



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**ELECTION PETITION NO. 11 OF 2017**  
**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: THE ELECTIONS ACT, 2012, THE INDEPENDENT AND ELECTORAL  
AND BOUNDARIES COMMISSION ACT, 2011**

AND

**IN THE MATTER OF:- THE ELECTIONS (GENERAL) REGULATIONS, 2012, AND THE  
ELECTION (REGISTRATION OF VOTERS) REGULATIONS OF VOTERS) REGULATIONS ,  
2012, THE ELECTION (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RUES,  
2013, THE ELECTION(TECHNOLOGY) REGULATIONS 2017**

AND

**IN THE MATTER OF: THE ELECTION OF GOVERNOR VIHIGA COUNTY**

BETWEEN

**HAMZAH MUSURI KEVOGO.....  
.....PETITIONER**

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST  
RESPONDENT**

**SARAH MOGATI OGARO.....2ND  
RESPONDENT**

**WILBER KHASILWA OTTICHILO.....3RD  
RESPONDENT**

**PATRICK LUMUMBA SAISI .....4TH  
RESPONDENT**

**J U D G M E N T**

**Introduction**

1. The second General Elections to be held under the Constitution of Kenya 2010 were conducted countrywide on 8<sup>th</sup> August, 2017 from 6.00am upto 5.00pm.. After the results were declared and the winners gazetted, most of the unsuccessful candidates, either directly or indirectly, filed petitions challenging the elections. Even the victory of the President of the Republic of Kenya, Hon. Uhuru Muigai Kenyatta was challenged at the Supreme Court vide **Election Petition No. 1 of 2017- Rt. Hon. Raila Amolo Odinga & Another – vs – H.E. Uhuru Muigai Kenyatta & 2 others**. By a majority determination of the Supreme Court delivered on 1<sup>st</sup> September, 2017 and the reasons thereof given on 20<sup>th</sup> September, 2017, the Court annulled the election of H. E. Hon. Uhuru Muigai Kenyatta who was sued as the 3<sup>rd</sup> Respondent in the case. Fresh Presidential Elections were held on 26<sup>th</sup> October, 2017 as directed by the Supreme Court on 1<sup>st</sup> September, 2017.

2. The decision by the Supreme Court annulling the presidential elections held on 8<sup>th</sup> August, 2017 was sufficient motivation for most of the petitions that were filed subsequent to the Supreme Court Judgment, hence, the instant petition in which the Petitioner who was a voter is contesting the gubernatorial results of Vihiga County in which the 3<sup>rd</sup> Respondent, Wilber Khasilwa Ottichilo was declared winner by the 2<sup>nd</sup> Respondent and subsequently gazetted as the duly elected Governor of Vihiga County. The 4<sup>th</sup> Respondent was the 3<sup>rd</sup> Respondent's running mate and automatically became Deputy Governor Vihiga County upon the 3<sup>rd</sup> Respondent being declared winner of the gubernatorial elections.

3. In his petition dated 7<sup>th</sup> September, 2017 and filed in court on the same day, the Petitioner seeks orders THAT:-

(a) It be determined that Wilber Khasilwa Ottichilo was not validly elected or declared as the Governor of Vihiga County and the Certificate of Results of Governor Election for Vihiga County in the name of Wilber Khasilwa Ottichilo issued on 11<sup>th</sup> August, 2017 be and is hereby declared unconstitutional, illegal, null and void ab initio and quashed.

(b) It be determined that Wilber Khasilwa Ottichilo was not validly gazetted as the Governor of Vihiga County and his gazette as the elected Governor of Vihiga be and is hereby declared unconstitutional, illegal, null and void ab initio and quashed.

(c) It be determined that the Gubernatorial elections held on the 8<sup>th</sup> day of August, 2017 in Vihiga County was null and void and it be ordered that a fresh election be held.

(d) The Respondents be condemned to pay your Petitioner's costs of and incidental to this petition.

(e) Such further, other and consequential orders as this Honourable Court may lawfully make.

4. It is to be noted that the Petitioner herein was not one of the candidates during the gubernatorial contest in Vihiga County, but from the petition the following persons fought it out on 8<sup>th</sup> August, 2017 for the gubernatorial seat of Vihiga County. Epainitous Moses AKaranga, Enosi Kennedy Butiko, Yusuf Chanzu Kifuma, Josephat Amadi Ogwero and Wilber Khasilwa Ottichilo. After the elections, the Returning Officer (R.O) returned Wilber Khasilwa Ottichilo as being duly elected. According to the Petitioner, the results as declared by the R.O were as follows:-

<b>Constituency</b>	<b>Wilber Khasilwa Ottichilo</b>	<b>Epainitous Moses Akaranga</b>	<b>Yusuf Kafuma Chanzu</b>	<b>Josphat Amadi Ogwero</b>	<b>Enosi Kennedy Butiko</b>
<b>Emuhaya</b>	26419	2724	509	575	237
<b>Hamisi</b>	16026	25320	5145	6225	797

<b>Luanda</b>	26799	5536	1962	1181	507
<b>Sabatia</b>	8922	21464	12418	4704	418
<b>Vihiga</b>	4469	10620	14152	3604	243
<b>Total</b>	<b>82635</b>	<b>65664</b>	<b>34186</b>	<b>16289</b>	<b>2202</b>

5. From the above figures, the difference in votes between the 3<sup>rd</sup> Respondent and his closest rival, Epainitous Moses Akaranga was 16971. As questions have arisen regarding the general conduct of the elections in Vihiga County, I shall return to the figures later to confirm whether or not the said difference in votes was deserved in light of the complaints raised by the Petitioner.

6. It is therefore the duty of this court to analyse all the evidence on record and to determine whether the gubernatorial election for Vihiga County was conducted within the law, or whether as alleged by the Petitioner, the said elections were marred with such irregularities and illegalities as to render the elections unconstitutional, illegal, null and void ab initio, and thus liable to being quashed. There is no doubt in the mind of the court that the burden of proof in this petition lies on the shoulders of the Petitioner because he is the one who has made allegations against the respondents. Section 107 of the Evidence Act, Cap 80 Laws of Kenya, casts this burden on the petitioner.

7. In the instant case, the Petitioner has to prove, or show the existence of facts pointing to the unconstitutionality illegality and nullity of the gubernatorial elections of Vihiga County if his petition is to succeed.

### **The Petitioner's Case**

8. The Petitioner's case rests entirely on the evidence of the Petitioner himself since he did not call any other witness. The petitioner relied on the averments in his 28-paragraph affidavit dated 7<sup>th</sup> September, 2017 and sworn on the same date, plus copies of various documents annexed to the said affidavit but which documents were not marked as annexures though in the affidavit at paragraph 26, he indicated that he had produced annexures marked MTBI to MTB7. The said documents, which were photocopies, were also not certified.

9. The gist of the Petitioner's case is that the gubernatorial election for Vihiga County did not comply with the principles of a free and fair election nor did it comply with the electoral process set out in the Constitution and the electoral Laws and regulations.

10. Apart from his affidavit evidence which he adopted as his evidence in chief, he was cross-examined at length. During cross examination the petitioner stated (initially) that after he cast his vote at Banja Muslim Primary School, he remained in the vicinity of the polling station to see what was taking place there. He also testified that there was no difficulty finding his name through the KIEM's kit but later stated that after he had cast his vote he visited other polling stations to see what was happening at those polling stations though he was neither a candidate nor an agent for any of the candidates. He also told the court in the same breath that he remained at his polling station until the results were announced between 8.30 pm and 9.00 pm on 8<sup>th</sup> August, 2017.

