



Arale v Independent Electoral and Boundaries Commission & 4 others (Election Petition E004 of 2022) [2023] KEHC 1886 (KLR) (6 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1886 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
ELECTION PETITION E004 OF 2022
SN RIECHI, J
MARCH 6, 2023**

BETWEEN

AHMED BORAY ARALE PETITIONER

AND

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

**ABDIBISHAR ALI NOOR IBRAHIM, THE CONSTITUENCY RETURNING
OFFICER, ELDAS CONSTITUENCY 2ND RESPONDENT**

**MARYAN HASSAN MOHAMED, THE DEPUTY CONSTITUENCY
RETURNING OFFICER, ELDAS CONSTITUENCY 3RD RESPONDENT**

**COUNTY RETURNING OFFICER, WAJIR COUNTY FEISAL ABDI BILLOW
PRESIDING OFFICER OROTE POLLING STATION 4TH RESPONDENT**

ADAN KEYNAN WEHLIYE 5TH RESPONDENT

JUDGMENT

1. Kenyans went to the 3rd Election under the new constitution, 2010 on 9.8.2022 on all 6 elective positions. The elections were held and supervised by the Independent Electoral and Boundaries Commission pursuant to their mandate under Article 88 of *the Constitution* and provisions of the Election Act No.24 OF 2011.
2. Eldas Constituency was one of the constituency whose election was gazetted to be held for member of National Assembly. By gazette Notice the IEBC declared the following duly nominated candidates for election of member of National Assembly for Eldas Constituency;
 1. Ahmed Boray Arale



2. Adan Keynan Wehliye
3. Salat Omar Haji
3. According to the IEBC Eldas Constituency had 72 polling stations and total registered voters 23356. The IEBC pursuant to its mandate under the Election Act, appointed presiding officer and deputy presiding officer for each polling station. The shortlisted names for appointment were forwarded as required by law to the participating political parties 14 days before the election.
4. Upon being served with the shortlisted names of the presiding and deputy presiding officer, the petitioner Ahmed Boray Arale was not happy with the names submitted and filed Garissa Petition Number 14 of 2022. Seeking the following prayers;
 - i. A declaration be and hereby issued that the recruitment process for presiding and deputy presiding officers undertaken in Eldas Constituency in contra Article 10, 81 and 232 of *the constitution* and therefore void unconstitutionally;
 - ii. A declaration be and is hereby issued that the recruitment process for presiding and deputy presiding officers undertaken in Eldas Constituency was contrary to the provisions of Regulation 5 of the Election (General) Regulations 2012
 - iii. An order of Certiorari be and is hereby issued, calling into this Honourable Court recruitment process for presiding and Deputy presiding officers undertaken in Eldas Constituency, for purposes of it being quashed and by the same writ it subsequently be quashed.
5. The Petition was set for hearing and parties were directed to file submissions by Lady Justice Abida Ali Aroni Ruling date was set and before the ruling would be delivered by the Hon. Judge, the Petitioner Ahmed Boray filed a notice of withdrawal.
6. Pursuant to the withdrawal the IEBC published the list of presiding and Deputy presiding officers and their respective polling station at the CDF Hall at the constituency tallying Centre on 8th August,2022. Aggrieved by the fact that the IEBC did not take into account his input, he protested to the Returning officer Mr. AbdiBashir Ali Noor Ibrahim and chaos erupted on 8.8.2022 at the CDF centre where officers were to collect election materials, thereby disrupting the exercise. Due to the chaos, the Returning officer Mr. AbdiBashir Ali Noor resigned as a constituency Returning Officer and his Deputy Maryan Hassan Mohamed took over as the constituency Returning Officer.
7. The chaos got the attention of the chairman IEBC, Mr. Chebukati who assigned Commissioner Guliye Guyo to manage the same. Commissioner Guyo addressed the parties and advised the chairman who issued the order dated 9th August 2022 stating that the election for Eldas Constituency had been postponed from 9.8.2022 to 10th August 2022 due to security reasons.
8. The elections were held on 10th August 2022 and the returning officer announced the results for member of National Assembly were as follows;
 - I. Ahmed Boray Arale- 6836
SUBPARAII.
Salat Omar Haji-66
 - III. Adan Keynan Wehliye-7517



9. She declared Hon. Aden Keynan Wehliye as the duly elected member of the National Assembly for Eldas Constituency in the elections held on 10th August, 2022. Consequently, she issued Aden Keynan Wehliye with certificate dated 13.8.2022.
10. Aggrieved by the declaration the petitioner filed this Petition. The Petitioner seeks the following prayers;
 - a. An order to secure the election materials including ballot boxes whereby Petitioner seeks to place additional seals to the ballot boxes, take inventory on the status of the ballot boxes, take inventory on the status of the ballot boxes and seek that the Deputy Registrar supervises the exercise and a report be filed in court.
 - b. An order do issue for securing of data stores in the KIEMs kit for the member of National Assembly, Eldas Constituency;
 - c. An order of scrutiny and recount and/or re-tallying of all the votes cast to ascertain the elected member of National Assembly, Eldas Constituency;
 - d. A declaration that the election of Eldas Constituency held on 10th August,2022 and subsequently tallying and declaration of results and certificate issued to the 5th Respondent was illegal, invalid, null and void for not being free, fair, credible, verifiable and transparent;
 - e. A declaration do issue invalidating the election of the 5th Respondent as the member of National Assembly Eldas Constituency;
 - f. In alternative to (b) above, and do order issue ordering fresh member of National Assembly election for Eldas Constituency
 - g. Such election offences by the 2nd Respondent and 3rd Respondent as pleaded, disclosed, heard and determined by this Honourable Court be recommended to the Director of Public Prosecution for appropriate action;
 - h. That the declaration of results for Eldas Constituency allegedly done on 13th August 2022, the certificate issued pursuant thereto be nullified;
 - i. An order do issue quashing the entry returning the 5th respondent as the member of National Assembly for Eldad Constituency as contained in the Gazette Notice No.9950 dated 22nd August 2022;
 - j. The Respondents be condemned to pay the petitioner's costs and incidentals to this petition;
 - k. Such other orders and consequential directions as the Honorable Court shall deem fit taking all the circumstances of this case into account.

