



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

ELECTION PETITION 2 OF 2017

HONORABLE MARTHA KARUA.....1ST PETITIONER

HONORABLE JOSEPH GACHOKI GITARI.....2ND PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....1ST RESPONDENT

MR. SEKI LEMPAKA.....2ND RESPONDENT

HON. ANN WAIGURU.....3RD RESPONDENT

HON. PETER NDAMBIRI.....4TH RESPONDENT

INTRODUCTION AND BACKGROUND:

JUDGEMENT

1. The gubernatorial elections for Kirinyaga County were held in the general elections held in the Country on 8/8/2017. The Petitioners Hon. Martha Wangari Karua & Hon. Joseph Gachoki Gitari and the 3rd and 4th Respondents Hon. Ann Waiguru and Hon. Peter Ndambiri were among the contestants for the gubernatorial elections. The 1st respondent Independent Electoral and Boundaries Commission conducted the elections and after tallying all the votes cast in the gubernatorial election for Kirinyaga County and in compliance with **Article 180(4) of the Constitution** declared that the 3rd and 4th respondents had received the greatest number of votes and were therefore the Governor elect and the Deputy Governor elect. **Article 180(4) of the Constitution Provides:**

“If two or more candidates are nominated, an election shall be held in the county and the candidate who receives the greatest number of votes shall be declared elected.”

2. The Petitioners Hon. Martha Wangari Karua and Hon. Joseph Gachoki Gitari who were the aspirants and running mate respectively in the elections of Governor Kirinyaga County filed this petition contesting the return of Hon. Ann Waiguru by the Independent Electoral Boundaries Commission as being duly elected as the Governor Kirinyaga County in the general election held on 8/8/17. Though the Petitioners did not set out the declared results of the election as mandatorily required under **Rule 8(1)(c) of Elections (Parliamentary and County Elections) Petitions Rules** 2017 which provides:

“An election Petition shall state –

The results of the Elections, if any, and however declared.”-

The results were as follows:-

1. Hon. Anne Waiguru – Jubilee Party – 161,343 - 54.05%
2. Hon. Martha Karua – Narc Kenya - 122,067 - 40.81%

3. Bedan Muriithi Kagai – Independent - 9,806 - 3.28%
 4. Joseph Kathuri Ndathi – Independent - 4,663 - 1.56%
 5. Kennedy Karani Macharia – MCCC - 899 - 0.3%
- TOTAL VALID VOTES - 299,166**

3. This court had struck out the petition for failing to comply with the rules 8(1) of Elections (Parliamentary and County Elections) Petition Rules on stating the date of declaration of results and the tabulated results in an application dated 15/11/2017.

The petitioners appealed to the Court of Appeal and in a judgement of the Court dated 2.3.2018 the Court of Appeal set aside the ruling of this Court and ordered the parties to appear before this court for directions on hearing and disposal of the hearing.

4. The petitioners filed a formal application asking the court to recuse itself. The application was declined and court directed that it would comply with the Judgment of the Court of Appeal. The ruling is dated 6/4/18. The parties took directions and matter proceeded to hearing.

PETITION

5. In the introduction of the petition, the petitioners state that in a binding decision of the Supreme Court of Kenya in ***Petition No-1- 2017 Raila Omolo Ondinga & Others –v- I.E.B.C & Others*** which determined that the Presidential election was not held in accordance with the Constitution and other applicable laws and was invalid null and void. The petitioners state that the gubernatorial election for Kirinyaga County which was held contemporaneously with the Presidential Election must also be declared invalid, null and void. The petitioners sought to argue this as a preliminary point which they did and this court gave a ruling dated 28.9.2017 and dismissed the application.

6. The petition is based on the following facts and grounds.

· Elections were not credible, free, fair or verifiable since there was;

1. Cheating.
2. Intimidation
3. Voter bribery
4. Exclusion of the petitioner’s agents.
5. Use of unauthorized persons to man Polling stations.
6. Tampering with ballot boxes.
7. Forgery of ballot papers.
8. Breach of mandatory statutory and Constitutional requirements in voting, counting, tallying and transmission of votes across the County.

7. These are expounded under two headings.

- (1) Petitioner’s agents disallowed and kept out of polling stations.
- (2) Canvassing and voter bribery and other electoral offences/malpractices.

8. Under the first heading the following is stated:-

- (1) The petitioner’s agents were disallowed in many polling stations and hence denied the right to witness the voting and the counting of ballots at the polling stations. The excuse given by the Presiding Officer was that the letters appointing the agents did not have I.E.B.C stamps. Appointing letters not having I.E.B.C stamps is not a requirement under the law. The I.E.B.C issued badges for party agents and the appointing letters (if any) were to originate from the appointing principals.
- (2) The Petitioner reported the barring of her agents to the County Returning Officer, one Mr. SEKI LEMPAKA and the 2nd Respondent who promised to call the Returning Officers and warn them but the problem persisted.
- (3) In some polling stations all agents had been barred from polling stations except the Jubilee Party agents.
- (4) The Petitioners agents were not allowed to witness the opening of ballot boxes and hence the integrity of the same cannot be verified.

(5) The results transmitted by the Presiding Officers to the County Tallying Centre and subsequently to the National Tallying Centre were based on forged forms that did not bear signatures of the Petitioner's agents.

9. Under the 2nd heading the following is stated:-

(1) The Deputy Chairperson of the Jubilee Party, Muriithi Kangaru, was canvassing and bribing voters at Kangaru Primary School and other areas with the facilitation of the OCPD Mwea West one Suarey Kiptoo and two of his officers.

(2) The Presiding Officer at Kangaru Primary, upon being notified of the bribery and canvassing, indicated that he was not aware of the bribery but would be more vigilant thereafter. Various agents of the 3rd respondent were also bribing voters.

(3) Particularly the Head Teacher of Mutithi Primary School was with a printed list of voters at the entrance of Mutithi Primary School polling centre where she was intercepting voters, checking their names on the printed voters list canvassing and bribing them before they entered to vote telling them to vote for the respondent. Tabitha informed me that she had confiscated the said printed voters list from the Head Teacher and kept it as evidence.

(4) The 4th Respondent, and the Returning Officer for Mwea Sub County locked up themselves in the hospitality room at Wang'uru Girls Tallying Centre. I and my running mate Hon. Gitari the 2nd Petitioner rushed to Wang'uru Girls tallying center and on being asked why he was locking up himself with a candidate he first denied but later said that he only greeted him.

(5) Ballot boxes from some areas such as Ciagini Primary School were tampered with before tallying.

(6) At Ciagini Polling Station the Presiding Officer was caught red handed opening a sealed ballot box.

(7) At Thiba Polling station a Mr. Juma, who was not the Presiding Officer, took control of the station with the help of the Returning Officer.

(8) At Ngurubani Primary one Hon. Alfred Nderitu took control of the polling station and Presiding Officer took orders from him.

(9) The upshot of the foregoing is that the election process from voting, counting, tallying and declaration of results was not free, fair or verifiable and that the process violated mandatory statutory and constitutional requirements.

(10) The 3rd Respondent's votes were inflated by over 48,000 votes distributed in a majority of the polling stations throughout the count as can be evidence on the forms.

(11) The Presiding Officers colluded and allowed voters to breach secrecy of the ballot by checking on each other's choice to merit being paid for voting for the competition.

10. BASED ON THESE GROUNDS THE PETITIONERS SEEK THE FOLLOWING ORDERS:

a) An order that the decision of the Supreme Court in Petition No. 1/2017 is binding on this honourable court and the petition must be allowed. Without prejudice to prayer(a).

b) An order do issue, compelling the 1st respondent to provide and avail the electronic information of the Kirinyaga County Gubernatorial elections.

c) A declaration that the election for the position of Governor Kirinyaga County was not free, fair and verifiable and therefore null, void and invalid.

d) A declaration do issue that the 3rd respondent was not duly elected as Governor Kirinyaga County.

e) A declaration do issue that the declaration of 3rd respondent as the winner for the gubernatorial elections for Kirinyaga County is null, void and invalid.

f) The honourable court be pleased to issue an order for a afresh election for the position of Governor Kirinyaga County.

g) A declaration that the 3rd respondent is not fit to contest for the gubernatorial position for Kirinyaga County or any other elective post for committing or aiding the commission of electoral offences.

h) Costs of this petition.

11. The petition was supported by the supporting/verifying affidavit of Hon. Martha Wangari Karua sworn on 5th day 2017 (sic) where she gives details of the grounds, stated in her petition. She also filed affidavits of her witnesses.

12. The 1st and 2nd respondent filed a response dated 18/9/17 and they denied that the petitioner's agent were disallowed in many polling

stations. They aver that all the Presiding Officers allowed the agent of all candidates in the polling station to witness voting and counting as long as they had the required documents which were:

- a) National Identity Card.
- b) Copy of Oath of Secrecy duly commissioned by a commissioner for oaths.
- c) Appointment letter from either a political party or candidate.

13. They deny that the petitioner's agents were not allowed to witness the opening of ballot boxes and aver that all the agents who had arrived at the Polling station were allowed to witness irrespective of the party or candidate they represented. They also deny that the transmitted results were based on forged forms that did not bear signatures of petitioner's agents and aver that agents who were present at time of closing of voting process signed all the necessary documents.

14. On allegation of canvassing and voter bribery and other electoral offences/malpractices, the 1st& 2nd respondents aver that they were not aware of canvassing and voter bribery at Kangaru Primary School and other areas as alleged. That they had posted names of the registered voters at the polling station and anybody could have made a copy. They deny that the Returning Officer for Mwea Sub-County locked themselves up at the hospitality room at Wang'uru Girls. They deny the allegation of tampering with ballot boxes. They also deny that a Mr. Juma and Hon. Nderitu took control of Thiba and Ngurubani Primary Polling stations and state that the Presiding Officers were firmly in control. They also deny that the votes of the 3rd respondent were inflated by over 48000 and that Presiding Officers colluded and allowed voters to breach the secrecy of the ballot by checking the other's choice to merit being paid for voting and state that those were mere imaginations. They pray that the petition be dismissed.

15. The response is supported by the replying affidavit of Samuel Seki Lempati sworn on 18/9/2017 and annexures. He also filed affidavits of his witnesses.

16. The 3rd and 4th respondents filed a response to the petition dated 16/9/2017 and state that they deny that the Supreme court decision in Presidential **Petition No -1- 2017** is binding on this court or has any bearing in the final determination of this gubernatorial petition. They state that the respondent exercised its powers and performed its functions in relation to the elections in accordance with the law, that is that Constitution and all the relevant electoral laws and regulations. They reiterate the legal presumption on elections in the maxim – '***Omnia praesumuntur rite, at Salemwiter esse acta***'- which stipulates that all acts are presumed to have been done rightly and regularly until the contrary is strictly proven by the petitioners who have the burden of proving the disputed allegations contained in their petition. They further state that the allegations are bare, unsubstantiated and are devoid of judicial cogency.

17. That the allegations at paragraphs 1 and 1-5 of the petition which are denied are in the nature of election offences which require prove and the persons named are presumed innocent until proved guilty. That the allegations which are not clear, cogent and certain violates the rights of the respondents under **Article 50 of the Constitution** by failing to provide sufficient details, not informing the respondents in advance of the evidence they need to rely on and not providing the respondents with opportunity to adduce and challenge evidence. They state that having participated in the elections they can state that the elections were free and fair, the electorate came out in large numbers to exercise their political rights under Article 38 of the Constitution and the 1st respondent complied with electoral laws and regulations and the voting process continued smoothly throughout the County. That agents of candidates were allowed at the polling stations to monitor the process of voting, counting of votes recording of results and transmission of the results.

18. The 3rd& 4th respondents deny the allegations that petitioners agents were disallowed and kept out of polling stations. They deny the allegations of canvassing, voter bribery and other electoral offences and malpractices. They submit that the petition discloses no reasonable cause of action and urges the court to dismiss it summarily pursuant to **Section 79 of the Elections Act**. That the court to determine that Hon. Anne Waiguru and Hon. Peter Ndambiri were duly elected and the election was valid. The petition dated 5/9/17 be dismissed and the 3rd& 4th respondents be awarded costs.

19. The Court gave the following rulings:

- Ruling dated 6.4.2018 on an application by the Petitioners for the Judge to recuse herself and on Jurisdiction. The Court held that the Court of Appeal had addressed the allegation of bias and refused the application. The Court also stated that it had Jurisdiction.
- Ruling dated 4.5.2018 which allowed the Petitioner to comment on the report of the Deputy Registrar.
- Ruling dated 20.4.2018 arising from notice of motion dated 12.4.2018 which gave the orders that the Deputy Registrar's report be produced as the Court was entitled to a return and declined a prayer for filing of further affidavits to introduce new evidence in form 37 A after the petition was served with certified copies by I.E.B.C.
- The Court directed that the Registrar to appear in Court and produce his report.
- The Court directed the parties to submit on the report.
- Ruling on affidavits of witnesses who were not called though they had filed affidavits. The Court ruled that since the petitioner did not wish to call the witness, their affidavits could not be relied on.
- The Court gave Ruling on admissibility of video evidence and directed that the video was not admissible as there was no

compliance with the provisions of the Evidence Act. It also dealt with the issue of production of exhibits not attached and not filed with affidavits of the witnesses. Ruling dated 21.5.2018.

Lastly a ruling dated 21.5.2018 on cross examination of the 2nd respondent Mr. Zeki on the Registrar's report. Petitioners were allowed to cross-examine him. Directions were also given in the proceedings arising from objections raised.

20. ISSUES FOR DETERMINATION.

Based on the issues filed by parties and grounds in the petition, the court narrowed down the following issues for determination which the parties accepted. They are follows:-

SUMMARY OF ISSUES FOR DETERMINATION

1. To what extent is the Judgment of the Supreme Court of Kenya in ***Raila Amolo Odinga & Others –vs- I. E. B. C*** applicable and binding on this Court.
2. Was the Kirinyaga gubernatorial election marred by intimidation, voter bribery, exclusion of petitioners' agents, use of unauthorized person to man polling stations, tampering with ballot boxes, forgery of ballot papers resulting in an election that was not credible, free and fair.
3. Was the Kirinyaga gubernatorial elections marred by breach of mandatory, statutory and constitutional requirements in voting, counting, tallying and transmission of votes across the County.
4. Whether this court should make the following declarations:
 - i) The Kirinyaga gubernatorial elections was not free, fair and verifiable and is therefore null and void.
 - ii) That Ann Waiguru, the 3rd respondent was not duly elected as the Governor Kirinyaga County.
 - iii) That the declaration of Hon. Ann Waiguru as the winner of gubernatorial elections for Kirinyaga County is null, void and invalid.
5. Whether the Court should direct the holding of fresh elections for the position of Governor Kirinyaga County.
6. Whether the Court should make a declaration that Hon. Ann Waiguru is not fit to contest for the gubernatorial position of Kirinyaga County or any other elective post for committing and aiding in the Commission of electoral offences.
7. Costs.

21. In support of the petition, the petitioner adduced evidence and also called eight -8- witnesses. The 1st and 2nd respondents called nine witnesses. The 3rd & 4th respondent called five witnesses. At the conclusion of the hearing I directed the parties to exchange written submissions and highlight them at a later date. This was done.

22. The General Principles:-

The people of Kenya exercises their sovereign will and the political rights enshrined under **Article 1 and Article 38 of the Constitution**. The general election and the electoral process put in place the mechanisms for the realization of that will. **Article -1-(1) of the Constitution** provides that:

“All sovereign power belongs to the people of Kenya and shall be exercised only accordance with this constitution.”

Article 38 of the Constitution guarantees the right of the people to exercise that power. It provides:-

38. (1) Every Citizen is free to make political choices, which includes the right –

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

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

- (a) any elective public body or office established under this Constitution; or

(b) any office of any political party of which the citizen is a member.

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

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and

(c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

24. In compliance with the realization of the sovereign will the electoral system in place must ensure that the elections are free and fair. This is one of the guiding principles which must guide the electoral system. **Article 81(e) of the Constitution provides:**

“The electoral system shall comply with following principle free and fair elections, which are:-

i) By secret ballot,

ii) free from violence, intimidation, improper influence or corruption.

iii) conducted by an independent body.

iv) transparent and

v) administered in an impartial, neutral, efficient accurate and accountable manner”.

25. Under the constitution, it is the responsibility of the body entrusted with the duty to conduct the election that has an obligation to ensure that the voting is free and fair. That body is the I.E.B.C which is established under **Article 88(1) of the Constitution** and enjoins it to exercise its powers and perform its functions in accordance with the constitution and national legislation. **Article 86 of the Constitution** provides:-

86. 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.

