



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MARSABIT**  
**ELECTION PETITION NO. 2 OF 2017**  
**(FORMERLY NAIROBI MILIMANI ELECTION PETITION NO.15 OF 2017)**

IN THE MATTER OF: ARTICLE 1(2), 3, 38, 81, 84 ,  
86 AND 87 OF THE CONSTITUTION OF KENYA

**AND**

IN THE MATTER OF: SECTION 78 OF THE ELECTION ACT (No.24 of 2011)

**AND**

IN THE MATTER OF: THE GUBERNATORIAL ELECTIONS FOR MARSABIT  
COUNTY HELD DURING THE GENERAL ELECTIONS  
CONDUCTED ON THE 8<sup>TH</sup> OF AUGUST 2017

**BETWEEN**

**AMB. UKUR YATTANI KANACHO..... PETITIONER**

**VERSUS**

**1. I.E.B.C.....1<sup>ST</sup> RESPONDENT**

**2. ARNOLD MUTWIRI NJABANI.....2<sup>ND</sup> RESPONDENT**

**MARSABIT COUNTY RETURNING OFFICER**

**3. ALI MOHAMUD MOHAMED.....3<sup>RD</sup> RESPONDENT**

**RULING**

The application dated 12<sup>th</sup> October 2017 seeks the following orders:-

***(a) This Honourable court be pleased to order the 1<sup>st</sup> Respondent herein to give access to all the parties in the petition, for purposes of scrutiny, and supply to the Court and to the parties, the***

**following technological information and data that is in its exclusive possession:**

**i. The 1<sup>st</sup> Respondent's Election Technology System Network Architecture for the period of seven(7) days before the general elections held on the 8<sup>th</sup> of August, 2017 to the date of the order of this Court; comprising but not limited to:**

**(a) All the servers used for the Gubernatorial Elections in Marsabit;**

**(b) Number of servers;**

**(c) Location of servers;**

**(d) Firewalls**

**(e) IP addresses;**

**(f) Operating systems;**

**(g) Software running applications**

**ii. In relation to the Kenya Integrated Elections Management System (KIEMS) Kits:**

**1. The static IP addresses of each KIEMS Kit used during the Marsabit Gubernatorial Election;**

**2. Specific GPRS location of each KIEMS Kit used during the Marsabit Gubernatorial Election for the period between and including 5<sup>th</sup> August 2017 and 11<sup>th</sup> August, 2017;**

**3. Polling station allocation for each KIEMS Kit used during the Gubernatorial Election;**

**4. Audit logs of what each KIEMS Kit transmitted from Polling Stations to Constituency Tallying Centres during the Marsabit Gubernatorial Election.**

**5. Count of Identified Voters by each KIEMS Kit in Marsabit County.**

**6. Audit logs of transmissions of scanned Forms 37 A's from each of the KIEMS Kits in Marsabit County.**

**(b) This Honourable Court be pleased to order the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein to furnish before Court, all the original Forms 37A's, 37B's and 37 C's prepared at and obtained from all the Polling Stations and Tallying Centres in Marsabit County.**

**(c) The Honourable Court be pleased to order the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' herein to furnish before Court, copies of all the original poll book diaries prepared at and obtained from all the Polling Stations and Tallying Centres in Marsabit County, documenting occurrences at the various polling station and Tallying Centres.**

**(d) This Honourable Court be pleased to order the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein to furnish before Court, copies of the voter register used in the elections held on the 8<sup>th</sup> of August, 2017.**

**(e) This Honourable Court be pleased to take immediate custody for preservation purposes, all the ballot boxes used in the gubernatorial elections for Marsabit County and to that effect document and record the number of ballot boxes received, the serial numbers of the seals thereto and the state in which they were received.**

***(f) This Honourable Court be pleased to grant any other reliefs that it may deem just and fit to grant in the circumstances.***

***(g) The costs of this application be in the cause.***

The application is supported by the Petitioner's affidavit and his further affidavit sworn on 12.11.2017. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed an affidavit in reply to the application sworn by **ARNOLD MUTWIRI NJABANI** on 8<sup>th</sup> November 2017. The 3<sup>rd</sup> respondent filed an affidavit in reply to the application sworn on 6<sup>th</sup> November, 2017.

Mr. Walukwe, Counsel for the applicant maintain that the petitioner is seeking access and preservation of the Gubernatorial materials and specifically the technological materials used during the 8<sup>th</sup> August 2017 election. The applicant is seeking the whole technological architecture. The applicant is also seeking certified copies of forms 37A's, Bs and Cs. The original poll book diaries for all the polling and tallying centres as well as the voter register.