Petitioner's Case

11. The Petitioner Ahmed Boray Arale testified in the petition as witness No.9. He testified that he was a candidate for member of National Assembly for Eldas Constituency nominated by Orange Democratic Party under the Azimio Coalition. He produced his nomination certificate.
12. He testified that he had issue with IEBC on recruitment of presiding officers and Deputy presiding officers which exercise he felt was unfair. He filed Garissa Petition Number 14 of 2022 where his complaint was that the majority of the presiding officers and deputy returning officers were affiliated to



Hon. Aden Keynan, some were not qualified and others were public servants and others were known campaigners for Hon. Keynan, the 5th Respondent.

13. As a result of a discussion with the IEBC he stated that a gentlemen's agreement was reached that the issues in the petition would be looked into. He consequently withdrew the Garissa High Court Petition 14/2022.
14. When final list was published on 8.8.2022 he found that the issues he had raised had not been addressed. He went to the CDF hall to see the returning officer as there was a problem. He spoke to the Returning Officer Mr. AbdiBashir Ali Noor Ibrahim and informed him that 68 of the 72 of the officers were affiliated to the 5th Respondent. While still in the hall with the Returning officer. There were demonstrations and he heard gunshots.
15. The returning officer Mr. AliNoor Ibrahim indicated that he had resigned. All the candidates met commissioner Guyo who communicated the chairman IEBC's decision to postpone the election to 10.8.2022.
16. He was asked to submit a list of 17 preferred presiding officers which he did but his list was not considered and elections proceeded on 10.8.2022.
17. He participated in the election and cast his vote at Bulla Shair polling station at 8.45am. He thereafter visited other polling stations. At 2pm he was informed that there was violence at Dela Yarey polling station and election materials were destroyed. He went there and found many police present and saw one of his agent Mohamed being arrested by the OCPD. He also received information that voting in some polling stations started late. The elections having been conducted on 10.8.2022 and counting of votes done at the polling stations, tallying was to be done at the Constituency Tallying Centre at CDF Hall.
18. He testified he went to the tallying centre on 11.8.2022 at 8.00pm and met the Returning Officer M/ S Maryan Hassan and raised his concern on allegation of vote swapping while chaos erupted outside and gunshots fired into the hall. One presiding officer Mr. Kanyari was shot. The police took control and he was evacuated from the hall and taken home. Pictures and videos recorded on mobile phones were confiscated by the police and erased. The next day he received information that a helicopter was sent and took away the Deputy Returning Officer to the County Tallying Centre where results were announced and the 5th Respondent declared the winner.
19. He testified he compiled his Independent Tallying from his agents in 70 out of 72 polling stations the results were;
 1. Ahmed Boray Arale 7190
 2. Adan Keynan Wehliye 6893
 3. Salat Omar Haji. 42In his tallying he excluded Orote polling station and Dela Yarey polling station where he said no elections were held.
20. On being cross examined by Mr. Mwiti for the 1st-4th Respondent he was aware the applicants for Presiding and Deputy Presiding Officer were to be appointed through a competitive process using the IEBC portal and stated that he had issues with the shortlisted candidates which was subject of the Garissa Petition Number 14 of 2022 and he withdrew the same. He confirmed he was not happy with the list published later and on 8.8.2022 at 6.30pm he went to the CDF Hall to complain on the



- deployment. He confirmed that there were protests and said that it was not likely that 5th Respondents supporters would be the ones protesting.
21. He stated that 2nd Respondent had agreed to include 17 of his proposed officers but no minutes of the meeting were taken and that Keynan and Salat were not in the meeting. He confirmed he was in the hall when chaos and demonstration outside degenerated into chaos and gun-shot heard but denied that he was the cause of the chaos on 8.8.2022 at 8pm.
 22. The petitioner stated he received information about violence at Dela Yarey polling station and went there with Hillow Mohamed who was identified as one who had caused the violence earlier and was arrested. Later charged alongside other people in Wajir Court.
 23. When cross examined on late opening of the polling stations and closing early he confirmed that he did not avail as a witness one voter who was disenfranchised by such action. He stated that at Orote Polling station it has one (1) registered voter and that he did not visit the polling station nor did he have an agent there.
 24. On being cross examined on the allegations of vote swapping he stated that he was informed that the Deputy Returning Officer, Maryan Hassan Mohamed was swapping votes he had obtained at the polling station with those of the 5th Respondent and those obtained by the 5th respondent at the polling station as his votes. He confirmed he went to the Tallying Centre, protested to the Returning Officer and later chaos erupted which disrupted the Tallying.
 25. He confirmed police were present and that an IEBC officer was shot and that he was rescued from the tallying Centre and did not know whether the election materials were safeguarded and evacuated.
 26. He confirmed by the time he left 50-60 polling stations results had been announced out of the 72 polling stations. He confirmed he received form 35B and 35C but could not remember where he got THEM from.
 27. On being cross-examined by Mr. Issa for the 5th Respondent, Petitioner confirmed he had not identified the presiding and Deputy Presiding officers he complained of but stated that majority of them were affiliated to the 5th respondent. His complaint was that the list of Presiding and Deputy Presiding Officers should have been agreed by all parties. He stated that he had submitted names of his agents to IEBC and had also appointed chief agents Isaak Mohamud Faraj and Maalim Adrian Mohamed who he later replaced with Abdulahi Bakey. He stated that the chief agent Isaak Mohamed Farah did not testify in this petition.
 28. He stated that Form 35A which he produced on pages 106-176 of the petition were posted in a whatsapp group and physical copies given to his Chief Agent Isaak Mahamud Farah who did not testify. The Petitioner in response to the cross-examination on results swapping at Waradey polling station, he stated that he got the information from his agent Mohamud Shakir Omar (PW1) who gave him a carbon copy of form 35A which he said had been changed in votes garnered by each candidate.
 29. He stated that in Biad primary school, there were excess votes of 3, Junction polling 44. In Dela Yarey polling where he stated that no voting took place, he went there and spoke to his agent but did not speak to the presiding officer.
 30. He denied that he is the one who made it impossible for the returning officer to declare the result at the tallying centre or that he was the cause of the violence. He stated that he is aware that tallying centre was burnt on 24.8.2022 but does not know if election materials were destroyed.



