



**REPUBLIC OF KENYA**

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

**ELECTION PETITION APPEAL NO. 3 OF 2018**

**WILFRED KIKAE T KUYO.....APPELANT**

**-VERSUS-**

**LETULAL OLE MASIKONDE ...../.....1<sup>ST</sup> RESPONDENT**

**MARK MEJOOLI LEMPAKA,**

**CONSTITUENCY RETURNING OFFICER,**

**NAROK NORTH CONSTITUENCY.....2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL &**

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

[Being an appeal from the entire judgement and order of the Principal Magistrate's Court sitting at Narok (Hon. T. Gesora) delivered on 7<sup>th</sup> day of February, 2018 in Narok Election Petition No. 4 of 2017]

**JUDGEMENT**

**INTRODUCTION**

1. The appellant has appealed against the whole judgement and decree of the magisterial election court which declared his election as a member of the county assembly for Olposimoru Ward within the County Assembly of Narok, null and void. The court held that he was not validly elected as a member of that county assembly. Counsel for the appellant filed written submissions in which he cited a plethora of authorities in support of the appeal. He also made oral submissions in support of that appeal.
2. Mr. Manyange, counsel for the 1<sup>st</sup> respondent filed written submissions in which he similarly cited a plethora of authorities in addition to making oral submissions in opposition to the appeal.
3. Both parties filed affidavits which were adopted as their evidence in chief. Additionally, they called witnesses who similarly had filed affidavits and were then cross-examined on their affidavit evidence in that trial court.
4. Following the general elections of 8/8/2017 and after voting and tallying, the announcement of the results in respect of the seat of member of county assembly for Olposimoru Ward were as follows:

1) Wilfred Kikaet Kuyo (ODM)	3,521 votes
2) Letulal Ole Masikonde (JP)	2,603 votes
3) Stanley Salau Ole Koros(CCM)	1,254 votes
Rejected votes	12 votes
Total votes cast	8,380 votes

**THE APPLICABLE LAW**

5. I have considered counsel's submissions and the authorities cited. I find the following to be the applicable law. Appeals from the magisterial election courts to this court lie only on matters of law. This is clear from the provisions of section 75 of the Elections Act of 2011.

6. Furthermore, the standard of proof in election petition cases is one between proof beyond reasonable doubt that is applicable in criminal cases and on a balance of probabilities that is applicable in civil cases. This is according to *Raila Odinga & 5 others v. IEBC & 3 others [2013] eKLR*. Additionally, where there are allegations of the commission of criminal offences, the standard of proof is beyond reasonable doubt, according to *Raila Odinga & 5 others v. IEBC & 3 others, supra*.

7. It must be borne in mind that findings of fact by the trial court which are supported by evidence and the law may not be interfered with by this court. Those findings should be scrutinized and re-evaluated by this court to ascertain whether they are supported by the evidence and the law. It is trite law that this court sits as a first appeal court in this instant appeal. As a first appeal court, according to *Abuk James Odera t/a A. J. Odera and Associates v. John Patrick Machira t/a Machira t/a Machira and Company Advocates [2013] eKLR*, I am required to re-assess the entire evidence tendered at trial and make my own findings, while bearing in mind that I do not have the advantage of having seen and heard the life testimony of the witnesses. In those circumstances, I am required to generally defer to findings of fact as found by the trial court, which are based on credibility and the law. This is according to *Fredrick Otieno Ota v. Jared Odoyo Okello and 4 others [2014] eKLR*.

#### **FINDINGS ON THE GROUNDS OF APPEAL**

8. In this court the appellant has raised 9 grounds in his memorandum of appeal. In ground one the appellant has faulted the trial court in law in upholding the petition in the absence of production of material evidence before him. Additionally, the appellant had faulted the trial court for not being independent and impartial.