11. During further cross examination on the contents of his supporting affidavit, the petitioner stated that it was erroneous of him to speak of his agents having not been provided with copies and duplicates of form 37A's because as a voter, he had no polling agents. After further questioning, he elected to retract his averments in paragraph 21(f) of his affidavit which alleged that the 2<sup>nd</sup> Respondent refused to provide the Petitioner's polling agents with copies and duplicates of form 37A. Regarding the allegations at paragraph 21(b) of his affidavit, the petitioner stated that he did not vote at Mudindi Polling Station, though he alleged that it was one of the polling stations he visited after he had cast his vote at Banja Muslim Primary School. But on further cross examination about his allegation that he visited other

polling stations, the petitioner stated, *“I admit I have lied to the court, I do not agree, that my evidence should not be believed.”* After stating the above, the Petitioner went on to state that he went to Mudindi Polling Station by motor bike, and stated further that:- *“Those who came out of the station (two people whose names I cannot remember) told me that things inside Mudindi were not going well. The two persons are not my witnesses.”*

12. The Petitioner also testified that none of the other four gubernatorial contestants have filed any petition seeking to annul the election of the 3<sup>rd</sup> Respondent as Governor for Vihiga County, but maintained his position that having been personally dissatisfied with the outcome of the election, he elected to come to court to challenge the election of the 3<sup>rd</sup> Respondent as Governor of Vihiga County.

13. On the allegation that the votes cast in some polling stations were more than the registered voters, the Petitioner testified that he could not recall any such station, even after taking time to peruse the bundle of documents he had marked for identification. The petitioner also told the court that throughout his petition and supporting affidavit he had not identified nor could he place a finger on any polling stations, where there were problems, though there were problems at Shiru Polling Station. He however stated that he could not identify that polling station from his bundle of documents. He also stated that there were no such details in both his petition and his affidavit touching on Shiru Polling Station as having experienced problems during the voting exercise. The petitioner also admitted that he did not know how many polling stations there were in Vihiga County.

14. Regarding the allegation that the Independent Electoral and Boundaries Commission (the IEBC) conducted the elections under the influence of the 3<sup>rd</sup> Respondent, the Petitioner stated that he had no evidence to support such an allegation.

15. The Petitioner also testified that though he believed there were certain forms which bore no IEBC stamps, he had not stated so in his petition and in his affidavit and further that his petition contained only general allegations without any specifics, but still prayed that his petition should not be dismissed. He added that in the unlikely event that the petition is dismissed, he would be prepared to pay the costs.

16. The Petitioner was also cross examined at length by counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, and stated that the votes cast for governor were much higher than those cast for the Senator in the same County, in that while the Governor's votes were 119544, the Senator's votes were 114164, showing that the 3<sup>rd</sup> Respondent got about 6,000 more votes than the Senator, and that the 6000 unexplained votes cast in favour of the Governor were a concern to him, since that difference shows that the election was not fair. The Petitioner alleged the results were manipulated by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in favour of the 3<sup>rd</sup> Respondent, and that there was no proper counting, tallying and totaling of the results.

17. In his further testimony, the Petitioner stated that apart from Banja Muslim Primary School polling stations he visited the following polling stations: Chebirin, Goibei Kapsotik, Kapsoi Givogi Mudindi, Jelebuk, Hamisi, Dr. Morris Dangana and Kapchemugun, all in Hamisi sub-county. While admitting that he was not the agent of any of the contestants during the elections, he said he sponsored himself to go round the named polling stations. Regarding the complaint about irregularities in Emuhaya Constituency, the Petitioner testified that his complaint was based on the fact that the 3<sup>rd</sup> Respondent had 6000 more votes than the Senator. He added that the 6000 votes were in Emuhaya while Luanda and Hamisi recorded 100 and 500 more votes respectively in favour of the 3<sup>rd</sup> Respondent as compared to the Senator's votes in those areas, making a total of 6,600 more votes cast for the 3<sup>rd</sup> Respondents than the Senator in the three constituencies. Relying on the averments at Paragraph 21(g) of his Petition, the Petitioner stated that the 3<sup>rd</sup> Respondent influenced the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their work, but added that he had no evidence to support such an allegation. The Petitioner also testified that he could not say in what way the 3<sup>rd</sup> Respondent influenced the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and further that he could not say in what ways the 3<sup>rd</sup> and 4<sup>th</sup> Respondents influenced the voters to vote for them, but in the same breath the Petitioner maintained that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents influenced the voters.

18. In response to further questions from counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, the Petitioner stated that at each of the polling stations he visited he talked to two or three people about what was going on inside the polling stations. He however admitted Morris Dangana and Kapchegun Primary Schools polling stations did not exist. When pressed further about his generalized allegations in the petition, affidavit and oral evidence, the Petitioner, asked the court to pardon him for any errors and untruths in his pleadings and evidence.

19. When asked about the reconciliation he alleged he had carried out of forms 37A, 37B and 37C used by the 1<sup>st</sup> Respondent to declare the results, the Petitioner stated that he could not remember when the reconciliation was done nor could he remember nor was he in a position to produce the record of the alleged reconciliation. He added that the reconciliation was done off-head. Though the Petitioner testified that all the pleadings were read and explained to him, he stated that he had problems with some of the words used both in the petition and the supporting affidavit.

20. During re-examination, the Petitioner made attempts to adduce fresh evidence, but this attempt was objected to by counsel for the respondents on the ground that what the Petitioner was now trying to do was contrary to the rules of procedure on re-examination of a witness. The objection was upheld on the ground that the respondents would have no opportunity to test the veracity of such evidence given during re-examination. The Petitioner then closed his case.

21. By the close of the Petitioner's case, the petitioner had admitted the following matters:-

*(a) he was a voter and not a candidate or an agent of any of the candidates;*

*(b) two of the polling stations he alleged to have visited did not actually exist in the records of the 1<sup>st</sup> Respondent.*

*(c) electronic transmission of results applies to presidential and not gubernatorial elections.*

*(d) he did not visit 1<sup>st</sup> Respondent's public portal to access the results posted therein.*

*(e) he was electronically identified through KIEMS kit before he was allowed to vote*

*(f) none of the unsuccessful candidates for the gubernatorial elections in Vihiga County have challenged the election of the 3<sup>rd</sup> Respondent.*

*(g) there was no single polling station at which the total number of votes cast exceeded the number of registered voters.*

*(h) both the petition and the supporting affidavit do not contain details of polling stations where malpractices were witnessed;*

*(i) he had no evidence on the manner in which the 3<sup>rd</sup> Respondent influenced the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as well as the voters during the elections held on 8<sup>th</sup> August, 2017*

*(j) the allegations in the petition are of a general nature and lack particularity*

22. The court will draw from the above admissions in determining whether or not the petition succeeds or fails

### **The 1<sup>st</sup> and 2<sup>nd</sup> response case**

23. The 1<sup>st</sup> and 2<sup>nd</sup> respondent's response to the petition is contained in the sworn affidavit of the 2<sup>nd</sup> Respondent, Sarah Mogati Ogaro dated 21<sup>st</sup> September, 2017 as well as the written response to petition of

similar date. The 1<sup>st</sup> and 2<sup>nd</sup> respondents aver that the 3<sup>rd</sup> Respondent was validly elected by the voters of Vihiga County as Governor for Vihiga and that the role of the 2<sup>nd</sup> Respondent was to merely declare the choice of the said voters. The 1<sup>st</sup> and 2<sup>nd</sup> respondents also aver that the elections held on 8<sup>th</sup> August, 2017 respected the sovereign will of the people of Vihiga County and upheld the constitutional principles of free and fair elections administered in an impartial, neutral efficient, accurate and accountable manner.

24. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents denied that the elections were void or marred by fatal irregularities, election offences or malpractices. They instead aver that the elections were conducted substantially in accordance with the dictates of the Constitution and the electoral law and all regulations governing the conduct of elections, and in particular that the elections were conducted in strict compliance with the provisions of Articles 81 and 86 of the Constitution. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents deny the allegation that they committed any election offences irregularities or malpractices and state categorically that the election was free, fair, transparent and credible and that the results declared were a true reflection of the will of the people of Vihiga County based on universal suffrage and free expression of the voters will.

