



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

ELECTION PETITIONS NO.1 AND 4 OF 2017 (CONSOLIDATED)

SILVERSE LISAMULA ANAMI 1ST PETITIONER

ADRIAN MAMBILI MEJA 2ND PETITIONER

VERSUS

1. INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION 1ST RESPONDENT

2.HENRY BAHATI LUMITI (RETURNING OFFICER,

SHINYALU CONSTITUENCY)..... 2ND RESPONDENT

3. JUSTUS GESITO MUGALI M'MBAYA 3RD RESPONDENT

RULING

Introduction:

1. The **Kakamega High Court Election Petitions No.1** and **No.4 of 2017** were consolidated for the purposes of hearing since they were filed against the same parties. The petitioner in **Election Petition No.1 Hon Silverse Lisamula Anami** is herein referred to as the 1st petitioner while the petitioner in **Election Petition No.4 Mr Andrian Mambili Meja** is referred to as the 2nd petitioner. All the parties in the petition have given evidence and closed their cases. Before the hearing started, the 1st petitioner Hon Lisamula had on the 3rd October 2017 filed an application dated the same date seeking for orders that:-

(1) That this Honourable court be pleased to order for scrutiny of all votes cast in Shinyalu Constituency, ballot papers, counter-foils, registers, KIEMS and poll day diaries used in Shinyalu Constituency, Member of National Assembly Elections.

(2) That this Honourable court be pleased to order a recount of all votes cast for Member of National Assembly in Shinyalu Constituency.

This ruling is in respect to that application.

2. The application was based on grounds stated in the body of the application and was supported by the affidavit of the 1st petitioner. The application was also supported by oral submissions of his advocate **Mr Lubulellah** assisted by **Miss Ngeresa**, advocate.

The 2nd petitioner supported the application by the 1st petitioner through the oral submissions of his advocate **Mr Khamati**.

3. The application was opposed by the advocates for the 1st and 2nd respondents (i.e. the Independent Electoral and Boundaries Commission and the returning Officer, Shinyalu Constituency) through the oral submissions of their advocate **Mr Juma**.

The application was also opposed by the 3rd respondent through the oral submissions of his advocate **Mr Ayuga**.

Grounds of the application:

4. Both petitioners were contestants in the August 8th 2017 general elections for the seat of Member of Parliament for Shinyalu Constituency. The 3rd respondent was declared the winner of the election. The 1st petitioner alleges in his application that the 3rd respondent contravened the law and committed electoral malpractices before, during and after the elections and that the said breaches of the law affected the overall outcome of the election. His complaints were:

- His agents not being allowed into some polling stations
- presiding officers assisting voters in the absence of agents
- Opaque counting and tabulation of votes
- delay in counting and tabulation of votes
- Refusal for recount
- Interchange of his votes to those of the 3rd respondent
- Refusal of presiding officers to issue forms 35A to his agents
- Failure of presiding officers to allow his agents to sign forms 35A
- Hi agents being ejected from the tallying centre
- Failure of presiding officers to sign and stamp forms 35A
- Bribery of voters by the 3rd respondent.

SUBMISSIONS:

Submissions by Mr Lubulellah for 1st petitioner:

5. The advocate submitted that the elections as conducted in Shinyalu Constituency were not accurate, accountable or verifiable. That evidence was adduced that the procedure used by the presiding officers at most polling stations was opaque and that at some polling centres agents were not allowed to confirm the validity of votes or in whose favour they had been cast. That agents were not granted recounts. That forms 32 in respect of assisted voters were not produced in court and as such it is not possible to confirm the number of voters who were assisted to vote. That it is only an order of scrutiny that will assist the court to determine that fact.

6. The advocate submitted that forms 33 that are used in the tallying process were not produced in court. That in their absence the court is not able to verify the accuracy of forms 35As on how the results in those forms were arrived at. That looking at form 35As on their own cannot verify the results. It is only checking in the ballot box that the results can be verified.

7. The advocate submitted that the results were announced on 10th August, 2017 as indicated by the signatures of agents who signed form 35B but the results were dated 9th August, 2017. He argued that the results were predetermined before they were announced.