9. In ground 2 the appellant has faulted the trial court in law by elevating mere irregularities to catastrophic levels in an effort to justify the nullification of the election. He has further faulted that court in failing to find that the administrative and human errors by officials of IEBC were honest mistakes, which did not benefit the appellant. The appellant in his submissions pointed out that the admission of NASA agents and the signature of a poll official on an agent form were normal human errors. This he points out were elevated by the trial court which found that the admission of NASA agents were deliberate and it was:

*“an avenue to admit more agents for the 1<sup>st</sup> respondent that he was entitled to probably not with the connivance of the 1<sup>st</sup> respondent but by other elements acting in their own interests.”*

10. Furthermore, the trial court further found that the poll official namely Mbuyuk Sebastian who acted as a party agent for NASA confirmed that the election did not conform to the constitution and the applicable laws and was flawed with illegalities and irregularities, which were bound to affect the outcome of the elections. In this regard, the evidence of the appellant (1RW1) under cross examination was that one Daniel Sanamwala was his agent and he indicated that his party was ODM (Orange Democratic Movement). Furthermore, he testified that Moses Lekokoyo Kuyo is shown in the documents as an agent for NASA. The appellant explained that ODM and Wiper were members of the NASA coalition. Moses Lekokoyo Kuyo (1RW2) the appellant's agent testified in support of the appellant's case.

11. He (1RW2) testified that all agents signed the polling station diary. It was his evidence that in that polling station diary, he is indicated as an agent of NASA. Other agents namely Evans Naimadu, Dominic Lekstian and Daniel Sanamwala are recorded as being ODM agents. He continued to testify that he was not denied entry into the polling station, because he was from NASA. He further testified that no agent was denied entry. He explained that when one was for NASA it could mean either he was from ODM or CCM (Chama cha Mashinani). It was also his evidence that all agents signed forms 34A, 35A, 36A, 37A and 38A. It was also his evidence that no single agent refused to sign form 36A.

12. Furthermore, there is the evidence of Mark Lempaka (2RW5), who was the returning officer. It was his evidence that all agents were trained on their role. Furthermore, they were also briefed on the role of IEBC. Additionally, all agents were given communication protocols including the cell phone number of 2RW5. He further testified that he did not receive any complaints in respect of denial of access to the polling station.

13. The trial magisterial election court did not consider this evidence that was favourable to the appellant. The error/mistake as to whether one was an agent for NASA or ODM or CCM was explained by these witnesses namely 1RW1, 1RW2 and 2RW5. It is a cardinal rule that a trial court must consider the evidence of each witness who testified in court. It must then proceed to consider their evidence as a whole before making findings of fact. Thereafter, it must give reasons for believing or disbelieving any of the witnesses. This is according to *Oketch Okale & others v. Republic [1965] EA 555*, in which it was held that a trial court must consider the whole evidence before making findings of fact, which must be based on the evidence tendered before it. This pronouncement of the law was made in a criminal case. The principle is the same in civil cases, which includes the instant appeal. In the circumstances, I find the trial court erred in ignoring the evidence of the appellant and his witnesses and those of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents without giving reasons for doing so. It further erred in law in elevating normal human errors to fatal errors. Human and administrative errors that do not affect the result of the election cannot be the basis of nullifying an election. The issue of harmless administrative errors was explained in *Peter Gichuki King'ara v. Independent Electoral and Boundaries Commission and 2 others [2014] eKLR*, in the following terms: *“Given the complexity of administering a federal election, the tens of thousands of election workers involved, many of whom have no on-the-job experience, and the short time frame for hiring and training them, it is inevitable that administrative mistakes will be made. If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election.”*

14. The upshot of the foregoing is that I find ground 2 of the memorandum of appeal is meritorious with the result that I hereby set aside the finding of the magisterial election court, being in itself a finding, which in law is not supported by the evidence.

15. In grounds 3 and 4, the appellant has faulted the trial magisterial election court in law for totally ignoring the evidence of the appellant, that of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents together with those of the appellant's agents in the polling stations. Additionally, the appellant had faulted the trial court in law by ignoring, misunderstanding and misapplying the law and precedents. In this regard, he has submitted that the trial court fell in error by finding that the 1<sup>st</sup> respondent's agents were denied entry into the polling stations and additionally there were denied the chance to sign the declaration forms.