25. With regard to the general contents of the petition the 1<sup>st</sup> and 2<sup>nd</sup> respondents aver that:

*(a) The 3<sup>rd</sup> Respondent was validly elected as Governor for Vihiga County.*

*(b) The declaration of the 3<sup>rd</sup> Respondent as the Governor was regular, lawful and legitimate since he had received the highest number of votes in Vihiga County.*

*(c) 1<sup>st</sup> and 2<sup>nd</sup> Respondents deny the allegation that some people particularly in Mudidi polling station whose details could not be biometrically identified were allowed to vote. Only registered voters identified through the KIEMS kit were allowed to vote. Voters whose biometrics could not be detected were identified through alphanumeric search system.*

*(d) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents deny the allegation that it made false entries in form 37As indicating that the 3<sup>rd</sup> Respondent was the winner. No votes were deliberately manipulated in favour of the 3<sup>rd</sup> respondent.*

*(e) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents deny the allegation that some 37As were not signed and stamped. Strict proof is invited.*

*(f) All agents were issued with copies of forms 37As.*

*(g) The Petitioner is invited to strict proof on allegation that votes cast exceeded registered voters.*

*(h) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents aver that the process of counting and scrutiny of votes cast was transparently conducted in the full involvement of all polling stations in Vihiga County and the results entered in Form 37A was duly approved by the Petitioner's agents in each of the polling stations who also signed the said forms to confirm the accuracy of the said results.*

*(i) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents deny the allegation of results having been altered in favour of the 3<sup>rd</sup> Respondent and aver that no votes were stolen, added or misallocated to the 3<sup>rd</sup> Respondent or any other candidate hence the process was credible and accurate.*

*(j) There was no faulty counting and tallying of votes as all candidates were granted sufficient opportunity to scrutinize and interrogate the results in each polling station before computation of the final tally.*

*(k) The scrutiny of all votes cast was done methodically in strict compliance with the electoral laws and the Constitution.*

*(l) The election officers employed by the 1<sup>st</sup> Respondent were impartial and independent and discharged their duties diligently, lawfully and professionally.*

*(m) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents afforded all parties and agents reasonable opportunity to scrutinize the results and ventilate any queries.*

*(n) The 1<sup>st</sup> and 2<sup>nd</sup> Respondents deny that it committed any electoral offence or malpractice. The petitioner is invited to strict proof.*

*(o) The 1<sup>st</sup> and 2<sup>nd</sup> Respondent aver that the final tally of votes for Vihiga County that the 3<sup>rd</sup> Respondent had garnered the highest hence the 3<sup>rd</sup> Respondent was declared validly elected as Governor for Vihiga County.*

*(p) No erroneous result was declared in any polling station*

*(q) There was no faulty counting and tallying of votes as all candidates were granted sufficient opportunity to scrutinize and interrogate the results in each polling station before computation of the final tally.*

*(r) The voting and counting process was simple, accurate, verifiable, secure accountable and transparent under Article 86 of the Constitution.*

26. It is thus the case of the 1<sup>st</sup> and 2<sup>nd</sup> respondents that the petitioner's prayer to the court to void the election of the 3<sup>rd</sup> respondent as governor for Vihiga County is misconceived and baseless and aver that if there be any minor irregularities and/or errors( which is denied) then the said irregularities and /or errors were so trivial as not to effect the outcome of the election. The 1<sup>st</sup> and 2<sup>nd</sup> respondents also aver that the petitioner has failed to discharge the burden of proof required to invalidate the declaration of the 3<sup>rd</sup> Respondent as governor, Vihiga County, and further that the petitioner's petition is not only baseless spiteful mischievous and unfounded, but is also incurably defective and lacks merit. They urge the court to dismiss the petition with costs.

27. In her oral evidence, the 2<sup>nd</sup> Respondent, Sarah Mogati Ogaro testified that as Returning Officer for Vihiga County, her duty was to collate results using form 37A ad 37 B into form 37C and from the tally the winner of the gubernatorial elections for Vihiga County was the 3<sup>rd</sup> Respondent.

28. The 2<sup>nd</sup> Respondent's evidence in chief was her affidavit sworn on 21<sup>st</sup> September, 2017, to which were annexed copies of form 37C, 37Bs, for Vihiga, Sabatia and Hamisi constituencies and form 37As, from other polling stations. She testified that from form 37B for Hamisi Constituency, there are no polling stations by the name Morris Dangana and Kapchugun as alleged by the petitioner.

29. During cross examination, the 2<sup>nd</sup> Respondent stated that all form 37As are supposed to be signed by the Presiding Officer (P.O) the Deputy Presiding Officer (DPO) and any agents who are present also indicate their names and sign the form. She also testified that all the forms are required to have IEBC rubber stamp.

30. On the alleged difference between the votes cast for the governor and those cast for the senator, the witness stated that it is not necessarily true that the votes cast for the governor must be exactly in number as those cast for the senator. She admitted however that some of the forms produced by her do not bear the IEBC stamp; some have not been signed by the Presiding Officer and Deputy Presiding Officer and also that in some of the forms the results are overwritten without countersignatures. According to the 2<sup>nd</sup> Respondent, the votes cast for governor were 200634, but she could not trace the votes cast for the senator. On the issue of whether all the voters who cast their vote on the polling day had their details captured in the KIEMS kit, the 2<sup>nd</sup> Respondent said she could not say whether that happened or not.

31. In response to questions from counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents, the 2<sup>nd</sup> respondent stated that there was no complaint raised by the Petitioner against any of the forms 37A, 37B and 37C, and that all the agents signed the forms as a confirmation that the information contained in the said forms was correct. She also testified that throughout the elections no complaints as to the process thereof were lodged by any of the gubernatorial candidates either to herself or to the IEBC.

32. Regarding the petitioner's allegations that the 3<sup>rd</sup> and 4<sup>th</sup> respondents influenced her as well as the IEBC to tilt the results in favour of the 3<sup>rd</sup> respondent, the witness stated that those allegations were not factual and that in any event the petitioner has not proved the same. According to the 2<sup>nd</sup> respondent, the following are the results she announced:-

- 1) Wilber Khasilwa Ottichillo -82260 as opposed to 82635 given by the Petitioner
- 2) Epainitious MosesAkaranga-65539 as opposed to 65664 given by petitioner
- 3) Yusufu Chanzu Kafuma – 34102 as opposed to 34186 given by petitioner
- 4) Josephat Amadi Ogwero – 16427 as opposed to 16289 given by petitioner
- 5) Enosi Kennedy Butiko – 2306 as opposed to 2202 given by petitioner

33. In her further testimony, the witness stated that any discrepancy in votes cast for the governor and the senator could be attributed to stray or rejected votes and she went on to state that the votes cast in Vihiga County were not more than the registered voters. In her view the elections were well conducted and the results she declared, showing the 3<sup>rd</sup> respondent as the winner were correct.

34. The witness stated further that whereas the total votes cast were 200634, the number of registered voters was 272409, and further that the alleged discrepancies between the votes cast for the governor and those for the Senator were neither pleaded nor supported by any documentary evidence from the petitioner.

35. Concerning the complaint that some Presiding Officers and Deputy Presiding Officers as well as some agents did not sign form 37A, the witness stated that there was no legal requirement for the said persons to do so, though administratively, they were under a duty to do so. She stated further that in any event, the lack of a signature would not invalidate the form. Finally, the witness stated that where party agents sign the forms, it is an indication or confirmation that the tallies on that/those forms are correct. The 2<sup>nd</sup> respondent urged the court to dismiss the petition with costs.

### **The 3<sup>rd</sup> and 4<sup>th</sup> Respondents' Case**

36. The case for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents is contained in the response dated 27<sup>th</sup> September, 2017 and filed in court on 29<sup>th</sup> September, 2017. The 3<sup>rd</sup> Respondent contends that the petition is incurably incompetent and an abuse of the court process as it is couched in general terms without giving any specifics of the alleged illegalities, irregularities and/or any malpractice to enable a response. The 3<sup>rd</sup> Respondent denies the contents of paragraph 12 of the petition as read with paragraph 12 of petitioners affidavit which alleges that there were massive systemic systematic and deliberate non-compliance with the Constitution and the law by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents with the result that there were substantial, systemic, glaring, qualitative anomalies that put to question the credibility of the gubernatorial election results for County of Vihiga.

37. The 3<sup>rd</sup> Respondent also contends that the petitioner has demonstrated a considerable degree of ignorance of both facts and law by making generalized allegations without proof or specifics, thus resulting in misinformed and unsubstantiated allegations.

38. The 3<sup>rd</sup> Respondent also testified and adopted the contents of his sworn affidavit dated 27<sup>th</sup> September 2017 as his evidence in chief. No questions were put to him in cross examination. The 3<sup>rd</sup> Respondent's affidavit is a replica of his response to the petition in which he faults the Petition because of the generality of the contents of the petitioner's case which he says dismally falls short of the threshold for invalidating an election. He denied all the allegations contained in the petition and petitioner's supporting affidavit. The 3<sup>rd</sup> Respondent prays that the petition be dismissed with costs, as the same lacks merit and remains unsubstantiated.