8. Some of the forms 35A that were filed by the 1st respondent (IEBC) in their response were faint and were not clear. Counsel for IEBC Mr Juma made an application for him to file clear copies of the said documents. The court granted his permission to do so. Mr Lubulellah submitted that the said forms when

compared with the forms 35A that had been filed by the 1st petitioner revealed glaring discrepancies. In some of them they were not signed by the Presiding Officers and Deputy Presiding Officers. Others had different serial numbers from what had been earlier filed by IEBC. Some had results figures written over. Some were not stamped with IEBC stamp. Some were not signed by agents. The advocate submitted that all these discrepancies call for a scrutiny.

9. The advocate noted that many of the forms in the petitioner's bundle are not clear. He counted 33 of them. He submitted that the results borne out of these forms do not reflect the will of the people of Shinyalu.

10. The advocate submitted that in one place at Musingu Primary School polling station, the 1st petitioner's votes as reflected in forms 35A were 207 while those of the 3rd respondent were 87. In form 35B the 1st petitioner's votes were indicated as 07 while those of the 3rd respondent were posted as 207. That that meant that the votes meant for the 1st petitioner were given to the 3rd respondent. Therefore that the accuracy of form 35B cannot be vouched for. That the results are not verifiable.

11. The advocate submitted that matters that come up during the hearing of an election petition must be considered whether they originated from the petitioner or from the respondents. On this proposition he cited the case of *Musikari Nazi Kombo vs Moses Masika Wetangula & 2 others* [2013] eKLR.

In a nutshell the advocates submitted that they have shown sufficient reasons why an order for scrutiny should issue.

Submissions by Mr Khamati for 2nd petitioner:-

12. The advocate submitted that the only variable forms 35A are 53 in number. That these are the forms that are signed and stamped by IEBC officer and signed by agents of the 2nd petitioner. That the rest of 91 forms were not signed by agents of the 2nd petitioner.

The advocate submitted that the total of the votes as indicated in form 35B is 51,473 but the correct number is 51,447. That the difference of 46 votes is a miscalculation.

The advocate submitted that absence of IEBC stamps on forms 35A means that there is no proof of accuracy of the forms. That the total number of stamped forms 35A are 91 out of 144. That there is then reason to scrutinize the record of the election.

Submissions by Mr Ayuka for 3rd respondent:

13. The advocate opposed the application for recount. He submitted that **Rule 29(4)** of the Elections (*Parliamentary and County Elections*) **Petitions Rules 2017**, provides that a recount may be ordered only when the only issue in the petition is the tallying and count of the votes received by candidates. That therefore if the petitioner wanted a recount, then the only issue he should have brought up is tallying and counting of votes. That the words used on the rule are "scrutiny or recount" but not "scrutiny and/or recount." Therefore that these two are mutually exclusive and the application should fail on that ground.

14. The advocate submitted that the 1st petitioner is requesting for scrutiny in the polling stations where the 3rd respondent won but not where he, the 1st petitioner, won. That the partial and selective proposition for scrutiny where the 1st petitioner lost is inappropriate.

15. The advocate submitted that the allegations of bribery cannot be found in the materials and documents that are in the ballot box. That witnesses have testified. That the court is now left to make a determination on the allegations of bribery. That the opening of the ballot box cannot ascertain allegations of bribery.

16. The advocate further submitted that the petitioners have not submitted any other result of the election other than what was declared by IEBC. That no study was done to contradict the results declared by IEBC. Therefore that if the results are said to be unverifiable, what results are they being compared with so that they can be said to be unverifiable.

17. On the 1st petitioners documents that are said to be unclear the advocate submitted that the 1st petitioners filed them on 4th September 2017. That since the falling the petitioner has not made a request for better particulars or the production of materials that are in custody of IEBC. They cannot use their failure to do so to demonstrate that they need scrutiny to access those documents.

18. The advocate submitted that counsel for the 1st petitioner made reference to where clear and unclear copies of forms 35A have been provided and not provided therefore that now the parties are on equal terms before the court. That they can make comments on the forms by way of submissions and draw conclusions from the materials. That if the petitioners go to the ballot box they will find the same materials that has been provided to them. There is thereby no need to make an order for scrutiny.