26. It is this electoral system which is envisaged in the constitution that has the function and is designed to ascertain the will of the people. The fundamental principle in the resolution of the electoral disputes stands to ascertain the will of the people and give it unwavering effect while upholding the guiding principles stated above. The election court does not become a forum to re-look afresh to the elections nor is it an opportunity to conduct a fresh election through the court. There is a presumption that the elections were conducted in accordance with the Constitution and the law and the candidate validly elected unless the contrary is proved.

27. The courts would have nothing to do with elections unless and until a dispute is filed in court. The court then determines the dispute based on the allegations pleaded in the Petition. This is provided under Article 87(1) of the Constitution which provides:-

87.(1) Parliament shall enact legislation to establish mechanisms for timely settling of electoral disputes.

(2) Petition concerning an election, other than a Presidential election, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission.

(3) Service of a petition may be direct or by advertisement in a newspaper with national circulation.

28. This has been done under the Elections Act and Rules there under.

There is evidential burden on the petitioner who alleges that the elections were not conducted in accordance with the principles in the constitution and the law, and that there were illegalities and irregularities to discharge that burden of proof to the required standards. The

prove that is to be discharged is that failure to comply with the constitution and the law should inevitably render the said elections invalid. This was stated in the Supreme court on the case of Raila Odinga –v- I.E.B.C and Others Pet. No. 5/2013 where the court stated:

“ This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies, ‘Omnia praesumitur rite et solemniter esse acta’. all acts are presumed to be done rightly and regulary, so the petitioner must set out by raising firm and credible evidence of the public authority’s departure from the prescriptions of the laws. The threshold of proof should, in principle, be above balance of probability, though not as high as beyond reasonable doubt – save that this would not affect the normal standards where criminal charges linked to an election are in question.”

29. It follows that what the petitioner embarks on is to prove what she has laid before the court to plead illegalities and irregularities. The party is bound by her pleadings. This is trite and it is what is pleaded supported by her affidavit, the affidavits of witnesses and the testimonies of the witnesses sets out to prove and the court renders a determination. The determination must be based on what is pleaded. The court is bound to consider what is pleaded, a party cannot deviate midway from what is pleaded and bring in new matters. This is meant to ensure that the respondents are well informed in advance of the allegations and the case of their opponent and prepare the evidence to adduce and to challenge evidence. In Raila Amollo Odinga & Another –v- Independent Electoral and Boundaries Commission, and Others, S. C. K. Pet 1/2017 the Supreme Court quoted with approval the Supreme Court of India in Arikala Narasa Reddy –v- Venkata Ram Reddygari & Another. C.A No. 5510 -5711 of 2012 (2014) 2 SCR where it stated:

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also settled legal proposition that no party should be permitted to travel beyond its pleading and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”

30. It behoves the court to consider what is pleaded in the petition the supporting evidence and the evidence tendered to determine the petition based on the agreed issues for determination.

PETITIONER’S CASE

31. The 1st petitioner Hon. Martha Wangari Karua in her affidavit deposes that from around 8.00 a.m on the polling day she started receiving information and complaints that her agents had not been allowed in many polling stations throughout the country. She depones that she went to Kimunye Polling Station -2- No. 020101050400202 and found her ward super agent one Loise Karua together with her agent Lucy Njeri outside Kimunye Primary Polling Station -2-. She engaged the Presiding Officer who said the letter appointing her agent did not have I.E.B.C stamp. That the agent was not present to witness the opening of ballot boxes and the beginning of voting process contrary to the law. The petitioner further deposes that the barring of her agents appeared a generalized problem and so she called Mr. Seki the 2nd respondent and made the complaint. Mr. Seki promised to call the Returning Officers in all the four constituencies to direct them to allow the agents in the polling station. She disposes that the problem persisted despite that and she continue to receive calls complaining about barring of her agents. She lists the following Polling Stations as the stations where her agents were barred.

32. A.MWEA CONSTITUENCY.

- (i) Kangai Ward
- (ii) Mianya - 020100049701801,02,03.
- (iii) Ndaba – 020100049702301,02
- (iv) Kangure Primary – 020100049702001,03,03
- (v) Komboini Primary – 020100049702401,02,03

B.WAMUMU WARD

- (vi) Ciagini Primary School – 020100049903601,02,03,04
- (vii) Gategi B. Market Center – 020100049904101

C. NYANGATI WARD

- (i) Ahiti Ndomba Primary – 020100050004501,02 agents were sent away multiple times.
- (ii) Kimbimbi Primary School – 020100050004301,02,03
- (iii) Kianganga Cattle Dip - 020100050004701,02
- (iv) Kangu Nursery – 020100050005201,02

- (v) Urumandi Coffee Factory –020100050004601.
- (vi) Kutus Primary – 020100050005301,02,03,04
- (vii) Mutungara Primary – 020100050004401,02
- (viii) Kiorugari Primary – 020100050004201,02,03
- (ix) Kithiriti Primary –020100050005101
- (x) Kutus Secondary – 020100050005501,02.

D. THIBA WARD

- (i) Nguka NIB Stores – 020100049803201,02,03; a Mr. Juma took control of the station in collusion with the Returning Officer.
- (ii) Mokou Primary – 020100049802501,02,03.

E. TEBERE WARD

- (i) Mucii Wo Urata Youth Polytechnic – 020100050309401,02,03,04 all four agents were kept out till 1 P.m.
- (ii) Wanguru Secondary School – 020100050309301,02,03,04,05,06,07.
- (iii) Ngurubani Primary – 020100050309001,02,03,04,05,06,07,08,09,010 Hon. Nderitu took control of the polling station and the Presiding Officer took orders from him.
- (iv) Kiarukungu Primary – 020100050309101,02
- (v) Kiamanyeki Primary – 020100050308801,02,03
- (vi) Mithuthini Market Center – 020100050308501,02

F. MUTITHI WARD

- (i) Mutithi Primary – 020100049601001,02,03 agents barred till about eleven a.m.
- (ii) Riandira Primary – 020100049601201,02
- (iii) Rukanga Primary – 020100049600801,02 access given at about Nine Thirty a.m
- (iv) Wakaniu Primary School – 020100049601501,02 agents barred till Two P.m.
- (v) Kandogu Primary – 020100049600401,02

G. MURINDUKO WARD

- (i) Difathas – 020100050106701,02,03
- (ii) Itangi Primary – 020100050107201,02.
- (iii) Kanjinji Secondary – 020100050105901,02
- (iv) Togonye Primary School – 020100050106001,02
- (v) Kadawa Primary School – 020100050107001,02
- (vi) Karuangi Primary School – 02010005010691,02,03 all three agents out.
- (vii) Ithiga Ria Njuki Primary School – 020100050106602
- (viii) Mathiga Primary – 020100050106501,02
- (ix) Gathigini Primary – 020100050106301,02

- (x) Ngucwii Primary – 020100050106101,02
- (xi) Ichangi Primary - 020100050106201
- (xii) Mugamba Ciura Primary School – 020100050105701,02
- (xiii) Urumandi Primary – 020100050106401,02 agents excluded during voting & counting.

H. GATHIGIRIRI WARD

- (i) Kirogo Social Hall – 020100050208201,02
- (ii) Kirogo Primary School – 020100050207901
- (iii) Mahigaini Nursery – 020100050207801,02,03
- (iv) Kiriko Primary –
- (v) Kiriko Social Hall – 020100050207501,02

I. KARITI WARD

- (i) Gacharu Primary School – 020102051106401,02
- (ii) Kahiro Primary School – 020102051106501
- (iii) Upper Sagana Primary School -020102051106601,02,03,04,05.
- (iv) Lower Sagana Primary – 02010202051106701,02,03,04
- (v) Thigirici New Apostolic – 020102051105801 agents barred in the morning and during counting.
- (vi) Thanju Primary – 020102051106801.
- (vii) Karima Primary School – 020102051106001,02

J. MUKURE WARD

- (i) Kiburu Primary School – 020102050902101,02,03,04
- (ii) Ndiriti Primary School – 020102050900101,02
- (iii) Gathambi Coffee Factory – 020102050900701
- (iv) Kairici Tea Buying Center – 020102050900801
- (v) Lower Baricho Primary School – 020102050902001,02,03,04

K. KIINE – WARD

- (i) CCM Kagio church hall – 020102051005201,02,03,04,05,06.

L. KANYEKIINE – WARD

- (i) Kiangungu Primary School – 020103051301701
- (ii) Mukinduri Primary School – 020103051301801,02,03,04
- (iii) Kianjege East Primary School – 020103051302001,02
- (iv) Kiaga Primary School – 020103051302901,02,03
- (v) Gitwe Primary School – 020103051302701,02,03

- (vi) Gatuto Primary School – 020103051302601,02
- (vii) Kirima Primary School – 020103051302401,02
- (viii) Kirinyaga Technical Institute – 020103051302801,02,03.

M. INOI – WARD

- (i) Kaaraini Primary School – 020103051505301,02,03,04,05.

N. KABARE – WARD

- (i) Kimunye Primary – 020101050400201,02
- (ii) Kutus Town Centre – 020101050401101,02,03

33. In her testimony she told the Court that there was exclusion of her agents. These was from the reports of super agents and agents in the County. She testified that she visited Kimunye Polling Station and found her agent Lucy Njeri outside. The Returning Officer told her that the letter the agent presented did not bear the I.E.B.C stamp. She informed her all she required was a letter appointing her. The Returning Officer relented and allowed the agent inside. She testified that she received information that at Ndaba all her agents were outside and that it was at 12.00 noon. She continued to receive information even in the afternoon. That in very many polling stations his agents were not able to witness the opening of the polling station or that assisted voters were not assisted according to their wishes. That it was a calculated plot to ensure that her agents were denied access to the polling station without any jurisdiction.

34. The petitioner has deponed and also testified in court that at Kangaru Primary School she was informed by Kennedy Muriithi and Jason Chewa that Muriithi Kanga'ra, the Chief campaigner of the 3rd respondent and Deputy Chairman of Jubilee Party was bribing voters. She hurried to Kangaru and found Muriithi Kang'ara with OCPD Mwea West Mr. Suarez. He confronted Muriithi Kangara but he denied that he was bribing voters. She entered the Polling Station with Muriithi Kang'ara and the Presiding Officer claimed not to be aware of the voter bribery and promised to be vigilant. She reported the OCPD to the County Commander Mr. Biriki on phone and Mr. Kitili Deputy Inspector General Kenya Police Service.

35. The petitioner testified that she continued receiving reports throughout the day of voter bribery on the polling queues at various polling stations by agents of the respondent such as Muriithi Kang'ara, Kianyaga, 4th Respondent, Hon. Nderitu and a Mr. Juma among others. At Kirinyaga Cenral she was informed of a supporter of the respondent Mary Wambui Ngengi was busy bribing voters at St. Joseph Primary School in full view of the police.

36. The petition deponed and testified in court that on 8/8/17 she received a call from her super agent Tabitha Mutero informing her that she found the head teacher of Mutithi Primary School with a printed list of voters at the entrance of Mutithi Primary Polling Centre intercepting voters, checking their names canvassing and bribing them before they entered to vote telling them to vote for 3rd respondent. That the said Tabitha Mutero informed her that she had confiscated the list and kept it as evidence. That Tabitha Mutro called her at 6.00 Pm and told her that 4th Respondent was at Wang'uru Girls tallying Centre and locked himself up in hospitality room with the Returning Officer Mwea and all Senior Police Officers present. Her running mate rushed to Wang'uru Girls tallying Centre and found he had already left. She confronted the Returning Officer but he denied vehemently. He finally admitted having met the 4th respondent and only greeted him.

37. At about 7.00 P.m. she received a message that her agent had been thrown out of the tallying centre during counting she went and found her agents about 200 metres and accompanied them back to the polling station and after engaging the Presiding Officer they were restored. She won at the station with a landslide.

38. On 9/7/17 at 5.52 a.m she received information through a call from Tabitha Mutero that they had caught a Presiding Officer of Ciagini outside Wang'uru tallying centre having broken seals of the Governors ballot box and tampering with the electoral materials contrary to the law. She called Mr. Seki and informed him and also wrote a letter to him demanding a recount. She went and found the P.O who claimed she had violated the gubernatorial box due to ignorance. It is her contention that the election was riddled with irregularities during voting, counting and tallying. The integrity of the ballots after counting cannot be ascertained as well as the integrity of the Counting and tallying process and integrity of the entire process. That the election did not meet the constitutional and statutory threshold for free fair and verifiable election.

39. I will now deal with the first limb of the Petitioner's grounds that is –

Petitioner's agents disallowed and kept out of Polling Station. Para 4 of the petition which I have quoted above.

The petitioner took us through various polling stations with regard to the allegation that her agents were disallowed in many polling stations and denied the right to witness the voting and the counting of ballots at the polling stations across the County. These are:

- Kangai Ward – Over Ten Polling Stations.
- Kimunye Ward – Five (5) Polling Stations.
- Nyangati Ward – 20 Polling Stations.

- Thiba Ward – Six Polling Stations.
- Tebere Ward – 28 Polling Stations.
- Mutithi Ward – 11 (eleven) Polling Stations.
- Murinduko Ward – 27 Polling Stations
- Gathigiriri Ward – Nine (9) Polling Stations.
- Kariti Ward – 16 Polling Stations.
- Mukure Ward – 12 Polling Stations.
- Kiine Ward – 6 Polling Stations.
- Kanjekiini Ward – 20 Polling Stations.
- Inoi Ward – 5 Polling Stations.
- Kabare Ward – 5 Polling Stations.

40. The summary of the issues which she pointed out in this regard were as follows:

- (1) The agents were not allowed at the polling stations to witness the sealing of the ballot boxes before the start of the polling stations to witness the sealing of the ballot boxes before the start of the polling.
- (2) The agents were allowed in the Polling Station late some at midday or after midday.
- (3) The agents were not present at the time of counting or were thrown out during counting.
- (4) The agents have not signed on the poll diary.
- (5) Strangers manning Polling stations.
- (6) The Polling diaries were forgeries. That time was written by one hand and in some station those who came early signed later than those who came earlier.

41. The Petitioner at Paragraph 17 of her Supporting Affidavit sworn on 5th day of 2017 (sic) she depones with specificity where her agents were barred. I have looked at this against the poll diaries which were filed by the 1st and 2nd respondent which the 2nd respondent stated were filed in response to the allegations by the Petitioner.

42. It is clear from the analysis of the poll diaries it will show that some of the agents reported to the stations but did not witness the start of polling while others did some were at the station throughout from start of polling to closure after counting.

43. I hasten to say that this did not affect agents of Narc Kenya only but also agents of other parties including those of Jubilee. The petitioner had a burden to prove that the agents were barred not due to their own fault or that of their principal but through the fault of I.E.B.C, He who alleges must prove. I have stated the petitioner's case with regard to agents. No particular provision of the law was cited in the petition with regard to allegation of barring. The petitioner listed various polling stations which I have considered and compared with polling station Diaries.

44. The petitioners did not give any particular polling station where all agents were barred except those of Jubilee. The diaries have not supported this claim. There are many stations where agents were present and those of Narc Kenya and Jubilee were not present. The petitioners did not specify the stations where agents were not allowed to witness the opening of ballot boxes to verify the integrity. In many of the polling stations, her agents were present from the time of start of polling to closure of counting. The petitioner avers that the agents were barred on allegation that the letter appointing her agents did not bear I.E.B.C stamp which she says was not a requirement under the law. Paragraph 5, 6, 7 of petitioner's affidavit states that Lucy Njeri was barred at Kimunye Polling Station on claims of appointing letters not having I.E.B.C stamp. Her witness Loise Wanjiru Karua, swore an affidavit sworn on 30/10/17. Paragraph -2- she depones that Lucy Njeri who she had recruited as an agent of 1st petitioner was barred because appointment letter should bear a stamp of Narc Kenya party.

45. She depones as follows at Paragraph 2, 3, & 4.

“(1). That at about 6.30 a.m I received a call from one Lucy Njeri Njagi who I had recruited on behalf of the Petitioners as an agent at Kimunye Primary School informing me that she had been barred from entering the polling station on the grounds that her appointment letter did not have a stamp of Narc Kenya Party.

(3) That I found this to be weird since Kimunye Primary School had two polling stations and one agent had already been allowed in with a Narc Kenya appointment letter similar to the one Lucy Njeri Njagi had.

(4) That I drove to Kimunye Primary and engaged the Presiding Officer who I came to learn later is Mary Nyambura Murigi, and who was adamant that Lucy Njeri Njagi's appointment letter should bear a Narc Kenya stamp".