31. On being re-examined by Ms. Muturi he confirmed that in his independent tally he did not include 2 polling stations Masalale, Orote not Della Yarey Polling stations where no elections were held. He stated that he wanted scrutiny and recount of the polling station ballots.
32. PW1 Mohamed Sheikh Omar testified that he was appointed ODM party agent at Waradey Primary School polling station. He produced his letter of appointment. He stated that on 10th August, 2022 he arrived at his polling station at 6.30am and election material were set up and voting commenced at 9.00 a.m and continued calmly throughout the day. He testified that just before closing at 10.00pm there were several voters who KIEMS Kit failed to identify and they were identified using manual register. He stated when voting exercise was completed, tallying commenced at 10.30pm with counting of presidential votes and on 11th August 2022 tallying for Members of parliament votes began and was completed at around 5am. He testified that results as announced by the presiding officer were as follows;
 - a. Registered voters-473
 - b. Valid votes-291
 - c. Arale Ahmed Boray-197
 - d. Wehliye Adan Keynan-93
 - e. Salat Omar Haji-1
 - f. Rejected ballot papers-3
33. He stated that after announcement of results by the Deputy Presiding Officer, he took a photo of the results, obtained a carbon copy and availed it to Petitioner's Chief Agent, at the Constituency tallying centre. He produced a print out of a photo of the Form 35A he took at the polling station.
34. On cross examination by Mr. Mwiti for 1st to 4th Respondents, he confirmed that on 10th August 2022 he reported to the polling station at 6.30am and closed at 10.00 p.m. several voters presented themselves for identification but the KIEMS KIT failed to identify them He testified that when some voters at 10pm were not identified they resolved to causing chaos. He testified that he did not identify the voters because they were outside.
35. He testified further that he did not challenge the results of the member of National assembly at the polling station which the presiding officer read from the Form 35A he had completed in their presence. He testified that he was satisfied with the results and he signed the form and he took a carbon copy of form 35A and took a photograph too. He testified that he did not mention allegation of swapping in his affidavit. He was referred to form 35A on page 53 of the IEBC response and he testified that he did not sign the Form as produced by IEBC.
36. On cross examination by Mr. Issa he testified that at close of voting at 10.00pm none of the voters was on the queue. He confirmed further that when some voters could not be identified by KIEMS Kit they used a manual register in voting by taking photos of their identification cards.
37. He testified that at the end of voting at 10.30pm the polling station turned into a tallying centre and tallying started at 10.30pm and they started with counting of Presidential election for 5hours 30 minutes. He testified that they started counting of member of national assembly at around 3.00am upto 5.30am. He testified that at the end of counting, the presiding officer filled the results in the form 35A in their presence and he was issued with a carbon copy. He stated that the carbon copy is attached to his affidavit in the Petition.



38. He testified that photograph of Form 35A on page 277 of the Petition, marked as exhibit -3 is what he received at the polling station. He stated further that the serial number on the form is not clear and he cannot read the serial number on the form. He testified that the form is a photograph of the original form 35A. He testified that there were no disputed votes in his polling station. He testified that the 3 disputed votes in the form 35A on page 277 of the Petition were rejected ballots not disputed votes. He testified that the results in the Form35A by IEBC on page 53 of their response were altered to read; Arale Ahmed Boray -93, Salat Omar Haji-1 and Wehliye Adan Keynan 197. The signature on the Form 35A produced by IEBC is not his signature. He testified that the results in the form 35A by IEBC were altered at the tallying centre. He testified that he did not report to the police and does not know if Petitioner reported to the police.
39. PW 2 Hashim Jimale Omar stated that he was a duly appointed agent of the Wiper Democratic Party assigned to Biladul-Amin Primary School polling station.
40. On 9.8.2022 at 3.00am, 3rd respondent started calling list of Presiding Officers and Deputy Presiding Officer per polling station to collect electoral materials and though he was in the initial list, his name was not there as presiding officer. He was then appointed as a Wiper Democratic Party candidate agent to Biladul Amin polling station for the Women Representative candidate.
41. He testified that at 6.30 a.m, he got into one of the IEBC buses and arrived at his polling station at around 9.30am. However, the presiding officer of his polling station inadvertently fell and broke the ballot box for Women Representative position. He stated they had to wait for it to be replaced and voting commenced at 11.20am and ran smoothly until 10pm. He stated t they started tallying process after 15 minutes' break starting with presidential ballots and tallied the remaining posts the next day.
42. He stated after counting of ballots for other elective positions, they realized they were uneven. He stated that 3 out 6 elective position were different and they requested the presiding officer to open the KIEMS Kit so that they could verify but he refused. He stated at 3pm the IEBC bus arrived to collect the election materials but the presiding officer refused to board the material or board the bus.
43. He stated further that the bus left and later on at 6.20pm a Land cruiser belonging to Rapid Deployment Unit came and took the Presiding Officer, the Chief Agents for Jubilee Party and the election materials. He stated he boarded a different bus and followed them to the Eldas CDF Constituency Tallying Centre.
44. He stated that at the gate the presiding officer and Chief Agent of the 5th Respondent alighted from the Land cruiser and fled. He stated that the driver of the Land cruiser proceeded through the gate into the compound and security officers off-loaded the election material into the main hall.
45. He stated that 8.00pm while standing outside the door of the hall, chaos erupted from the tallying centre due to swapped results of two polling station. The Police started beating people and switched off the lights and collecting people's mobile phones. He stated that he ran, jumped over the fence and fled.
46. On cross-examination by Mwiti for the 1st -4th Respondents, Pw2 confirmed that on 10th August he was at the tallying centre as Presiding Officer. He confirmed that the returning officer resigned at 12.00pm. He testified that it not only agents of Petitioner who had issue with the list of Presiding Officer and Deputy Presiding Officers. He confirmed that on 9th August voters blocked the gate for two buses and they could not leave CDF Hall.
47. He testified that at the time the KIEMS kit went off showed 257 people had voted. He testified that he does not have evidence to collaborate that 257 voters had voted at that time. He testified that the KIEMS Kit was recharged and he did record statistical summary from the KIEMS Kit when voting



