidate and, if elected, the right to hold a public office.

10. Specifically, under **Article 38(2)** the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors is fundamental and has been conferred to every citizen. In **Article 81(e)** the ingredients of free and fair elections are outlined. They are election by secret ballot; election free from violence, intimidation, improper influence or corruption; election conducted by an independent body; transparent election; and election administered in an impartial, neutral, efficient and accountable manner. The independent body that is established under **Article 88** is the Independent Electoral and Boundaries Commission. Its functions are enumerated, the details of which are to be found in the **Independent Electoral and Boundaries Commission Act (No. 9 of 2011)**. In **Article 86** the Constitution sets out the principles that relate to the actual voting. It commands the Commission to 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.”**

11. **Article 87** entrenches the principle of timely resolution of electoral disputes.

12. The substantive and procedural election law is to be found in the **Elections Act**. The other important legislations dealing with elections are the **Election Offences Act**, the **Political Parties Act**, the **Public Office Ethics Act** and, of course, the **Independent Electoral and Boundaries Commission Act**.

13. **Article 10** enjoins all State organs (including courts), State officers, public officers, and all persons to comply with national values and principles of governance whenever they apply or interpret the Constitution or any law, or when they are implementing any public policy. The values and principles include:-

**“(c) good governance, integrity, transparency and accountability.”**

14. In **Richard Kalembe Ndile & Another –v- Patrick Musimba Mweu & 2 Others [2013]eKLR**, the Court observed that:

**“Under our democratic form of government, an election is the ultimate expression of the people and the electoral system is designed to ascertain the intent of the voters and to give it effect whenever possible.”**

15. **Section 83** of the **Elections Act** recognizes the sanctity of the right of the people to choose their political leaders, and forbids the court from trivialising that right by nullifying an election merely because errors and irregularities have been shown to have been committed, or that a provision of the law relating to elections has not been complied with. The errors and irregularities, or the non-compliance with election law, must be of such gravity that the integrity of the election is materially compromised. This is what the section states:

**“No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the**

**principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.”**

16. The Supreme Court in **Gatirau Peter Munya –v- Dickson Mwenda Kithinji & 2 Others [2014] eKLR** acknowledged the practical reality that imperfections in the electoral process are expected; that elections are conducted by human beings under stressful circumstances, and therefore mistakes do sometimes occur. It follows that an election court should not lightly overturn the election; especially where the results substantially reflect the will of the voters, and where neither a candidate nor voters have engaged in any wrongdoing. The court laid down the following principles; in its interpretation of **section 83:-**

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

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

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

17. In election matters, there is a presumption that the election was properly conducted and that the results declared were correct (**Raila Odinga & Another –v- IEBC and 3 Others, Presidential Petition No. 1 of 2017**). The burden of proving that such was not the case rests with the petitioner. The petitioner has to prove that the election was not conducted in accordance with the principles laid down in the Constitution and election law. Where there are allegations of irregularities, malpractices, or misconduct that the petitioner has made about the election, it is up to him to prove their occurrence. Further, he has to prove that they were of such magnitude that they affected the results (**Raila Odinga & Another –v- IEBC & 3 Others [2013]**).

18. In **Raila [2017]**, the Supreme Court rendered itself on the question of the shifting of burden of proof in electoral matters. It stated that, although the legal and evidential burden of establishing the facts and contentions which will support the petitioner’s case is static, and remains constant throughout the trial, depending on the effectiveness with which he discharges this, the evidential burden keeps shifting, and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced. The court observed as follows:-

**“133. It follows therefore 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 the 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. In other words, while the petitioner bears the evidentiary burden to adduce “factual” evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law.”**

It was the petitioners’ counsel’s submission that their clients had placed before the court sufficient evidence to warrant the impugning of the election, in which case the burden had shifted to the respondents to show by evidence that there was compliance with the law. The respondents’ case was that no such evidence had been adduced by the petitioners.

19. The standard of proof required in election petitions is higher than a balance of probabilities but lower

than beyond reasonable doubt (**M’Nkiria Petkay Shem Miriti –v- Ragwa Samwel Mbae & 2 Others, Civil Appeal No. 24 of 2013**). Where there is alleged commission of an election offence, the standard is beyond reasonable doubt. Counsel for the petitioners rightly submitted that, on the basis of the decision in **Fredrick Otieno Outa –v- Jared Odoyo Okello & 4 Others [2014]eKLR**, where an election offence is proved this will not only lead to the election being set aside, but also to the disqualification of the proved culprit from standing as a candidate. In the case of **Moses Masika Wetangula –v- Musikari Kombo & 2 Others [2014]eKLR** it was held that, where one engages in bribery, treating or commits any other election offence, his election violates the electoral law principle of “free and fair election” contained in the Constitution, the **Elections Act** and the **Election Regulations**. The petitioners sought the disqualification of the 3<sup>rd</sup> respondent on the basis that he was guilty of the offence under **section 15(1)** of the **Election Offences Act**. The 3<sup>rd</sup> respondent denied that he had committed the offence, or any other offence.