16. In this regard, the evidence of the appellant was that the agents of the 1<sup>st</sup> respondent left before signing the declaration forms after seeing that the 1<sup>st</sup> respondent had lost. The appellant's agent Moses Lekokoyo Kuyo (1RW2) informed the appellant that the 1<sup>st</sup> respondent's agents had disappeared. In this regard also the evidence of Noah Sito Nkaiwarei (2RW2) was that not a single agent was denied the opportunity to sign the document and not a single agent was denied entry to the polling station. It is to be borne in mind that this witness (2RW2) was the deputy presiding officer in charge of Olposimoru Primary School, stream 2. He further testified that not a single agent raised any issue at that polling station.

17. Furthermore, there is the evidence of the presiding officer in charge of Olangape Polling Station namely Nkuyata Ole Letoluo (2RW2), who testified that all the agents entered the polling station. Thereafter, they entered their personal details themselves, which I understand to mean that they entered their details in the polling station diary. It was also his evidence that he did not chase away any agents.

18. In addition to the foregoing evidence, there is the evidence of the presiding officer in charge of Kamurar Primary School namely Mpalinga Mandela (2RW3). It was his evidence that Jubilee and ODM were parties and that NASA was not a party. He further testified that although NASA was indicated as a political party in the polling station diary, he was not allowed to rectify that error. It was his further evidence that it was assumed that the competition was between NASA and Jubilee. He continued to testify that no agent was denied entry to the polling station.

19. In addition to the foregoing evidence, there is the evidence of Gladys Nkoisena Kuyioni (2RW4). She was the presiding officer for Olposimoru Primary School. It was her evidence that the details of the agents were entered in the polling station diary by the agents themselves. It was her evidence that she was the one receiving the agents. She further testified that before allowing each agent to enter his particulars in the polling station diary, she checked their credentials which included the national identification card (ID), letter of appointment as an agent and the oath of secrecy form duly completed.

20. She (2RW4) continued to testify that Josephine Leperes (PW7) was a Jubilee party agent. At the end of counting and tallying of the votes, Daniel Sanamwala and Josema Nkaiwanta signed form 36A. She continued to testify that the other agents left. It was also her evidence that whenever there was a complaint either orally or in writing, it had to be confirmed in the polling station diary. Finally, it was her evidence that no agent was denied entry into the polling station.

21. Finally, there is the evidence of Mark Lempaka (2RW5), who was the returning officer for Olposimoru Ward. It was his evidence that there were no complaints presented in any of the polling stations. It was also his evidence that he was in that ward before, during and after the election. Furthermore, he testified that Josephine Leperes was a Jubilee agent and Julius Nkuito was an agent for the 1<sup>st</sup> respondent. It was also his evidence that all agents were trained in respect of their functions.

22. Additionally, he testified that they were also trained on the concepts of IEBC. He also testified that he gave all agents their communication protocols including his cell phone number. He testified that he did not get any complaints of denial of access to the polling stations. He also testified that once entries have been made in the polling station diary no one was allowed to change it.

23. Furthermore, it was his evidence that political parties forwarded the lists of their agents 14 days before the date of the general elections. Finally, he testified that if there were malpractices and disturbance, the complainant would tell the security officer or the presiding officer. He testified that he never got any such report from agents, candidates and the IEBC officials. Finally, he testified that he never got reports on witchcraft or related matters. It is to be borne in mind that it had not been proved that the appellant was involved in witchcraft, which allegedly involved the sacrifice of a columbus monkey.

24. Mr. Manyange for the 1<sup>st</sup> respondent submitted that it is not open to this court to assess the credibility of witnesses. In support thereof he cited *Fredrick Otieno Outa v. Jared Okello and 4 others, supra*. I find that his submission ignores the following principles. First, it ignores the duty bound function of this court as a first appeal court to re-examine and reassess all the evidence tendered at trial. Second, it also ignores the duty of this court to reassess the conclusions reached by the trial court and make its own conclusions. If the conclusion reached whether based on credibility or not is in conflict with the totality of the evidence tendered at trial, it is open to this court to set it aside. Third, if the submission of Mr. Manyange was to be accepted, it would amount to asking this court to abdicate its responsibility as a first appeal court in reassessing the entire evidence and the conclusions of the trial court.