### **The Law Governing the Dispute Herein**

39. The detailed submissions made on behalf of the petitioner together with relevant authorities were filed by Mr. P.S. Kisaka advocate on 17<sup>th</sup> November, 2017. The submissions on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, also supported by relevant authorities are dated 17<sup>th</sup> November, 2017 and filed on the same day by the firm of Z.K. Yego Law Offices while the submissions on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents were duly filed on 17<sup>th</sup> November, 2017 by the firm of GS Law LLP Advocates. Counsel for 3<sup>rd</sup> and 4<sup>th</sup> Respondents. Also filed their list of authorities. In terms of appearances during the hearing of the petition, M/S Rauto appeared for the petitioner, Mr. Yego for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents while the 3<sup>rd</sup> and 4<sup>th</sup> Respondents were represented by M/S Sore and Khayega advocates. All the advocates have clearly set out the law as regards the issues in controversy in this petition. For ease of reference. The following are the salient provisions of the applicable law.

40. Article 38(2) of the Constitution 2010 provides as follows;-

*“ 38(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for-*

*(a) any elective public body or office established under this Constitution.*

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

41. The operative words in the above sub-article are free, fair and regular elections.

42. Article 81- General Principles for the electoral system – provides thus:-

***“81 General Principles for the electoral system.***

*The electoral system shall comply with the following principles.*

*(a) freedom of citizens to exercise their political rights under Article 38*

*(b) .....*

*(c) .....*

*(d) universal suffrage based on the aspiration of fair representation and equality of votes and*

*(e) free and fair elections, which are-*

*(i) by secret ballot*

*(ii) free from violence, intimidation, improper influence or corruption*

*(iii) conducted by an independent body,*

(iv) transparent; and

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

43. Article 86 provides thus:-

*“86 Voting*

*At every election, the Independent Electoral and Boundaries Commission shall ensure that-*

*(a) whatever method is used the system is simple, accurate, verifiable, secure, accountable and transparent.*

*(b) the votes cast are counted, tabulated and the results announced promptly by the presiding Officer at each polling station.*

*(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and*

*(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.*

44. Section 107 of the Evidence Act, Cap 80 Laws of Kenya is worded as follows:-

*“107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

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

45. Section 109 of the Evidence Act, Cap 80 laws of Kenya also provides thus:-

*“109 The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on my particular person.”*

46. Section 42 of the Elections Act, No. 24 of 2011 (The Act) provides as follows:-

***“42 Accreditation of observers, agents, reporters etc.***

*The Commission may at any election accredit –*

*(a) persons as an observer, agent or media representative; or*

*(b) any person or institution to report on an election.”*

Section 75 of the Act makes the following provision with regard to County election petitions;  
*“75(1) A question as to validity of an election of a county governor shall be determined by the High Court within the county or nearest to the county.*

*(1A) -----*

*(2) A question under sub-section (1) shall be heard and determined within six months of the date of lodging the petition*

*(3) In any proceeding brought under this section, a court may grant appropriate relief including-*

(a) a declaration of whether or not the candidate whose election is questioned was validly elected;

(b) a declaration of which candidate was validly elected; or

(c) an order as to whether a fresh election will be held or not.

(4) .....

47. Section 80 of the Act sets out the powers of the election court in the exercise of its jurisdiction to hear and determine election petitions, while section 82 deals with scrutiny of votes during the hearing of an election petition.

48. On the other provisions of the Act, Section 83 thereof provides as follows:-

**“ 83. Non-compliance with the law**

*No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election”*

49. Section 84 of the Act, on costs provides as follows;

*“84 An election court shall award the costs of and incidental to a petitioner and such costs shall follow the event.”*

50. The Elections (Parliamentary and County Elections) Petitions Rules 2017 provide as follows at rules 8,12,29 and 36:-

**“8.Contents and form a petition**

*(1) An election petition shall state-*

*(a) the name and address of the petitioner;*

*(b) the date when the election in dispute was conducted;*

*(c) the results of the election, if any, and however declared;*

*(d) the date of the declaration of the results of the election:*

*(e) the grounds on which the petition is presented: and*

*(f) the name and address of the advocate, if any, for the petitioner which shall be the address for service.*

*(2) The petition shall be divided into paragraphs, each of which shall be confined to a distinct portion of the subject, and every paragraph shall be numbered consecutively.*

*(3) The petition shall conclude with a statement setting out the particulars of the relief sought which may include-*

*(a) a declaration on whether or not the candidate whose election is questioned was validly elected:*

- (b) a declaration of which candidate was validly elected
- (c) an order as to whether a fresh election should be held
- (d) scrutiny and recounting of the ballots cast at the election in dispute;
- (e) payment of costs; or
- (f) a determination as to whether or not electoral malpractice of a criminal nature may have occurred.

(4) The petition shall-

- (a) be signed by the petitioner or by a person authorized by the petitioner;
- (b) be supported by an affidavit sworn by the petitioner containing the particulars set out under rule 12; and
- (c) be in such number of copies as would be sufficient for the election court and all respondents named in the petition.

(5) .....

51. Rule 12 of the Petition Rules provides as follows:-

“12 Affidavits generally

(1) A Petition shall be supported by an affidavit which shall-

- (a) set out facts and grounds relied on the petition: and
- (b) be sworn personally by the petitioner or by at least one of the petitioners, if there is more than one petitioner.

(2) An affidavit in support of a petition under sub-rule (1) shall state-

- (a) the name and address of the deponent
- (b) the date when the election in dispute was conducted
- (c) the results of the election, if any, however declared
- (d) the date of the declaration of the results of the election;
- (e) the grounds on which the petition is presented; and
- (f) the name and address of the advocate, if any, acting for the petitioner which shall be the address for service.

(3) Each person who the petitioner intends to call as a witness at the hearing, shall swear an affidavit

(4) A petitioner shall, at the time of filing the petition, file the affidavits sworn under sub rule (3)

(5) A response to the petition under rule 11 shall be supported by an affidavit sworn by the respondent.

(6) Each person who the respondent intends to call as a witness at the hearing, shall swear and affidavit

(7) A respondent shall, at the time of filing the response to a petition, file the affidavits sworn under sub-rule (6)

(8) Except with the leave of the election court and for sufficient cause, a witness shall not give evidence unless an affidavit sworn by the witness is filed as required under these Rules.

(9) The election court may, on its own motion or on the application by any party to the petition, direct a party or witness to file a supplementary affidavit.

(10) An affidavit shall-

(a) state the substance of the evidence be divided into paragraphs, each of which, as nearly as may be, shall be confined to a distinct portion of the subject, and numbered consecutively, and

(b) contain a list of exhibits and copies of any documents which the deponent intends to rely on.

(11) Each affidavit shall be served to all parties to the petition.

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

(13) Every deponent shall, subject to the election court's direction, be examined-in-chief and cross examined

Provided that the parties may, by consent, accept not to cross-examine the deponents but shall have the deponent's evidence admitted as presented in the affidavits.

(14) The Oaths and Statutory Declarations Act (cap.15) and Order 19 of the Civil Procedure Rules, 2010 [ L.N. No.151/2010] shall apply to affidavits under these Rules.”

52. Finally, Rule 36 of the Rules provides as follows:-

*36 Power of an election court to issue administrative orders*

*Despite any provision in these Rules, the election court may, at any time before or during the hearing, issue any orders of an administrative nature, including-*

*(a) an order to require written submissions; and*

*(b) an order prescribing the timelines for certain actions.*

53. In addition to the above issues of law, counsel cited numerous relevant authorities in support of their rival positions. I have had the opportunity to read through these authorities and I am grateful to counsel for the industry and depth of research exhibited in this regard.