20. Another important principle in election petitions is that, the petitioner is bound by his pleadings and bound to prove the case he has pleaded. He is not permitted to make a case outside the pleadings. His affidavits and documents must be consistent with, and support, the case he has pleaded. The Supreme Court in **Raila [2017]** 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 court stated as follows:

**“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.”**

21. Lastly, there were a number of allegations made by the petitioners regarding their agents, and how they were treated by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. It was alleged, for instance, that in over 300 polling stations their agents were denied access and/or were chased away by the 1<sup>st</sup> respondent from the polling stations; vote counting and tabulation did not happen in various polling stations; some results in Forms 37A were understated in Forms 37B; in significant number of polling stations (154 in number) and tallying centres the 1<sup>st</sup> respondent granted admission to more than one agent for the 3<sup>rd</sup> respondent; in most polling stations the only agents admitted were those of the 3<sup>rd</sup> respondent; in more than 100 polling stations none of the candidates or their agents signed the declaration of results, and so on. It is therefore important to outline the role of an agent in the electoral process.

**22. Section 2** of the **Elections Act** defines an agent as a person duly appointed by a political party or an independent candidate for the purposes of an election or referendum under the **Act**. Under **section 30** of the **Act**, a political party may appoint one agent for its candidates at each polling station. Where a political party does not nominate an agent, a candidate nominated by a political party may appoint an agent of his choice. An independent candidate may appoint his own agent.

23. An agent is required to make an oath of secrecy prescribed under the **Act** before he is allowed to attend a polling station (**Regulation 5(5)** and **62(1) (c)** of the **Elections (General) Regulations, 2012**). At the polling station, during the voting process, he is to inspect the ballot papers for use at the polling station and to note the serial numbers thereon before voting commences (**Regulation 68(57)**); witness the process of voter identification (**Regulations 62(1)(c)** and **69(1)(e)(i)**); witness the voting process (**Regulation 70(1)(b)**); witness the sealing of ballot boxes (**Regulation 67(1)(b)**); witness counting of votes (**Regulation 76**); sign the election declaration forms (**Regulation 79(2A)(b)**); collect a copy of the declaration of the results (**Regulation 79(2A)(c)**); and witness the tallying of results from each polling station (**Regulation 82**).

24. In the case of **Bwana Mohamed Bwana –v- Silvano Buko Bonaya & 2 Others [2013]eKLR**, it was stated that:-

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

In the case of **Harry Okello Nadimo –v- IEBC & 2 Others [2013]eKLR**, it was observed as follows:-

**“For these reasons, how the Agent carries out his duty, conducts himself, treats, or is treated by the polling officials is important. An Agent who accepts or acquiesces to an outcome but wishes to recant it must give plausible reasons for the change of heart. Where at the hearing an Agent raises complaints about the conduct of the Election the Agent must be asked about the action taken by him or her to seek intervention when the issue arose. Where the Agent is guilty of inaction, then the Agent will be hard put to explain the inaction. On the converse the court may take a benign view of the evidence of an Agent who raises a legitimate complaint or query in a formal and timeously fashion. These are but a few instances of how the evidence of an Agent can assist the court to assess the credibility of the election process. The point to be made is that the evidence of Agents can turn out to be crucial in aiding the court to get a true impression of how an election was managed and conducted.”**

25. In the final analysis, it is through agents that candidates participate in and observe the electoral process. It is the role of the agents to make sure that IEBC officials administer the election in an impartial, neutral, efficient, accurate and accountable manner. Agents have the right to cause the presiding officer to re-check and re-count the votes. They are to keep a record (which may be used in evidence) of all the happenings during the voting process, they have to complain to the presiding officer, or indeed to the security officers present at the polling station. They keep in touch with their chief agent, and ultimately with the party or candidate. They are an integral part of the voting process. Their evidence is crucial in the determination of an election petition.

26. I will now deal with the issues raised in the petition. The first issue is whether election offences were committed during the election, and whether they affected the validity of the election. This is how the issue was framed, but I bear in mind that proof of an election offence is enough to invalidate an election. It was alleged that the 1<sup>st</sup> respondent’s polling clerk at Kenyatta Stadium polling station Stream 2 was caught on camera having issued more than one ballot paper to voters. It is an offence under **section 5(n)** of the **Election Offences Act** to vote more than once in any election. Under **section 6(k)** of the **Act** the polling clerk would be colluding with the party or candidate for whom more than one vote is being cast by the voter. Under **section 19** of the **Act** it would be an offence to aid, abet, counsel or procure the commission of the offence. Under **Regulation 59(3)** no person shall cast more than one vote at any particular election. The 1<sup>st</sup> and 2<sup>nd</sup> respondents denied this allegation. The 3<sup>rd</sup> respondent denied that he committed any election offence or ordered or procured the commission of any election offence by the 1<sup>st</sup> respondent’s officers. The name of the clerk who was allegedly caught on camera giving more than one ballot to voters was not given. The camera evidence was not tendered. No single voter was called to come and say he was given more than one vote, or that he voted twice. The petitioners’ agent for Kenyatta Stadium polling station was not called to substantiate the claim. I find that the allegation was not proved.

27. It was alleged in the petition that at Athi River polling station, the 3<sup>rd</sup> respondent’s agents were caught on camera bribing voters using vehicle registration number KBN174U, and that this offended **section 9** of the **Election Offences Act**. The 1<sup>st</sup> petitioner was not personally at the polling station to be able to witness the incident, and the camera evidence was not produced. The person who witnessed the incident

was not called to testify. The 3<sup>rd</sup> respondent stated that he had no knowledge of the incident, and neither did he own the vehicle in question. It was not difficult for the petitioners to get the records at the Motor Vehicle Registry regarding the ownership of the vehicle. I find that the offence was not proved.