46. This was at Kimunye Primary School where the petitioner was also present. The affidavit of Felix Wanjohi who was the Chief agent of the 1st petitioner stated that the agents were harassed and interfered with a fact not pleaded in the petition or petitioner's affidavit.

47. At Paragraph 12 he stated that he made inquiries with Presiding Officers and they quickly allowed the agents into voting hall but they never gave explanation on why they kept the agents away. He did not in his affidavit corroborate the petitioner and Loise Wanjiku Karua on reasons given for barring the agents.

According to his affidavit, no explanation was given.

48. ***In the case of Twehangare –v- Uganda – Cr. App No. 31 of 2001 (2003) UGA6*** where it was held –

“with regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.

49. Samuel Gachoki Cini in affidavit sworn on 6/9/17 talks of interference and frustrations of Hon. Karua's agents. He deponed that agents at Wang'uru Girls school polling station were not let in as they did not have I.E.B.C accreditation letters which he says were not a requirement. In his further affidavit he depones that at Ngurubani Primary the agents were allowed in on production of Narc Kenya appointment letters. That at request of Presiding Officer Ngurubani Primary School he supplied all the agents of petitioner with 1st respondent accreditation letters, a sample which was on affidavit of Priscilla Wanjiru marked PW2. Para -2- C he states that at Wanguru Girls the agents of the petitioners were struggling to obtain accreditation letters from the Returning Officer who had denied the Petitioners agent access.

50. None of the agents who were barred were called as witnesses. The affidavit of Mercy Njoki Kangi sworn on 6/9/17 depones that Hon. Karua's agent Mr. Muriithi was thrown out. She also saw one agent Mr. Wambugu Wa Rabano who was an agent of Wangui Ngirichi a candidate for Women Representative was thrown out. She depones that she questioned why the agents were thrown out when they had produced their I.E. B.C. appointment letters. The witness is stating that they had I.E.B.C appointment letters. The said Mr. Muriithi was not called as a witness and he never swore an affidavit. The petitioner stated during cross-examination that she did not find it necessary to file affidavits of the agents.

51. We have a situation where no single agent testified as to why he/she was not at the Polling station in time, why he/she was barred if at all and was not present at some point during polling. There are many reasons why agents could fail to be at polling station. A fact which the petitioner admitted during cross-examination. One is that one could oversleep and come late, sickness etc. It is only the agents who could tell. I understand the petitioners had many agents but she had a burden to discharge that the agents were not allowed through no fault of their own. In cross-examination she said she submitted a list to I.E.B.C and was left with a copy but did not attach it to her affidavit. The documents which were given to the petitioner's agents were not exhibited in court to show that they had in deed given the agents the required documents. The list of agents was not exhibited in court.

52. The evidence in support of the allegation on agents not being allowed in polling station is not cogent. A fact must be proved by evidence. Once the burden of proof is discharged, the burden shifts. The names of agents were not given. The Presiding Officers who barred agents had not been named. The petitioner submits that a list of agents was sent to Mr. Seki, that is a list of all the 569 agents. Mr. Seki 2nd respondent admitted that he received the list sent to 1st respondent by Narc Kenya Party. The petitioner during cross-examination said a witness would produce the list. The facts remains that the list was not availed to court, and there is no way of telling whether they are the same agents who went to the polling station on the day of polling. The 1st& 2nd respondent case was that as long as the agent had the requisite documents, that is to say;

- i) A letter of appointment as an agent from either the party or the candidate.
- ii) Copy of Oath of secrecy duly commissioned by a commissioner for Oaths.
- iii) National Identity Card.

53. They were allowed in the Polling Station. The Returning Officers from the constituencies where there were allegations of agents being barred, did testify in this court. They had sworn affidavits which they adopted as their evidence. These are:

Millicent Wanjiru Mbui, - Ndia Constituency,(DW -7-),

Julius Maingi – Mwea constituency (DW -8-).

Dominic Kapiri Leparmari – Kirinyaga Central Constituency – (DW -9-)

54. In their replying affidavits they annexed extracts of Polling Station diaries which I have referred above. There were no denials that the agents of Narc – Kenya who had signed at various times of polling were not Narc Kenya agents. Not a single agent was called to deny that he or she is the one who signed the polling diaries to confirm that they were present at the time stated. The 1st & 2nd respondent called a witness Mary Nyambura Murigi who was a Presiding Officer at Kimunye and stated that Lucy Njeri Njagi was allowed in when she came with the requisite documents. There was no affidavit sworn by Lucy Njeri. The evidence of Lucy Nyambura Murigi is credible and more so because there was a material contradiction between the petitioner and her witness Loise Wanjiku as to what documents this agent Lucy Njeri was required to have. I have pointed this out above. The petitioner testified that her agents had oath of secrecy and a letter from Narc Kenya showing they were her agents. PW-2- is on record saying that they had (that is agents) a letter from I.E.B.C. The evidence by PW-2- contradicts the petitioner's assertion that the agents did not require a letter from I.E.B.C. PW-2- , Mercy Njoki Kangi in affidavit sworn on 6/9/17 and filed in court the same day at Para -5- she states that she asked the Presiding Officer why she had thrown out the agents and they had produced their I.E.B.C appointment letters. The Petitioner during cross-examination admitted that strangers could not be allowed in the polling station and if the agents had no requisite documents he could not be allowed inside. The petitioner admitted during cross-examination that she has not attached any documents which they had at the stations where they were barred. The petitioner further admitted that failure by the agents to be at the station does not affect the voting. The petitioner was taken through the polling station diaries where he agents in the polling stations she was complained of had reported at the stations, signed the diaries and witnessed the certification of ballots and seals before polling started. He assertions that the agents were kicked out was not pleaded in the petition. In the Petitioner's Supporting Affidavit. Paragraph 15 talks of barring, Paragraph 16 talks of agents being denied access. Paragraph 17 lists the station where they were barred. Paragraph 31 talks of agents being thrown out during tallying, at 7.00 P.m. So it was expanding the scope of the petition by claiming that the agents were kicked out of the polling station.

55. There was no affidavit by any agent who avers that they were not allowed to witness the opening of ballot boxes. The petitioner has not in her affidavit sworn by an agent who was thrown out.

56. The witnesses PW-2- as I have pointed out talked of a letter from I.E.B.C to be agent in cross-examination. She did not talk of oath of secrecy and letter of appointment from party or candidate. It raises doubts on her credibility. When shown annexure PW-1- in affidavit sworn by Priscilla. She said the letter was similar to that one which was from Narc Kenya. She stated that they were given only one letter. This was a letter from Narc Kenya and yet she said she was an agent of Independent Candidate.

57. PW-5- Loise Wanjiku testified. In Cross-examination she said the agent Lucy Njeri was barred because she did not have party stamp, that is Narc Kenya and that it also needed to have I.E.B.C stamp. She stated that agents could not be allowed in without proper documentation. She was shown a letter with letterhead of Narc Kenya and stated that with the letterhead, no stamp of Narc Kenya was required. She also admitted that the Narc Kenya letter and accreditation letters would be used to allow the agents in the polling station. She said Lucy Njeri called her at 6.30 a.m though she had been given the letter at 6.00 a.m. She could not tell whether she was at polling station late or in time.

58. PW-6- Samuel Gachoki Cini who was a super agent for the petitioner at Tebere Ward testified that at 7.30 a.m some of the agents had not arrived at Wang'uru Girls. It shows it is the agents who were late they were not barred. He testified that agents were not allowed in for lack of accreditation letters from I.E.B.C.He said he did not know about the letter until that morning. He checked with the Returning Officer who said they would not be allowed without accreditation letters. The Returning Officer Julius Maungi gave him a letter to go and make photocopies Evidence that the agent Zippora reported at 7.30 a.m disapproved by poll diary which shows she signed at 6.00 a.m. He denied the allegation in the petition that all agents were barred at Ngurubani (page 13 of petition). Though he had said the agents were kept out upto 9.00 a.m at Mucii Wa Urata, she was shown documents – poll diaries which show they were there as early as 5.30 a.m. The same as Kiarukungu.

59. Felix Wanjohi who was petitioner's Chief Agent in his testimony in court and Cross-examination testified that he received calls that agents were not being allowed in. He said at Karoti Girls two of their agents were not in. There were long queues and voting was going on. He testified that the agents were given the requisite documents. He did not give the names of the agents. He did not produce a list of the agents and did not attach any document to show that the agents had the requisite documents. He said the minimum number of agents who were barred was 50 and the tally he had was about 50-60 agents. He did not give a single name of an agent who called him. He stated that calls were made by the super agents. He testified that no agent out of the 659 called him to say Form 37A was not properly filled or that any votes of a candidate were indicated more than what the candidate had garnered. He further stated that he was not at any polling station at 6.00 a.m to know why the agents were barred. During cross-examination he was taken through the polling station diary and admitted that the agents had signed as early as 6.00 a.m in some polling stations. In his affidavit he had not stated that he had agreed with Mr. Seki that the agents had the required documents.

60. The DW-2- Mary Nyambura Murigi was the Presiding Officer at Kimunye Primary Stream -2- testified that agents were supposed to produce a letter of appointment from candidate, oath of secrecy and ID Card. That she told Lucy Njeri she needed the three documents. That she did not tell the agent she needed a stamp. That the first time Lucy Njeri did not have the three documents the 2nd time she came with petitioner she had three documents and was allowed inside. She denied that she had asked for I.E.B.C stamp. The evidence is direct and shows why the agent was barred. The petitioner and her witness gave conflicting reasons why Lucy Njeri Njagi was barred. Loise Karua stated that no stamp would be needed since the appointing letter was on letter heads. The evidence by DW-2- shows that the agent was barred for not having the requisite documents. The witness stated that other agents had come and she did not admit them.

61. DW-4- Edward Munene Njoko the Presiding Officer at Karaini Tea Buying Centre testified that the Narc Kenya agent was not admitted as he did not have the requisite documents. He denied the allegations by Mercy Kangi (PW-2-). He attached polling station diary to show that the Narc-Kenya agent signed at sealing, at closing and affirmation at the time of closing and sealing of packages. The agent of Narc Kenya signed at affirmation of seals on ballot boxes. The agent Stephan Muriithi signed at all the material stages of the polling. He stated that the agent did not confront him, did not swear an affidavit and did not make allegations against him. This was shown on the diary.

62. DW-6- Francis Kariuki Mugo was Presiding Officer at Karoti Girls Stream-3-.

63. DW-7- Millicent Wanjiru Mbui testified, that the agents who went to the polling stations without the requisite letters were barred but

were admitted when they came with the letters.

64. DW-8- Julius Maingi, on the issue of agents he testified that he annexed diaries to show the agents were at the polling stations and Presiding Officers swore affidavits.

The petitioners submits that **section 30 of the Elections Act** allows parties and/or candidates to nominate agents to represent them at polling stations. The 1st Petitioner testified that she nominated agents

65. **DW 1 - SAMUEL SEKI LIAMPATI**

He was the County Elections Returning Officer during the August 2017 General Elections.

Form 37 C which was generated at the county tallying center was derived from Form 37 B which came from the constituencies and is a record of Form 37 A derived from the polling centers.

66. In his affidavit he stated that there were 661 polling stations in Kirinyaga County but for gubernatorial elections and all other election, that is Senate and National Assembly, they were 659. The other two were meant for Presidential Elections and were for the prisons.

67. They trained chief agents on 27.7.17 and briefed them on 7.8.17. What agents needed was an appointment letter by Political party or candidate, duly signed oath of secrecy signed by a commissioner of oath and identification, identity card. The accreditation letters were administrative and were from I.E.B.C.

By 8.8.17 IEBC had received the lists before the buildup, we were relying on the candidates agents, Felix and Doctor Wambui. He received the email on 4.8.17 officially from IEBC.

68. On the day of polling, candidates were complaining over a number of issues. The issue of agents is the one the petitioner and Felix called him about. He called the Returning Officer of the centres, he called Returning Officer Kimunye - Titus Murimi, Returning Officer Gichugu - Julius Maingi, Returning Officer Mwea - Millicent Mbui, Returning Officer Ndia and Returning Officer Kirinyaga Central - Dominic Lempamari.

69. The issue of Muriithi Kang'ara, he received communication on issue of bribery on the morning of 9.8.17 and issue of Angela and ballot box. He called Julius Maingi who is Returning Officer Mwea and he said nothing like that was happening. He then called County Commandant Kirui to talk to his officers on the same issue and they denied. I did not follow it up because it was not reported anywhere so that it could be brought to my attention. The report should have been made to the Presiding Officer who had a responsibility and role to report to the police and they arrest the culprits.

70. He received a call on broken seals. Wang'uru Girls was the tallying centre for Mwea constituency where we trained officials and there could be broken seals all over. He did not give Hon. Martha any explanation and told her he could follow up with presiding officer.

71. The petitioner called him on the morning of 9.8.17 complaining about the two issues and followed up with a letter which was received at 10.32 a.m at tallying centre by four lawyers. She was seeking a recount which was not possible as it could only be done at polling centre.

72. The issue of bribery, elections is not about officials only, tax payers money was used to train and we trained security officials on 27.7.17 and we even gave them charge sheets for the offences and they could deal with it. The petitioner erred because she could have reported to the Presiding Officer, there was a report at Wang'uru and matter is in court.

73. He denied that there were additional 48,000 votes for 3rd respondents and confirms he has not been given any forms to confirm the allegation or the particular polling stations affected. I announce the winner under Form 37 C, I declared Anne Waiguru because she garnered more votes than all the other candidates. In the petition 1st petitioner did not attach Forms 37 A and 37 B and no Form is annexed to say it does not tally with Form 37 C.

74. The Petitioner submits that she had submitted a list of her agents to I.E.B.C as testified by PW-9- Felix Wanjohi. That 1st Petitioner received calls from all over the County informing her that her agents were being barred from accessing the Polling Stations on flimsy reasons despite having the required documents. That Mr. Seki confirmed he was called severally by Petitioner and PW-9-. That Mr. Seki agreed the agents should not have been barred. That the barring was widespread and affected 181 polling stations tabulated in Para 17 of the Petitioners Replying affidavit which is close to 1/3 of all the Polling stations. That Mr. Seki claims to have communicated to the petitioner that if agents were barred it was for lack of requisite documents.

She submits on the incident at Kimunye Primary which I have referred and submits the agent was barred without lawful justification. That 1st& 2nd respondents did not forward to the court all the 187 polling station diaries as they only forwarded 164. That they withheld material evidence from the court.

75. She submits that at Ndaba she found her agents outside nearly at midday. She engaged the Presiding Officer and they were allowed. This was not supported by the diaries which showed the agents had signed in. That at Itangi her complaint was that the agents were thrown out during counting but were restored. I have stated that it was not pleaded that agents were thrown out. The petitioner has submitted on the incident at Wanguru Girls as testified by Mr. Cini. She has also submitted on the testimony of PW-2-. That she has proved the case to the required standard. That the 1st& 2nd respondent did not bring all the diaries and they have something to hide and the diaries are not reliable as they are maintained in a haphazard and casual manner with illogical entries of people who came early appearing last on the diary after

people who came later. It is submitted that the barring of petitioners agents was widespread as demonstrated by they evidence and the only inference is that it was deliberate and calculated move to give advantage to the 3rd& 4th respondents to the detriment of the petitioners.

76. For the 1st& 2nd respondent it is submitted that at Para 17 of Petitioner's affidavit where she states that her agents were barred, she has not named the agents who were barred and she could not give the names during the hearing. She has not named the Presiding Officers who barred the agents if at all. That no single agent has sworn an affidavit to say they were barred or thrown out. That the 1st& 2nd respondents witnesses proved that the agents who had the requisite documents were admitted in the polling station. They submit that they annexed polling station diaries extracts in respect of all the polling stations where the petitioner complained that her agents were barred. The polling station diaries show the time the agents reported at those stations. They give the names of the agents of Narc Kenya and clearly shows they signed at various stages of polling i.e during opening of stations, sealing of packets, closing before counting and closing of counting and of polling stations. That the petitioner did not deny that the names in those diaries entered as being Narc Kenya agents were not theirs. They did not bring evidence to prove that the signatures were bot by the agents. That respondents had no control over the parties or candidates agents as to the time they reported or departed at the stations. They could not force the agents to sign.