The application is brought under Article 35 of the Constitution as well as Section 4 of the Access to Information act. Under section 4(4) of the Access to Information Act, the applicant does not need to justify the reasons for seeking the information. Further, the application is based on Section 27(2) of the I.E.B.C Act which provides for the publication of information. Mr. Walukwe submitted that the information being sought is with the commission. The applicant served the

IEBC with a notice to produce the information and is fully aware that the information is necessary to the Petitioner who intends to rely on it. Despite such a notice, the 1<sup>st</sup> and 2<sup>nd</sup> respondents are yet to provide the information.

Counsel for the applicant submit that the first and second respondents have conceded that they are able to supply certified copies of forms 37As, Bs and Cs. The forms that were supplied are not in conformity with Section 8 of the Evidence Act. Also, the IEBC is ready and willing to provide the poll book diaries but is opposed to the request for the technological information.

Mr. Walukwe contends that the petition is anchored upon the technological inconsistencies and irregularities. The Petitioner and his agents were denied access to the statutory forms and were constantly denied the right to participate in the election. Due to that denial to participate in the election, the petitioner entirely relied on the information transmitted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents through the portal. The results on the portal materially differs from the information in the statutory forms. The petitioner further contends in his petition that the respondents irregularly and unlawfully allowed people who could not be identified by the KIEMS Kits to vote. Due to the irregularities, there is a mismatch of the results for the six elections on the total number of votes cast. A total of 31 stations had no data entered for the gubernatorial election. The results from these 31 polling stations were not transferred thereby affecting 12,351 votes. This number of votes is far above the margin of victory which is 8,199 votes.

Mr. Walukwe further contends that in view of the anomalies committed by the respondent, the only way the petitioner can find out whether the people who voted were actually more than those identified by the KIEMS Kit is through accessing the technological information. How can it be held that the 3<sup>rd</sup> respondent won fairly without the results from the 31 polling stations? The information being sought goes to the root of the petition and does not seek to expand the petition. The 3<sup>rd</sup> respondent was supplied with several documents by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. The petitioner is seeking equal treatment by the 1<sup>st</sup> and 2<sup>nd</sup> respondents.

Counsel for the petitioner maintains that the transmission of election results electronically is not limited to the Presidential election. Counsel relies on the case of **RAILA ODINGA V IEBC & OTHERS, Supreme Court Presidential Election Petition No.1 of 2017**. In that case the Court distinguished between scrutiny and recount and access to information. **The case of CHRIS MUNGA BICHANGE & 2 OTHERS V IEBC & 2 OTHERS KISII ELECTION PETITION NO.12 OF 2017** in that case, Justice A.K. Ndungu

granted similar prayers. The applicant also relies on the case of **JACKTON NYANUNGO RANGUMA V IEBC & 2 OTHERS Kisumu Election Petition No.3 of 2017** where Justice Majanja held that information is to be provided as a matter of right upon request.

Mr. Walukwe further contends that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are required by the law to store the required information for a period of three years. The application is seeking access to information and is not one for scrutiny and recount.

Mr. Odhiambo appeared for the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Counsel relied on the replying affidavit of ARNOLD MUTWIRI. Counsel submit that the purview of Gubernatorial elections does not revolve around servers. The server is only intergral in the Presidential election. When it comes to a County elections, the Information is relayed to the constituency tallying centre. The returning officers carry the physical forms to the county tallying centre. The declaration of the results is based on the physical forms and not on the servers. No server of the IEBC could have affected the Governors Election.

Mr. Odhiambo submit that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are is ready to give the information. The petitioner was supplied with copies of the forms. The petitioner's agents signed the forms. It is the forms that were supplied to the petitioner that were used to draft the petition. The two respondents have attached all the forms 37 and the petitioner has not pointed out the specific forms he is interested in. The polling station diaries can be provided but the petitioner has to be specific on the polling stations and constituencies. The notice to produce issued by the applicant does not indicate that the applicants went to access the servers.

According to Mr. Odhiambo, the KIEMS Kit is used for two main functions. Identification of voters and transmission of results. If a voter cannot be identified by the Kiems Kit, then an alpha numerical search is done using the voter's name and identity card. The alleged 31 polling stations which did not transmit data have not been itemized. On the issue of access to information, Mr. Odhiambo submit that one has to request for the information and it will be provided upon payment of the requisite fees. The voters register is available on the portal. No request was made and therefore there was no denial on the part of the 1<sup>st</sup> and 2<sup>nd</sup> respondents. Electronic Transmission of results for the Governor's election cannot be an issue.