19. The advocate submitted that there is no requirement for the presiding officers to stamp forms 35A. They relied on the Court of Appeal decision in **Independent Electoral and Boundaries Commission and another vs Stephen Mutinda Mule & 4 others** (2014) eKLR where the court held that the only requirement is for the presiding officer to sign the referred to document. That failure to stamp the forms is thereby immaterial.

20. The advocate further submitted that votes garnered by the 2nd petitioner cannot be ascertained by the opening of the ballot box. That the 2nd petitioner did not offer evidence that he supplied agents in all the 144 polling stations. That it is only those agents who are present who can sign the forms. That the obligation on IEBC is to issue forms 35A and 35B to those agents who are present. Failure by agents to sign the forms or not to be issued with the same cannot be the basis for scrutiny.

21. The advocate submitted that both petitions raise generalized complaints based on suspicions. That the pleadings as they stand do not support an application for scrutiny. That the evidence adduced in court similarly does not support an application for scrutiny.

22. The advocate further submitted that courts have held that the difference in margins between the votes garnered by candidates may impel the court to make an order for scrutiny see **Hassan Ali Joho vs Hothman Nyange & Anania Mwasambu Mwaboza** (2008) 3KLR EP 188. That in their case the margin of 5000 votes does not warrant a scrutiny.

Submissions by Mr Juma for IEBC and Returning Officer:

23. The advocate submitted that **Regulation 5(4)** of the ***Elections (General) Regulations, 2012*** bestows powers on the deputy presiding officer to operate as a presiding officer. That the deputy presiding officer can thereby sign forms 35 in that capacity.

The advocate quoted **Regulation 79(7)** that states that absence of agents and the failure by agents to sign the forms cannot invalidate an election.

The advocate submitted that it is not sufficient to point out the discrepancies in form 35B. That evidence must be adduced against it. That all forms except for one polling station, **Musingu**, were properly collated. That human error in the Musingu polling station was admitted in their response. That the said error cannot upset the results.

The advocate submitted that the agents who were there were allowed to sign forms 35As. That truth cannot be demonstrated by scrutiny. That no form 35A has been disputed. That the results transferred to form 35B are proper.

The advocate submitted that the grounds for scrutiny are only based on “believe” but not sufficient reasons. That the grounds can be put in the final submissions and therefore the application should be dismissed.

Reply by Mr Lubulellah:

24. The advocate stated they have made two distinct prayers for scrutiny and recount. That it is the discretion of the court to grant one or the other. However that an exercise of scrutiny encompasses a tally of votes.

The advocate submitted that stamping of documents has a purpose. That it is an important factual issue that cannot be disregarded.

The applicable Law and Judicial Precedents:

24. The application is brought under *sections 80(3) and 82(1) of the Elections Act No.24 of 2011* and under *Rule 28(a) and 29 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017*. *Section 82(1) of the Elections Act 2011* states that:-

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

Rule 28 of the *Elections Petitions Rules 2017* provides that a petitioner may apply to an election court for an order to:-

(a) recount the votes; or

(b) examine the tallying, if the only issue for determination in the petition is the count or tallying of votes received by the candidates.

Rule 29(1) provides that:

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

Rule 29(4) provides that:-

“The scrutiny or recount of votes in accordance with sub-rule (1) shall be confined to the polling stations in which the results are disputed.”

25. In the case of *Gatirau Peter Munya vs Diskson Mwenda Githinji & 2 others* (2014) eKLR, the Supreme Court of Kenya set out the following guiding principles with respect to the scrutiny and recount of votes in an election petition:

(a) The right to scrutiny and recount of votes in an election petition is anchored in section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.

(b) The trial Court is vested with discretion under Section 82(1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition, in exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for

the order for scrutiny or recount.