77. The 1st& 2nd respondent submit that the petitioners have failed to prove that their agents were unlawfully barred from the Polling Stations complained of while armed with requisite documents. For the 3rd& 4th respondent it is submitted that the petitioners and their witnesses whom they called to testify failed to produce the list of agents that they had allegedly supplied to the 1st respondent, neither did they produce any letter of appointment, oath of secrecy furnished to their agent whom they claimed were barred from polling stations nor the badges from the 1st respondent to indeed prove that their agents were authorized legally permitted to access the polling stations. That the burden did not shift to 1st and 2nd respondent to explain why they barred the agents notwithstanding compliance. That the petitioner did not call any of the agents whom they claimed had been barred from entering the polling station. That all the witnesses who testified acted on information received and not first hand knowledge. They all admitted that they visited the polling station after the fact. They submitted that the evidence of the 1st petitioner and her witnesses in respect of the allegation of barring is hearsay evidence as they admitted during cross-examination that they did not witness the agents of Narc Kenya being barred from accessing the Polling Station. The Court to disregard the evidence. They relied on the case of *Julius Makau Malobe –v- Charity Karuki Ngilu & 2 Others (2018) eKLR H.C. Jamweya J.* where it was stated:-

After consideration of the evidence adduced by the witnesses who testified in this regard, I note firstly that the evidence as regards denial of access of ejection of the Wiper agents from the polling stations by the Petitioner and PW8 was hearsay, as they admitted they did not directly witness any such denial and ejection, and were told of the same by third parties. The applicable law as regards is admissibility of evidence is the Evidence Act, (Chapter 80 of the Laws of Kenya), which in section 2 provides for its applicability as follows:

“(1) This Act shall apply to all judicial proceedings in or before any court other than a Kadhi's court, but not to proceedings before an arbitrator.

(2) Subject to the provisions of any other Act or of any rules of court, this Act shall apply to affidavits presented to any court.”

69. The provisions of the Evidence Act therefore apply to all Judicial proceedings be they criminal or civil proceedings, or election petitions as in the case of the present proceedings. The only exceptions are proceedings in Kadhi's Court where Islamic Law applies. It is notable that the Evidence Act also applies to affidavit evidence adduced in court. As regards admissibility of hearsay evidence, such evidence is inadmissible save in well-known exceptions under section 33 of the Evidence Act which are not applicable in this Petition. Section 63 of the Evidence Act in addition specifically requires direct evidence to be adduced in the following terms:

“(1) Oral evidence must in all cases be direct evidence.

(2) For the purpose of subsection (1), “direct evidence” means:

(a) With reference to a fact, which should be seen, the evidence of a witness who says he saw it;

(b) With reference to fact, which could be heard, the evidence of a witness show says he heard it.

(c) With reference to a fact, which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner.

(d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case may be, who holds it on those grounds:

Provided that the opinion of an expert expressed in any treatise commonly offered for sale, and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.

(3) If oral evidence refers to the existence or condition of any material thing, other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection.”

I accordingly agree with the position as stated in *Kithinji Kiragu –vs- Martin Nyaga Wambora & 2 Others (Supra) eKLR that as no direct evidence was adduced by the Petitioner and PW8 as to ejection of their agents from polling stations, it remained*

hearsay and the same cannot be relied on by this court.

78. They submitted that a negative inference must be drawn on the failure to call the agents as the petitioner has not given any reason why she did not call the agents. He relied on the case of Raila Amolo Odinga & Others –V- I.E.B.C & Others 2017 where it was stated.

(280)” where does this leave us? It is trite law that failure to comply with lawful demand leave alone a specific court order leaves the court with no option but to draw an adverse inference against the party refusing to comply.”

79. He also relies on Bukenya & Others –V- R(1972) E. A. 549 at 551.

While the Director is not required to call a superfluity of witnesses, if he calls evidence which is barely adequate and it appears that there were other witnesses available, who were not called, the court is entitled under the general law of evidence, to draw an inference that the evidence of these witnesses, if called would have been tended to be adverse to the prosecution case.

They have cited various decisions which I have considered. The 3rd& 4th respondent submit that the ground that the petitioners agents were barred/disallowed in the polling station was not proved to the required threshold of proof.

80. It is trite that the legal burden of proof in Electoral Disputes lies on an remains with the petitioner throughout the case. This was stated by the Supreme Court in Pet. No. 5/2013 Raila Odinga –V- I.E.B.C & 3 Others. The rationale for this is that the petitioner is the one who seeks relief from the court and in particular the nullification of elections. That burden may shift between the parties based on the weight of the evidence adduced. The petitioners had the burden to prove that their agents were not unlawfully barred from the polling stations. Section 107 of the Evidence Act Cap 80 Laws of Kenya provides:

(1) Whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts, which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

81. The petitioners are seeking to have the gubernatorial elections for Kirinyaga County set aside inter alia on the basis that there were illegalities and irregularities. The burden is on the petitioner to prove the illegalities and irregularities complained of with regard to barring of her agents from polling stations in order to render the said election in-valid. This calls for credible evidence which proves the case to the required standard, above the balance of probability though not as high as beyond reasonable doubts. The evidence must be cogent and to establish that the allegations are substantial, and convincing. The law with regard to agents is at Section 30 of the Elections Act. Which provides:

1) “A political party may appoint one agent for its candidate’s at each polling station.

2) Where a political party does not nominate an agent under subsection (1) a candidate nominated by a political party may appoint an agent of the candidate’s choice.

3) An Independent candidate may appoint his own agent,”

82. The regulations made there under provide for the powers of the Returning Officer to admit persons in the Polling Station. These are elections (General) Regulations 2012. Regulations 62(1),(2), (3) & (4) stipulates that:-

“The Presiding Officer shall regulate the number of voters to be admitted to the Polling station at the same time and may exclude all other persons except;

a) A candidate

b) A person nominated as Deputy to the Candidate where applicable

c) Authorized agents.

d) Members of the commission and elections officers on duty.

e) Persons necessarily assisting or supporting voters with special needs or assisted voter and

f) Observers and representatives of the print and electronic media accredited by the commission.”

Regulation 62(3) stipulates –

“The absence of agents shall not invalidatethe proceedings at the polling station.”

83. The regulations require that the person to be admitted must be an authorized agent. The authorized agent required, as submitted by 1st

and 2nd respondent, a letter of appointment from the party or candidate. A copy of accreditation letter from the I.E.B.C and duly signed and commissioned Oath of Secrecy.

84. The petitioners had the burden to prove that their agents had these requisite documents in order to be allowed to the polling station. The petitioner needed to prove that the agents were authorized agents having complied with the requirements for entry into polling station. The petitioner need to prove to the court in order to shift the burden that the agents who they allege were denied access to polling stations had letters of appointment. They should have proved to court that those agents were on the list furnished to I.E.B.C. This was stated by the Court of Appeal in the Case of Dickson Mwenda Githinji –vs- Gatirau Peter Munya & 2 Others (2014) eKLR.

We have examined and re-evaluated the evidence of record to ascertain if any error of law and non-judicious exercise of discretion by the Returning Officer is revealed. The first and most important criteria for admission to the polling station other than being a voter is the requirement under Regulation 62(1) (c) that the individual/person shall be an authorized agent. The appellant was not a candidate in the gubernatorial elections held on 4th March 2013. Consequently, for the appellant or any other person to be lawfully present at any polling station or tallying centre, it must be demonstrated that the appellant was an authorized agent of a political party and also that the appellant had an official badge provided by the I.E.B.C. The evidence on record shows that neither the appellant nor his witness (PW3, PW4, 5 or PW6) were able to furnish any document demonstrating that they were agents authorized to be present at any polling station or tallying centre. Neither the appellant nor any of his witnesses proved that they had badges issued by the I.E.B.C to signify that they were entitled to be at the polling station or tallying centre. None of these witnesses testified that they were unlawfully excluded from the polling or tallying centre. Regulation 74(1) stipulates that no agent shall be deemed to be an agent for purposes of counting unless the candidate or political party has submitted the name and address of the agent and a letter of appointment of the agent it is our considered view that if one is not entitled to be at a polling station or tallying centre, then one cannot claim to have been unlawfully excluded thereat. The failure of the appellant and his witnesses to prove that they were authorized agents of any political party and failure to tender evidence that they had badges issued by the I.E.B.C is fatal to the allegation that authorized agents were excluded from the polling station and tallying centre. For such an allegation to succeed, it must be proved that the person allegedly excluded was an authorized agent – this is the sine qua non for the allegation to have a legal foothold. Upon proof that the person was an authorized agent, then proof of exclusion is to follow. From the evidence on record, we pose the question who was excluded? The appellant as petitioner did not testify that he was excluded from any polling station or tallying centre. Did any of the appellant's witnesses testify that they were excluded from the polling or tallying centres? We have examined the record. Neither did PW3, PW4, PW5, or PW6 testify that they were excluded.

85. A similar holding was made in Richard Nchapi Leiyangu –V- I.E.B.C & 2 OTHERS.(H.C) 2013 eKLR.

It was stated:

“For this reason an election court will not lightly overturn the results of an election. The petitioner has to prove his allegation with credible evidence to a level slightly above the balance of probability but slightly below that of beyond reasonable doubts - - - - -”.

86. The Evidence Act Cap 80 Laws of Kenya is the law applicable in production and admissibility of evidence in proceedings before courts of law.

These proceedings being judicial proceedings with regard to evidence presented are governed by the Evidence Act. The Act provides that facts be proved by direct evidence and outlaws admissibility of hearsay evidence. The Act provides for direct evidence to be adduced. Section 63 of the Act provides:

87. The petitioners with regard to allegation of the agents being disallowed to access the polling station, relied on her evidence and that of her super agents Loise Karua PW5, Samuel Cini PW6 and the Chief Agent Felix Kinyua Wanjohi. No agent was called. Although she called PW-2- she was not her agent and she contradicted the petitioner and her super and Chief agents as to why the agents were not allowed. The Petitioner's evidence and that of her witnesses is hearsay and inadmissible. The evidence of appointment of agents was not presented before this court. No letter appointing the agents and Oath of Secrecy was not produced in this court by the petitioners. The list of the Narc Kenya agents assigned to the various polling stations as agents of the petitioners was not produced in court. In the light of failure to call the agents, to exhibit the documents which were supplied to the agents and the list of agents, it is my view that the petitioners have failed to discharge the burden of proof that the agents were denied access to the polling station unlawfully. In Amama –Mbabazi –vs- Yoweri Kaguta Museveni & 2 Others (Uganda SC Presidential Election Petition No. 1 of 2016) where it was held at Page 27-29 as follows:-

The burden of proof is the imperative or duty on a party to produce or place evidence before court, evidence that will shift the conclusion away from the default position to one's own position. It is the necessity of affirmatively proving a fact in dispute on an issue raised between parties in a cause in electoral cause is established much in the same way as a civil cause. The principle is coined in a Latin maxim - - - semper necessitasprobandiincumbetei qui agit – the necessity of proof always lies with the person who lays a claim. The legal burden rests on the Petitioner to place credible evidence before court, which will satisfy the Court that the allegations made by the Petitioner are true. The burden is on the Petitioner to prove not only noncompliance with election law but also that the noncompliance affected the result of the election in a substantial manner. It is only if credible evidence is brought before the Court that the burden shifts to the respondent and it becomes the respondent's responsibility to show either that there was no failure to comply with the law or that the noncompliance did not have substantial effect on the election. In the matter before us, the Petitioner had the duty to adduce evidence to the effect that specific malpractices and irregularities occurred and furthermore that the irregularities so affected the result that the 1st Respondent cannot be said to have been validly elected.

88. In Raila Odinga & 5 Others –vs- Independent Electoral and Boundaries Commission & 3 Others (2013) eKLR (sc Petition No(s) 3-5

of 2013) where it was held at Paragraph 195 as follows:

There is, apparently, a common thread in the foregoing comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the court to determine whether a firm and unanswered case has been made.

89. In the right of the decision in *Dickson Mwendia Githinji –V- Gatiaru Peter Munya & 2 Others by Court of Appeal* that if one is not supposed to be at the polling station he cannot claim to have been unlawfully excluded thereat. Failure to call agents who were barred to prove that they were barred when they had the requisite documents was fatal. All those who testified were not the agents who were excluded. The 1st and 2nd respondent adduced credible and cogent evidence to prove that the agents of the petitioners were barred because they did not have the requisite documents. The Returning Officers had a duty to admit only those agents who were authorized. The Presiding Officers barred agents who did not have documents authorizing them to be at the polling station. Once they produced the documents they were admitted. On this issue of barring of agents.

90. I hold that it is not proved that they were unlawfully barred from the polling station. The petitioners have not proved that failure to have agents at the polling stations compromised the election or put in doubt the independence of I.E.B.C while conducting the elections. It was not proved that failure to have agents affected the manner in which the elections were conducted or the integrity of the elections.

91. At Kimunye where the petitioner said she went to reinstate her agent. There was not allegation that voting was affected in anyway. PW-6- Felix Wanjohi is on record stating that voting was going on well with long ques at the polling station. This was stated in *Richard Nchapi Leiyangu –v- I.E.B.C & 2 Others*, that **“Accordingly the burden lies with the petitioner to establish to the required standard of proof that the irregularities complained of were so substantial that they affect the results.”**

92. The evidence by the petitioner and her witnesses cannot be relied. The petitioner testified that she did not find it necessary to call the agents. I find that since the agents were not called the petitioners, did not produce direct evidence which is the best evidence and the evidence adduced cannot be relied on. My conclusion is that this ground has not been proved to the required standard. The ground that the petitioner’s agents were disallowed and kept out of polling station fails.

93. **The second limb in the petition is canvassing and voter bribery and other electoral offences/malpractices.** The 1st allegation is that the Deputy Chairperson of Jubilee Party Muriithi Kangaru, (sic) was canvassing and bribing voters at Kangaru Primary School. The petitioner testified that she received reports of bribery and canvassing on polling ques by the Jubilee County Vice Chair who is also the 3rd& 4th Respondent’s Chief Campaigner one Muriithi Kangara at Kangaru Polling Station in Mutithi Ward of Mwea Constituency. In her testimony and her affidavit she stated that she was informed by Tabitha Mutero. Para -8- of the Petitioners affidavit she said she was informed about canvassing and annexed photos by one Kennedy Muriithi. Para 19 & 20 she deposes that she rushed to Kangaru Primary and found the said Muriithi Kangara with OCPD Mwea West Mr. Suarey Kiptoo and two of his officers seated at the back. She confronted Mr. Kiptoo and asked him why he had surrendered his authority and why he had not arrested the said Muriithi Kangara for bribing voters. Mr. Muriithi alighted and denied having bribed voters. They proceeded to the polling station with Muriithi Kangara and upon enquiring from the Presiding Officer why they were allowing voter bribery and canvassing of votes on the ques. The Presiding Officer claimed not to be aware and promised to be vigilant.

94. At Paragraph 24 the petitioner depones that she was receiving reports throughout the day of voter bribery on the polling ques at various polling stations by agents of the respondent such as Muriithi Kangara 4th respondent and a Mr. Juma. Para 22 that at Kirinyaga Central she was informed that a lady supported of the respondent Mary Wambui Ngengi driving vehicle registration number KBW 868B was busy bribing voters at St. Joseph Primary School in full view of the police.

95. Para 26 at about 2 Pm on 8/8/2017 Tabitha Mutero her super agent informed her that she had found the Head Teacher of Mutithi Primary with a list of voters at the entrance and was checking their names, canvassing and bribing them before they entered to vote telling them to vote for 3rd respondent. Tabitha informed her they had confiscated the list from Head Teacher and kept it as evidence.

96. In all these averments by the petitioner about bribery, she did not witness any single incident. When he confronted Muriithi Kangara about allegation of bribery he denied and the Presiding Officer informed her that he was not aware. Para 18 she has not state who informed her. Kennedy Muriithi who the 1st petitioner depones he took photos of Muriithi was not called as a witness. Para 24 the informant is not named, the same at Para 24. Para 26, Tabitha Mutero was not called as a witness.

97. The allegation of bribery against Muriithi Kangara at Kangaru Primary School is hearsay as it is not corroborated by the informant who called the Petitioner. Similarly the allegation of bribery at St. Joseph is hearsay. The person who informed her has not testified. Similarly the allegation of bribery by 4th respondent, Hon. Nderitu and Mr. Juma is hearsay. No witness testified to this other than what petitioner says she received reports.

98. The other allegations of bribery is in the affidavit of Elias Mwangi Wachira PW-3- who testified that he saw James Muriithi Kangara entering the polling station, that is Upper Baricho. That he noticed Muriithi Kangara walking along the ques shaking voters hands and telling them to vote for Miji Miji which is a moniker for Hon. Anne Waiguru the Gubernatorial Candidate. People on the ques got wind and started moving backwards to get to where he was. There was commotion and Muriithi left.

99. Morris Njeru Kanyoko swore an affidavit and states that he saw what Elias Mwangi Wachira saw they were together.

100. The Returning Officer for Kirinyaga Central testified that there was no incident of bribery reported at St. Joseph. Muriithi Kangara testified as DW-10- and denied the allegation of bribery at Kangaru.