- stopped in form of Image but he did not supply the court with evidence that voting stopped and statistical results of the Kiems Kit.
48. He testified that he was present when the results were announced. He confirmed that at the tallying centre the Presiding Officer and the Chief Agent on alighting from the land cruiser they fled. He confirmed that they Presiding Officer fled but the results were delivered. He confirmed that while at the CDF Tallying Centre chaos erupted and he fled and never came back.
 49. On Cross examination by Counsel Issa for the 5th respondent, he testified that he was appointed Presiding Officer but that he does not have an appointment letter. He testified that he was among the shortlisted candidates. He testified that when he was dismissed he was appointed as an agent of Wiper Party.
 50. Pw3 Osman Muhumed Elmi he stated that he was duly appointed Orange Democratic Movement Party Agent at Della Primary School. He stated further that Della Primary polling station and Dela Yarey polling station were within the same compound, opposite to each other.
 51. He went to Dela Yarey polling station on 10th August 2022 at 6.00 a.m not on 9th August 2022 as stated in his affidavit. He testified that election material arrived at 8.00am and voters were already on the queue. He stated that the presiding officer informed them that the KIEMS KIT was not working and this delayed commencement of voting. The presiding officer called the IEBC official who then informed them a technician would be sent to repair the KIEMS Kit. The technician arrived at around 11.30am but he was unable to fix the kit and this delayed voting even more. At around 1.00pm he left voters on the queue and proceeded to pray at an area within the polling station. He testified that after concluding his prayers he heard some noise from outside his polling station and he went to see. He stated that he stood by the window outside Dela Yarey polling station looking inside. He stated that one security officer was present at the door. The presiding officer and agents at Dela Yarey polling station were in a heated argument in which the presiding officer was been accused of rigging. He stated that he did not identify the agents because he was far but they were wearing badges. It deponed further that that the agents accused the presiding officer for taking votes of taking vote for one candidate and put it for another box. He deponed that some angry people stormed the voting hall and entered through the window, took off wire mesh from the window and caused destruction of election materials. He stated that he was not part of the people who caused destruction.
 52. He stated the entered the hall at 1.30pm and took the video recording of the state of the hall using his phone. He stated there was no human activity in the room and voting had stopped. He referred to video recording in flash disc annexed and marked 'OME-2'. He testified that the video is for Dela Yarey Primary polling station and he can identify it from the police officer. He stated he went back to Della Primary Polling station.
 53. He testified that Dr. Hassan, a gubernatorial Candidate arrived at the same time. Pw3 testified that he complained to him about the failed KIEMS KIT and delay in commencement of the voting process. He testified Dr. Hassan called the IEBC on the situation and at around 3.30 pm, the same technician who was unable to fix the KIEMS KIT earlier managed to repair it.
 54. It was PW3 evidence that voting commenced at 4.00pm on 10th August 2022 and closed at 4.00AM on 11th August 2022. He testified he did not leave his Dela Primary polling station throughout the voting period but he could see what was happening at Dera Yarey Primary polling station because the polling station were adjacent to each other and 100 meters apart.
 55. On cross examination by Mwiti for 1st to 4th respondents, he confirmed that at his polling station voting started and went on well until results were announced. He confirmed that delay in voting was



- occasioned by failure of KIEMS Kit but it was restored and voting continued. He confirmed that he heard noise at Dera Yarey polling station and he went to check. He testified he went to check what was happening and he stood by the window and he saw one security officer. He confirmed that he got into the hall and took the video that he produced and played in court. He testified that he could identify that was Dera Yarey polling station from the police officer in the video but he had not identified the policeman in his affidavit.
56. On cross examination by counsel Issa, he testified that he does not know what time voting started at Dera Yarey polling station. He testified that the two polling stations were opposite each other and there was visibility between them. He testified that the commotion incident at Dera Yarey took 10 minutes. He testified he saw the ODM Agent complain but does not know his name and he also cannot tell who were the people there during the commotion. He testified that he does not know presiding officer and deputy presiding officer.
57. PW 4 Alibashir Gumow Abdi was a registered voter at Dela Yarey polling Station. He stated that he arrived at his polling station at 6.30am to vote and he joined the rest of voters on the queue waiting to vote. He stated that the queue did not seem to move and he could not tell whether voting was going on or not.
58. He stated that he noticed commotion outside the room and there were people fighting, breaking windows and getting into the polling station through the windows. He stated ballot boxes were thrown outside and ballot papers were flying around the polling station's compound. He stated that the chaos lasted 40 minutes and the security officers could not contain the situation.
59. He stated Military Officers came at 2.00pm in armoured vehicle and a lorry and by this time the chaos had ended. He stated that he inquired from Presiding Officer whether he was going to vote and he told him it was not possible the polling station had been compromised. He stated he stayed in the compound until the next day on 11th August, 2022 when he left for Nairobi.
60. On cross examination by Mwiti, he confirmed he arrived at Dela Yarey polling station at 6.30am where he found voters on a queue waiting to vote. He testified that he stayed on the queue from 6.30am to 3.00pm and the queue did not seem to move and if it was moving it was extremely slow. He confirmed that evidence that he noticed commotion from outside the room. He testified that he went away from the polling station, he stated he was about 10 meters away from the polling station. It was his evidence that he was outside the window and he saw through window but could not see inside the polling station but could see outside. On cross examination by Issa he testified that he went to the polling station on 10th August 2022, and was not at the polling station on 9th August 2022. He stated that he was a voter at Dela Yarey polling station. He testified that he did not go to Della Primary polling station, the two stations were slightly far apart but he saw it while entering the compound. He confirmed commotion lasted 40 minutes. He testified he did not count number of ballot boxes that were destroyed. He testified that he saw ballot papers flying but could not tell it was for which position or candidate. He testified he did not go back to the polling station. He testified that he did not see any agent in the room and confirmed military officers came to secure the room.
61. PW5 Abdullahi Abdi Bakay was duly appointed as Orange Democratic Movement Party Chief agent for ICF Primary. He stated that he arrived at Eldas Constituency Tallying Centre on 10th August, 2022. He stated that he is aware there are 72 polling stations in Eldas Constituency and two polling stations did not deliver the results, Dela Yarey polling station and Orote Primary School. He stated that during tallying process the agents of 5th Respondent walked out of the tallying centre but the tallying continued smoothly. He stated that the agents who walked out came back at 6.30pm with Mr. Onsando, the officer commanding Police Division and 20 police officers and they took command of