25. In the light of the foregoing evidence and the applicable law, I find that the trial court erred in law in failing to assess the evidence of the appellant and his agents and that of 2<sup>nd</sup> and 3<sup>rd</sup> respondents, which was favourable to those parties. The upshot of the foregoing is that I find there is merit in grounds 3 and 4 and I hereby uphold them.

26. In ground 5 the appellant has faulted the trial court in law by totally ignoring the evidence and testimonies of the appellant and that of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in respect of the procedure that is applicable in regard to assisted voters. The evidence of Moses Lekokoyo Kuyo (1RW2), who was the agent of the appellant, was that there were two types of assisted voters. It was his evidence that the 1<sup>st</sup> type of assisted voters are those who went to the polling station without an assistant. Those voters would ask for assistance. Thereafter, the voter seeking assistance was referred to the presiding officer. The presiding officer would then call all the party agents to come and witness the voting by this voter. He further testified that all agents had taken an oath of secrecy, which they had to sign before commencing their work. In this regard, there is no breach of the secrecy of the ballot paper for those types of assisted voters. This secrecy is for the benefit of the voters. Any breach of this secrecy by the presiding officer, any polling official or agent is punishable. It is clear that this is intended to safeguard the integrity of the voting process.

27. The 2<sup>nd</sup> type of assisted voters were those who came to the polling station with an assistant. It was the evidence of Moses Lekokoyo Kuyo (1RW2) that these type of voters would require the completion and signing of form 32A before being assisted. It was also his evidence that the voters, who were in need of assistance were asked as to whom they wanted to vote for. This was done in the presence of all the agents. Thereafter, form 32A had to be filled, a matter in respect of which they had been trained as agents. It was his evidence that he witnessed forms 32As being filled during the election. He continued to testify that there were many assisted voters in his stream. It was also his evidence that in his polling station (Olposimoru stream 2) there were 15 agents for every candidate in respect of all the six elective posts.

28. He continued to testify that they had been briefed that the purpose of form 32A was to ensure that an assisted voter could not vote twice. This witness also testified that no agent was denied entry to the polling station.

29. The evidence Moses Lekokoyo Kuyo (1RW2) is supported by that of the deputy presiding officer in charge of Olposimoru Polling Station namely Noah Sito Nkaiwarei (2RW1), which I do not intend to reproduce here.

30. There is further supporting evidence from Nkuyata Letoluo (2RW2), who was the presiding officer in charge of Olangape polling station. It was his evidence that he received agents and verified their credentials, who then proceeded to enter their particulars in the polling station diary. It was also his evidence that there was no complaint in that station. He also testified that he did not chase away any agents. As regards assisted voters, it was his evidence that no assisted voter came with an assistant and that he assisted the voters in need of assistance in the presence of agents.

31. Finally, he testified that there were no reports of malpractice or any problem in his station. Furthermore, there is the evidence of Mpalinga Mandela (2RW3), who testified that he was the presiding officer in charge of Kamurar polling station. His evidence in respect of assisted voters was that he assisted those voters in need of assistance. It was his evidence that all voters were identified by the KIEM's kit (voting machines). It was also his evidence that all agents were present in respect of a voter who came without an assistant. Finally, it was his evidence that for those voters who came with assistants their assistants had to sign form 32A.

32. The evidence of 2RW3 is supported by that of Gladys Nkoseina Kuyioni (2RW4). It was her evidence that there were many assisted voters in her Olposimoru Primary School polling station. She testified that agents were not allowed to assist a voter. They were only allowed to witness the voting process by the assisted voter. Her further evidence was that a voter was assisted in her presence and all of the agents.