101. It is submitted for the petitioners that though Muriithi Kangara denied that he bribed voters at Kangaru, he admitted that during campaigns he dished out money to voters, women groups, church etc and that he was riding in the 4th respondents car wherever he accompanied the 3rd& 4th Respondent. That he changed and said he gave the youth transport at the end of the day. There was no allegation in the pleadings that Muriithi Kang'ara was giving money during campaigns. The petitioner cannot build a case out of cross-examination. The tow who were alleged to have witnessed the canvassing and bribery Jason Chewa and Kennedy Muriithi were not called as witnesses. The affidavits formed basis of the testimony of the two. They were among witnesses the petitioner offered to respondents for cross-examination and she submitted that they would cross-examine the witnesses. The court gave a ruling. The affidavits are of no probative value. The allegation of bribery against Muriithi Kangara is hearsay which is uncorroborated and is therefore inadmissible to support the allegation.

102. The 1st& 2nd respondent prove that no voters were bribed. The witness could not state how much money was being given. That the people who were alleged to have been bribing voters were called by 3rd& 4th respondents as their witnesses and they denied the claims.

103. The 3rd& 4th respondents submit that the allegation of bribery are grave and have penal consequences. The allegation of voter bribery is serious. The Supreme Court in *Moses Wetangura –v- Musikari Kombo & 2 Others* 2015 eKLR s.c Pet. No. 12/2014. The court stated:-

a) MOSES MASIKA WETANGULA –VS- MUSIKARI NAZI KOMBO & 2 OTHERS (2015) EKLR (SC PETITION NO. 12 OF 2014).

“Further, by section 67(2) of the Elections Act, the offence of bribery is cognizable: a person alleged to have committed it is liable to arrest, without warrant. This shows the gravity of the offence, and signals that a high standard of proof is required. Accordingly, an allegation that an election offence has been committed has to be specific, cogent, and certain. This requirement guarantees the right of fair trial, for the person(s) against whom such allegations are made”.

104. This has not been shown. The allegations at Kang'aru were not substantiated as they are based on hearsay. As for the incident testified to by PW 3&4, it was the evidence was not cogent as the witnesses could not tell how much money was being given. The constituency Returning Officer for Kirinyaga Central Dominic Kabuli Leparamai denied that there was a complaint of bribery. He testified that the Petitioner won in 138 stations out of 140, 67% of votes. He testified that he did not receive any complaints concerning agents or bribery. I have cited authorities above on burden of proof which have held that allegations of criminal nature must be proved beyond any reasonable doubts. That is the standard. The ingredients of voter bribery are that a gift was given to a voter by a candidate or her agent and was given with intention that the gift induces the voter on how he votes. No evidence to that effect was adduced. The evidence by PW 3 & 4 if indeed it happened is based on mere suspicion which can never be a basis to prove an allegation of criminal nature. The witnesses said they did not see money. No voter was called to say he or she was given money to be induced on the manner to vote. The contention by Muriithi Kangara is convincing that if a person gave out money at the polling station violence could break out. There were no incidents of violence reported. At Kang'aru the Presiding Officer when confronted by the 1st Petitioner said he was not aware of bribery. He said he would be vigilant.

105. I am of the view that the allegation of bribery is not proved to the required standard. The evidence in support of the allegation is not cogent. In any case all those mentioned MuriithiKangara, Juma, Hon. Nderitu and 4th respondents swore affidavits which bears more weight and probative value than the informants who informed the Petitioner and they did not testify. Mr. Muriithi Kangara explained in his affidavit why he went to Kang'aru Primary school. He depones that he is a member of Salvation Army Church which is the Sponsor of Kangaru Primary School. One Alex Maina informed him that I.E.B.C officials required help accessing a class with electricity as the class they were operating from had no electricity. The Presiding officer informed him of the problem. He looked around for a teacher who would assist to access the class. He was shown a teacher who was on the voting queue. He greeted him and asked him who the custodian of the key was. He was informed that it was the head teacher. He states that it was that time Kennedy Muriithi took a photograph. He denied that he was greeting people and telling them to vote for a candidate while giving them money. He contacted Karani and I.E.B.C was assisted. This averments have not been rebutted.

106. Regulation 63 though Petitioner had referred to regulation 62, there was no evidence that Presiding officer took action envisaged in the regulation against Muriithi Kangara.

107. The Petitioner submits that they have proved the allegation of bribery by circumstantial evidence. The issue of bribery of voters was addressed by the Supreme Court in *Fredrick Otieno Outa Vs. Jared Odoyo Okello & 4 Others (2014)eKLR*.

[102] Evidence, in instances where an election offence is alleged, is crucial to the making of a proper judicial finding. This evidence should be clear, and certain.

[107] By section 67 (2) of the Elections Act, the offence of bribery is cognizable: a person alleged to have committed it is liable to arrest, without warrant. It shows the gravity of the offence, and signals that a high standard of proof is required. Accordingly, an allegation that an election offence has been committed has to be specific, cogent, and certain. This requirement guarantees the right of fair trial, for the person(s) against whom such allegations are made...

[109] The principle thus conveyed, is that the pleadings must be clear, the allegations elaborate and the evidence adduced, focused and clear-cut.

108. This is the standard set by Supreme Court. The circumstantial evidence is not cogent. PW3, said he can't tell the amount of money given nor the names of the people who were bribed. He did not report to the Presiding Officer or the Police. PW 4 could also not tell the amount being given. He admitted there was difference in the evidence he was adducing and that of PW3.

PW4 says in his affidavit he was an observer. Yet in court he said he went home.

109. There were material contradictions in their evidence which entitles the court to reject their testimony. They did not strike me as credible witnesses. More so because we have evidence of the Returning officer Ndia Constituency Millicent Wanjiru Mbui who testified in court and deposes that she was not aware of any voter bribery anywhere in Ndia Constituency. PW3 & 4 deposed that they voted at Upper Baricho Secondary Polling station in Ndia Constituency. I have gone through the Form 37 C attached to the affidavit of Mr. Seki. I have not found a Polling station by that name. This raises doubts as to where the two voted and where they witnessed the alleged bribery. Felix Wanjohi at paragraph 18 of his affidavit says he was informed of the incident at 1.00pm and it was at Baricho Primary School. This is a contradiction. Again he did not witness it first and did not disclose who informed him. It is hearsay.

110. This incident of bribery at Upper Baricho Secondary is not disposed in the affidavit of the 1st petitioner. Worse still it not pleaded in the sub heading of canvassing and voter bribery and other electoral offences. After inboud by her pleadings. This evidence by PW3 & 4 is fabricated and is not credible or reliable. In the light of the Supreme Court decision in Raila Odinga Vs. I.E.B.C and Others No.1/2017 where court quoted with approval the Indian decision Avikara Narasa Reddy decision, evidence not pleaded in the pleadings and produced by the party cannot be considered. The Petitioners pleaded the incidents of bribery at page 5 of the petition, paragraphs 1-11. This incident at Upper Baricho Secondary was not one of the incidents specifically pleaded. I have confirmed that there was no polling station by name Upper Baricho Secondary.

111. On the allegation of bribery I have stated that the evidence by the 1st Petitioner was hearsay as she never witnessed it first hand and the allegations by the PW3 & 4 are fabrications and not pleaded. The upshot is that the Petitioners have failed to prove the allegation of bribery which is an election offence which as held by the Supreme Court in Fredrick Otieno Outa Vs. Jared Odoyo Okello & Others should be proved with cogent evidence and standard of prove is beyond any reasonable doubts. I find that the allegations of bribery have not been proved.

112. The Petitioners allege that the head teacher of Mutithi Primary school had a printed list of voters at the entrance of the polling station canvassing and bribing them. Tabitha informed her that the list was confiscated. Paragraph 26 & 27 of the 1st Petitioner's affidavit. The affidavit of Felix Wanjohi does not seem to corroborate this as paragraph 17 of his affidavit talks Karoti girls secondary. He deposes that they confiscated the sheet of papers which were in his custody. This allegation at Mutithi primary school was not proved as Tabitha who informed the Petitioner was not called as a witness.

113. At paragraph 26 & 27 the Petitioner deposes that she was informed by Tabitha Mutero. The list which was confiscated was not annexed to the affidavit of the 1st Petitioner. It has not been availed in this court. I have addressed the provisions of the Evidence Act with regard to admissibility of Evidence. Hearsay evidence is not admissible to prove the facts. The Petitioners are under an obligation under the Law to produce the best evidence secondly the failure to annex the alleged confiscated list must attract negative inference that either it does not exist or would not support the averments.

114. The 2nd respondent testified that they had pinned the names of voters at the polling station and voters and other members of public could access the list. The allegation has not been proved.

115. The Petitioners raised an issue that the Returning officer for Mwea Constituency had locked himself in the hospitality room at Wang'uru Girls tallying centre with 4th respondent. The Petitioner did not witness this incident. Paragraph 28 of the Petitioner's affidavit states that she was informed by her Super agent Tabitha Mutero. I have stated that Tabitha Mutero was not called as witness. According to the Petitioner, she confronted the Returning officer who denied but later admitted having met 4th Respondent and only greeted him. Samuel Cini deposes about this incident at paragraph 10, 11 & 12 of his affidavit sworn on 6.9.2017. He has stated that he was with Tabitha Mutero who called the 1st Petitioner to report the incident.

116. The Returning officer Mwea Julius Maingi swore an affidavit and gave evidence in this Court. At paragraph 7 of his affidavit he deposes that on 8.8.2017 at about 7.00pm he was coming from taking a cup of tea in the hospitality room and met 4th Respondent who was not known to him and he introduced himself. The 4th Respondent asked him whether the process was going on well and he confirmed and went away.

117. That it was outside the hospitality room and so it is not true they locked themselves inside. When Mr. Cini was cross-examined by Mr. Kathungu he categorically stated that the incident of the running mate was not bad but they were talking in hospitality room and he did not hear that makes it wrong. This shows that the allegation of any wrong doing was mere suspicion. Though the Petitioner deposes that she was informed of the incident at 6.00pm, Mr. Cini maintains that it was at 7.00pm. He Mr. Cini admitted that they cannot add up there could be contradictions. Mr. Cini testified that the hospitality room was meant to facilitate the short call and breakfast and security taking something. Mr. Cini further stated that it was not necessarily in his wrong thought that to be in there (hospitality room) there was something wrong. He further stated that his concerns were suspicion. The allegation on this incident has contradictions. Mr. Cini says it was at 7.00pm and admitted that Tabitha Mutero had in her affidavit said it was at 8.00pm. The Petitioners affidavit says he received the report at 6.00pm. These are averments in the affidavit. Where contradictions occur on some material particulars which are in dispute, it weakens the evidence and casts doubts.

118. The 4th respondent swore an affidavit and testified in court and denied locking himself up in a room with I.E.B.C officers. This was corroborated by DW11. Chief Inspector Loise Kihara who testified that there was no incident of policemen locking themselves in a room with constituency returning officer and the 4th Respondent. DW11 testified the door of the room was wide open and they were just waiting for the tallying to start.

119. Having considered the evidence on this incident, I find that there was no wrong doing on the part of the Returning officer. He was

expected to go in the room as it was where I.E.B.C officers were being facilitated. The Petitioner's witness Mr. Cini confirmed that it was just suspicion but there was no wrong doing. Suspicion is not sufficient to prove an allegation as grave as impropriety.

120. The Petitioner states that boxes from some of the areas such as Ciagini Primary school were tampered with before tallying. The Petitioner deposes this at paragraph 34 where she states that at 5.52am. She received a call from Tabitha Mutero who was at Wang'uru Girls tallying centre that they had caught the Presiding officer at Ciagini outside Wang'uru tallying centre having broken the seals of the governors ballot box and tampering with the electoral materials contrary to the law. She called the 2nd respondent and informed the Petitioner then wrote a letter to Mr. Seki drawing his attention to the matter and demanding for a recount. She copied the letter to Mr. Chebukati the Chair of I.E.B.C. She further deposes that she rushed to Wang'uru Girls and found the Presiding officer Ciagini had already resealed the governors ballot box but she admitted in the presence of the Returning officer Mwea claiming she did so in ignorance.

The letter MWK -2- dated 9.8.2017 states;

“As verbally reported to you by myself on phone at 5.52am my agents found one of your officers at Wang'uru Girls tallying centre outside the polling centre building within the compound with six open gubernatorial boxes. That is with the seals broken and lying on the compound. I am informed that your officer was trying to place new seals on the boxes without any agent in sight, noting the polling station (we shall provide a video of the said officer in action”.

121. The letter says that they fear that the boxes have been interfered with and or stuffed with ballots. We suspect the tallying going on at Wang'uru. She further demanded action on the officer and a recount of the violated ballot boxes for the purpose of comparing them with the Form 37 A signed by the relevant agent and thereafter a retally of the entire gubernatorial results.

122. As can be seen from the letter, there is a departure from contents of that letter. Whereas the letter talks of six gubernatorial boxes, the Petitioner deposes about one particular gubernatorial box, that is for Ciagini. Mr. Cini in his affidavit deposes in his affidavit that on the morning of 9th with Tabitha Mutero, Edward Njoka and Kelvin Kabata Kibe found six ballot boxes with broken seals outside the hall which broken ballot boxes belonged to Ciagini. He confronted the Presiding officer and demanded to know why she was compromising election materials. The officer had two record books and suspected she was tampering with the tallies. That the Presiding officer Angela Wanjiru Maina denied tampering but she could not explain what exactly she was doing.

123. Further evidence on this allegation was from Kepha Sagana who testified as PW7. At paragraph 12 he deposes that he went to Wang'uru Girls in the evening and while standing outside the hall he noticed a person opening the ballot boxes and afterwards received a bag from another person which they opened and put the contents in the ballot boxes. This witness does not corroborate Mr. Cini because Mr. Cini said he suspected the officer was tampering with the tallies. Mr. Cini who said he was present never saw a bag being put in the ballot box. PW5 then moved closer and saw it was a gubernatorial box and papers being poured in the box. He took video but was barred from taking the registration of the vehicle. People became hostile and he left the place. He removed his jacket and went back to Wang'uru Girls and found that the altercation had become bigger and they were saying they were putting 'miji' in the boxes which was a monicker for Hon. Waiguru.

124. The 1st& 2nd respondent filed the affidavit of Angela Maina who was the Presiding officer at Ciagini. In her testimony in Court Angela Wanjiru Maina denied ever violating the gubernatorial box as alleged. She stated that upon arrival at Wang'uru tallying centre, she realized that the ballot box of the member of National Assembly was missing two seals and she decided to put them. It is while she was in the process of putting the two missing seals that she was confronted by the agents and supporters of the Petitioners. She further explained that she had delegated the duty of sealing the ballot box to her Deputy and the clerks at the polling stations and that explains why she had not noticed the two missing seals earlier. On the issue of having two polling station diaries she explained that one was a training diary.

125. The Petitioner has not adduced cogent evidence in support of this allegation of violation of ballot boxes. There is a material contradiction of the complaint she made to the County Returning officer and the averments in her affidavit Mr. Cini said they suspected. The evidence by Mr. Kefa Sagana is not credible. No purpose would be served by putting more 'mijis' at the tallying centre in ballot boxes.

126. The law is now settled that the polling station is where votes are counted and information put in form 37 A. AT the tallying centres there is no counting of ballots. It is the form 37 A which is filled at the polling station that forms the basis of determining the will of the people. In **Independent Electoral and Boundaries Commission Vs. Maina Kiai & 5 Others Nbi C.A. No.105/2017 [2017] eKLR**. The Court of Appeal in a binding decision emphasized the finality of results recorded at the polling station. It was stated:

“It is clear beyond par adventure that the polling station is the true locus for the free exercise of the voters will. The counting of 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, the count there is clothed with a finality not to be exposed to any risk of violation or subversion. It sounds ill that a contrary argument that is so anathema and antithetical to integrity and accuracy should fall from the appellants mouth”.

127. No question was raised in this petition as to the accuracy of the Form 37 A which was filled at Ciagini polling station. The polling diary from Ciagini polling centre where Angela Wanjiru Maina was Presiding showed that the agent for Narc Kenya Agent was present throughout. This was polling station No.036-03 page 109. The Presiding officer Angela Wanjiru Maina. Narc Kenya agent Milka Wairimu Muriuki signed in at 5.30am and witnessed certification of ballot box and seals used at start of polling. The agent was also present at the closure of polling before counting at sealing of packages and at the closure of counting. This agent was not called as a witness. There is nothing to show that what was filled in form 37 A was not what was tallied at the tallying centre.