- tallying centre but the tallying process went on. He stated that the County Returning office read results for Masalale stream 2 of 3 as 294 votes for 5th Respondent and 33 votes for the Petitioner. He stated that they had already received results from Masalale Stream 2 of 3 from their agents which read that the Petitioner had garnered 294 votes against 33 votes garnered by 5th respondent. He stated he raised concern about the swapping but he was shut down by security officers and out of fear agents allowed the tallying process to continue. He stated that the results of Waradey polling station were announced yet again the results were swapped to indicate the 5th Respondent had 197 votes and the Petitioner 93 votes while at the polling station it was announced that the 5th Respondent had 93 votes and Petitioner had 197 votes. He stated that chief agents including himself protested but Mr. Onsando commanded his officers to surround the Deputy Constituency Returning officer and she was separated from the agents. He stated there was arguments for about 15 minutes and this caused tension at the tallying centre and soon thereafter he heard gunshots from outside the tallying centre hall. He stated that the security officer immediately instructed everyone to lie down lights were switched off and they were told to hand over their mobile phones and they started beating all agents and the candidates. He stated that Mr. Kanyare was told to produce results and he refused and also declined to hand over the election materials to unknown people and in the process he was shot by one of security personnel on the leg.
62. He stated after a while they were told to move out of the hall and lie down at the perimeter wall. He stated he was called out his and surrounded by 8 police officers who hailed blows at him and asked him to produce his mobile phones. He produced his phone and security officer ordered him to delete all photos and videos he had taken and empty the recycle bin.
63. He stated a probox came and took him and others who had been injured to Wajir Hospital for treatment. He stated he later on learnt that no declaration of Member of Parliament Elect- Eldas Constituency was declared at the tallying centre.
64. On cross examination by Mr. Mwiti on behalf of 1st -4th respondent. PW5 testified in his appointment letter dated 5th August 2022 he was appointed as polling/tallying agent at ICF Stream 3 of 3 not Chief Agent. He testified his status changed on 11th August as tallying agent to Chief Agent but he does not have evidence to show the changes. It was PW5 evidence he was allowed access to the tallying centre on 11th August 2022 and not on 10th August 2022 as Chief Agent. PW5 testified he does not have a letter of appointment as Chief agent. He testified that at the tallying centre things were running smoothly. He confirmed there are 72 polling station and he was informed by one of the Chief Agents that Orote and Dela Yarey polling stations did not deliver materials to the tallying centre. He stated that he has not disclosed to this court the name of the chief agent on his averment under paragraph 5 of his affidavit. He testified further that he did not visit Orote Polling station.
65. He testified he was at the tallying CDF Hall and tallying started at 5.00pm on 11th August 2022 and there was commotion. He confirmed agents of Jubilee Candidates who is the 5th Respondent herein walked out of the hall. He testified he did not provide names of those agents.
66. He confirmed at around 6.30pm, the agents who had walked out came back with Mr. Osando, who is Officer Commanding Police Division- Wajir East and he walked in with 20 police officers. He confirmed Mr. Osando claimed that he has taken command of the tallying centre. PW 5 testified Mr. Onsando did not take command or control of result declaration to declare result. He testified he later learnt that Mr. Osando was not there under instructions of the County Commander.
67. He stated that he called the County Commander who told him that Mr. Osando was a stranger in the hall. He testified that under paragraph 10 of his affidavit he mentioned vote swapping at Masalale Mobile 2/ 3 polling station but he was not at Masalale Mobile 2/3 polling station. He testified he