Mr. Odhiambo also maintain that the information on the voters or number of voters is not stored in a Kiems Kit but on the SD card. The Kiems Kits were reconfigured and used in the fresh Presidential election of 26<sup>th</sup> October, 2017. The forms 37 which have been provided are the primary documents in a gubernatorial election.

Miss Hashim and Mr. Muganda appeared for the 3<sup>rd</sup> respondent. Counsels rely on the 3<sup>rd</sup> respondent's replying affidavit and the response to the petition. Counsel maintains that the Access to Information Act deals with access to general information. Election Petitions are *sui generis* and are governed by different legislation. There is the Election Technology Legislation which provides for the framework for access to information. Counsel submit that the primary data for scrutiny or verification for the gubernatorial results is contained in the forms 37As, Bs and Cs. Section 44 of the Election Act and Regulations 79 and 83 of the Election General Regulations 2012 does not make Electronic transmission mandatory. The petitioner did not seek the relief in the petition.

Counsels for the 3<sup>rd</sup> respondent submit that the Petitioner's application does not allude to specific polling stations. It is based on generalities. There is reference to mismatch in votes in about 200 polling stations but those specific polling stations are not stated. There is a total of 384 polling stations in the County and the 200 affected polling stations are not mentioned. Reference is also made to 31 polling stations with no results. The names of those polling stations are not given. Issues relating to Kiems Kits for Moyale and Saku constituencies have been raised but no specific polling stations have been identified. The application is a fishing expedition which does not narrow on any polling station. The applicant claims that the number of votes casts exceed the registered voters but no polling stations have been identified.

Counsels further submit that the Court is being asked to conduct an inquiry on all election materials. Scrutiny is supposed to be limited to the specific polling stations where there is dispute. The applicant is seeking information for the entire County. It is further argued for the 3<sup>rd</sup> respondent that the application has introduced unpleaded issue. Counsels rely on the case of **FARAH MAALIM V IEBC & 3 OTHERS Nairobi Election Petition No.4 of 2017** where **Justice H.I. Ong'undi** granted an applicant access to the Kiems Kits on read only basis but still the order was limited to specific polling stations. Counsels also rely on the case of **Hon. MARTHA WANGARI KARUA & ANOTHER V IEBC & 3 OTHERS Kerugoya Election Petition No.2 of 2017. [2017]eKLR**. In that case the court allowed a read only access of the Kiems Kits. According to the 3<sup>rd</sup> respondent, the application would like to turn the court to be one of inquiry and not a court of law. Reference is made to specific constituencies without specific identification of the affected polling stations. No connection is made of any discrepancies. No issue is being raised on the primary forms 37. The prayers in the application have no nexus with the prayers in the petition. What is being sought leads to scrutiny and recount and yet no basis has been laid. The petitioner was supplied with all the forms. He was supposed to study them and point out the forms in dispute. No demand for information in form of a letter was made to the IEBC. The applicant is trying to buttress his case as it progresses.

The Constitution and several status provide for the right to access information. Article 35(1) (a) and (b) of the Constitution states as follows:-

***(i) Every Citizen has the right of access to-***

***(a) Information held by the State, and***

***(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.***

Article 86(a) and 86(b) of the Constitution states the following:-

***(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;***

Section 44 of the Elections Act No.24 of 2011 provides for the use of technology. Section 44 (3) provide that the IEBC shall ensure that the technology in use is simple, accurate, verifiable, secure, accountable and transparent.

The petition herein is in relation to a gubernatorial election. Several legal provisions provide for the conduct of a gubernatorial election including the transmission of the results. Sections 39(1), (1A) (ii) and (iii), (1B) and 1C (a) states:-

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

***(1A) the Commission shall appoint constituency returning officers to be responsible for-***

***(ii) Collating and announcing the results from each polling station in the constituency for the election***

***of the President, county Governor, Senator and county women representative to the National Assembly; and***

***(iii) submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor,***

**Senator and County women representative to the National Assembly to the respective County returning officer (emphasis added)**

**(1B) 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.**

**(1C) (a) electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre,**

The following procedure is relevant in the conduct of the election of a governor. Regulation 82 of the Elections (General) Regulations, 2012 states:-

**(2) The presiding officer shall, before ferrying the actual results of the election to the returning officer at the tallying venue, submit to the returning officer the results in electronic form, in such manner as the Commission may direct. (emphasis added)**

**(2) The results submitted under sub-regulation (1) shall be provisional and subject to confirmation after the procedure described in regulation 76.(emphasis added)**

Regulation 83(1) (d) and (h) provides as follows:

**(1) Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present-**

**(d) Collate and publicly announce to the persons present the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National assembly.**

**(h) deliver to the county returning officer the collated results for the elections of the county Governor, Senator and county women representative to the National Assembly. (emphasis added)**

Regulation 86 (2) (a) require the returning officer to put the polling station diaries in a separate ballot box, seal and label the box.