33. Finally, in respect of assisted voters there is the evidence of Mark Lempaka (2RW5), who was the returning officer for Olposimoru Ward. It was his evidence that the presiding officer was the only one allowed to assist a voter, who did not come with an assistant. If the voter came with an assistant, as a presiding officer he would not be involved. Finally, it was his evidence that in assisting an unaccompanied voter the assistance was done by the presiding officer at the booth in the presence of all the agents, if the space allowed. If the space did not allow, the presiding officer could request a few of those agents to attend and witness. Furthermore, the presiding officer had discretion to place a table next to the booth for all the agents to witness in order to avoid mistrust. He finally testified that there were no complaints.

34. In respect of a son who accompanied his father at Ololung'oi Primary School, he testified that it is from that polling station that they received unfilled (uncompleted) form 32As. It was his evidence that forms 32A was completed in respect of the son (John Merelole Nkalia-PW2) and his father (Salalon Ole Nkolia –PW3). He contradicted the evidence of PW2 when he testified that he did not complete any form. It is only in respect of Ololung'oi polling station that the forms were not completed according to the returning officer. The evidence of this witness (2RW5) substantially complied with the order of the trial court in respect of producing forms 32A on assisted voters

35. In the light of the foregoing evidence, it is clear that the evidence of the appellant and his witness (1RW2) and that of 2<sup>nd</sup> respondent and his witnesses was cogent, consistent and credible as regards assisted voters. The evidence of the witnesses of the 1<sup>st</sup> respondent namely PW2 and PW3 was not credible. Again the magisterial election court failed to evaluate this evidence and as a result that evidence was ignored without any reasons being given. It therefore follows that this is a matter of law in regard to which this court has a right to interfere by setting aside the erroneous finding by the trial court which I hereby do.

36. The upshot of the foregoing is that I find merit in ground 5 and I hereby uphold it with the result that the finding of the trial court is hereby set aside.

37. In ground 6, the appellant has faulted the trial court in law by failing to analyze and take into consideration the pleadings by the parties and their witness testimonies and as a result arrived at an erroneous conclusion. In this regard, I have considered the 1<sup>st</sup> respondent's petition and it is clear that the issue concerning assisted voters was not pleaded. In terms of evidence, the appellant called 2 witnesses namely John Merelole Nkalia (PW2) who was the son of Salalon Ole Nkolia (PW3). The evidence of these witnesses is that PW2 assisted PW3 to vote. PW2 testified that he was not compelled to mark what his father did not want. In this regard also his father, PW3 testified that he trusted his son *"because someone else may have tricked me. I finished mine and he came in later..... no one forced me to vote for anyone I didn't want to vote for. I have never been in a class at school. I didn't see any form."* It is clear from the evidence of these two witnesses that they voted freely. The evidence of the returning officer, Mark Lempaka contradicts the evidence of these 2 witnesses that no form was completed when they voted. However, there is ample evidence that all assisted voters whether unaccompanied by their assistants or not, voted freely, although the issue of assisted voters was not pleaded by the 1<sup>st</sup> respondent (petitioner). He called PW2 and PW3 as witnesses who gave evidence in that regard.

38. The returning officer (2RW5) contradicted their evidence. In the circumstances, I find that notwithstanding the lack of pleadings, the respondents were not mistaken in any way. Furthermore, there is the evidence of Nkuyata Letoluo (2RW2) that he assisted many voters to cast their votes. In that regard, he testified that there was no complaint regarding the assisted voters. He further testified that there was no form to be filled in respect of assisted voters who were not accompanied by their assistants.

39. I have considered the evidence in respect of these two witnesses and that of the respondents and I find the two witnesses voted freely. Even if they never signed form 32A at the polling station, it didn't affect their free will. I therefore find that the trial court fell in error in this

regard and I therefore set aside its finding in that regard.