- knew about Masalale Mobile 2/3 because Noordin Ibrahim who was agent of Masalale Mobile 2/3 sent results to him as a Chief agent.
68. He testified that he had authority to receive the results and that he received carbon copy of form 35A of the results. It is evidence of PW5 that when results of Masalale Mobile 2/3 polling station were announced he stood up from his seat and protested. He testified he did not speak to DCRO to complain on the results. Pw5 testified that he was not present at Waradey Polling Station when results were announced.
 69. On being cross examined by Mr. Issa for 5th respondent he testified that he was appointed as Chief agent after the Chief agent became sick but he does not have any letter to show the appointment.
 70. He confirmed that he was at El-Nur Tula Tula ICF stream 3 of 3 where he had been appointed during the counting and he witnessed but he did not sign the form on page 101 of the IEBC response. He confirmed that it was signed by Mohamud Adur for ODM. He confirmed he was chief agent but he did not sign any results of ICF Primary polling station streams. He testified that the chief agent for ODM was party was Abdile Yusuf and the agent ODM chief Tallying agent was Isaak Mahalim.
 71. PW6 Ruweitha Farah Abdi. She was duly appointed agent for ODM for Dela Yarey polling station and produced her letter of appointment. She testified that on 10th August, 2022 and voting started at 9.00am and everything went on smoothly. She testified that most voters were illiterate and required voter assistance in voting. He stated that they were assisted by the Presiding Officer, after voters had selected their preferred candidate for Member of Parliament, the presiding officer after conducting the voter assistance intentionally placed the Member of Parliament ballot papers in the Member of County Assembly ballot boxes. She stated this was done in three assisted voting incidences.
 72. She informed Mr. Noor the chief agent Mr. Noor came to the polling station and asked the Presiding Officer whether ballot papers were placed into the wrong ballot boxes and he admitted. She testified that after admission chaos ensued and voters stormed the polling station. She stated election materials were destroyed including votes cast. There were two police officers who tried to manage the situation but they were overpowered. She testified she got under the seat during the chaos for safety for about 30 minutes and thereafter she fled to Della Primary School polling station and stayed there until next day 11th August 2022. She stated voting never resumed at her polling station and they were never issued with Form 35A as elections in the polling station were not formally concluded.
 73. She confirmed that all election materials were destroyed and when she fled the polling station she never came back until the next day. She was shown results Dela Yarey polling station the Form 35B on page 48 of the response to the petition and she denied those are not the results as there were no election held in her polling station. She confirmed that it was the Presiding Officer who assisted voters in voting. She testified there many voters on the line when the violence started. She testified that she blamed Keynan supporters for the violence. She was referred to form on page 48 of the IEBC document and she confirmed that it had IEBC stamp. She confirmed that during the destruction she went to Della primary and never came back. She testified that they waited to vote but they did not vote and there were no voting.
 74. PW7 is Noordin Ibrahim Ahmed stated he was appointed agent of ODM for Masalale Mobile Polling Station Stream 2 of 3. On 10th August 2022 he reported to his polling station and voting started at 8.46am and Presiding Officer indicated that the voting would close at 8.46pm but closed at 7.30pm while many voters were still on the queue. He stated this led to protests but the voters were dispensed.



75. He stated that they started counting of the votes of Member of Parliament at 3.00am on 11th August 2022 and the Petitioner garnered 295 votes while the 5th respondent garnered 33 votes at Masalale stream 2 of 3.
76. He testified he took pictures of the forms and stamped copy was affixed to the wall of the classroom. He stated he sent an image of the results to the Chief Agent who was at the tallying centre and followed election officials to the tallying centre. He stated at the CDF hall tallying centre the 5th respondent announced that the petitioner garnered 44 votes and the 5th respondent had garnered 295 votes. He stated that they protested the result which had been swapped in favour of 5th respondent and soon thereafter the police stormed the room and ordered them to lie down.
77. On cross examination by Mr. Mwiti for the 1st - 4th respondent he confirmed that he was appointed as ODM agent for Masalale stream 2/3. He testified that he does not have an appointment letter. He confirmed that he was at the polling station as an agent and that the Presiding officer admitted him to the polling station. He was referred to page 83 of the 1-4th respondent's response to the petition and he stated that he did not challenge those results as shown but they are not the results that were announced at the polling station.
78. On being cross examined by Mr. Issa for 5th respondent he confirmed he does not have his appointment letter attached to his affidavit. He testified that he sent the results form to their chief agent via whatsapp but the same is attached to the affidavit.
79. He was referred to form annexed to the petition on page 142 of the petition and he testified that he cannot read the serial number. He testified that the form does not have names of the agents. He testified that from the angle the picture was taken he cannot see the name of presiding officer. He confirmed that he took carbon copy of the form and gave to Abdalla Yusuf the chief agent. He confirmed that the results of Masalale mobile stream 2/3 were swapped.
80. PW8 Mohamed Nunow Shuriye. He stated he was appointed ODM agent of Eldas Primary School. He stated that at his station voting went on smoothly and there were no issues.
81. On cross examination by Mr. Mwiti for 1st – 4th Respondent he testified that he called Mr. Bakay who informed him they were been harassed at the tallying centre. He testified he did not know the role of Mr. Bakay at the tallying centre. He testified he went to the tallying centre and found everyone lying down apart from security officer.
82. On cross examination by Mr. Issa for the 5th Respondent he testified that he went to the tallying centre at around 11pm and took only 15 minutes there. He testified he was told to take Mr. Kanyari to the hospital. He confirmed that he did not sign the form 34A at the polling station.

1st -4th Respondent's case

83. Rw 1 Abdibashir Alinoor Ibrahim adopted his sworn affidavit sworn on 24th September, 2022 as his evidence in chief. His evidence was that he was gazetted as Eldas Constituency Retuning Officer under gazette Notice No. 4961 of 20th April, 2022. Among his duties was to oversee the recruitment, training and deployment of Presiding and Deputy Presiding Officer. On 17th June, 2022 he received a complaint after from the petitioner and recruitment of presiding and deputy presiding officers which he responded to. The petitioner filed Garissa Petition No. 14 of 2022 challenging the recruitment process which he later withdrew.
84. He confirms that the recruitment was transparent and competitive. On 8th August, 2022 Presiding and Deputy assembled at the CDF Hall to receive electoral materials. By 6 p.m. 64 of 72 Presiding