### **Issues for Determination**

54. Each party filed their own issues for determination. The petitioner framed the following issues:-

1. *Whether the elections for the Governor Vihiga County were conducted, administered and managed by the 1<sup>st</sup> Respondent in accordance with the constitutional principles of free and fair*

*elections and were administered in an impartial, efficient, accurate and verifiable manner.*

*2. Whether the elections for the Governor Vihiga County were marred with illegalities, irregularities and malpractices.*

*3. Whether the tallying, collation and declaration of the elections results of the governor Vihiga County by the 1<sup>st</sup> Respondent was in compliance with the Constitutional Provisions as read with the Elections Act.*

*4. Whether the results of Vihiga County Governor election were announced through valid forms 37A, 37Bs and 37Cs*

*5. Whether the 1<sup>st</sup> respondent in its management of the electoral of the elections of Governor Vihiga County manipulated the results in a manner that gave undue advantage to the 3<sup>rd</sup> Respondent.(sic)*

*6. Whether the 3<sup>rd</sup> and 4<sup>th</sup> Respondents were validly elected by the voters of Vihiga County as the Governor and Deputy Governor respectively.*

*7. Whether the illegalities, irregularities and malpractices were so substantial[as] to have affected the outcome and result of the election*

*8. What appropriate orders should this Honourable court make in the circumstances of the case;*

*9. Who is to bear the costs of this Petition?*

55. On the part of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents the following four issues were framed:

*1) Whether there was non-compliance with the Constitution and electoral laws in the election for Governor Vihiga County*

*2) If so, whether the said non- compliance was substantial and significant and affected the final result of the election;*

*3) Whether the 3<sup>rd</sup> Respondent was validly elected as Governor, Vihiga County and*

*4) Who shall pay costs of the petition?*

56. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents also isolated four issues for determination as follows;

*1) Whether the petition has cogent facts and grounds to warrant the reliefs sought*

*2) Whether the 3<sup>rd</sup> and 4<sup>th</sup> respondents were validly elected as governor and deputy governor of Vihiga County*

*3) Whether the evidence before Court is sufficient to support the allegations AND*

*4) Who should bear the cost of the proceedings.*

57. From all the three sets of issues, the issues for determination, boil down to the following;

*1) Whether the elections for the governor Vihiga County were conducted in accordance with the with the Constitution and the electoral Laws or whether they were marred with irregularities and illegalities so substantial and significant as to affect the final result of the election.*

2) Whether the tallying collation totaling and declaration of the election result of the Governor of Vihiga County by the 2<sup>nd</sup> Respondent was in compliance with the Constitutional provisions as read with the Elections Act in terms of Forms 37A, 37B and 37C.

3) Whether the 3<sup>rd</sup> and 4<sup>th</sup> Respondents were validly elected as Governor and deputy Governor of Vihiga County

4) Incompetence of the petition.

5) Who should bear the costs of this petition?

58. In my humble view, the above are the issues that occupied all the parties in this matter. The rival submissions filed by the parties contained relevant authorities in support of or against the issues as framed. Whenever necessary, I shall refer to the authorities during determination of the issues. However before I make any findings on the issues as framed, I need to say something about credibility of witnesses, because the parties have, in their submissions, cast doubt on the credibility of the petitioner as a witness.

### **Credibility of witnesses**

59. Although this petition is not a criminal case, the fact that election petitions are of a quasi – criminal nature, has made me to rely on the law on credibility of witnesses as laid down in ARCHIBALD CRIMINAL PLEADING, PRACTICE and EVIDENCE (1997) at page 1037 thus:

*“The credibility of a witness depends upon:-*

*(a) his knowledge of the facts to which he testifies;*

*(b) his disinterestedness*

*(c) his integrity*

*(d) his veracity and*

*(e) his being bound to speak the truth by such an oath as he deems obligatory, or by such affirmation or declaration as may by law be substituted for an oath. The degree of credit his testimony deserves will be in proportion to the jury’s assessment of these qualities.”*

60. In a nutshell, any witness in general and the petitioner herein is expected to have known the facts to which he testified, and to show interest in his case. The petitioner is also expected to be consistent and wholesome in his testimony to the court and thus to testify without wavering. The petitioner is also expected to be accurate in what he tells the court and to conform to the facts of his case. Since the petitioner confirmed he was of Islamic faith and took an oath on the Koran, he was bound by that oath to tell the court the truth and nothing but the truth. Did he?

61. In the case of **Ndungu Kimanyi – vs – Republic [1979] KLR 282**, the Court of Appeal at paragraphs A and B on page 284 expressed itself thus:-

*“.....We lay down the minimum standard as follows. The witness upon whose evidence, it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.”*

62. The import of the above holding shall become apparent as I consider the petitioner’s testimony which formed the sole evidence of his case.

## **Burden of proof**

63. There is no longer any doubt in the mind, of any election court or any citizen of this country that election petitions comprise a special category of cases that must be heard and determined within set statutory timelines. All the parties in this petition appreciate this particular fact.

64. As clearly stated under Article 38(2) of the Constitution, every citizen has a right to free and fair elections that are also held at regular intervals based on universal suffrage and free expression of the will of the electorate. The definition of free and fair elections is found under Article 81(e) of the Constitution which requires that the electoral system should comply with the principles of elections characterized by secret ballot, freedom from violence, intimidation, improper influence or corruption and conducted by an independent body in a transparent, impartial, neutral, efficient, accurate and accountable manner. There is of course a rebuttable presumption under Section 83 of the Elections Act that elections are generally conducted in accordance with the provisions laid down in the Constitution as well as in the Elections Act and the rules and regulations made thereunder. That is why in the case of **Raila Odinga and 5 others – vs – Independent Electoral and Boundaries Commission & 3 others, Supreme Court Election Petition No. 5 of 2013**, the Supreme Court held inter alia, that

*“ A petition seeking to nullify an election should clearly and decisively demonstrate that the conduct of the election was so devoid of merits and so distorted as not to reflect the expression of the peoples’ electoral intent and that the evidence should disclose profound irregularities in the management of the electoral process,”*

65. The Supreme Court in the same **Raila case** (Supra) went further to say that:-

*“Where a party alleges nonconformity with electoral law, the petitioner must not only prove that there had been non-compliance with the law but that such failure and non-compliance did affect the validity of an election. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies **Ominia Praesumuntur rite solemniter esse acta** (All acts are presumed to have been done, rightly and regularly). So, the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the presumption of the law “*

66. In the earlier English case of *Morgan & another – vs – Simpson & another* [1974] 3 ALL E.R 722, the court stated the same principle in the following words:-

*“An election court was required to find an election invalid:-*

*(a) if irregularities in the conduct of elections had been such that it could not be said that the elections had been conducted as to be substantially in accordance with the law as to the election; or*

*(b) if the irregularities had affected the results.*

*“Accordingly, where breaches of the election rules, though trivial, had affected the results, that, by itself, was enough to compel the court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the law, it was vitiated irrespective of whether or not the result of the election had been affected.”*

67. **In the case of Benard Shinali Masaka- vs – Boni Khalwale & others** [2011] eKLR, Lenaola J (as he then was) had this to say on the issue in hand:-

*“It is now trite that election petitions are a special category of cases and reading the authorities submitted by parties, I am in agreement with **Maraga J in Joho – vs – Nyange & another (2008)***

**3KLR (EP) and Rawal J. in Onalo – vs – Ludeki & others [2008] 3KLR (EP) 507** where the learned judges held the view that the burden of proving any allegation made in a petition lies with the petitioner. Further I agree with the proposition grounded on the decision in **Mbowe – vs – Eliufoo [1967]E.A 240** that any allegations made in an election petition have to be proved to the “satisfaction of the Court.” Like Rawal J. in **Onalo**, I am certain that the standard of proof save in matters where electoral offences are alleged, cannot be generally beyond reasonable doubt, but the quasi criminal nature of some election petitions, it is almost certainly on a higher degree than merely on a balance of probabilities, the latter being the standard in civil cases.”

68. I fully subscribe to and agree with the above principles.

69. From the above authorities, it is clear that a petitioner who seeks to nullify an election on grounds that there was non-conformity with the law or on grounds that there were, as in the instant case, “massive, systemic, systematic and deliberate non – compliance with the Constitution and the electoral laws” must adduce cogent and credible evidence to prove the grounds put forward in the petition. The burden of proof is thus squarely on the shoulders of the petitioner in this case to show by cogent evidence that indeed the allegations he has made against the Respondents are true. He must point to the irregularities both in his pleadings and in his oral evidence. He must not only prove to the satisfaction of this court that there were massive systemic, systematic and deliberate non-compliance with the law but must go further to prove that those irregularities affected the gubernatorial results of Vihiga County. It will not be enough to make generalized assertions without giving specific evidence to support each and every allegation. It is not lost to this Court that pleadings remain pleadings. They do not form the evidence. The evidence must be given in support of the pleadings which would otherwise remain dry bones without flesh on them.