Section 2 of the Election (Technology) Regulations, 2017 defines Election Technology as a system that includes a biometric voter registration system, a biometric voter identification system, a system that enables the nomination and registration of candidates and electronic results transmission system. Regulation 25 of the Election (Technology) Regulation requires the IEBC to have a data recovery mechanism.

Section 27(2) and (3) of the IEBC Act No.9 2011 states as follows:

**(2) A request for information in the public interest by a citizen-**

**(a) Shall be addressed to the secretary or such other person as the Commission may for that purpose designate and may be subject to the payment of a reasonable fee in instances where the commission incurs an expense in providing the information, and**

**(b) May be subject to confidentiality requirements of the Commission.**

**(3) Subject to Article 35 of the Constitution, the Commission may decline to give information to an applicant where-**

- (a) The request is unreasonable in the circumstances;**
- (b) The information requested is at a deliberative stage by the Commission;**
- (c) Failure of payment of the prescribed fee; or**
- (d) The applicant fails to satisfy any confidentiality requirements by the Commission**

Another relevant statute on the right to access information is the Access to Information Act No.31 of 2016.

The preamble to this Act states that it is intended to give effect to Article 35 of the Constitution. The Act allows citizens to seek for information from public Institutions. Section 2 of the Act defines a public entity to mean:-

- (a) Any public office, as defined in Article 260 of the Constitution.**
- (b) Any entity performing a function within a Commission, office, agent or other body established under the Constitution.**

Section 4 of the Act provides that every citizen has the right of access to information. Section 6 provides for circumstances where the information can be limited. Section 17 defines records to mean documents or other sources of information compiled, recorded or stored in written form or in any other manner and includes electronic records.

Turning to the application, paragraph 14 of the Petitioner's affidavit in support of the application states that the relevance and purpose of the information and data being sought is to show and prove inter alia the following:-

- (i) That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in conducting, supervising, tallying and declaring the results of the said election did not comply with the Constitutional principles and electoral law;**
- (ii) The 1<sup>st</sup> Respondent did deliberately tamper with the results especially in those instances where the Forms 37A, Forms 37B and results on the IEBC Portal are inconsistent**
- (iii) That the inaccuracies between Forms 37A's and 37B's and the IEBC Portal was not random, accidental or inadvertent but rather widespread and deliberate;**
- (iv) Through the logs, the Petitioners can prove to the Court that there was deliberate failure to transmit and tally the results as required by law and that during that intervention, the 1<sup>st</sup> Respondent manipulated the results.**
- (v) The logs and information sought will show the difference in number between voters identified by the KIEMS Kit and those who were not identified by the system, which will drive to prove the imported voters who were allowed to vote in Moyale constituency.**
- (vi) That the 1<sup>st</sup> Respondent's commissioner(s) and the 3<sup>rd</sup> Respondent herein colluded to invert the will of the Marsabit Electorate.**

The first and second respondents have agreed to provide some of the information requested by the applicant. The only issue being raised by the two respondents is that the request is general in nature and is not confined to specific polling stations. Paragraphs 14 and 16 of the affidavit of Arnold Mutwiri Njabani states as follows:-

- (14) That on account of the foregoing, I am aware that the Commission is willing to deposit with**

***this Honourable court the ballot boxes, ballot papers, counterfoils, envelopes, packets statements, results declaration forms and the memory (SD) cards of the KIEMS Kit which were used during the August 8<sup>th</sup>, 2017 General Elections.***

***(16) That the Commission is ready and willing to facilitate the Court to access the data on the SD card.***

The 3<sup>rd</sup> respondent seems not to be opposing the request to provide the materials which are in documentary form. Counsel for the 3<sup>rd</sup> respondent seems to be against the general manner in which the application is made. The applicant has simply floated a number of polling stations like 31 and 200 yet the specific polling station are not given.