128. The Elections (General) Regulations 2012, Regulation 5 stipulates on the counting of votes. Regulation 80 stipulates that a candidate or agent may request for a recount. The recount shall not take place more than twice. After the recount the ballot box is sealed. Regulations 83

stipulates that at the tallying centre what is tallied are results from polling stations. No counting of votes takes place at the tallying centre. The allegation by PW7 Kefa Sagana that the ballot box was opened at the tallying centre was made in ignorance of the procedures of voting and tallying. It would not make sense to add ballot papers at the tallying centre as there are safeguards under Regulation 83 (1) (b) which allows the Returning officer to disregard the results of the count of a polling station where the total valid votes exceeds the number of registered voters. There was no allegation that the total valid votes for Ciagini exceeded the number of registered voters.

129. These regulations show that the County Returning officer could not order a recount after it was concluded at the polling station. The petitioner in her petition has not applied for a recount of the gubernatorial box for Ciagini. The court draws a negative inference against the petitioners. There was no prove of conspiracy. The Presiding officer denied that a gubernatorial box was violated. She was firm and found no reason to doubt her in the light of the contradiction surrounding this allegation. The incident has been properly explained and considering the work that the Presiding officers had to undertake on the polling it is understandable that one can forget to put all the seals. There were mechanisms for confirming and verifying the results from Form 37 A, 37 B and 37 C.

130. The petitioner has not discharged the burden to prove that the gubernatorial ballot box for Ciagini was violated. The Supreme Court in **Raila Odinga VS. I.E.B.C and 3 Others Pet. No.5/2013.**

“A Petitioner should be under obligation to discharge initial burden of proof, before the respondents are invited to bear the evidential burden”

131. The Petitioner stated that she had video evidence to prove these allegations. However, the issue of service of the said evidence arose and with the question whether it was indeed filed. A Court official who received the documents of the Petitioner when they were filed testified on oath that the video evidence was not filed with the Petition. However the petitioner did adduce evidence and it is not only the video evidence which could prove the allegations. What matters is not the nature of the evidence but the weight and the Probative value of the evidence tendered. The evidence of tampering is inconsistent as the Petition states the incident was at Ciagini polling station while the affidavit of Petitioner talks of Wang’uru tallying centre as well as the evidence. Such inconsistencies raise doubts on the credibility of witnesses. There was also material contradictions as to the time the incident occurred.

132. The Petitioner’s witnesses Kefa Sagana PW7 and Ruth Wawira Mukuba testified that they were observers accredited by I.E.B.C. None of the witnesses produced any letter to show they were accredited nor did they produce any badges. Though Ruth Mukuba said she had a badge, it is noted that it was after Kefa was cross examined and had none. Such letters of accreditation and badges if the witnesses were telling the truth should have been attached to their affidavits. The could not be produced from the witness box. Regulation 94 (6) of Elections (General) Regulations 2012 stipulates that:

“ All the accredited Election observers shall submit to the Commission a written report in accordance with the guidelines issued by the commission in sub-regulation (2)”.

133. The two did not prove that they submitted a report to I.E.B.C. They did not attach the report to their affidavits. There was material contradiction with Kefa Sagana admitting they did not prepare a report while Ruth said they prepared one and gave it to the advocate. The two claimed they were paid by I.E.B.C contrary to what is provided in I.E.B.C. General Elections Handbook which provides that they meet their costs. They have not proved that they were accredited observers. It is most likely they were observing for the Petitioner.

134. The PW7 could not tell how the Petitioners came to know he was an observer. On the issue at hand, Kefa contradicted the evidence of Mr. Cini. According to Kefa, the incident opening the ballot box was at 9.00pm. He said he did not know why they were putting ballot papers in the box at that time and no counting was going on at the tallying centre.

135. I find that Kefa Sagana was not truthful and is not a reliable witnesses. There is no way of confirming that he was an observer as he had no evidence of accreditation by I.E.B.C and he never filed a report which can confirm to this Court that what he is telling the Court is what he had witnessed. He admitted in cross examination that his affidavit had information gaps and one can only speculate.

PW8 Ruth Mukuba did not annex evidence to show she was accredited as an observer. She did not annex a report. Though she said herself and Sagana prepared a report, Mr. Sagana was emphatic that he did not. Mr. Sagana was emphatic that he did not lodge a formal report. Though PW7 & 8 said people were being given money, they never witnessed anybody being given Kshs.100/=. Though she adopted Mr. Sagana’s affidavit, she contradicted his evidence on material particulars. It is evident that PW7 & 8 Kefa Sagana and Ruth Mukuba lied that they were I.E.B.C accredited observers and their evidence is not reliable.

136. I find that there is no prove that a gubernatorial box was deliberately violated at Wang’uru tallying centre. The 1st& 2nd respondent through their witness Angela Maina have stated that the ballot box involved was not a gubernatorial box but that of a member of parliament but even then, there was nothing deliberate as it was seals that had not been put which were added.

137. The PW7 & 8 in their affidavit and testimony in court stated that people were being registered on the polling day. They stated that they were registered as they went to vote and afterwards receive Kshs.100/= Mr. Felix Wanjohi also alluded to this at paragraph 17 of his affidavit though the said recovered list was not annexed. I find that these averments were not pleaded in the petition nor was it deponed in the affidavit of the Petitioner. The averments are pleaded at paragraph 4, 5, 6, 7, 8 of Kefa Sagana’s affidavit. Earlier I had stated that it is trite that a party is bound by his/her pleadings. There are various authorities on the subject which say that matters not pleaded even where evidence is adduced cannot be considered as no orders can be given as they remain outside what is pleaded.

138. PW7 & 8 also introduced evidence not pleaded in the petition and not averred in the affidavit of the Petitioner that Karoti Girls polling centre clerks in polling station No. 2 & 3 was giving two or more ballots to the voters. That is at paragraph 10 & 11 of Kefa Sagana’s affidavit sworn on 7.9.2017. In a further affidavit he states that in polling station 2 & 3 two ballots were being issued for the Presidential and gubernatorial elections which is irregular.

139. Though not pleaded, the 1st & 2nd respondent called the Presiding officer Mr. Francis Kariuki Mugo (DW6) who impressed me articulate and firm witness and whose credibility I found no reason to doubt. He denied the allegation that clerks were issuing more than one ballot.

140. Mr. Sagana admitted that if voters were issued with more than one ballot there would have been over voting at the two polling stations. When he was taken through the Form 37 C, stream 2, at Karoti Girls had 541 registered voters, the number of voters who voted were 430. He admitted there was no over voting. Stream 3 had 541 registered voters and the number of votes who voted were 448.

141. He admitted there was no over voting. Mr. Sagana admitted that his affidavit was erroneous as he had deposed that he raised the issue with the Returning officer at the polling station whereas the person manning the polling station was a Presiding officer. He was also taken through form 37 C for Kiorugari where he said voters were being registered and he admitted there was no evidence of over voting. These allegations by Mr. Sagana were not proved and it shows the witnesses were not telling the truth.

142. The Petitioners have not submitted on these two allegations by Mr. Sagana and Ruth Mukuba. My view is that an election petition is not an open ended inquiry an election Court enquires into pleaded matters to determine whether the principles laid down in the Constitution were observed in the conduct of elections. As such the Court determines the petition based on the matters pleaded in the petition and based on the constitution and the Laws. Matters not pleaded cannot form a basis for the determination of the petition. In Phillip Mukwe Wasike Vs. James Rusweti & 2 Others H.C Bungoma E.P 6/2013. The Court held:

“Generally parties must confirm their arguments to the issues raised in their pleadings and that issues not pleaded cannot be introduced by way of evidence and submissions”

In persuasive decisions in Adetoun Oladeji (Nig). Ltd Vs. Nigeria Breweries Plc & S.C 91/2002 it was held;

“It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded. In fact that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issue as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation”

This is principle of a party being bound by her pleadings in well settled. Matters not pleaded cannot be considered.

143. The other allegation on this limb that at Thiba polling station a Mr. Juma took control of the station with the help of the Returning officer. That at Ngurubani primary Hon. Alfred Nderitu took control of the polling station and Presiding officer took orders from him. The petitioner has deposed at paragraph 17 B of her affidavit that at Thiba ward Juma took control of the polling station in collusion with the Returning officer. Paragraph 17 C she deposes that Hon. Nderitu took control of the polling station and the Presiding officer took orders from him.

From the affidavit, it shows that Nguka N.I.B stores had three polling stations Ngurubani primary had ten (10) polling stations. It is not stated which particular polling station which the two took control of. It is also not stated what the two did for somebody to conclude that they were in control of the polling station. The two witnesses swore affidavits and testified in Court. Hon. Alfred Nderitu swore his affidavit of 16.9.2017. He deposes that he was Chief Agent of the 3rd respondent at Mwea Constituency. In response to the allegation he stated that at some point he went to Ngurubani primary. He denies the allegation and states that he does not understand what it means that he took control of the station. That as Chief agent all he was to ensure was that agents of 3rd respondent was present and voting process was going smoothly. He also denied the allegations of bribery.

144. John Wambugu alias Mr. Juma swore affidavit sworn on 6.9.017 and deposes that he did not participate in the general elections in any official capacity. He deposes that he was a voter at Wang’uru County Council hall and he was at no point at Thiba Primary school. He denies the allegation that he took control of the Polling station and does not understand what is meant by taking control of the station. He further deposed that he was a stranger to the allegation of bribery.

145. No submission was made by the petitioners on this allegation. I find that as submitted by the 1st and 2nd respondents the petitioner did not prove this allegation as she did not specify the polling station or the presiding officer. It is not shown how they took control of the polling station. The petitioners as demonstrated from the poll diaries had agents at the polling station and none was called to confirm this allegation.

The petitioner testified that she received a report. No witness was called to testify as having given the report to the petitioner what he or she witnessed to make her conclude that they had taken control. I find that the allegation is hearsay and has been disapproved as the two were alleged to have taken control had sworn affidavits and were cross-examined in court. The allegation has not been proved and is dismissed.

146. The petitioner alleged that 3rd respondent’s votes were inflated by over 48,000 votes distributed in a majority of polling station throughout the count (sic) as can be evidenced from the forms. The allegation relates to a specific number and forms. In her supporting affidavit, the petitioner did not refer to any specific form where the votes were inflated. The petitioner has also not made an averment as to this allegation of inflating 48,000 votes for the 3rd respondents. None of her witnesses who testified has sworn affidavit on this issue of inflating votes of the 3rd respondent. It is an allegation which is not supported by any evidence.

147. This issue has not been addressed in the petitioner’s submissions. The 2nd & 3rd respondent submits that since the allegation is data specific the standard of proof is high. This is so because where a specific figure is pleaded it must be specifically proved and where it has not the court must come to the inevitable conclusion that the burden of proof to prove the allegation has not been discharged.

148. In the case of *Raila Odinga & 5 Others -V- IEBC & 3 Others (2013) eKLR* this is what the Supreme Court had to say,

“In the case of data specific electoral requirements such as those Specified in Article 38 (4) of the constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubts”

149. The standard of proof has been put very high by the Supreme Court when a party has to rely on specified data. The standard is beyond any reasonable doubts. The petitioner testified that her votes were less with the 48,000 added to the 3rd respondent. She had the evidential burden to discharge the allegation.

150. At the end of the day she has failed to adduce any evidence to support the allegation. It is submitted for the 3rd & 4th respondents that the petition lacks a fulcrum for this claim and hence the same should be dismissed.

151. The case of *Stephen Kariuki -vs- George Mike Wanjohi & 2 others (2013) eKLR* was cited. The court stated;

The fulcrum of the petition is the conduct of the returning officer at the tallying hall and the contested documentation and declarations that flowed from there. It is then critical to evaluate the evidence of witnesses against the burden of proof and standard of proof in election petitions. The statutory and evidential burden of proof rests with the petitioner. It is underpinned by section 84 of the Elections Act, which provides as follows:

“83. 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”.

That section of the Act is couched in negative language to emphasize the caveat placed on the election court. There is in it a rebuttable presumption in favour of the respondents that the election was conducted properly and in accordance with the law.

It also implied by the provision that elections are not always perfect. Consequently not all malpractices will lead to nullification of the result”.

152. There are various processes in the elections and various forms used to capture number of votes cast which are then captured in the tallying process at the constituency and finally at the county where after tallying the final results are declared. It is clear from the ground that the petitioner intended to use forms to prove to the court that the votes were inflated with 48,000 votes in favour of the 3rd respondent.

Such forms were not availed and the burden to prove to court from the forms was not discharged to the required threshold stated by the Supreme Court in the authority cited. The allegation has not been proved and is therefore dismissed.

153. Finally it is alleged that the presiding officer colluded and allowed voters to breach the secrecy of the ballot by checking on each other's choice to merit being paid for voting for the competition (sic). This allegation like the one before it was not supported with evidence. No polling station out of the 659 polling stations was singled out nor was any presiding officer who allowed this to appear if at all it happened was cited or identified. No agent was called from any polling station to prove this. The allegation was not proved and the burden to prove that there was such an irregularity was not discharged. The allegation is dismissed.

Those were the allegations in the petition under the two limbs which I have stated above.

154. There was an allegation of misleading an assisted voter. This was based on the affidavit of the petitioner at Paragraph 11 (1) where she stated that she was given information. Mercy Njoki Kangi deposes at paragraph 7 of her affidavit that the Presiding officer told them not to go near as he did not want them to witness him marking the ballots for the assisted voters saying he would assist such a voter alone. She deposes that she tip toed and noted that the Presiding officer marked the ballot for Anne Waiguru though he had wished to vote for Martha Karua. Mercy in her affidavit has made reference to the Presiding officer.

155. The petitioner testified that she received information that the deputy presiding officer at Kimunye Tea buying center had misled an assisted voter who asked to vote for the petitioner but the deputy presiding officer marked the ballot in favour of the 3rd respondent. The petitioners went to Kimunye Tea Buying Centre where the 1st petitioner confronted deputy presiding officer and the officer promised not to do that again. The informant to the petitioner was not called as a witness.

The petitioner had agents at the polling station. Again none was called to testify.

156. The 1st and 2nd respondent called the deputy presiding officer at Kimunye Bedan Mwendia Mbogo who had sworn an affidavit and he vehemently denied the allegation. It turned out that Bedan Mwendia Mbogo is a person living with disability which this court noted. He had disability on both legs and walked with difficulties using two crutches. He demonstrated to court that he could not have been assigned the duties of helping voters who required to be assisted due to his physical disabilities as he uses two crutches to move and that duty required one to severally stand up, sit down and move around to assist such voters and that would have been very difficult for him. This was noted.

The petitioners submit that the allegation is serious which constitutes an election offence if proved the witness could have stated in his affidavit that he was not confronted by the petitioner or that he could not have been assigned the duties.

I have talked of the need to adduce the best evidence which is direct as required by the *Evidence Act*.

157. The petitioner has not adduced direct evidence. Even if we were to pose for a movement and say that she wanted to keep it confidential, she had agents who were supposed to oversee the goings on at the polling station on her behalf. She was also accompanied by her running mate all who have not given evidence.

158. Negative inference has to be drawn as I have earlier stated. In the case if Jacinta Wanjala -v- IEBC& 3 Others it was stated:

“I do agree with Counsel for the Petitioner that the Court will eventually be at liberty to draw an adverse inference from the failure of these witnesses to avail themselves for cross examination. In the United Kingdom case of Wisniewski Vs. Central Manchester Health Authority 1997 PIQR 324, the Court of Appeal held as follows:

“In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in any action”.

159. In the article by Robert H. Stier Jr. Revisiting the Missing witness inference Quieting the loud voice from the empty Chair, 44 md L. Rev. 137 [1985] it is observed;-

“The doctrine that has evolved over time to handle the missing witness problem is sometimes called the “empty chair doctrine”, because it holds that “a litigant’s failure to produce an available witness who might be expected to testify in support of the litigant’s case, permits the fact finder to draw the inference that had the witness chair been occupied, the witness would have testified adversely to the litigant”

160. The traditional view therefore seem to be that, if a witness is available to one of the parties alone and the anticipated testimony of that witness would elucidate or shed light on some material issue, and the party who fails to produce the witness offers no explanation, then the court may be permitted to infer that the testimony would have been unfavourable to the party who failed to call the witness. That inference however does not supply affirmative proof or substantive proof, but it affects the weight or credibility of the evidence.

161. My view therefore is that, a court may in certain circumstances be entitled to draw adverse inferences from the absence of a witness who might be expected to have crucial evidence. In such circumstances, the inferences may go to strengthen the evidence adduced on that issue by the opposite party or weaken the evidence. If any, adduced by the party who was reasonably expected to call the witness. However, there must first be some evidence, however weak, adduced by the opposite party on the issue before the court can draw the desired inference.