28. It was alleged that on 10<sup>th</sup> August 2017 at Vocational Training Tallying Centre in Athi River, three presiding officers were found with ballot books each of 50 ballot papers from three polling stations. The ballot books were not sealed, and were outside the ballot boxes which was contrary to **section 6** of the **Election Offences Act**. The particulars of empty and used ballot books were given in the petition. It was further alleged that, contrary to **section 6(j), (k) and (l)** of the **Act**, the said presiding officers were found with 2 ballot books numbers 7659 and 7657 for gubernatorial election, and that marked ballot papers remained in the books and each ballot paper was marked in favour of the 3<sup>rd</sup> respondent. These discoveries were all reported to the CID at Athi River vide OB No. 37 of 10<sup>th</sup> August 2017. The 3<sup>rd</sup> respondent denied these allegations. When the 1<sup>st</sup> petitioner testified, she stated that she did not personally witness these incidents; that a report was made to her. The person who witnessed the incidents, or reported to her, was not called to testify. There was no indication that the reports to CID had resulted into any successful prosecution. I find that the claims were not materially substantiated.

29. There is no dispute that at the time of the election the 3<sup>rd</sup> respondent was the sitting governor for Machakos county. Among the chief officers of the county were Urbanus Musyoka and Kennedy Auma. They were public officers. Under **section 15(1)(a)** of the **Election Offences Act** it is an offence for a public officer to engage in the activities of any political party or candidate or act as an agent of a political party or a candidate in an election. It was pleaded in paragraph 144 of the petition that the 3<sup>rd</sup> respondent enlisted or caused to be enlisted several public officers from Machakos county government to act as his agents and also as agents of his political party, Maendeleo Chap Chap, of which he was the party leader. In terms of particulars, a list containing 59 names of the county government public officers who had allegedly acted as agents of the 3<sup>rd</sup> respondent and/or the party was given. In the list given there is the name of Urbanus Wambua Musyoka. The name of Kennedy Auma was missing. In paragraph 88 of the 1<sup>st</sup> petitioner's supporting affidavit there is produced the 3<sup>rd</sup> respondent's list of tallying centre agents dated 29<sup>th</sup> July 2017. The list was the one that he allegedly sent to the 1<sup>st</sup> respondent. The name of Kennedy Auma was not on the list. No evidence can be admissible in regard to Kennedy Auma who was not pleaded and who was not in the supporting affidavit. In the response by the 3<sup>rd</sup> respondent he stated that at no time did he participate in the recruitment of agents; that agents were recruited by the CEO of the party who was called Mary Mueni Mutuku. He denied committing any offence under **section 15(1), (2) and (3)** of the **Act**. When he testified he stated that he was not aware of any employee of the county who was an agent in the elections. He was shown the names in the petition where it was alleged they were his agents. He stated that none of these were his agents. Form 37B for Mavoko constituency tallying centre had the name Urbanus Wambua Musyoka of ID card No. 20236674 having signed as tallying agent for Maendeleo Chap Chap party. Of course his ID card number was the same as the one in the petition and in the 1<sup>st</sup> petitioner's supporting affidavit. It had to be the same because the information in the petition and affidavit came from the 1<sup>st</sup> respondent. That information came from the list that the 3<sup>rd</sup> respondent had provided to the 1<sup>st</sup> respondent. According to the 3<sup>rd</sup> respondent that information came from the CEO of the party as he was not personally involved in the recruitment of agents. He went on to state that Urbanus Wambua Musyoka was a common Kamba name. Of course, the chief officer Urbanus Wambua Musyoka did not testify to confirm or deny that he participated in the election as an agent, or at all. He did not testify to confirm or deny that the ID card he carries was number 20236674. Can the court find that the circumstances presented by the petitioners on this issue irresistibly point to the fact that the agent in question was the chief officer, and to no one else and to nothing else? In **Mwangi & Another –v- Republic [2004]2KLR 32** it was observed by the Court of Appeal that in a case depended on circumstantial evidence, each link in the chain must be closely and separately examined to determine its strength before the whole chain can be put together and a conclusion drawn that the chain of evidence as proved was incapable of explanation or any other reasonable hypothesis that the accused was guilty of the charge.

30. I was wondering, what if the petitioners had under **Article 35** of the Constitution sought from the

county government the employment records of chief officer Urbanus Wambua Musyoka? Would such records not have shown whether or not he was the holder of ID Card No. 20326674? Is there a possibility the records would have shown a different ID card? Secondly, is there a possibility that the Urbanus Wambua Musyoka who was the agent of the party at Mavoko carried a name similar to that to the chief officer at the county? In the face of these possibilities, I find that it was not proved beyond doubt that the 3<sup>rd</sup> respondent engaged as his agent a public officer employed by the county.