The law requires the IEBC to ensure that the election materials are properly stored. This is not only meant for purposes of an election petition but also for public record and future reference. Section 2 of the Election Act defines Election material as:

***“Election material” means ballot boxes, ballot papers, counterfoils, envelopes, packets statements and other documents used in connection with voting in an election and includes information technology equipment for voting, the voting compartments, instruments, seals and other materials and things required for the purpose of conducting an election:***

Since the documentary materials are available and the 1<sup>st</sup> and 2<sup>nd</sup> respondents are not opposed to providing the same, I do grant prayers (b), (c) and (d) of the application herein subject to specific directions of this Court. With regard to prayer (e) on preservation and custody of all the ballot boxes used in the gubernatorial elections for Marsabit County, parties herein entered into a consent whereby the petitioner and the 3<sup>rd</sup> respondent were allowed to place extra seals on the ballot boxes. The exercise was conducted by the Deputy Registrar and all the parties were represented by their agents. I see no need to grant prayer (e) as it has already been compromised.

An election petition is an inquiry into the manner in which an election was conducted. An election incorporates among other the processes the registration of voters, nomination of candidates, printing of voters cards, preparation of the voters register, establishment of the mechanism to be used in the voting process, training of the staff who conduct the election, identification of voters either biometrically or alphanumerically, sensitization and education of the voters, campaigns, casting of votes, counting of the voters, declaration of the number of votes garnered by each candidate at a polling station, transmission of the results either electronically or manually and ultimately, the declaration of the candidate who garners the highest votes as the winner and issuance of a certificate to that effect. That is why the law requires that the voting method should be secure, simple transparent, accurate and verifiable. The essence of this requirement is that the IEBC should be able to account for each vote cast and verify the entire voting process when called upon to do so after the election has been completed.

Any citizen whether a candidate or not, is authorized by the law to question the validity of an election. Ordinarily, an election petition would be filed by one of the candidates who participated in an election. Recent trends have seen a multiplicity of election petitions filed by independent citizens who were not candidates in an election and who may not have participated in the election by way of casting their votes. This is an expansion of the democratic process in Kenya. Every citizen has the right to seek verification by a Public entity on the manner in which it conducts its constitutional or statutory duties.

Once the winner is declared and an election petition is filed, it is incumbent upon the Court to carefully hear the petition and come to a just conclusion. Termination of election petitions on technicalities should be frowned upon. It is better to allow an election petition to be heard despite having been served late upon the respondents or despite the petition not indicating the date the results were declared or the results themselves than to allow a member of the National or County Assemblies to represent Kenyans despite having not been properly elected. An inquiry on the validity of the election supercedes procedural technicalities. An election petitioner starts from a disadvantaged position. The rebuttable presumption

is that the election was conducted in accordance with the law. It is the duty of the petitioner to rebutt that presumption by providing evidence to the contrary. That being the case, the court should be in a position to enable the petitioner obtain all the relevant materials for purposes of proving his case. However, the petitioner should not be permitted to make demands and request which are either unnecessary in the case or which are made in the hope that the information provided will help to build up the already filed case.

The petitioner herein contends that the election was not conducted in accordance with the law. Mr. Walukwe submitted that the current application is not one for scrutiny but is entirely anchored on the right to information. That being the case, the court is only duty bound to grant the orders which go directly to the manner in which the election was conducted and results declared. The application is seeking both the physical forms as well as the technological information. My view is that the information being sought should be able to assist the court in making a just decision. It should not be sought purely for purposes of fulfilling the petitioner's interest in satisfying himself that indeed he lost fairly.

The petitioner herein is seeking access for purposes of scrutiny to all the servers used during the gubernatorial election. In Marsabit County, number of servers, location of servers, firewalls, I.P. address, operating systems, software running applications, static IP addresses of each Kiems Kit used, specific GPRS location of each Kiems Kit used for the period 5<sup>th</sup> August to 11<sup>th</sup> August 2017 and Audit logs of what each Kiems Kit transmitted from each polling station. In my considered view, all the above information is not going to help this court in arriving at its decision. What is important is how the voters were identified and how the results were transmitted. The tallying in a gubernatorial election is done physically. All the results are physically taken to the constituency returning officer. The Constituency returning officer tallies all the results from the constituency and physically takes the results to the County Returning officer. The County returning officer physically tabulates and tallies all the results received from the constituencies, enters into the relevant form the results of each candidate, totals the results and declare the winner.