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

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

26. The court further held in paragraph 163 that:

“The authority granted to the election Court is discretionary in nature. In this regard, the court may order for scrutiny on its own motion or upon application by a party to the election petition. This necessarily entails that the court may decline to grant an order for scrutiny following an application seeking one. The court may also grant an order for partial scrutiny, even where a party has applied for scrutiny in wider electoral area. In exercising this discretion, however, the court must act judiciously. An order for scrutiny must be rationalized on the basis of evidence, or sufficient account in the pleadings. As we have noted, the purpose of recount and scrutiny is to determine who actually won the election, the validity of votes, and the integrity of the election. Therefore, it is only logical that recount and scrutiny follows ‘disputed results’, or ‘impugned electoral processes.’ If an election court were to order for scrutiny and recount in the absence of a specific dispute, then such order would amount to an abuse of discretion and an act in vain”

27. In the same case the Supreme Court quoted with approval the decision of Odunga, J. Gedion Mwangangi Wambua & Another vs IEBC & 2 others (paragraph 26) where the learned Judge stated that:-

“26. The aim of conducting scrutiny and recount is not to enable the Court [to] unearth new evidence on the basis of which the petition could be sustained. Its aim is to assist the court to verify the allegations made by the parties to the petition which allegations themselves must be hinged on pleadings. In other words a party should not expect the Court to make an order for scrutiny simply because he has sought such an order in the petition. The petition ought to set out his case with sufficient clarity and particularity and adduce sufficient evidence in support thereof in order to justify the court to feel that there is a need to verify not only the facts pleaded but the evidence adduced by the petitioner in support of his pleaded facts. Where a party does not sufficiently plead his facts with the necessary particulars but hinges his case merely on the documents filed pursuant to Rule 21 of the Rules, the Court would be justified in forming the view that the petitioner is engaging in a fishing expedition or seeking to expand his petition outside the four corners of the petition.”

28. In William Maina Kamanda vs Margaret Wanjiru Kariuki Election Petition No.5 of 2008 cited in the Gatirau Peter Munya case (supra), the Supreme Court stated the purpose of scrutiny is to:-

(1) Assist the court to investigate if the allegations of irregularities and breaches of the law complained of are valid.

(2) Assist the court in determining the valid votes in favour of each candidate.

(3) Assist the court to better understand the vital details of the electoral process and gain impressions on the integrity of the electoral process.

29. The court has to bear in mind the foregoing principles when considering the questions at hand in this petition.

ANALYSIS AND DETERMINATION:

30. For the court to grant an order for recount or scrutiny, it has to be satisfied that the 1st petitioner has preferred sufficient reasons to warrant either of the orders being made. The complaints being made by the 1st petitioner hinged on what happened during the voting day and what had transpired prior to the voting day. The complaints on what happened on the voting day related to what took place at the polling stations and at the tallying centre. The 1st appellant had deployed agents in all the 144 polling stations of the constituency. He also had a chief agent, supervisors and election co-ordinators. The 1st petitioner called as witnesses 6 agents who were at the polling centres and 8 witnesses who were election co-ordinators/supervisors. I will thereby analyse their evidence vis-à-vis the complaints raised by the 1st petitioner and the pleadings before the court.

(1) Denial of entry into the polling centres:-

31. The only polling centre agent for the 1st petitioner who claims to have been denied entry into the polling centre was **Elisha Liyengwa**, 1st petitioner's witness No.26, who was deployed at **Shivakala** polling centre. He however did not state the reasons why he was denied entry into the polling centre. He did not state whether he had all the requisite documents for an agent. He stated that he was let in at 7.30 am after intervention by his election co-ordinator, one Joseph Musonye. The chief agent for the 1st petitioner **Manoah Siema** witness No.5 however stated in his evidence that the agent was let in at 9.00 am after he went to the polling centre and personally intervened. The witnesses have thereby given contradictory evidence as to the time the agent was let into the polling centre and at whose intervention. This contradiction creates doubt into the credibility of the two witnesses. Since there was no other agent for the 1st petitioner who claimed to have been locked out of the polling centres, I find no evidence that any of the agents for the 1st petitioner were denied entry into the polling centres.

(2) Complaint on assisted voters:-

32. The 1st petitioner complained that in 5 polling stations – Shidodo, Lubao, Bulovi, Sigalagala and Shivakala – the presiding officers assisted more than 60% of the voters alone and away from the agents of candidates without maintaining a record of assisted voters. The witnesses who gave evidence towards this end were the 1st petitioners agent at **Maruna** polling centre **Elisha M'mudi**, witness No.8, and an observer with catholic church at **Mugomari** polling centre witness No.12 and a supervisor for 1st petitioner **John Mutsotso** witness No.25. **Mr M'mudi** stated in his evidence that between 200-300 people were assisted to vote at his centre yet 270 people voted there. That would mean that everybody was assisted to vote. That in all fairness cannot be the case in this age of high literacy levels in Kakamega County. The witness himself signed form 35A. He did not make any complains. His evidence therefore cannot possibly be true.