40. In ground 7, the appellant has faulted the trial court in law for exercising its discretion in a capricious manner to the detriment and prejudice of the appellant. Counsel for the appellant has submitted in respect of the following matters in that regard. First, counsel pointed to paragraph 143 of the judgement in which the trial court stated as follows:

*“I would imagine that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ report that the docs submitted by agents upon entry to the polling station. They did not prove the petitioner’s agents wrong by countering allegations strongly. It was necessary that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents demonstrate that indeed the signature on the list were genuinely the petitioner’s agents signatures.”*

41. Counsel also submitted that the trial court found there were many assisted voters and yet only 14 form 32A were produced. He submitted that the word “many” meant there had to be more than 14 assisted voters. He further pointed out that there was no evidence to show that there were more than 14 assisted voters.

42. Furthermore, the appellant’s counsel submitted that the affidavit evidence of Josephine Leperes (PW7), Justus Nkuito Manara, Silantoi Koros, Samson Masikonte and Jonah Kipkoech Bett was defective. The alleged defects in their affidavit evidence was a subject of a ruling by the trial court. In this regard, I find that the language used in ground 7 is unacceptable. Counsel should use sober and dispassionate language. That notwithstanding, I have considered this ground and I find the language used by the trial court is not capricious and I also find that the alleged defects in the affidavit evidence are not fatal.

43. However, I find that the trial court fell in error in requiring the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to prove that the signatures of the respondent’s agents were forgeries. It is the evidence of the 1<sup>st</sup> respondent and his witnesses that those signatures were forgeries. After reassessing the entire evidence, I find the evidence of the agents of the 1<sup>st</sup> respondent to be untruthful. Agent Josephine Leperes (PW7), when asked as to why she did not sign her oath of secrecy form she kept quiet. She also testified that she was allowed entry into the polling station at 3.00.pm by the presiding officer, which is denied by the latter. There is no entry of denial of access to the polling station in the polling station diary. In this regard, the burden of proof lay with the 1<sup>st</sup> respondent to prove beyond reasonable doubt that the signatures were forgeries. The reason being that forgery is a criminal offence and to prove a criminal offence, the standard of proof is beyond reasonable doubt and that lies with the 1<sup>st</sup> respondent. It never shifted to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. I therefore uphold this submission. Finally I do not find the usage of the word “imagined” to be capricious. Language that imputes caprice and one that is emotive has no place in judicial proceedings.

44. In ground 8, the appellant has faulted the trial court in law by not finding that the court did not have jurisdiction to entertain and determine the instant appeal. In this regard, counsel stated that the petition was incompetent and fatally defective, because it did not state the results and date of the election results in the petition and in his supporting affidavit. In that regard, counsel cited *Mwamlole Tchappu Mbwana v. IEBC & 4 others [2017] eKLR*, in which the court stated that:

*“parties are bound by their own pleadings. A court cannot frame an issue not stated in the pleadings. In line with this well established principle of law, this court cannot frame any issue in respect of the date of declaration of results of the election and indeed in respect of the results of the election.*

45. Furthermore, counsel also cited *Amina Hassan Ahmen v. Returning Officer Mandera County & 2 Others [2013] eKLR*, in which that court stated:

*“put differently, the provisions of Rule 10 and others afore stated are not mere technical requirements. If they are technical in so far as they are procedural and spell out the form and content of intended petition, they nevertheless at the same time, are substantive and go to the root and substance of issues and matters prescribed upon. A further reason why the provisions of the Elections Act and/or Rules, are a special legislation. They are a legislation for the purpose, as already stated above of efficiently prescribing the proper, efficient, expeditious and just conduct of election petitions. Every provision in them therefore, is intended to achieve a required result...”*

46. Counsel for the 1<sup>st</sup> respondent cited a number of authorities including this court’s decision in *David Kipsang Keter v. Johana Kipyegon Ngeno & 2 others, High Court Election Petition No.1 of 2017 (Narok)* amongst other authorities, in respect of jurisdiction. He submitted that there was substantial compliance of the requirement governing the contents of what the petition should contain.