31. At paragraphs 153 – 158 of the petition the 1<sup>st</sup> petitioner claimed that the 3<sup>rd</sup> respondent bribed voters to influence them into voting for him; that he unduly influenced voters by ferrying them to polling stations and giving them money to vote for him. In paragraph 94 of her affidavit she stated that on various occasions the 3<sup>rd</sup> respondent convened meetings of various employees of the county government where he threatened them with loss of their jobs if they did not vote for him; that he would arrange for each employee to be given Kshs.1,000/= as an inducement to vote for him. She attached a bundle of affidavits marked as “WN29” from the alleged employees. These documents were struck out. None of the alleged employees testified to make the claims. At paragraph 69 of the 1<sup>st</sup> petitioner’s affidavit, she stated that the 3<sup>rd</sup> respondent gave small loans of Kshs.500/= to Kshs.1,000/= to traders with a promise that the rest would be disbursed as and when he was re-elected. On his part, the 3<sup>rd</sup> respondent denied bribing any voter. He testified that the county government had an ongoing project of small scale business traders; that the project was going on even now. He denied that it was related to the election. No trader or business person was called to say that he was given the loan and that it was linked to the election. The 1<sup>st</sup> petitioner in her testimony admitted that she did not herself witness voter bribery, at Kikambweni polling station or wherever else. None gave evidence on the alleged ferrying of voters to polling stations. The alleged meetings convened for county employees were not shown to have taken place. The allegations were not established.

32. Under **section 14** of the **Election Offences Act** the use of public resources for the purpose of campaigning during an election is an offence. In paragraphs 159-160 of the petition it was alleged that the 3<sup>rd</sup> respondent used 10 county government vehicles to campaign during the election. The supporting affidavit repeated this, and in evidence the 1<sup>st</sup> petitioner stated that videos of these vehicles were taken. She did not produce the videos. She did not say that she personally saw the vehicles, and no witness was called to say he saw any of these vehicles being used in campaign. The 3<sup>rd</sup> respondent denied in evidence that he used any of the vehicles to campaign. He stated that the only vehicles he used were from friends and supporters, and that any other vehicles were those rightly attached to him as governor. This claim was not proved.

33. The next issue to be determined is whether the election was marred with irregularities and illegalities, and whether these substantially affected the validity of the election results.

34. Before dealing with the complaints in the petition on this issue, it is important that certain observations be made about the case of the petitioners. First, the petitioners called only two witnesses: the 1<sup>st</sup> petitioner (PW 1) and Christopher Mutinda (PW 2). PW 2 was not one of the agents of the petitioners during the election. He was an employee of Machakos county government, and the secretary of Kenya County Government Workers Union. His evidence was that the employees of Machakos county government were recruited to be returning officers, presiding officers and polling clerks during the gubernatorial election. The evidence of the 1<sup>st</sup> petitioner was that, on the election day, she voted at Athi River Social Hall polling station and thereafter went to her tallying centre where she remained during the election process. From here, she received reports from her agents on how the election was proceeding. She testified that she was running on Wiper Party ticket, and that they (both her and the Party) had the same agents. They had an agent for each of the 1332 polling stations. Her chief agent was one Ngovi. Ngovi did not testify.

35. The gubernatorial results for Machakos county were declared in Form 37C. This Form contains the results that the petitioners are challenging through the petition. The 1<sup>st</sup> petitioner admitted that the Form 37C had been signed by a Wiper Party agent Margaret Nzioki. That would mean that, through Margaret

Nzioki, Wiper Party accepted the results that the 2<sup>nd</sup> respondent declared. When this was put to the 1<sup>st</sup> petitioner, she stated that Margaret Nzioki was not her agent, but the agent for the Wiper Party Woman Representative. It is trite that Form 37C was not about the results of the seat of Women Representative but that of governor. The 1<sup>st</sup> petitioner then stated that her chief agent (who was supposed to sign Form 37C) was Ngovi; that Ngovi was present when the 2<sup>nd</sup> respondent declared the results but that he did not sign. He was a material witness to answer the question why he did not sign the results that were declared in his presence. He is the one who ought to have indicated the reservations he had, if any, about the results. His non-calling was not explained. The only presumption that can be drawn is that, had he been called he would have given evidence adverse to the petitioners. Further, it was material to call Margaret Nzioki to come and explain why she conceded the results that now her Party and candidate are disowning. It should be pointed out that, in fact, on 6<sup>th</sup> September 2017 the affidavit of Ngovi (Lawrence Nzau Ngovi) was filed in the petition by the petitioners. They filed in all 34 affidavits. Most of these affidavits were of agents, including Raphael Nzuki Kyalaani who was the chief agent for Mwala constituency. Why the petitioners decided not to have these witnesses testify will always remain a puzzle.

36. Lastly, when the petition was filed on 5<sup>th</sup> September 2017, together with it was an application for the scrutiny of all the original Forms 37A, B and C -

**“prepared at and obtained from the polling stations by presiding officers and used to generate the final tally of the Governor’s election, and pursuant to such production leave be granted for the use of an aid or reading device to assist in distinguishing the fake Forms from genuine ones.”**

Counsel for the petitioners did not prosecute the application for scrutiny, and therefore the same was considered abandoned. In the case of **Philip Mukwe Wasike –v James Lusweti & 2 Others [2013]eKLR**, the court observed as follows:-

**“The purpose of scrutiny is:-**

- (1) To assist the court to investigate if the allegations of irregularities and breaches of the law complained of are valid.**
- (2) Assist the court in determining the valid votes cast in favour of each candidate.**
- (3) Assist the court to better understand the vital details the electoral process and gain impressions on the integrity of the electoral process.”**

37. The application for scrutiny, if successful, was going to present the petitioners with the opportunity to examine the copies of the results of each polling station in which the results of the elections were in dispute (**Rule 29(8) of Elections (Parliamentary and County Elections) Petitions Rules, 2017**). The petitioners were going to be presented with the opportunity to examine all the original Forms 37A in respect of the polling stations that were in dispute and to check them against the disputed Forms 37B and, finally, against the results in the original Form 37C. The opportunity to test the allegations of irregularities and breaches of electoral law was lost by the none-prosecution of the application for scrutiny. Did the petitioners fear that scrutiny could have confirmed the results declared in the gubernatorial election held on 8<sup>th</sup> August 2017? The court will never know.