33. **John Mutsotso** stated that he went to Mugomari polling centre and saw IEBC officials assisting voters. That he saw 3 people who were known to him being assisted by the IEBC staff to vote. However the three people were not witnesses in the case. Though the 1st petitioner had two agents there, they did not testify. The evidence can only be taken with a pinch of salt. I do not believe the evidence of the witness.

34. The observer for the Catholic Church testified that she was deployed at stream 2. That she went to vote in stream 1 and saw IEBC officers assist 7 people to vote with only one agent observing. However in her affidavit that was filed with the petition she stated that she saw the 7 people being assisted by the IEBC officials in stream 2. That it is in stream 1 that she witnessed an assisted voter being told who to vote for by the presiding officer. In face of the glaring contradictions in the evidence of the witness and the fact that the evidence was denied by the presiding officer, the evidence of the witness cannot be true.

35. The 2nd petitioner called two witnesses one of whom stated that he went to vote at Shiswa polling centre and saw the presiding officer assisting a voter in the absence of agents. The other one stated that at

the same polling centre he wanted an agent for the 2nd petitioner to assist him but that the presiding officer became hostile to him and marked the ballot. That he did not know for whom the presiding officer marked the ballot. However the evidence is not backed by anything to possibly prove that it is true. There is thereby no reason to believe the evidence.

In view of the above there is nothing to prove that the allegation that presiding officers assisted voters in the absence of agents.

(3) Opaque Counting and tabulation of votes:-

36. The 1st petitioner complained that during the counting, collation and tallying of votes on 27 or so centres mentioned in paragraph 29 of the petition, the officials of the 2nd respondent were not allowing the agents present to verify the details in the ballot papers in order to ascertain the candidate in whose favour the ballot papers had been cast or to confirm whether they could be validly rejected. Further that the malpractice is evident that the candidates' vote, as garnered and recorded at the polling station differed from those recorded at the tallying centre. That the process of counting and tabulation was inordinately delayed in some of those polling centres so as to facilitate the rigging of the elections. That there was widespread improper acceptance and rejection of votes due to the above said malpractices. Further that the collation and tallying of votes was not prompt. That the 1st petitioner's agents in those polling centres requested for recounts but the same were denied.

37. In spite of the 1st petitioner making such serious allegations, he did not adduce evidence to prove them. The complainant was touching on about 27 polling stations. Among those ones he only managed to call two witnesses from two polling stations – Chirobani and Maluna. The two witnesses did not raise any issue touching on the complaints by the 1st petitioner. Both witnesses signed their respective forms 35A. Therefore the complaint relating to the counting, collation and tabulation of votes contained in paragraph 3(j) – (o) of the 1st petitioner's notice of motion have not been proved.

The 1st petitioner complains that his agents were ejected from the tallying centre during the tallying of votes. There was no evidence to this effect.

(4) Failure by presiding officers to sign or stamp forms 35A:-

38. The Returning Officer admitted that there were instances where the Presiding Officers failed to sign or stamp forms 35A. However the 1st petitioner has not particularized in his petition the polling stations where the Presiding Officers did not sign the documents. The requirement for specificity in an election petition has been stated in numerous court decisions including the latest one being the **Supreme Court Election Petition No.1 of 2017 – Raila Amolo Odinga & Others vs IEBC & 2 Others** (2017) eKLR where the court held that lack of specificity in an election petition is a cause to disallow an order of scrutiny and recount. The Returning Officer explained that a booklet of form 35A has 6 leaflets. It was explained that the forms in a booklet are carbonated. It would therefore mean that when the top leaf is written on, the documents at the far end from the top may not be as clear.

The Court of Appeal in **Independent Electoral & Boundaries Commission vs Stephen Mutinda Mule & 4 others** (supra) held that a presiding officer is only required to sign the form 35A and is not obligated to stamp it. The fact that some of the forms 35A were not stamped should thereby not be an issue.