47. In this regard I have considered the appellant’s petition and I find it that does not state the election results and the date of declaration of those results as required by Rules 8 and 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. There is evidence in the affidavit of the appellant, which shows that the appellant garnered 3,521 votes and the 1<sup>st</sup> respondent garnered 2,603 votes.

48. Furthermore, in the appellant’s replying affidavit, the appellant stated as follows:

1) Wilfred Kikaet Kuyo (ODM)	3,521 votes
2) Letulal Ole Masikonde (JP)	2,603 votes
3) Stanley Salau Ole Koros(CCM)	1,254 votes
Rejected votes	12 votes

Total votes cast

8,380 votes

49. Furthermore, there is the evidence of the returning officer (2RW5) that on 8<sup>th</sup> August, 2017 he declared the appellant as the duly elected member of the county assembly and issued him with a certificate of election as member of that county assembly.

50. In the circumstances, I find that after considering the entire petition, the 1<sup>st</sup> respondent's supporting affidavit and the response of the returning officer and his replying affidavit, that the results were announced on the 8/8/2017 by the returning officer. I also find that the votes garnered by the participating candidates were counted, tallied and announced as indicated in the foregoing paragraph 48. In the circumstances, it is clear that there is substantial compliance with Rules 8 and 12 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. I therefore find no merit in this ground and I hereby dismiss it.

51. In ground 9, the appellant has faulted the trial court for usurping the will of the voters of Olposimoru Ward by setting aside the election results which were in favour of the appellant. In this regard, I have considered the entire evidence produced at trial by all the parties and in the light of the applicable law, I find that this election was free and fair and was in accordance with Article 86 of the Constitution and Regulations 75, 76, 77, 78 and 79 of the Elections (General) Regulations, 2012.

52. The powers of this court in exercise of its appellate jurisdiction are set out in Rule 34 (10) of the Elections (Parliamentary and County Elections) Petition Rules, 2017, which provide as follows: "*The High Court to which the appeal is preferred may confirm, vary or reverse in whole or in part, the decision of the court from which the appeal is preferred and shall have the same powers and perform the same duties as are conferred and imposed on the court exercising original jurisdiction.*"

53. Pursuant to those powers, I now proceed to make the following orders. That the whole judgement and decree of the magisterial election court dated 7<sup>th</sup> February, 2018 and the consequential orders are hereby set aside.

54. As regards costs, counsel for the appellant submitted that the costs which were ordered to be paid by the 3<sup>rd</sup> respondent namely IEBC which were capped at 1 million shillings (Kshs.1,000,000) for the 1<sup>st</sup> respondent and at seven hundred and fifty thousand shillings (Kshs.750,000) for the appellant were oppressive and excessive. I have considered the issue of costs. I find that they have the effect of deterring potential good leaders standing for elective posts. In the circumstances, I hereby set aside the order for costs.

#### **FINAL DISPOSAL ORDERS**

- 1) The appellant is hereby declared to have been validly elected as a member of the county assembly for Olposimoru Ward within the County of Narok.
- 2) The 1<sup>st</sup> respondent is hereby ordered to bear the costs of this appeal.
- 3) The costs payable are hereby capped at Kshs.120,000 to be shared equally between the appellant on the one hand and the 2<sup>nd</sup> and 3<sup>rd</sup> respondents on the other hand.
- 4) The security for costs deposited in this court to be released to the appellant/ depositor.
- 5) Pursuant to section 86 of the Elections Act 24 of 2011, a certificate of the determination of this appeal is hereby ordered to issue to the Independent Electoral and Boundaries Commission (IEBC).
- 6) In terms of section 86 (1) of the Elections Act 24 of 2011, notice of this determination is hereby ordered to be served upon the Speaker of the County Assembly of the County of Narok.

**Judgement Delivered** in open court at **Narok** this **15<sup>th</sup>** day of **August, 2018** in the presence of Mr. Rotich for the appellant, Mr. Manyange for the 1<sup>st</sup> respondent and Ms. Karanja for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

**J. M. BWONWONGA**

**JUDGE**

**15/8/2018**