38. Back to the question of irregularities and illegalities during the election, and whether they were substantial enough to affect the results. The petitioners alleged in paragraphs 68 to 76 of the petition that there were inconsistencies and anomalies in Forms 37B. The particulars were that several Forms 37B were not internally consistent, and the figures therein did not add up thereby putting into question the authenticity and integrity of the results declared; that in Form 37B in respect of Mwala constituency, the indicated total votes cast for both the petitioners and the 3<sup>rd</sup> respondent did not tally with the total aggregate of all the votes cast for the petitioners and the 3<sup>rd</sup> respondent from all the polling stations for

Mwala constituency; that the said Form 37B for Mwala constituency showed that the 3<sup>rd</sup> respondent got 42,269 votes whereas tabulation of the actual votes in the same Form shows he actually got 21,369 votes; that the votes cast for the 1<sup>st</sup> petitioner in Mwala constituency was shown as 20,846 votes whereas the actual tabulation of votes received from the various polling stations showed she got 13,188 votes; that the difference in total votes shown in the Form 37B was 21,423 votes while the actual difference between the two candidates ought to have been 8,181; and, therefore, the 1<sup>st</sup> respondent relied on the wrong totals in declaring the 3<sup>rd</sup> respondent as winner.

39. On the onset, it is clear that these alleged inconsistencies and anomalies in results declared for the county, and for Mwala constituency in particular, could have been resolved by the scrutiny of all these Forms, and the recount of all the votes cast. The petitioners did not want to go that route. They did not call their chief agent for Mwala constituency to testify on the said inconsistencies. Instead they relied on an analysis prepared by one Dr. Noah Akala of the results of the Machakos gubernatorial elections as posted in the IEBC portal the Forms 37A to C as well as all other election materials. It was pleaded, and stated by the 1<sup>st</sup> petitioner, that Dr. Akala's analysis had shown that going by the evidence on the portal, out of the 1332 polling stations, 109 polling stations had no data entered and this had affected 51,566 registered voters; that 5 polling stations had voter turn-out higher than the number of registered voters; that out of the 1332 stations, in 1157 there was a mismatch in the total number of votes cast for each of the 6 elections (affecting 552,283 voters); that from the search, out of the eight constituencies, only two Forms from two constituencies (Kangundo and Kathiani) accounting for 108,384 registered voters had been uploaded, and that there was no Form 37B uploaded for the entire Machakos County. Dr. Akala's further analysis had allegedly shown that on checking the Forms 37A received from the petitioners' agents against the Forms 37A received from the IEBC portal and those from the 2<sup>nd</sup> respondent, there was revealed glaring differences and inconsistencies between the Forms ranging from the presiding officers and the deputy presiding officers not signing, mismatch in the tallies, and different Forms signed by different presiding officers and deputy presiding officers, all affecting 50,000 valid votes.

40. The 1<sup>st</sup> and 2<sup>nd</sup> respondents called the Mwala constituency Returning Officer Leonard Njenga (DW 1) to testify. The 2<sup>nd</sup> respondent (DW 2) also testified. The evidence of DW 1 was that all the results from the 213 polling stations in the constituency were duly captured in Form 37B which had six pages; that all the results from the Forms 37A as tallied in Form 37B showed that the 3<sup>rd</sup> respondent had got 42,629 votes (and not 21,369 as alleged) and the 1<sup>st</sup> petitioner had got 20,846 votes. The 3<sup>rd</sup> respondent testified to deny there were any inconsistencies in the Forms or results. The respondents testified that neither the petitioners nor their agents had filed any complaint, either oral or written, with the IEBC regarding the alleged inconsistencies or anomalies.

41. It is material that Dr. Akala was not called to testify, and his alleged analysis was not produced in evidence. Dr. Akala swore an affidavit which was filed, meaning the petitioners intended him to be a witness. His non-calling was not explained. The agents who allegedly collected the inconsistent or anomalous Forms and results were not called to testify. I find that the allegation was not materially substantiated.

42. The petitioners pleaded in paragraphs 77 to 81 of the petition that in over 300 polling stations their agents were denied access and/or were chased away by presiding officers; as a result, the agents in the polling stations were not issued with Forms 37A; that 119 polling stations in Masinga, Yatta, Kangundo, Kathiani, Machakos Town and Mwala constituencies did not have Forms 37A; that in at least 86 polling stations their respective Forms 37B were completed without supporting Forms 37A; that the missing Form 37A from Masinga, Yatta, Kangundo, Kathiani, Machakos Town and Mwala constituencies accounted for 28,000 votes; and, that without the supporting Forms 37A the results declared in Forms 37B could not be verified and their integrity ascertained. The 1<sup>st</sup> and 2<sup>nd</sup> respondents denied that any of the petitioners' agents was denied access into, or chased away from, any polling station. DW 1 stated that all the agents who were present were handed over results. DW 1 and DW 2 stated that they did not receive any complaints on the alleged matters. When the 1<sup>st</sup> petitioner testified she stated that she was informed that over 300 of her agents were chased and/or denied access. This means that, she did not

herself witness the denial of access or the chasing away. Those who were chased away or were denied access did not testify. They did not testify to say that they had not been given the respective Forms 37A. I find that the claim was not proved.