- Officers had been allocated materials when petitioner and his agents raised the issue of deployment of election Officials. Members of public came to the CDF compound. The petitioner came and asked him to compromise on the list but he declined. He then heard gun-shoots and people chanting that no election would proceed. He informed his Chairperson and at 5 a.m. he wrote an e-mail to the chairman and resigned as the Returning Officer and his Deputy Maryana Mohamed 3rd Respondents took over.
85. On being cross-examined by M/s Hashi for petitioner he stated that petitioner in his letter complaints including errors in names and repetition of names which he rectified. He sated on 8th August, 2022 he was at Eldas CDF Centre and that later the compound was filed by petitioner's supporters but would not identify them. He stated he resigned from his position due for reason of personal security. He sated he could not testify as to the elections held after he had resigned.
 86. On being cross-examined by Issa for the 5th Respondent he stated that the petitioner letter complained of repetition of names of shortlisted officers, Form 4 leavers not qualified, recruitment of non-locals and inclusion of supporters of Dr. Keynan who was the incumbent MP. He invited the petitioner to prove his allegations but he did not. He denied the petitioner's assertion that he had agreed to offer him 25 slots for the Presiding and Deputy Presiding Officers.
 87. RW 2 No. 232716 Supt. Abduba Hussein Gura then sub-county police Commander Eldas sub-county adopted his affidavit sworn on 26th September, 2022 as his evidence in chief. He deponed that on he was in-charge of providing security and assigned 2 police officers for each of the 72 polling stations and 20 officers to the CDF Tallying Centre. On 8th August, 2022 he went to CDF Centre at 1.30 p.m. and found protesters over deployment of Presiding Officers and Deputy Presiding Officers. At 4 p.m. the protesters came into the compound of the CDF Hall. They barricaded the hall and lit fires. At 8 p.m. armed militia attacked the hall but were repulsed by police. The election which was to be held on 9th August, 2022 was postponed due to the violence and was to be held on 10th August, 2022 when he received reinforcement.
 88. On 10th August, 2022 he received information that there was an incident at Dela Yarey Polling station. He went there and was informed that an agent had incited voters in the morning but and order was restored voting was going on. The agent who had caused the incitement was an agent of the petitioner and was arrested along with others and charged in Wajir Court. He deployed 50 more officers from Border Patrol Unit. The other security incident occurred on the night of 11th August, 2022 at the CDF Tallying Centre where the centre was attacked by armed militia but security officers present responded, contained the situation by repulsing the attackers. The declaration of results was postponed and was to be made at the County Tallying Centre in Wajir.
 89. On 24th August, 2022 he received information that the CDF Tallying Centre had been attacked using a Rocket propelled Grenade and burnt down.
 90. On being cross-examined by M/s Hashi he stated that the people who were protesting were supporters of the petitioners but said there is nothing wrong to picket to seek redress. He confirmed that he did not see the petitioners protesting outside. He stated that he did not see the 5th Respondent Dr. Keynan at the Eldas CDF Hall. He confirmed he saw the petitioner in the hall. He stated that on 11th August, 2022 it is the petitioner who caused the commotion at the CDF Tallying Centre as he and his supporters were preventing the Deputy Returning Officer from announcing the results.
 91. He stated that during the commotion, lights were switched off and an election official was shot at. He arranged for the officer to be taken to hospital by a civilian vehicle. He also assisted the petitioner to get a vehicle and he was taken home.



92. On cross-examination by Issa for the 5th Respondent he stated that he had officers from police, prisons, NYS and National Police Reserve under his command. He addressed the demonstrators who were saying the 5th Respondent was being favoured by IEBC. He estimated the protestors to be between 300-400 people. He stated that when he went to Dela Yarey Primary in response to report he had received, he found the polling station calm and voters were waiting for Ballot Box. On what hampered to the election material during the fracas at CDF Tallying Hall, he stated the materials were secured and no election material was lost. He denied that his officers beat civilians or took away mobile phones from civilians who were recording the incident.
93. On re-examination by Mwiti he testified that in the enhanced security at Dela Yarey, no Military Force was involved but there was presence of armored vehicles used by Border Patrol Unit.
94. RW 3 Jimale Daud Mohamed adopted his sworn affidavit sworn on 25th September, 2022 as his evidence in chief. He stated he was the presiding officer deployed at Anole Primary School Polling Station/ that on 10th August, 2022 he went to the polling station and voting started at 8.39 a.m. At 7 p.m. the Kiems Kits Power became low and they started voting and proceeded at 8 p.m. when a power bank was availed and voting proceeded. He confirmed that voting proceeded on well and there was no violence. After the counting he filed Form 35A which he handed over to the 3rd Respondent and the CDF Tallying Centre. At the polling station there were registered voters 680, voters authenticated by Kiems Kit and valid votes cast 431 rejected Ballots 4. In the form he by error recorded 435 valid votes cast when he included the rejected votes. On cross-examination by Issa for 5th Respondent he stated that the votes garnered by candidates were: -
- Ahmed Boray 255
Salat 01
Keynan 175
95. On being cross-examined by M/s Muturi for petitioner he stated that the Kiems kit authenticated 435 voters. He confirmed that his name is not in the list provided by the petitioner of trained presiding officers but he confirmed he was deployed.
96. RW 4 Mahat Adow Ismael adopted his affidavit sworn on 25th September, 2022 as his evidence in chief. He testified that he was appointed presiding officer and deployed at Junction Polling Station. On 10th August, 2022 he went to the polling station and voting started at 10 a.m. and concluded at 11 p.m. after counting he filled Form 35A which was signed by agents and he handed it over to the Returning officer. In his polling station Total Number of registered voters 599, voters authenticated by Kiems Kit 372, valid votes cast 371, stray ballot 1.
97. On being cross-examined by Issa for the 5th Respondents he stated that the results of the candidates were: Ahmed Boray -131, Salat 00 and Dr. Keynan -240. He stated that the allegation by the petitioner that the voters authenticated by Kiems kit is 327 is not correct.
98. On cross-examination by M/s Hashi he stated his name is not in the list produced by the petitioner as trained presiding officers. He stated he is trained and was deployed by the Returning Officer. He stated he signed the Form 35A and admitted that the dates of 10th August, 2022 was an oversight as the date had passed, though that was the date elections were held.
99. On re-examination by Mr. Mwiti he stated that Abubakar Noor the agent of the petitioner signed on the form which he handed over to the Returning Officer. He stated that the process of voting, counting



and announcing started on 10th August, and ended on 11th August, 2022 and that the dating on the form does not affect the results each candidate garnered.