Given the above process, the most important information is whether those who did cast their votes were indeed registered voters. This calls is for verification of the information relating to identification of the voters and the number of people who did cast their votes. The poll book diaries and the voter register assist in the verification process. The information in the Kiems Kits which is available in the SD cards can be retrieved, accessed and made available to the petitioner. The bottom line is that the physical forms which were used to declare the results should be made available. The petitioner should be able to compare the physical results contained in the forms 37 with the electronically transmitted results contained in the portal which is located at the county tallying centre. However, regard must be sought to Regulation 82 whereby the results transmitted electronically are considered to be provisional results. The actual results are obtained after the physical results (contained in the relevant forms) are received, and tallied. Regulation 82 makes reference to **ferrying of the actual results** to the tallying centres. The import of the above provision is that the **actual results** are contained in the dully filled forms.

In the Indian case of **KISAN H SHANKAR KATHURE V ARUN DATTATRAY SAWANT, AIR, 2014 S.C. 2069**, the court held that the right to get information in a democracy is recognized all throughout and it is a natural right flowing from the concept of democracy.

The applicant contends that there are discrepancies in the total number of votes cast in the general election for the president, governor, senator, women representative, member of parliament and member of County Assembly. Part of this allegation can only be proved or disproved during the hearing of the Petition. There is the allegation that there are five polling stations (paragraph 26 of supporting affidavit) whose results are more than the registered voters. Since those polling stations are not stated, it is an issue to be dealt with during the hearing. I do agree with the sentiments expressed by the respondents that there is need for the applicant to be specific on the polling stations where the results are disputed. The County is comprised of four constituencies and a total of 384 polling stations. I have noted that in North Horr constituency, the 3<sup>rd</sup> respondent managed to get 1,211 votes out of the 23,785 valid votes cast. The Petitioner garnered 17,037 votes. It would be imprudent for the court to order access to the Kiems Kits and SD cards for that constituency were the applicant obtained the highest number of votes without

identifying the specific polling stations. The applicant should be specific on the polling stations where he disputes the results or where allegations are made that unregistered voters were allowed to vote.

Since an election petition is a scrutiny of the election process, I do find that the applicant is entitled to obtain some of the information he is seeking. The application partly succeeds and is granted in the following terms:

- 1. The 1<sup>st</sup> and 2<sup>nd</sup> respondents to furnish before Court all the original forms 37A's, 37B's and 37C's prepared at and obtained from all the Polling Stations and Tallying centres in Marsabit County.**
- 2. The 1<sup>st</sup> and 2<sup>nd</sup> respondents to provide the applicant with copies of the voters' register used in the elections held on 8<sup>th</sup> of August, 2017 in relation to Marsabit County at the applicant's own costs.**
- 3. The 1<sup>st</sup> and 2<sup>nd</sup> respondents to keep in their custody and preserve all the ballot boxes used in the gubernatorial elections for Marsabit County in the same condition as they were after the resealing exercise conducted by the Marsabit Deputy Registrar.**
- 4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents to avail the SD cards used in the gubernatorial elections for Marsabit County for all the polling station in Moyale, Laismis and Saku Constituencies.**
- 5. The 1<sup>st</sup> and 2<sup>nd</sup> respondents to allow access on read only and notes taking of the data contained in the Kiems Kits and SD cards for the gubernatorial elections of Marsabit County for all the polling stations in Moyale, Laisamis and Saku Constituencies.**
- 6. The 1<sup>st</sup> and 2<sup>nd</sup> respondents to provide the applicant with information from the Kiems Kits or SD cards on those voters who were identified biometrically and those who were identified through their identity cards or other means.**
- 7. Should any document stored in electronic form other than the forms 37, be capable of being printed or copied, the 1<sup>st</sup> and 2<sup>nd</sup> respondents should avail such a document to the applicant at the applicant's own costs.**
- 8. The 3<sup>rd</sup> respondent shall be at liberty to participate in the above process either himself or through his appointed agents or advocates.**
- 9. The responsibility to carry out the above process rests with the 1<sup>st</sup> and 2<sup>nd</sup> respondents through their counsels on record.**
- 10. Apart from providing access and the forms and documents indicated in the orders hereinabove, no report should be filed with the Court and the Deputy Registrar shall not participate in the above exercise.**
- 11. The above orders to be complied with between the 1<sup>st</sup> of December 2017 and 18<sup>th</sup> December, 2017.**

**Dated, Signed and Delivered this 30<sup>th</sup> day of November 2017**

**S. CHITEMBWE**

**JUDGE**