43. It was alleged in paragraphs 84 to 91 of the petition that Forms 37B for Mwala, Machakos Town and Matungulu constituencies did not bear the required security features; the returns used in a material number of stations at constituency level were not in the prescribed Forms 37B contrary to **Regulation 87(1)(b)** of the **Elections (General) Regulations**; and that the deliberate use of inconsistent and different Forms and returns demonstrated lack of consistency, uniformity, neutrality and impartiality, and indicated an intention to manipulate the results. DW 1 and DW 2 testified that all Forms had security features which included water marks and serial numbers. DW 2 stated that since the Forms filed in court were photocopies, some of the security features had disappeared during photocopying. Her case was that only Forms 37A were in prescribed form since they captured the final results as counted and declared by the presiding officers. According to her, and indeed DW 1, IEBC had given a format in excel on how to capture data to generate either Forms 37B or Form 37C. It followed that security features would only be found in Forms 37A. This was also the submission and contention by Mr. Kimani Muhoro for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Mr. Otieno's other complaint was that, as required by **Regulation 87(2)** of the **Elections (General) Regulations, 2012**, DW 2 had not in Form 37C completed and declared results of all polling stations for each candidate; that all polling stations, codes and candidates, constituency subtotals and county totals should have been reflected in Forms 37C, and, now that this had not been done, the declaration in Form 37C was not valid. Mr. Kimani Muhoro's response was that this issue had not been pleaded and evidence given thereon, and therefore could not be raised in the submissions.

44. I agree that the issue that Form 37C was not valid because it did not include the information contained in **Regulation 87(2)** cannot be raised if it was not one of the grounds on which the petition was based. Further, I have found in the foregoing that the results in Form 37C were acknowledged by Wiper Party. More important, and for the avoidance of doubt, Forms 37A contain the primary results in a gubernatorial election. These results cannot be varied by the constituency returning officer in Form 37B or the county returning officer in Form 37C. Any mistakes, if at all, therein cannot be corrected by these officials, or any other official, of the IEBC. It is only the election court that can interfere with them. Form 37B contains the tallying and collation of Forms 37A, and Form 37C contains the tallying and collation of Forms 37B. The county returning officer does not deal with Forms 37A when putting together Form 37C. In **IEBC –v- Maina Kiai & 5 Others [2017]eKLR** the court emphasized the finality of the results at the polling station in the following terms:-

**“It is clear beyond peradventure that the polling station is the true locus for the exercise of the voter’s will. The counting of the votes as elaborately set out in the Act and Regulations, with its open transparent and participatory character using the ballot as the primary material, means as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion.”**

It should be observed that had there been scrutiny of all original documents, most of the issues being raised by the petitioners could have been clarified.

45. It was alleged that there was deliberate omission in vote counting and transmission of results. Under this complaint, it was claimed that the votes cast in significant number of polling stations were not counted, tabulated and accurately collated; that in Mwala constituency, the results of 86 polling stations were not accounted for in Form 37B which affected 38,000 registered voters; and, that in several instances votes cast for the petitioner were deliberately understated from the results of Forms 37A to Form 37B thereby reducing the 1<sup>st</sup> petitioner's actual final result. In response, DW 1 stated that all results from the polling stations in Mwala constituency were received in the tallying centre and collated in Form 37B. DW 2 testified that at the county tallying centre, she received Forms 37B from all the 8 constituency returning officers, tallied them, and declared the final results on Form 37C. It was not for her to receive, tally or collate results from the polling stations as contained in Forms 37A. The 3<sup>rd</sup> respondent denied the allegations in the petition. Neither the 1<sup>st</sup> petitioner nor PW 2 gave evidence

regarding any results from any of the polling stations not having been included in the count. They did not give any evidence regarding the exclusion from the final tally of results of 86 polling stations from Mwala constituency. I find that this allegation was not substantiated.

46. It was alleged that there was variance in the number of total votes cast for the six elections (presidential, gubernatorial, senate, member of national assembly, woman representative, and member of county assembly). The allegation was denied by the respondents. During evidence, the petitioners did not call any witness to testify on the issue. No evidence was tendered to show how many people voted in each of the six elections, or to show that the votes in the gubernatorial election materially differed from those in the other elections. The allegation was, therefore, not proved.

47. In paragraphs 103 and 104 of the petition it was claimed that there was admission of more than one agent for the 3<sup>rd</sup> respondent in polling stations and tallying centres, and there were stations where only the 3<sup>rd</sup> respondent's agents were admitted. Under this limb, the petition alleged that in a significant number of polling stations and tallying centres the 1<sup>st</sup> respondent granted admission to more than one agent for the 3<sup>rd</sup> respondent, and 154 stations were named; that in most of these polling stations the presiding officers and deputy presiding officers were public officers in the Machakos county government thereby showing lack of impartiality and preferential treatment and, that in significant number of polling stations across the county, the only agents admitted were those of the 3<sup>rd</sup> respondent while in most cases the 1<sup>st</sup> petitioner's agents were denied access and no reasons were given by the presiding officers. DW2 testified that the polling stations were supposed to allow one agent per candidate at a time; that each agent was to produce an appointment letter and oath of secrecy; and that agents were designated for voting and/or counting. DW 1 and the 3<sup>rd</sup> respondent testified that no candidate or party was allowed more than one agent. I found in the foregoing that there was no evidence that any agent was denied access to any of the polling stations. The petitioners did not call any agent to come and say that the 3<sup>rd</sup> respondent was treated preferentially in matters of agents. **Section 30 of the Elections Act** allows political parties to nominate one agent for its candidates. The totality of the evidence of the 1<sup>st</sup> petitioner and the respondent would show that, for instance, the 1<sup>st</sup> petitioner as a candidate could have an agent in each polling station, and her party could also have its agent, or they share the same agent. Where Wiper Party had, in a polling station, gubernatorial, senate, member of national assembly, woman representative, and MCA candidates, there was a chance of more than one Wiper agent, as each candidate could opt to have his agent. It follows that the allegation was without basis.