70. I shall now proceed to consider each of the issues as framed.

**1. Whether the elections for the Governor Vihiga County were conducted in accordance with the Constitution and the electoral Laws or whether they were marred with irregularities and illegalities so substantial and significant as to affect the final result of the election.**

71. In his petition and supporting affidavit, the petitioner made far reaching allegations against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as well as the 3<sup>rd</sup> Respondent, and in particular, the petitioner alleged that:-

◆*The 1<sup>st</sup> and 2<sup>nd</sup> Respondents deliberately and negligently failed to electronically transmit results from polling stations in the prescribed forms, thereby contravening the provisions of Section 39 of the Elections Act;*

◆*There were massive numerical discrepancies in the final tallies in Form 37A and form 37B that affected the result.*

◆*There were numerous alterations on forms 37A, 37B and 37C without the accompanying counter signatures.*

◆*There was lack of IEBC stamps on some of form 37As*

◆*Some of the form 37A's were not signed by the Presiding Officers.*

◆*The total number of votes cast for the gubernatorial position were more than the total number of votes cast in other positions and in particular for the position of the Senator as well as the Women Representative.*

72. The Petitioner also alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted with partiality and were infact influenced in their work by the 3<sup>rd</sup> Respondent. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents allowed people who had not been biometrically identified to vote without filling the requisite form 32A; that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to account for results from certain polling stations in addition to completely failing to

provide results for three polling stations. The petitioner also alleged that the number of votes cast in a number of polling stations far exceeded the number of registered voters and further that the 1<sup>st</sup> and 2<sup>nd</sup> respondents refused to provide the petitioners polling agents with copies and duplicates of form 37A. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents were also accused of declaring inaccurate and unverifiable results that were also at variance with the results announced by the presiding officers at polling stations. All the respondents denied these allegations. The 2<sup>nd</sup> respondent stated that where there were any errors, as is expected in any human endeavor, such errors were not deliberate; and further that failure by the Presiding Officer or Deputy Presiding Officers to sign any of the forms would not necessarily invalidate a result.

73. In his written submissions, the petitioner avers that the 1<sup>st</sup> respondent so flagrantly flouted the Constitution and the electoral laws that the election result for governor of Vihiga County cannot be said to have been in accordance with the will of the people. In this regard, Counsel for the petitioner placed reliance on Supreme Court **Election Petition No. 1 of 2017 Raila Odinga & Another – vs – IEBC & 2 others** in which the Supreme Court stated, inter alia,-

*“On our part, having considered the opposing positions, we are of the view that, the contentions by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents ignore two important factors. One that elections are not only about numbers as many, surprisingly even prominent lawyers, would like the country to believe. Even in numbers, we used to be told in school that to arrive at a mathematical solution, there is always a computational path one has to take, as proof that the process indeed gives rise to the stated solution. Elections are not events but processes. As Likoti J.F. opines “[e] elections are not isolated events, but are part of a holistic process of democratic transition and good governance..... Incidentally IEBC’s own Election Manual (Source Book) recognizes that an election is indeed a process.”*

74. Counsel for the Petitioner also placed reliance on the case of **Karanja Kabage – vs – Joseph Kiuna Kariambegu Nganga & 2 others – Election Petition No. 12 of 2013 [2013] eKLR** where the argument that an election is a process and not an event was also discussed.

75. Counsel for the respondents in their respective submissions contend that while the petitioner has correctly stated the law, the evidence on record falls far short of meeting the threshold for the burden of proof required in this case. Counsel for the respondents submitted that the petitioner’s allegations both in his petition and in the supporting affidavit are couched in such general terms and so lacking in particularity that none of the petitioner’s allegations can be said to have been proved. Further that the petitioner’s allegations that the 1<sup>st</sup> and 2<sup>nd</sup> respondent’s contravened the provisions of Section 39 of the Elections Act are as baseless as they are untrue, the true position being that the elections to which the said section applies are presidential elections and not any other. Section 39(1C) of the Elections Act, read as follows:-

*“ 39(1C) For purposes of a presidential election, the Commission shall-*

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

*(b) .....*

*(c) .....*”

76. The respondents’ counsel also submitted that at no time did the petitioner try to access the 1<sup>st</sup> respondent’s portal to check for the gubernatorial results for Vihiga County, and that in the circumstances, the petitioner should not be talking of unverified and/or wrong results. Counsel also submitted that the petitioner failed to adduce evidence of any kind to support his other allegations against the respondents either corporately or singly.

77. I have myself carefully combed through the evidence which the petitioner placed before me. I also saw and heard him testify. I have also carefully considered the evidence given on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as well as that given on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> respondents. I saw the 2<sup>nd</sup> Respondent and heard her testify. I also saw the 3<sup>rd</sup> Respondent and heard him testify. In order to compare the veracity of the petitioner's evidence against his own pleadings and also against the evidence given on behalf of the respondents, the following excerpts from the petitioner's evidence will suffice:-

*“Yes, I was a voter at Banja Primary. After voting I did not go home to wait for results. I remained in the vicinity of the polling station until the results were announced between 8.00pm and 9.00pm. It was between 8.30pm and 9.00pm. No, I was not a candidate in the election. It is also true I was not anybody's agent. Yes, on that day, I visited only one polling station. I now see paragraph 21 of my affidavit at page 18 of the petition. I see paragraph 21(f). It is true I allege my polling agents were not provided with copies and duplicates of form 37A. It is true I had no agents because I was not a candidate.....according to paragraph 21(f) what is stated therein, is not correct. I wish to retract that statement.*

*I now see paragraphs 10 and 11 of my affidavit. I have said there was no electronic transfer of results. I do not know or understand the law I have referred to therein. I see paragraph 18 of my petition (at page 8). It is correct. I have quoted Section 39 of the Elections Act. This Section refers to presidential elections (witness reads section) I do not wish to withdraw my complaint.....*

*I know I have sworn to tell the truth. The truth is that apart from Banja, I visited Mudindi Primary School. I am now saying that I went around other polling stations. I admit I have lied to the court..... It is true. I was not a voter at Mudindi Polling station.....Those who came out of the station (two people whose names I cannot remember) told me that things inside Mudindi were not going well. The two persons are not my witnesses.*

78. During cross examination by Mr. Khayega, counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, the petitioner stated in part:-

*“Yes, the 3<sup>rd</sup> Respondent influenced 1<sup>st</sup> and 2<sup>nd</sup> respondents in their work. I do not have the evidence to support the same. Apart from celebrating the results that were wrong, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents influenced the election process. Though I may not have the evidence, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents influenced the 1<sup>st</sup> and 2<sup>nd</sup> respondents. I am not able to explain in what way the 3<sup>rd</sup> and 4<sup>th</sup> respondents influenced the voters to vote for them.....There is evidence that the 3<sup>rd</sup> and 4<sup>th</sup> respondents influenced the voters.....*

*Yes, the petition and the affidavit were explained to me before I signed. If there are any errors, untruths, I will ask the court to pardon me..... I do not see Morris Dangana and Kapchegun schools in that list. [of polling stations.]”*

79. From the above excerpts, the petitioner comes out as a person either suffering from selective amnesia or as one who had no knowledge of the case against the respondents. The petitioner could also just be an outright liar who readily admits his lies. He also comes out as a person who either did not care about the petition he was bringing to court or was not prepared for what he was confronted with during cross examination. Whichever way one looks at the petitioner one thing is clear. His evidence must be considered with great circumspection and only accepted as the truth when what he told the court during cross examination agrees with the allegations in his pleadings.