(5) Failure by presiding officers to provide copies of forms 35A to petitioners agents and failure to allow them to record reasons for refusal to sign them:

39. The 1st petitioner stated that he had agents in all the polling centres but then only one witness, his agent at **Vikutsa** polling station stated that the presiding officer refused to issue him with a copy of form 35A. It is not known whether the other agents were at their polling centres at the close of the whole exercise and the presiding officers deliberately refused to issue them with the said forms.

Pursuant to **Regulation 79(3)** of the Elections (General) Regulations, 2012, each of the candidate or agent is supposed to sign the declaration of results, if he or she is present when the presiding officer announces the results at the polling station. A candidate or agent who refuses or otherwise fails to sign the declaration form is required to record the reasons for his refusal or failure. When a candidate or his agent does not give any reason for refusal or failure to sign the declaration form, the presiding officer is supposed to record the fact of the said refusal or failure. **Regulation 79(7)** states that:-

“The refusal or failure of a candidate or an agent to sign a declaration form under sub-regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub-regulation (2)(a).”

The fact that agents for the petitioners had not been issued with forms 35As cannot be a ground for an order for either scrutiny or a recount.

The 2nd petitioner has not presented evidence that he had agents in all the polling stations. It is therefore not known why his agents were not issued with copies of the said forms.

(6) Unclear/illegible forms 35As supplied to the 1st petitioner:

40. The 1st and the 2nd petitioners filed their own sets of forms 35As when they filed their respective petitions. The 1st and the 2nd respondents thereafter filed the other set of the forms when they filed their response. On 6th December 2017, the 1st and 2nd respondents filed another bundle of the forms because some of the forms they had filed in the response were unclear/illegible.

In his submissions Mr Lubulellah pointed out some 33 forms 35As contained in the 1st petitioner's petition that are unclear/illegible. He submitted that results declared from such unclear/illegible forms cannot reflect the will of the people of Shinyalu Constituency.

41. In paragraph 36 of the petition the 1st petitioner enumerated the polling stations that the 1st respondent did not issue copies of forms 35A to him or the ones issued were not clear. I have gone through the unclear forms mentioned in the 1st petitioner's petition. Clearer copies of the said forms were filed in the 1st and 2nd respondents' response. Others were filed in their further document filed on 6th December 2017. The advocates do not seem to have gone through the 4 sets of the forms 35As filed with the court to establish how many of these forms are still unclear and from which polling stations. Only one form from Cherobani Primary school polling centre was still shown to be unclear as per the evidence of the 1st and 2nd respondents' witness No.3. There is then no basis for an order of scrutiny on the ground that the 1st petitioner has not been provided with clear copies of forms 35A.

(7) Discrepancies between different sets of Forms 35A:

42. Mr Lubulellah poked holes into the forms 35As filed on 6th December 2017 as compared with those filed by the 1st respondent. He pointed out various discrepancies between them. He noted that some of them had different serial numbers from those filed by the 1st petitioner. In one document the figures were over written. In another the form was signed by the presiding officer while in the one filed by the 1st petitioner the presiding officer had not signed. He submitted that these documents are forged for the purposes of this petition.

The Returning Officer, the 1st and 2nd respondents' witness No.7 explained that a booklet of Form 35A has six leaflets all with different serial numbers. That would then explain why the serial numbers on the forms filed by the respective parties were different. Many of these documents were signed by agents for the candidates. No witness disputed the results contained therein. The results declared in the forms do not differ. There is no evidence to suggest that the documents filed on 6th December 2017 are forged as alleged by Mr Lubulellah.

(8) Irregularity at Musingu Polling Station:

43. The irregularity at Musingu polling station where the 1st petitioner was given less votes than he had garnered and the 3rd respondent was given more votes than he got during polling was admitted by the 1st and 2nd respondents. There was no other station with such an irregularity. This is therefore an issue that should form part of the final submissions by the parties. A single incident that is admitted was an irregularity is not a sufficient reason for scrutiny.

(9) Allegations of bribery:

44. The 1st petitioner alleges that the 3rd respondent by himself and through his agents was involved in acts of bribery, treatment of voters and corrupt practices way before and including the day of the election. He has enumerated in the application the many times the incidents took place.