48. In paragraphs 108 and 109 of the petition it was alleged that Forms 37A were not duly stamped or closed to prevent tampering after declaration. It was stated that a very large number of Forms 37A relied upon by the 1<sup>st</sup> respondent to declare results did not bear requisite stamp of the 1<sup>st</sup> respondent, and therefore the validity of the Forms was questioned; that most Forms were not closed; and that at Nduluku Primary School polling station Form 37A was clearly stamped "REJECTED" and yet the results therein still counted. For Nduluku primary school, DW 1 states that the stamp "REJECTED" was put there in error (human error) and that should not invalidate the results. As to the alleged non-stamping, DW 1 and DW 2 stated that the Forms presented to court, and also given to the petitioners, were photocopies; hence the stamps could not show. Otherwise the originals had stamps. I accept the explanations. In any case, scrutiny could have shown irregularities, if any. Further, all these Forms showed that agents had participated in their authentication by signing.

49. In paragraph 115 of the petition, it was alleged that non-participating candidates' agents signed results declaration forms. The petitioners complained that, contrary to **Regulation 79(2A)(b) of the Elections (General) Regulations, 2012**, a sizeable number of Forms 37A, B and C were signed by strangers; and, that in most of the affected stations and tallying centres the 1<sup>st</sup> petitioner's agents were denied access. The response by the respondents was that in over 99% of Forms 37A reasons for the failure of agents to sign were noted. It is critical that no evidence was given regarding the strangers who signed the results declaration Forms. Secondly, no agent was called to testify that he was present at the polling station, witnessed the voting and counting and that he was refused to sign the results declaration Forms. No agent came to say strangers participated in the election process.

50. It was claimed that in over 100 polling stations across the county, none of the candidates or their agents signed the results declaration Forms, which was contrary to **Regulation 79(2A)(b)**, and that the presiding officers did not record their failure to sign. Again, no agent or candidate was called to state that he was present at the polling station when the votes were counted and that he was refused to sign. In any case, and this was the case for the respondents, under **Regulation 79(5)**, the absence of agents at the counting or declaration of results in itself cannot invalidate an election result.

51. In paragraph 122 of the petition it was pleaded that there was alteration and tampering with Forms 37A and yet there was no countersigning. Four polling stations were given in the particulars. They were from Mwala constituency. DW 1 stated that he looked at the Forms and saw no evidence of alterations. In my considered view, only scrutiny of the crucial Forms could have revealed whether the complaint was merited.

52. Lastly, it was pleaded in paragraph 124 of the petition that a number of Forms 37A and 37B were executed by persons not gazetted as either presiding officers or returning officers. During evidence, it appeared that what the petitioners had a problem with was the fact that initially Nicholas Kalimi had been appointed and gazetted as returning officer for Masinga and Lucy Mbithe John for Yatta and the two were swapped. The 2<sup>nd</sup> respondent testified, and produced a corrigenda, to confirm the swapping. I find that nothing turns on these changes on the appointment of the two officers. It was not alleged that the change in any way affected the voting process, or the results, in the two constituencies.

53. The next issue for determination was whether the principles laid out in the Constitution were violated during the election. The principles are basically entrenched in **Articles 10, 38(2), 81(e), 86 and 88**. The substantial complaint by the petitioners was that the 1<sup>st</sup> respondent appointed over 300 of the Machakos county government employees to work as returning officers, presiding officers and polling clerks during the gubernatorial election; that these were public officers who were working under the 3<sup>rd</sup> respondent as the incumbent governor; and that the appointment was with his approval, encouragement, convenience and/or with his influence. Not only was it illegal under **rule 2(1) (b)** of the Code of Conduct for members and employees of the 1<sup>st</sup> respondent, it was argued, but also offended **Article 81**. It was contended that, by this appointment, the independence of the 1<sup>st</sup> respondent to impartially manage the election was compromised; hence the election did not meet the constitutional requirement of being free and fair.

54. The petitioners called Christopher Mutinda (PW2) to testify in bid to prove this ground. PW 2 was the secretary of Kenya County Government Workers Union Machakos county branch, and an employee of the county government. He maintained a register of all employees who were members of the union. He testified that he was aware that county employees had participated in the election as 1<sup>st</sup> respondent's officials. It was his case that, in so doing, the employees were guilty of election offences, and that the employment influenced the outcome of the elections. PW 2 was asked if he had availed the list of the over 300 officials that he was talking about. He admitted that he had not provided the list.