80. In a nutshell, the court has assessed the petitioner as an “unreliable and untruthful witness”. Throughout his testimony, he gave contradictory statements and he perjured himself when he admitted that he had lied to the court under oath, and even sought to be forgiven. The petitioner testified of things he either did not know or deliberately withheld the truth about such things. A case in point is when the alleged to have visited Morris Dangana and Cheptugun polling stations while he was fully aware that

those two polling stations did not exist as polling stations for the elections that were held on 8<sup>th</sup> August, 2017. He also could not produce evidence to show that votes cast exceeded the number of registered voters in Vihiga County as a whole or within certain polling stations.

81. The question that arises as a consequence of the petitioner's above stated evidence is whether the petitioner has placed before this court cogent evidence to show that there were irregularities and illegalities during the election and whether such irregularities and illegalities were so substantial and significant as to affect the result of the election for Governor Vihiga County.

82. It is my considered opinion that the petitioner has not done so. The petitioner did not put forward evidence in support of any of his allegations, as clearly admitted above. The results in this case did not need to be electronically transmitted. The alleged malpractices touching on forms 37A, 37B and 37C were not proved. In any event, the evidence given by the 2<sup>nd</sup> respondent on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> respondents, as well as the evidence of the 3<sup>rd</sup> Respondent was enough to put to rest the petitioner's unsubstantiated allegations. The 2<sup>nd</sup> respondent was candid in her testimony that the results complained of were carefully aggregated in form 37C after she had tallied the results from each polling station as given in form 37A and after she had verified the results in form 37B as was required of her. This testimony given by the 2<sup>nd</sup> Respondent was not controverted by the Petitioner whose duty it was to prove the allegations to the satisfaction of this court.

83. Regarding allegations that the 3<sup>rd</sup> Respondent influenced the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the conduct of the elections, the petitioner stated clearly that he could not say how the 3<sup>rd</sup> Respondent did that nor could he say how the 3<sup>rd</sup> and 4<sup>th</sup> respondents influenced the voters to vote for them. The petitioner also failed to produce evidence to prove his allegation that the votes cast in some polling stations exceeded the registered number of voters. To say the least therefore, the petitioner's allegations were wild, untrue and unsubstantiated, including the allegation that the votes cast for the 3<sup>rd</sup> respondent exceeded the votes cast for the Senator and the Woman Representative to the national assembly by over 6000 votes. As correctly submitted by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the Petitioner failed to show by documentary comparison of forms 37C, 38C, and 39C to prove the alleged disparity in votes. In any event, from the evidence given by the 2<sup>nd</sup> Respondent, the disparity of votes between the Governor and the Senator was about 400, and in my considered view, that disparity did not affect the result of the gubernatorial election of Vihiga County.

84. The Petitioner also alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents committed election offences during the conduct of the elections for Governor Vihiga County on 8<sup>th</sup> August, 2017 including allowing unregistered people to vote. This allegation by the Petitioner was countered by the evidence of the 2<sup>nd</sup> Respondent who told the Court that only registered voters, biometrically identified, were allowed to vote. She also testified that no complaints were made either to her or to the 1<sup>st</sup> Respondent that unregistered people were allowed to vote. The petitioner did not refute this testimony by the 2<sup>nd</sup> Respondent nor did he to place cogent evidence before the court to prove the allegation.

85. Regarding allegations that the 3<sup>rd</sup> Respondent influenced the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the manner they conducted the elections, the 2<sup>nd</sup> Respondent gave her testimony and denied such allegations. The petitioner himself testified that he could not say in what manner the 3<sup>rd</sup> Respondent influenced the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, nor could he say in what manner the 3<sup>rd</sup> Respondent may have influenced the voters to vote for him and for the 4<sup>th</sup> Respondent. The 3<sup>rd</sup> Respondent himself testified and denied those allegations. The 3<sup>rd</sup> Respondent's evidence in that regard was not controverted.

86. In a nutshell, the totality of the petitioner's evidence is that he has failed to prove any of the alleged irregularities and illegalities resulting in massive systemic, systematic and deliberate non-compliance with the Constitution and the law. The petitioner's allegation that the sovereign will and power of the people of Vihiga County has not been proved, nor has he proved that the freedom of the people of Vihiga County to exercise their political rights was compromised. The respondents have placed evidence before

this court to the effect that over 200,000 of the registered voters turned out to cast their vote for the various political positions and not a single registered voter complained of being denied their right to vote. Consequently, the petitioner has failed to prove that the gubernatorial elections in Vihiga County were not transparent, or that they were not free from intimidation or improper influence. The only inference the court can draw from the evidence before it is that the electoral process conducted by the 1<sup>st</sup> Respondent for Governor Vihiga County was impartial, neutral, efficient accurate and accountable.

87. To sum up on this first issue, I find that the petitioner's preparation for his case is akin to the near zero preparations by a football team that is going to take part in an international football match headed by a coach who does not know where the match will take place. He does not know who the opponents are and does not know what style his team will play when the day of the match eventually comes. What the petitioner did not realize is that his opponents were well prepared for the match and that he had to do the chasing instead of being in the forefront to score goals for his team.

**2. Whether the tallying collation totaling and declaration of the election result of the Governor of Vihiga County by the 2<sup>nd</sup> Respondent was in compliance with the Constitutional provisions as read with the Elections Act in terms of Forms 37A, 37B and 37C**

88. The petitioner alleged at paragraph 23 of the petitioner that *“the 1<sup>st</sup> and 2<sup>nd</sup> Respondent contravened the law by making false entries in form 37As indicating the 3<sup>rd</sup> Respondent as the winner of the election while knowing very well or having reasonable cause to believe that that was false or not believing that the same was true.”* This allegation was denied by each of the four respondents.

89. In his written submission, the petitioner relied on the **Karanja Kabage** case (above) in which the High Court noted that:-*“An election is an elaborate process that begins with registration of voters, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally declaration of the winner by gazettelement. In determining the question of the validity of the election of a candidate, the court is bound to examine the entire process up to the declaration of the results..... the concept of free and fair election is expressed not only on the voting day but throughout the election process ----- . Any non-compliance with the law regulating these processes would affect the validity of the election of the Member of Parliament.”* In the present case, any non-compliance with the law regulating the electoral process on 8<sup>th</sup> August, 2017 would affect the validity of the gubernatorial election for Vihiga County.

90. The petitioner alleged that Forms 37A, 37B and 37C were altered and the number of votes changed without any countersigning by any of the presiding officers or returning officers. It is to be noted that there was only one Returning Officer in this case namely Sarah Mogati Ogaro, the 2<sup>nd</sup> respondent. There were suggestions during the hearing of the petition that the petitioner's petition is similar in content to Supreme Court Petition No. 1 of 2017 (supra). Although the petitioner denied that suggestion the wording of paragraph 21 of his petition would seem to suggest so.

91. As to the evidence in support of the allegations contained in paragraphs 20, 21 and 23 of the Petition, none was adduced by the petitioner. On the other hand, the 2<sup>nd</sup> Respondent testified that the results she declared were accurate, and verifiable. She also testified that in arriving at the tallies in Form 37B, she extracted the results in Form 37A from all the polling stations within Vihiga County before transferring the final result into Form 37C. The respondent's evidence remained unshaken throughout the trial. The petitioner did not point to the specific Constitutional or electoral law provisions that were violated by the 2<sup>nd</sup> Respondent and his case remained scanty from beginning to end. It was the duty of the Petitioner to give the evidence that would enable this court to make a finding in his favour. He did not do so.

92. In the result, I find and hold that the tallying collation and totaling and declaration of the election results of the Governor for Vihiga County was done in accordance with both the Constitution and the Elections Act.

**3. Whether the 3<sup>rd</sup> and 4<sup>th</sup> respondents were validly elected as governor and deputy governor**

## of Vihiga County

93. At paragraph 26 of the Petition, the petitioner alleges that “*Furthermore the 1<sup>st</sup> and 2<sup>nd</sup> Respondents willfully contravened the law by failing to adhere to the Constitutional principles of credible, free and fair elections and gave undue advantage to the 3<sup>rd</sup> Respondent on partisan or unlawful consideration by issuing him with a certificate indicating him as the winner of the election in the absence of other candidates, their agents and election observers.*”

94. Without going into the details on this allegation, the petitioner who was a voter admitted that he was not a candidate for governorship of Vihiga County during the 8<sup>th</sup> August, 2017 elections. He also admitted that as a voter, he had no polling agents. Further, he stated that he could not say whether or not any of the unsuccessful candidates raised any complaint regarding the said election. In her testimony, the 2<sup>nd</sup> Respondent told the court that after she had counted, collated and tallied the results, the 3<sup>rd</sup> Respondent was confirmed to have garnered the highest votes and she had no option but to declare him the winner after what she described as a free, fair and credible election. She also testified that none of the unsuccessful candidates raised any complaint with her or the 1<sup>st</sup> Respondent either during or after the elections.