162. If however, the reason for the absence of the witness is satisfactory, then in my view, the court should not draw any such adverse inference. On the other hand, if there is some credible explanation given, even though not wholly satisfactorily, the potentially detrimental effect of the witness’ absence may be reduced.

163. The evidence on this allegation must attract a negative inference. The court cannot overlook the evidence which has been tendered by the 1st& 2nd respondent in the absence of cogent evidence. I find that the evidence of Bedan Mwendia Mbogo is reliable. It disapproves the allegation that a voter was misled at Kimunye Tea Buying Centre.

164. On the allegation by Mercy Kangi, the 1st& 2nd respondents called the presiding officer for Karaini Tea Buying Centre, Edward Munene Njoka. He denied that he misled an assisted voter.

The witness has not given the name of the assisted voter. Again the agent of the petitioner has not sworn an affidavit nor has she given evidence.

165. Earlier in the judgement I have stated that and this has been held by the Courts including the highest Court that is the Supreme Court, that allegations of criminal nature must be proved beyond any reasonable doubts. The evidence of Mercy Kangi cannot be said to have the veracity to prove this allegation to the required threshold for the reasons she has not given the name of the voter nor has confirmed by the agent of the petitioner who was at the polling station.

This has been stated in various authorities.

In Musikari Nazi Kombo -V- Moses Masika Wetangula 2013 eKLR it was stated:

“The standard of proof refers to level of proof demanded by law in a specific case in order for the party to succeed. It is now settled that in election petitions the standard of proof in allegation other than those of commission of electoral criminal offences, is higher than that of balance of probabilities required in civil cases.....

However where the petitioner alleges commission of criminal offences, the standard of proof on the criminal charges is beyond reasonable doubt.....”

166. The petitioner submits that the allegation of misleading assisted voters has been proved. I find that I have stated reasons to show that the evidence in support of this allegation is insufficient. It is the mandatory duty of the presiding officer to assist a voter who requires assistance. The presiding officer deponed that he had set rules how to assist the voters with the agent Regulation 72 of the Elections (General) Regulations stipulates;

(1) On the application of a voter who is, by reason of a disability or being unable to vote in the manner prescribed in these Regulations, the presiding officer shall permit the voter to be assisted or supported by a person of the voter's own free choice, and who shall not be a candidate or an agent.

(2) Where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such a voter, in the presence of the agents".

167. I find that the burden was on the petitioners to prove that the presiding officer breached the regulation. The witness Mercy Kangi has sworn an affidavit just like the presiding officer has done. It was upon the petitioner to go a notch higher to discharge the burden. I find that the burden was not discharged and the allegations of misleading assisted voters has not been proved. There were several agents including those of petitioners who would have corroborated Mercy's affidavit if it was indeed there and none was available. The allegation is dismissed.

168. The Petitioners had pleaded facts and grounds at page four (4) of the petition which I have enumerated. I find that no evidence was adduced to prove the following:

- Cheating.
- Intimidation.
- Forgery of ballot papers.
- Breach of mandatory statutory and constitutional requirements in voting, counting tallying and transmission of votes across the county.

The 1st & 2nd respondents submit that indeed there was no cheating, intimidation, forgery of ballot papers or breach of statutory and constitutional requirement in the voting, counting, tallying and transmission of votes.

169. For the 3rd & 4th respondents it was submitted that these are imprecise claims. In addition, they state that the alleged "various agents" of the 3rd respondents who were allegedly bribing voters. The polling stations whose ballot boxes were allegedly tampered with before tallying centres in which the incidents allegedly occurred and particulars of the Presiding officer who colluded and allowed the secrecy of ballots. These are in addition to the ones I have listed above. Reliance was had in the case of *Mumo Matemu Vs. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR (CA NO.290 of 2012)* where it was held;

The Principle in Anarita Karimi Njeru (Supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp Vs. Holdsworth (1876) 3 Ch. D. 637 at 639* holds true today:

"The whole object of pleadings is to bring the parties to an issue, and the meaning of the ruleswas to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing"

[44] We wish to reaffirm the principle holding on this question in Anarita Njeru (Supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference.

170. I will now deal with submissions. The Petitioner submits that following an order of this court in a ruling dated 23.10.017 she was given forms. She submits that the forms had obvious unauthenticated alterations including cancellations of the votes garnered. These forms were not pleaded the petition and would give undue advantage and violate the rights of the 3rd and 4th respondent on fair trial which is envisaged under Article 50 of the Constitution which provides;

"Every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body".

171. It has been held that a scrutiny is not a fishing expedition to introduce new evidence. The Petitioner has not made inference to Form 37 A either in the petition or in her affidavit.

172. The Petitioner has also submitted that the extras from the polling diaries brought by the 1st & 2nd respondents collaborate (sic). The Petitioner's case is that they are partial not the entire diaries which suggest they have something to hide and hence their failure to bring to court the whole of the diaries for the stations complained of, secondly the diaries are not reliable, they have been maintained in a haphazard and casual manner, with illogical entries of people who came early appearing last on the diary after people who came much later.

173. The polling diaries were filed in Court in answer to the allegations pleaded in the petition. There were no allegations made in the pleading on allegations in the polling diaries which the petitioner has raised in her evidence. The polling station diaries are administrative documents. The only forgery alleged in the petition was that of ballot papers and forged form which are not specified, used to transmit results to the County tallying centres and National tallying centre. To seek to point out forgeries in the polling diaries is to expand the scope

of the petition which should not be entertained as it prejudices the respondents who may not be able to respond to the allegations adequately. I cited binding authorities which have emphasized the principle that a party is bound by her pleadings. The Court of appeal in binding decisions has held that even where such evidence should form a basis for determining the petition.

174. In Zakaria Okoth Obando Vs. Edward Akongo Oyugi [2014] eKLR the Court held;

“In our opinion, the trial Judge rightly refused to consider any issues that had not been canvassed fairly, such as the introduction of new matters which had not been disputed by the Petitioner.... We hold it to be improper that, when re-tally is conducted, a party should take this as an opportunity to introduce new spheres of disputes, which had not been signaled in his or her original pleadings. It is vital, in election disputes, that the respondent should know the case that faces him or her. Hence the Petitioner ought to have indicated in his or her pleadings the disputed matters with, clarity and specificity, as a basis for being allowed to urge that there were irregularities in those spheres, after re-tally has been conducted”.

175. Further in the case of I.E.B.C & Another Vs. Stephen Mutinda Mule & 3 Others 2014 eKLR;

As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of mater not properly before her. To that extent, she commuted a reversible error, and the appeal succeeds on that score.

Across the borders, the Court was referred to the case of Malawi Railways Ltd Vs. Nyasulu [1998] MWSC where the Court stated:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings.....for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon an inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the speculations. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain, if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specified may be raised without notice”.

176. In Lybia Arab Uganda Bank for Foreign trade and Development & Another vs. Adma Vassiliads (1986) UGCA it was held;

“In the system of trial which have evolved in this Country, the Judge sits to hear and determine the issues raised by the parties not to conduct an investigation or examination on behalf of the society at large, as happens we believe in some foreign countries”

177. The role of Judicial precedents in the administration of justice is an indispensable foundation upon which to decide the law and its application to individual cases in a common law legal system. It is the doctrine of stare decisis where decisions of superior Courts. Unless distinguished or overruled. The rationale for stare decisis has in the need to ensure predictability, certainty, consistency, uniformity and stability in the application of the law, so stated in Gatiaru Peter Muya Vs. Dickson Mwendia Kithinji & 2 Others Pet. 2 B/2014 S.C.

178. The common thread in the decisions cited hold dear the principle that a party is bound by his or her pleadings and Courts makes decisions based on the pleadings and the evidence tendered. So the matters not pleaded which includes unauthorised alternations of Forms 37 A, including alleged cancellations of votes garnered by various candidates, the alleged haphazard and casual manner of maintaining the diaries, over writings and inaccuracies and forgeries which have not been pleaded cannot be considered to determine the petition. The petitioner submits that the 1st and 2nd respondents willfully failed to comply with the Court order on scrutiny dated 23.10.2017 which ordered the 1st and 2nd respondents to give to the Court and to the Petitioners access to the data on (sic) the KIEMS Kit, access to the originals of all forms 37As 37 B and 37 C and to provide the Court and applicant/Petitioners with certified copies of the said forms. That 1st respondent admits having failed to give the read only access to the Petitioner of all the 659 KIEMS kit which he said were reconfigured for the repeat of the Presidential elections. She submits that the reconfiguration was without the express authority of the Court and in violation of the statutory duty by the first respondent of keeping all electoral records for 3 years. The petitioner submits that the action amounts to destruction of evidence thus depriving the Court and parties to find out the truth and obstruction of justice. That the KIEMS system was introduced to facilitate the verifiability of our elections. That KIEMS kit leaves foot prints of everything done using it. That the form 37 A were being transmitted using the KIEMS kit, the only way of verifying the Forms 37 A supplied were authentic or forgeries. The KIEMS kit would have confirmed that the SD cards supplied were from the KIEMS kit deployed in Kirinyaga County for the gubernatorial elections of 8.8.2017. That the petition was to access and read for themselves and that 51 SD cards were not supplied but claims the serve logs.

179. That failure to supply the information was conceding that they would have revealed illegalities and irregularities. The 1st & 2nd respondent in their response submit that they complied with the order. That they supplied Forms 37 A of the 659 stations for the gubernatorial elections in Kirinyaga County and they were allowed to compare the same with the original copies which they did. That there was no complaint that they materially differed. The petitioner was allowed all the data in the KIEMS kit. Stored in the SD cards as the KIEMS kits had been reconfigured for use in the repeat Presidential elections. That this had been disclosed to the Court and the Petitioners

even before the order was made. The missing 51 SD cards were availed through the voter turnout logs which contained 659 polling station.

180. The 3rd and 4th respondents submit that the orders given to the petitioner was not an exercise of scrutiny under **section 82 of the Elections Act** as read with regulation **29 of the Elections Petition Rules** which can be sanctioned by the Court suo moto or on application by the party. That it is scrutiny under that provision which entitles Court to a report. That the Deputy Registrar's report not being a report from an exercise of scrutiny envisaged in Section 82 cannot be relied on as proof or confirmation of irregularities in the results of the governor. That even if it was a report envisaged in **Section 82 of Elections Act** its finding would form part of the record subject to caveat put by the Supreme Court.

181. I have considered the submissions. This Court in a ruling dated 24.4.2018 held that the Court would be entitled to a return by the Deputy Registrar after the read only access. However, I have cited various decisions which show that after the exercise the law does not allow the election Court to use the material which emerge from the exercise of the read only access to base its decision. That is why this Court declined an application for filing of affidavits to introduce new evidence. The petitioner moved to Court to determine whether the elections were conducted in accordance with the law. That is why an exercise of scrutiny under **Section 82 of the Elections Act** where it includes scrutiny and recount on an application by a party or by the Court suo moto would entitle the Court to consider them in the wider interests of Electoral justice. This is what the Supreme Court stated in **Okoth Obado Vs. Edward Akong'o Oyugi & 2 others [2014] eKLR** where it was stated thus;

We hold it to be improper that, when re-tally is conducted, a party should take this as an opportunity to introduce new spheres of disputes, which had not been signaled in his or her original pleadings. It is vital, in election disputes, that the respondent should know the case that faces him or her. Hence the petitioner ought to have indicated in his or her pleadings the disputed matters, with clarity and specificity, as a basis for being allowed to urge that there were irregularities in those spheres, after re-tally has been conducted. However, where a trial Court exercises its discretion and, suo motu, orders a scrutiny, recount or re-tally, revealing irregularities other than those that were pleaded, then there is a proper basis for any party to pose questions upon such new findings; and the Court then will make findings on the effect of those irregularities on the declared results.

182. The 1st& 2nd respondents submits that the order of this Court was complied with. That the Petitioner singled out 22 certified copies of Form 37 A where she stated there were irregularities. She pointed out two polling stations where she said she could not tell what she got. This was however clarified by the 2nd respondent from form 37 C that she got 230 votes against 3rd respondents 105. For Kangaita the Petitioner garnered 340 while 3rd respondent garnered 109. The issue at Kangaita was that 0 (zero) was cut during photocopying. The over writings were explained as human errors and due to fatigue and not deliberate. The petitioners had not pleaded the irregularities and it has not been shown that the errors were deliberate. As submitted by Mr. Kathungu, if out of 659 forms 37 A only 22 were singled out of which in 2 she could not tell the results and she was explained it did not affect the results. From the primary documents if form 37 A the petitioner did not dispute the votes she garnered in all the polling stations. I find that the 1st& 2nd respondents have shown that they substantially complied with the Court order safe for the KIEMS kit which had been configured. These information is confirmed by the Deputy Registrar and he indicates that a distribution list was provided for the parties.

183. On form 37 B from Mwea the 2nd respondent testified that it is an agent who disputed. This was of no consequence as the Petitioner had accessed the Primary documents Form 37 A and did not dispute the results she got. There is nothing that calls for Courts intervention.

184. We are told by 1st and 2nd respondent that the KIEMS kit is like a DVD player such that once the CD is removed it cannot show anything. I am of the view that failure to avail the KIEMS kit did amount to concealing evidence. The Court order of 23.10.2017 ordered that the access given was to the data in the KIEMS kits. The SD cards contained the data. The 1st& 2nd respondent have explained why the KIEMS kit had to be configured. There was no Court order which had been issued to order preservation of the KIEMS kit. The data was preserved in the SD card. Technology in respect to gubernatorial elections is limited to identification of voters. There is no requirement for transmission electronically. **Section 44 of the Elections Act** provides for use of technology which enables voter registration, identification and transmission of results. **Section 39 (1)** provides electronic transmission of results in Presidential election. I find that no prejudice was suffered by failure to give access to the KIEMS kit. The information required to verify the results was adequately supplied and accessed.

185. The Petitioner has raised the issues on the letters and the photographs annexed to the petitioner's affidavit which she submits that the Court ruled that they should be formally produced. This fails to consider that there was an issue which arose as the photographs served to the respondents were different from what was on the Court record. That led to her Counsel marking the photographs. The petitioner closed her case without calling those who took the photographs. An issue on admissibility was raised and the Court ruled that they were not admissible for none compliance with the **Evidence Act**. There was no letter which the Court prevent the petitioner from producing.

186. The Petitioner submits that the annexures to the respondents affidavit that is Form 37 C and the polling diaries must be rejected. It should be noted that it is the petitioner who applied to refer to the polling station diaries. The Court ruled that the Petitioner could refer to the diaries since they formed part of the Court record. As has been submitted, the Petitioner spent three weeks using the polling station diaries. The petitioner referred the poll diaries to cross examine witnesses.

The situations with the photographs and the diaries are totally different and there is no case of unjust process.

187. The polling station diaries were in response to the Petitioner's allegation at paragraph 17 of her affidavit. The 3rd and 4th respondents submits that the Petitioner did not file affidavits to challenge the poll diaries after she was given leave to file replies to respondent's affidavit. They submit that she waived her right to challenge the diaries and she is stopped from contesting them. The case of **Serah Njeri Mwobi Vs. John Kimani Njoroge [2013] eKLR C.A NO.314/2009**.

"In our understanding the doctrine of waiver operates to deny a party his right on basis that he had accepted to forgo the same rights having known of their existence".

188. The witnesses referred to the poll diaries which were annexures to affidavits without any objection and 1st Petitioner after relying on the diaries was cross-examined on them and re-examined. It is a technicality to now say they have not been produced. **Article 259 (2) (d) of the Constitution** discourages use technicalities to defeat justice. The petitioners applied to use the diaries and though objection was raised the Court ruled in her favour. She is stopped from approbating and reprobating. The Petitioners submit that disparities in the names of the 2nd respondent and argued that slight difference in the record was not fatal to the award as there was not mistake as to identity of parties.

189. The Court is well guided by the authorizes on the issue of technicalities. The Court of Law should always seek to do substantial justice. I hold the same on the submissions that the petition has not complied with **Rule 8 (1) (d)** by failing to state date of declaration of results and the tabulated results. The **C.A NO.1/2017** in Hon. Martha Wangari & Others Vs. I.E.B.C dealt with this issue.

190. On the issue of Petitioner's affidavit I find that it is true it does not bear the date when it was sworn. It is true the date on the affidavit is not clear when it was sworn. The irregularity is curable. The petitioner has given evidence on oath. I find that since the fact of the affidavit not having a date was not raised, and she testified and was cross-examined on oath, the issue becomes a technicality. The petitioners relied on **Mbayo and Another Vs. Sinami [2007] E. A.** I am of the view that the issue becomes a technicality since the evidence in the affidavit has been given on oath.