45. The advocates for the respondents submitted that the allegations of bribery cannot be unearthed by scrutiny of the election materials in custody of the 2nd respondent. I entirely agree with them. The allegations of bribery should only form part of the final submissions by the advocate for the 1st petitioner. It would be futile for the court to make an order for scrutiny on grounds of bribery which cannot be ascertained by scrutinising any of the documents in the custody of the 2nd respondent.

(10) The date Form 35B was signed:

46. The Returning Officer explained that he completed form 35B on the 9th August at 10 pm. That he declared the results on 10th August 2017, hence some agents are indicated to have signed it on 10th August 2017. The explanation is convincing. No evidence was given to the contrary.

Scrutiny and Recount:

47. Recount of votes is provided for under **rule 28** of the Election Rules 2017 while scrutiny is provided for under **Rule 29(1)** of the said rules. The 1st petitioner has made two distinct prayers for scrutiny and recount. It is not that he has made one prayer of scrutiny and recount. The prayers sought are therefore proper - (see **Charles Oigara Mogere vs Christopher Mogere Obure & 2 others** (2013) eKLR). It is for the court to determine whether to grant him any of the prayers sought.

48. A recount is limited to establishing the number of votes garnered by candidates and the tallying of such votes (see **Justus Gezito Mugali M'mbaya vs Independent Election and Boundaries Commission & 2 others, Kakamega Election Petition Number 6 of 2012.**) A recount is ordered only when the only issue for determination in the petition is the count of tallying of votes received by candidates. In this case there is no dispute on the votes garnered by candidates. The petitioners have not alleged that they got any other figure other than what was declared by the returning officer. The court would require to have access to forms 33 that are used for tallying if there was a dispute on tallying. Neither the pleadings nor the evidence disclose a dispute on tallying of votes. There is thereby no basis for the court to make an order of recount.

49. Scrutiny on the other hand goes beyond the simple question of number of votes garnered by candidates and extends to the question of validity of such votes – see **Justus Gezito Mugali M'mbaya** (supra). The irregularities complained of by the petitioners herein have to a large extent been explained by the respondents. There was no evidence offered to support the complaints made by the 1st petitioner. The court is hence not satisfied that there is sufficient reason to make an order for scrutiny.

50. A court may be impelled by the margin between the candidates to order a scrutiny. Where the margin is narrow, the court will be inclined to issue such an order – see **Ali Hassan Joho vs Hothman Nyange & Anania Mwasambu Mwaboza** (2008) 3KLR Ep 188 and **Philip Osore Ogutu vs Michael Onyura Aringu & 2 others** (2013) eKLR. In this case the margin between the winner and the runner up

was over 5000 votes. A sufficient reason has to be given in such a case for the court to make an order of scrutiny.

51. In **Hassan Noor Hassan, Nairobi Election Petition No.1 of 2017, Ruling No.4**, Ochieng J ordered a scrutiny where there were alterations on forms 37A without countersigning and some forms for named polling stations were not signed by presiding officers. In this case there are no such irregularities. If there are any forms not signed by presiding officers they are not stated in the notice of motion neither have they been properly identified.

52. I am convinced that the application by the 1st petitioner is no more than a fishing expedition to see whether he could obtain evidence to support his case. In **Wavinya Ndeti vs IEBC & 4 others** (2013) eKLR Majanja, J held that:-

“The petitioner must not be permitted to launch a fishing expedition under the guise of an application for scrutiny in order to discover new evidence upon which to foist his or her case to invalidate an election.”

The petitioner herein should not be allowed to do so.

In the foregoing, and for the above said reasons, the petitioner has not adduced sufficient reasons to warrant an order for scrutiny or recount. The application dated 3rd October, 2017 is accordingly dismissed.

Costs of the application to await the outcome of the petition with the losing party to bear the costs of this application.

Delivered, dated and signed at Kakamega this 20th day of December, 2017.

J. NJAGI

JUDGE

In the presence of:

Miss Ngeresa for 1st petitioner

Miss Ngeresa h/b Khamati for 2nd petitioner

Kubebea for 1st and 2nd respondents

Ayuka for 3rd respondent

Parties:

1st petitioner present

2nd petitioner present

2nd respondent present

3rd respondent absent

George court assistant

Parties:

1st petitioner present

2nd petitioner present

2nd respondent present

3rd respondent absent

George court assistant