55. The 1<sup>st</sup> and 2<sup>nd</sup> respondents denied this allegation. They pleaded, and the 2<sup>nd</sup> respondent testified, that it was normal to engage public officials to help in the process of election as election officials. What happened in this election, and which was a standard practice, was that an advertisement was put up in newspapers of national circulation calling for those interested to serve as election officials. The recruitment was done, and list of successful officials shared with all political parties. The list was also displayed at the constituency offices. This was to invite any complaint, including complaint that any of the officials was not suitable. When there was no complaint they were allowed to help in the election. It was not known whether those appointed worked for the county government. They denied that the 3<sup>rd</sup> respondent had any role in the appointment, or that the officials in any way influenced the outcome of the election. The 3<sup>rd</sup> respondent testified that he was not aware that any county employee worked as an official in the election. He states that he was not involved in the recruitment of the election officials.

56. Mr. Gatonye for the 3<sup>rd</sup> respondent submitted that it was common knowledge that public servants are usually recruited during elections. He submitted that there was no evidence that the officials were

engaged at the behest of the 3<sup>rd</sup> respondent, or that the officials were biased against the petitioners.

57. During her evidence, the 1<sup>st</sup> petitioner stated as follows:-

**“It is true there was advert from IEBC to recruit election officials. I got list of presiding officers after the election. I did not know about these officials earlier. I had not challenged the list of officials. I did not question the list before elections..... I did not write to RO complaining about the list of election official.**

Her evidence confirmed what was stated by the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the recruitment was done publicly, and an opportunity was given to the parties and candidates to challenge the same. Secondly, neither the petitioners nor PW 1 testified as to any act or omission on the part of the recruited officials that gave the impression that they were either biased or that they in any way influenced the way the election was conducted. But more important, PW 2, who stated that county employees were engaged, did not produce the list of the employees so that a finding of fact be made on this. Who were they? Where did they serve? Who, among them, were presiding officers? Who were returning officers? Who were clerks? When asked, this is what he said –

**“I am the secretary of KCGWU Machakos Branch. I have not attached any document to show this position. I have not shown letter of employment by the Branch. My affidavit has no attachment. I see my affidavit. I have not attached list of employees. I have not attached list of my members.”**

He had stated that county employees were engaged by the 3<sup>rd</sup> respondent’s party as agents during the election. When questioned about it, he stated:-

**“I have not shown list of agents who worked for MCCP.”**

58. It was submitted by Mr. Willis Otieno for the petitioners that in employing the over 300 employees to work for the 1<sup>st</sup> respondent during the election, **rule 2** of the IEBC Code of Conduct was breached. I have looked at this provision. It relates to members and employees of the 1<sup>st</sup> respondent. It relates to the members of the Commission of the 1<sup>st</sup> respondent and to employees of the 1<sup>st</sup> respondent. I would imagine “**employee**” to refer to fulltime employee of the Commission. Even if it refers to part-time employees, including those who may have been engaged in this case, petitioners would have to show that they did not act impartially, or that they were influenced, or sought to influence the election. There was no evidence in that regard. The petitioners did not call evidence to show where the said employees were deployed, what is it that they did or did not do that compromised the election to favour the 3<sup>rd</sup> respondent, or at all.

59. In short, on the evidence, I am not able to find that it has been proved to the required standard that the 1<sup>st</sup> respondent engaged the employees of the Machakos county government to work as returning officers, presiding officers or polling clerks in the gubernatorial election held on 8<sup>th</sup> August 2017. Even if such employees were engaged, it was not proved what it is they did or did not do that compromised the election, or put to doubt the independence of the 1<sup>st</sup> respondent while conducting the election.

60. It was the evidence of the petitioner that when she went to vote, the KIEMS KIT did not identify her for a while. It eventually did and she voted smoothly. There was nothing in the station that she could complain about. She did not call any witness who went to any of the 1332 polling stations and observed anything unusual. It was not shown any voter was turned away. It was not shown that any non-registered person voted. There was no evidence that more people than those registered voted. There was no evidence to show that any election official sought to influence any voter to vote in a particular manner. No candidate or agent sought the recount of votes, and was not allowed. There was no evidence that the polling stations closed earlier than time allocated. There was no violence that was shown in any station. There was no intimidation. There was no campaign that was shown to have occurred in any station.

61. I have considered the evidence that was made available, and the submissions by counsel. I have come to the conclusion that the petition lacks merit. I find that on the whole the Machakos gubernatorial election was conducted in a free, fair, credible and transparent manner, and the results declared reflected the will of the people of Machakos County. I will dismiss the petition with costs.

62. Regarding costs, it is an accepted principle that they follow the event. The court considers that costs should not be too high as to make it impossible for parties to access electoral justice. Then, the court has to consider the nature of the petition, and the work done to prepare and conduct the same. The 3<sup>rd</sup> respondent asked for Kshs.10,000,000/= whereas the 1<sup>st</sup> and 2<sup>nd</sup> respondents asked for Kshs.12,000,000/=. The petitioners did not make reference to the amount of costs. Doing the best that I can, I order that the petitioners shall jointly and severally pay Kshs.5,000,000/= to the 1<sup>st</sup> and 2<sup>nd</sup> respondents and Kshs.5,000,000/= to the 3<sup>rd</sup> respondent. The total amount shall be kshs.10,000,000/=.

63. Finally, under **section 75(3)(a)** of the **Elections Act**, this court determines and confirms that Alfred Nganga Mutua was at the general election held on 8<sup>th</sup> August 2017 validly elected as the governor for Machakos county. 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 Senate.

**DATED and DELIVERED at MACHAKOS on the 9<sup>TH</sup> day of FEBRUARY 2018.**

**A.O. MUCHELULE**

**JUDGE**