191. Holding in **Kairu Vs. Shaw C.A. No.21/1985** holds true. A party is not permitted to approbate and reprobate to the detriment of his opponent. The Petitioner is stopped from challenging the production of the diaries. The petitioner has submitted that annexures to affidavit are admissible which I find is the case but an objection on the Petitioner's annexures were challenged on a different front and a ruling was issued. The submission in the ruling in **C.A No.1 2017 Hon. Martha Wangari Vs. I.E.B.C** is not disputed it binds this court. The submission on 2nd respondent's name is a technicality. 1st and 2nd respondent's submission on the affidavit has come too late. I agree with the persuasive decision cited **Kassim Vs. Habre International Ltd [2000] I.E.A 98** where it was stated;

“Courts of Law are enjoined by the Constitution to administer justice without undue regard to the technicalities where there was slight difference”.

192. The Petitioners raise the issue as to what is the effect of failure by the 3rd respondent to testify or to be availrf for cross examination. The Petitioner cites Rule 12 (5) of Elections (Parliamentary and County Elections) Rules which provides.

An affidavit shall form part of the record of the hearing and may be deemed to be the deponent's evidence for the purposes of an examination in chief.

193. It is submitted that the 3rd respondent filed the undated response on 18.9.2017 and denied the allegations in the Petition. She also filed a replying affidavit. The 3rd and 4th respondents closed the case without calling the 3rd respondent or offering her for cross examination. The Petitioners submit that the rules do not anticipate a party filling a response and fails to discharge the obligation to assert what it puts up. It is submitted that this is highly prejudicial as it sends the other party to (sic) a long wild goose chase. It causes the other party undue anxiety and may as well result in the contesting party altering its position or reserving its position or reserving its case by way of cross-examination and expect resulting admissions. It should also be noted that the 2nd Petitioner did not testify.

194. The petitioners submit that this conduct amounts to an abuse of Court process. That the petitioner's case should be deemed to go unanswered. The 3rd& 4th respondents submit that no allegation specific allegation was made directly against the 3rd respondent in the petition. Similarly no evidence was adduced against the 3rd respondent by the Petitioner's witnesses to warrant the 3rd respondent being put on her defence. The 3rd respondent availed in Court all the witnesses against whom specific allegations were made by the 1st Petitioner and she cross-examined them. That based on ruling of 18.5.2018 on affidavits of witnesses not availed in Court by petitioners for cross examination, the 3rd respondent obligations to produce the witnesses mentioned in those affidavits ceased as there was no accuser or accusation in law to warrant any response. That in the light of the said ruling the 3rd respondent's duty under **Rule 5 (2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** crystallized and to facilitate expeditious resolution of the Petition, the 3rd respondent was required to call necessary witnesses which she did.

Rule 5 (2) provides;

A party to a petition or an advocate for the party shall assist an election court to further the objective of these Rules and for that purpose to participate in the processes of the election court and to comply with the directions and orders of the election Court.

195. I have considered the submissions. It is indeed true that no allegations were made against the 3rd respondent by the Petitioner and her witnesses.

On the issue of cross-examination, a party case is not made from cross-examination. That is to say that if a party has not made his or her case from his/or her pleadings he/she cannot make one from cross-examining his/or her opponent. Cross-examination is expected to test the evidence. A party wishing to cross examine must demonstrate to court material which is in the affidavit by adverse party has deponed are adverse or disputed.

196. There are two issues which arise on the affidavits in this matter. The petitioners offered the witnesses whose affidavits they had filed and did not call them as witnesses. They offered them to the respondents with a rider that if the respondents cross-examine them, the petitioners will cross-examine. When the respondents rejected the offer, the petitioner sought to rely on the affidavits. I ruled that the petitioner could not approbate and reprobate. The court ruled on 18/5/18 that affidavits of witnesses not called by a party who filed them cannot be relied on and are of no probative value.

197. The other situation is where the 3rd & 4th respondents failed to call witnesses whose affidavits they had filed and they did not offer them for cross-examination.

Though the petitioners are submitting that they failed to call the witnesses as there was no time and the petition was time bound. They were not being candid. They are not being candid, the record is clear that they wanted to avail them and after cross-examination by respondents they cross-examine them. This was not to be **Section 161 of the Evidence Act Cap 80** gives court discretion to allow a party who calls a witness to cross-examine him on matters put in cross-examination by the adverse party. Such a witness is considered as a hostile witness. The witness is not reliable and no reliance can be heard on matters arising from cross-examination unless they are corroborated by Independent evidence.

198. The respondents submitted that they did not wish to call the witnesses as no allegations were made against them and due to time constraints they see no need to call them. In both situations the witnesses were not called. My view remains as in the ruling given earlier that affidavits of witnesses who have not been availed for cross-examination cannot be relied on by any party. I have looked at various persuasive decisions from the High Court which agree that though the affidavits remain part of the record by dint of Rule 12 (12) Elections (Parliamentary and County Elections) petition Rules, 2017 which provides:

An affidavit shall form part of the record of the hearing and may be deemed to be the deponents evidence for the purpose of an examination in Chief.

They have no probative value and cannot be relied on.

199. On the failure to call the 3rd Respondent, the Rule provides that the respondent may oppose the petition by filing a response. Rule 11(1) provides:

“Upon being served with the petition in accordance with Rule 10 a respondent may oppose the petition by filing and serving a response to an election petition within 14 days.”

200. The response shall be supported by an affidavit sworn by the respondent. The 1st and 2nd respondent filed a response and affidavits. The 4th respondent testified. The petitioners filed the case of T.C. Coombs & Co (a firm) –v- Inland Revenue Commissioners. ***Comet Products UK –v- Hawkex Plastics Ltd and Another***. The decisions are persuasive. In this case the 4th Respondent who was joined jointly in the petition, testified and was cross-examined on allegations made against him. The 2nd Petitioner did not testify and no explanation was given. The Petitioners are contented with that. There was admission that petitioner and witnesses have not made allegations against the 3rd respondent.

201. This is an election petition Rule 5(2) which I have cited above states that a party shall assist an election court to further the objectives of the Rules. Under Rule 4, the objective is to facilitate the expeditious the just expeditious proportionate and affordable resolution of dispute. A party who assists the Court to achieve this objective cannot be faulted. Failure to call the 3rd respondent was not an abuse of Court process as the 3rd & 4th respondents who were joint respondents called witnesses and one of them, the 4th Respondent, who answered to the specific allegations which were pleaded. I now address the issues for determination. The 1st issue is to what extent is the judgment of the Supreme Court in ***Raila Amolo Odinga & Others –V- I.E.B.C 2017 eKLR*** applicable and binding in this section. I have earlier in this Judgment addressed the doctrine of precedents and stare decisis. In the Raila Odinga case, the main issues for determination were:

- 1) Whether the 2nd respondent declared the results of the presidential election before he had received all the results tabulated on Forms 34A from all the polling stations.
- 2) Whether all the Forms 34A had been electronically transmitted from the polling stations to the National Tallying Centre., which is provided for under **Section 39(1C) of the Elections Act** stating as follows;

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 Election 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.

The Supreme Court in rendering its decision held that;

..... the petitioners herein have discharged the legal burden of proving that the 2nd respondent, declared the final results for the election of the president, before the 1st respondent had received all the results from Forms 34A from all the 40,883 polling stations contrary to the Constitution and the applicable electoral law. We also find and hold that, the 2nd respondent, declared, the said results solely, on the basis of Forms 34B, some of which were of dubious authenticity. We further find that the 1st respondent in disregard of the provisions of Section 39 (1C), of the Elections Act, either failed, or neglected to electronically transmit, in the prescribed form, the tabulated results of an election of the president, from many polling stations to the National Tallying Centre.

202. On the issue of burden of proof, the Court stated;

Thus a petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds “to the satisfaction of the court.” That is fixed at the onset of the trial and unless circumstances change, it remains unchanged. In this case therefore, it is common ground that it is the petitioners who bear the burden of proving to the required standard that, on account of non-conformity with the law or on the basis of commission of irregularities which affected the result of this election, the 3rd respondent’s election as President of Kenya should be nullified.

Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant throughout a trial with the plaintiff, however, “depending on the effectiveness with which he or she 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.”

203. The declaration by the Supreme Court of non compliance by the 1strespondent in **Election Petition No. 1 of 2017** was in regard to Forms 34A and its electronically transmission thereof to the National Tallying Centre. It does not therefore apply to gubernatorial election of Kirinyaga County as provided for under **Section 39(1B) of the Elections Act**.

204. The petitioners herein will have to discharge the legal burden of proof in regard to elections of a County Governor. They will have to adduce specific evidence relating to the election process of Kirinyaga County Governor and the tallying process which is to be differentiated with the presidential election. **Section 39(1B) of the Elections Act** will therefore be applicable and it states;

The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.

In addition, the petition herein is governed by the subsidiary legislation, Elections (Parliamentary and County Elections) Petitions Rules, 2017.

Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014]eKLR

The Supreme Court stated as follows in regard to elections of County Governor;

After considering the relevant provisions of the law, as well as the submissions made before us, and after taking due account of the persuasive authorities from a number of jurisdictions, we have come to the conclusion that the ultimate election outcome, for the gubernatorial office which is in question here, is the one declared at the county level by the County Returning Officer who issues the presumptive winner with a certificate in Form 38. The Petitioner did not adduce evidence to prove that the statutory constitutional requirements in vote counting and transmission of votes across the County was violated.

The decision cannot therefore apply to summarily determine the Petition.

205. The second issue is whether the elections were marred by intimidation, voter bribery, exclusion of petitioners agents, use of unauthorized persons to man stations, tampering with ballot boxes, forgery of ballot papers resulting in an election which was not free fair and credible. I have pointed out that no evidence was adduced to prove that the elections were marred by voter intimidation and forgery of ballot papers. The allegation of exclusion of petitioners agent was not proved. The law at **Regulation 79 (7) of Elections(General) Regulation**. The absence of a candidate or an agent at the signing of a declaration forms or announcement of results under sub-regulation -2- shall not by itself invalidate the results announced. The case of Gatiaru Peter Munya (Supra). It is not the business of the court to aid the indolent.

If party agents were required to be present, sign statutory forms and undertake any other legitimate duty that is imposed on them as part of a political process in an election then they are under an obligation to do it. To fail to do so is not only to fail ones party but also to fail our democracy. The court must frown upon any such in action reluctance or delay.

206. If the petitioners failed to ensure that their agents were at the polling stations in time with proper documentation they only have themselves to blame. In **Gatiaru Peter Munya Case**, Supreme Court, the court abhorred the indolent nature and acts of petitioner in finding that an agent who was not present at the polling station can now raise the issue that the forms were not signed. If no evidence was adduced in court to challenge the said results, then the result as declared is uncontested. This allegation of exclusion was not proved. Use of unauthorized person to man polling station was not proved. I have given the reasons. Tampering with ballot ‘boxes’ was not proved. The allegation of tampering of the ballot box of Ciagini, the evidence of witnesses was contradictory in very material particulars especially with regard to time, which was admitted by the petitioners in their submissions contradictions show that the witnesses were not credible. The allegation was rebutted with evidence that it was not a gubernatorial box which was involved. It also turned out it was one box not boxes as pleaded. The allegation was not proved.

The allegation of bribery was not proved to the required standard which is beyond reasonable doubts. The evidence in support was mostly hearsay and witnesses who were called did not adduce evidence to proof beyond any reasonable doubts, and were not credible.

207. On the 3rd issue, whether there was breach of mandatory and constitutional requirements in voting, counting, tallying and transmission of votes, I find that no evidence was adduced. No statutory or Constitutional Provision was cited. **Section 83 of the Elections Act** which I cited earlier,

“No election shall be declared to be void by reason of non compliance with any written law relating to the 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 none compliance did not affect the results of the election”.

208. There was no evidence to prove that the elections were not conducted in accordance with the principles of the constitution and the law. There was no violence, the voters exercised their sovereign rights to vote in a peaceful manner and the officers of I.E.B.C have deponed that the elections were free, fair, and verifiable as require under Article 38, 81, & 86 of the Constitution. The voting, tallying and transmission complied with the constitution and the will of the people as expressed in the results was not challenged. The 1 & 2 respondent was able to prove that even where the Petitioners had raised complaints of exclusion the petitioner still won, the results in some station with a land slide meaning that the alleged illegularities and irregularities did not affect the results. The case of ***Raila Odinga 2013***. The legal burden was on the petitioner. The legal burden did not shift. The respondents could not be called upon to answer to matters which were not pleaded. I have identified the matters raised but not pleaded.

209. I will address the issue of the Flash Disk which the petitioner stated that she filed together with her petition. Though she abandoned an inquiry which this court had ordered and wished to have the matter investigated by D. P. P. Being the court seized of the matter I should make a finding on the issue. The petitioner when cross-examined by the respondents, admitted that her affidavit did not make any reference to a CD or a Flash Disk. It was also conceded by the Petitioner that the CD referred to in the affidavit of Kefa Sagana a KS-1 and the affidavit of Tabitha Mutero TMI, TM2 & TM3 were not filed as the receipts issued in respect of the affidavit did not include payment for such annextures. The computation of the fees paid when the petition was filed showed that she was charged for the petition, order, affidavit and receipt as there was a requirement for an acknowledgment by the Deputy Registrar and affidavit.

210. The receipt had no charge for a Flash Disk or C.D. There was no receipt for annextures to the affidavit of Kefa Sagana and Tabitha Mutero.

211. The Court staff Mr. Jack Kiburu stated on Oath that the flash Disk was not filed. The Petitioner stated that she consolidated all the photographs and CD into one CD which she then stated she filed with a back-up CD and Flash Disk.

212. I am of the view the receipt which was issued to the petitioner and a copy which is in the filed do not corroborate the averment that she filed the Flash Disk together with the petition. In any case she stated that she filed CD and a Disk and there is no prove that she was issued with a receipt for the CD and Flash Disk. I find that it was not proved that any electronic evidence inform of CD and Flash Disk was filed with the petition.

IN CONCLUSION.

The ***Court of Appeal in Hon. Martha Karua & Others –v- I.E.B.C and Others, C.A No. 1/2017*** directed this court to hear the petition on merit having found that there was no dispute on the results returned by the Returning Officer and the date of declaration of results and the petition was filed On time.

The decision of the Court of Appeal was no doubt a learning experience which has guided this court. We have walked the journey and the petitioners as well as the respondents have had their day in court.

The court has heard the evidence and considered the law and the precedents. I have also considered all the evidence and the submissions. My finding is that the petitioners have failed to proof the allegations pleaded in the petition to the required threshold. I therefore dismiss the petition.

I find that as provided under ***Section 75(3)(a) of the Elections Act***, I make a declaration that:

3rd Respondent Hon. Ann Waiguru was validly elected as the Governor for Kirinyaga County in the General Elections held on 8/8/2017. The results reflect the sovereign will of the people of Kirinyaga.

The certificate of court as to the validity of elections pursuant to section 86 of the Elections Act shall issue to the I.E.B.C and the Speaker of the Senate.

Section 84 of the ***Elections Act*** provides that an Election Court shall award costs incidental to the petition. The costs shall follow the Event. The Election Court at the determination of the petition is supposed to award costs. At the close of the final submission the parties proposed costs.

In determining costs, the court must ensure that they should not be so exorbitant as to impede access to justice and unjustly enrich the parties. In a recent decision by the Court of Appeal in ***Wavinya Ndeti and Another –v- I.E.B.C and Others. E.P. No. 8 of 2018***. The court capped the costs at Kshs 2,500,000/-.

In ***Owino Paul Ngili –V- Francis Wambugu Muriithi C.A*** the costs were capped at Kshs 3,000,000/-. I have considered the award. A lot of work went in to this petition. The hearing proceeded for a whole month in the month of May and was heard on a day to day basis. The election court is supposed to determine costs guided by the principles of fairness justice and access to Justice. Taking all these matters into consideration I should award costs to the Respondents. The costs awarded are instructions fees. I cap the instructions fees at Kshs 2,000,000/- for the 1st& 2nd Respondents and Kshs.3,000,000/- for the 3rd& 4th Respondents.

The costs shall be taxed and total costs be certified by the Deputy Registrar.

Dated this 14th June 2018.

L. W. GITARI

JUDGE

Hon. Martha Karua – Petitioner. – Present.

Mr. Gitobu Immanyara – For Petitioner – Absent.

Mr. Kihara for Petitioners - Present

Mr. Kathungu – For 1st& 2nd Respondents - present.

Mr. Nyamondi – For 3rd& 4th Respondents - Absent

Mr. Kamotho Waiganjo - Present

Mr. Muchiri - Absent

Mr. Baraza. – Present.

L. W. GITARI

JUDGE