95. The evidence on record does not therefore support the petitioner’s allegation that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents were not validly elected Governor and Deputy Governor respectively of Vihiga County. The totality of the petitioner’s evidence, neither supports nor discloses such irregularities or illegalities on the part of the 2<sup>nd</sup> Respondent as would render her work suspect in conducting the Vihiga County gubernatorial election.

96. In reaching the conclusion that the 3<sup>rd</sup> Respondent was validly elected Governor of Vihiga County, I will conclude by quoting from the case of *Nicholas Salat – vs- Independent Electoral and Boundaries Commission and others – Kericho High Court Election Petition No. 1 of 2013* in which Muchelule – J considered what legal sufficiency in an election means:-

*“I understand legal sufficiency in the election mean that the election was conducted in a free, fair and credible manner and that it accurately represented the will of the electorate. It would not necessarily mean that the election was devoid of errors mistakes or irregularities. It means that if, there were such errors, mistakes or irregularities, they were not of such magnitude that they substantially or materially affected the result.”*

97. In the instant case, the 2<sup>nd</sup> Respondent did admit to some irregularities and mistakes which she attributed to human error. I do not think that such irregularities and mistakes substantially or materially affected the result of which the petitioner complains especially in view of the fact that the petitioner himself repeatedly and admittedly said he had no evidence to prove any of the allegations he set out in the petition. The petitioner did not also plead any particulars in the petition to warrant a finding by this court that truly the election for Governor of Vihiga County was not conducted in accordance with the Constitution, the Elections Act and the rules and regulations made thereunder. In the absence of such evidence, the petitioner’s case has no legs to stand on and must fail.

98. In the case of **Gatirau Peter Munya – vs - Dickson Mwenda Kithinji & 2 others [2014] eKLR**, the Supreme Court of Kenya had the following to say of minor errors/irregularities in the election process:-

*“ [213] ..... That the practical realities of election administration are such that imperfections in the electoral process are inevitable, and on this account, elections should not be lightly overturned, especially where neither a candidate nor the voters have engaged in any wrong doing.*

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

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

99. In the petition before me, the petitioner did not prove either minor or major irregularities. It was the 2<sup>nd</sup> Respondent who admitted that indeed there were some minor administrative and procedural irregularities like one or two Form 37A's missing an IEBC stamp or signature of a presiding officer or an agent. But these errors, by or of themselves without any cogent evidence from the petitioner pointing to specific stations showing contraventions of the Constitution and the electoral laws, are not sufficient to invalidate the election of the 3<sup>rd</sup> Respondent as Governor, Vihiga County.

#### **4. Incompetence of the Petition**

100. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted that the petition as filed is incurably incompetent and an abuse of the court process as it is lacking in specificity of any of the alleged illegalities, irregularities and malpractices. It is the respondents' contention that the petitioner is in contravention of the provisions Rule 8(c) the Elections (Parliamentary and County Elections) Petitions Rules, 2017 which provides that an election petition shall state, among other detail, *“The results of the election if any, and however declared.”* The Respondents' case is that the particulars given by the petitioner at paragraph 6 of the petition are not the results that were announced by the 2<sup>nd</sup> Respondent. Indeed the 2<sup>nd</sup> Respondent, during her testimony gave details of the results which she announced and dismissed the petitioner's figures which she said were not the correct results as announced by herself. There was no rebuttal of these submissions.

101. In arguing the above point, Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents cited three authorities. One of the cases cited is **John Michael Mututho – vs – Jane Njeri Wanjiku Kihara & 2 others [2008] KLR 10** where the Court of Appeal expressed itself thus:-

*“Regulation 40 implied that where the results were not included in the petition, it will be incomplete as the basis for any complaint would be absent and whatever complaints a petitioner had about an election would be regarded as having no legal basis. The law sets out what a petition should contain, and if any of the matters supposed to be included was omitted, the petition would be incurably defective.”*

102. In the present petition, the position is that though the petitioner included some figures, these figures are not the correct figures as per the evidence of the 2<sup>nd</sup> respondents. In my considered view, there is a difference between omitting the results all together as opposed to giving wrong results. In light of this distinction, I would not conclude that the petition is incompetent, but it forms a basis for the respondents to question the veracity of the petitioner's pleadings and evidence.

#### **Conclusion**

103. From all the evidence, the submissions and the analysis, I have reached the inevitable conclusion that the petitioner in this case has failed to prove the existence of massive systemic, systematic and deliberate non-compliance with the Constitution and the electoral laws by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The petitioner has also failed to prove that the 3<sup>rd</sup> Respondent influenced the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in the conduct of the elections. The petitioner has also failed to prove that the 3<sup>rd</sup> Respondent was not validly elected Governor of Vihiga County, during the elections held on 8<sup>th</sup> August, 2017.

104. The evidence on record is clear that the 3<sup>rd</sup> Respondent won the elections by about 17000 votes over his closest rival. Accordingly, prayers (a)(b)(c) and (d) of the Petitioner's petition dated 7<sup>th</sup> September, 2017 be and are hereby dismissed.

## 5. Who shall bear the costs of this petition

105. The law provides that the costs of any litigation follows the event. Section 84 of the Elections Act and Rule 36 of the Elections Petition Rules make provision to that effect. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent are asking this court to fix their costs at Kshs.5Million based on the holding in **Malindi HC Election Petition No. 6 of 2013 Rishad Hamid Ahmed Amana – VS- Independent Electorate & Boundaries Commission & 2 others**, in which the court capped the maximum costs at 2.5 million. That was in 2013. The 3<sup>rd</sup> and 4<sup>th</sup> respondents have not asked for any specific amount.

106. Under Rule 36 of the Elections Petitions Rules, this court has power to:

*(i) disallow any costs which may, in the opinion of the court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the petitioner or the respondent; and*

*(ii) impose the burden of payment on the party who has caused an unnecessary expense whether such party is successful or not, in order to discourage any such expense.*

107. In the instant petition, the petitioner made unfounded and unsubstantiated allegations. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents as well as the 3<sup>rd</sup> and 4<sup>th</sup> Respondents fiercely fought off these allegations. The petitioner's failure to substantiate even the smallest of his allegations means that his case was frivolous vexatious and an abuse of the Court process. The petitioner also perjured himself while under oath. Since the petition was heard in full, though with only three witnesses, it is my considered view that the costs awarded should adequately compensate counsel for their work. The petitioner stated that if the petition failed he would be prepared to pay the costs.

108. In my considered view, the costs for each set of Respondents shall be capped at kshs.3.0 million (three million only).

109. In conclusion, I now make the following declarations/orders:-

*(a) Wilber Khasilwa Ottichilo, the 3<sup>rd</sup> Respondent in this petition was validly elected and gazetted as the Governor of Vihiga County*

*(b) The Certificate of Results of Governor election for Vihiga County issued in the name of Wilber Khasilwa Ottichilo issued on 11<sup>th</sup> August, 2017 was constitutionally and legally issued to the said Wilber Khasilwa Ottichilo*

*(c) The gubernatorial elections held on 8<sup>th</sup> August, 2017 in Vihiga County were constitutionally and validly held*

*(d) The petitioner shall bear the costs of the petition*

*(e) The respondents shall get the full costs of the suit*

110. The costs shall be taxed and certified by the Deputy Registrar of this court.

Orders accordingly

Judgment delivered, dated and signed in open court at Kakamega this 18<sup>th</sup> day of December, 2017

**RUTH N.SITATI**

**JUDGE**

In the presence of;-

Mr. Shivega for Kisaka.....for Petitioner

Mr. Khayega for Yego.....for 1<sup>st</sup> and 2<sup>nd</sup> Respondents

M/S Khayega & Sore.....for 3<sup>rd</sup> & 4<sup>th</sup> Respondents

Polycap .....Court Assistant