100. RW 5 Ali Ibrahim adopted his affidavit sworn on 25th September, 2022. He testified that he was a pressing officer deployed to El-Nur Primary Polling station. He went to the polling station on 10th August, 2022 and voting started at 11.30 a.m. and closed at 10.30 p.m. They counted and announced the results. He filled Form 35A which was signed by agents. In his polling station the Number of registered voters – 595, Voters authenticated by Kiems kit and valid votes Cast 410, rejected votes 5 – Total 415 votes.
101. On being cross-examined by Issa for the 5th Respondent he stated that he had a Deputy Presiding Officer Mr. Mohamed Abdile. He stated that after counting the votes results were No. of Registered voters – 595.

Boray 167

Salat 01

Dr. Keynan 242

The total number of valid votes cast – 410 and rejected votes 5. He testified that there was no variance of 14 votes as alleged by the petitioner. He confirmed that the petitioner's agents Adulahi Sheikh was present.

102. Upon cross-examination by M/s Hashi for petitioner he stated that he is a public servant and an employee of TSC deployed at Anole Secondary School. He stated that he and teachers are allowed to be appointed Presiding Officer and that he was trained and was No. 111 on the list produced by the petitioner. He testified he was at the CDF offices. On 8th August, 2022 and saw the petitioner there but did not see him protesting. He re-affirmed that there was no variance at his polling station and stated that the same can be verified by examination of Kiems Kits.
103. On re-examined by Mwititi, he stated that Abdulahi Sheikh was the petitioner's agent and that he has not seen him testify though he signed and did not raise any objection.
104. RW 6 Abdulahi Ibrahim Mohammed testified that he was the presiding officer of Biladul Amin Primary Polling Station stated that he went to the polling station on 10th August, 2022. Voting started late at 1 p.m. on 10th August, 2022 and closed at 1 a.m. on 11th August, 2022. He explained the delay in the start of voting was due to accidental damage to the presidential ballot box which was later replaced and voting commenced. At the polling station there were registered voters 560 voters authenticated by Kiems Kit 390, Valid Votes Cast 379, rejected votes 11.
105. On cross-examination by Issa for 5th Respondent, he stated that his Deputy was Mohamed Dawood. He gave the votes garnered by each candidate as;

Boray 092

Salat 00

Mr. Keynan 287

106. The petitioner's 2 agents Mohamed Yunis and Adan Salt Mohamed signed the form 35A. He testified that he had presiding officer pass-word to the Kiems kit and made the dash-board available to agents to check. He denied that he ever refused the agent of the petitioner to observe the Kiems Kit dash-board. After delivering the materials to the CDF Tallying Centre he left. He denied fleeing on arriving at the Tallying Centre.



107. On cross-examination by M/s Hashi for petitioner he denied that he is a relative of Dr. Keynan the 5th respondent. He testified that the Kiems kit had a problem with charging at 4 p.m. and issue was resolved in 30 minutes and voting continued. He stated that the petitioner had Yunis and Mohamed Salat who were the party agents. He knows Jimale as a wiper party agent's. He stated that he boarded a police vehicle to the tallying Centre. He denied the petitioner's assertion that the Kiems kit authenticated only 258 voters.
108. On re-examination by Mwiti he stated that they continued with the voting using Kiems Kit and at closure no agent requested for statistical summary and he issued carbon copies of results to the agents.
109. RW 7 Abdikadir Hajir Omar adopted his affidavit sworn on 25th September, 2022 as his evidence in chief. He testified that he was deployed as a Presiding officer at Warade Polling Station. On 10th August, 2022 voting started at 9.00 a.m. and voting went on smoothly. Counting of the votes was orderly in the presence of agents and election observers. He filled Form 35A which was signed by agents. He escorted election materials of Eldas CDF Centre and handed over to the Deputy Returning officer. He denied that there was any vote swamping in his polling station as alleged.
110. On cross-examination by Issa for the 5th Respondent he testified that on 8th August, 2022 he was at the CDF Hall where he saw Abdulayi Bakay, Abdi Shakir Adan known supporters of petitioner and petitioner came into the compound. They raised their concerns about the presiding and Deputy Presiding Officers deployed. The petitioner came in with about 20 people. Later Prof. Guliye came and addressed them and told them election will proceed on 10th August, 2022. After the voting and counting he announced the votes garnered by each candidate as follows;

Registered voters 473

Ahmed Boray 093

Salat 001

Dr. Keynan 194

Total Valid cast 291

Total Votes Cast including rejected 294

Form 35A was signed by agents including Mohamed Shekhia Omar (PW 1) for the petitioner. He stated that he handed the petitioner's agent the copy of results and denies that the photograph of the document produced in page 277 of Petition's bundle is genuine. He stated that what is in the document is not the results he announced.

111. On being cross-examined by M/s Hashi for petitioner he stated that voters at the polling station were identified by Kiems kit which worked properly. He, however, stated that some voters could not be identified by Kiems kit he used the Presiding Officers pass-word and they voted.
112. On the issue of votes garnered by each candidate he stated that the results he provided in Form 35A which he produced is genuine and no other. He stated that Form 35A original is given to Returning Officer, at Tallying Centre, one copy placed in ballot box and rest given to agents. He confirmed that petitioner's agent received a carbon copy.
113. RW 8 Dahira Bishair Maalim was deployed to Biad Primary Polling station as a Presiding Officer. On 10th August, 2022. He and other officers proceeded to the Polling Centre. Voting started and after completion and counting he filled Form 35A which he handed over to the Deputy Returning Officer.



- In his polling station, the registered voters were 33. Voters authenticated by Kiems Kit 30. Total Valid votes cast 30.
114. On cross-examination by Issa for 5th Respondent he stated that the votes garnered by each candidate were Boray – 18, Salat – 00, Dr. Keynan – 12. He stated that in the tallies he by error indicated that Salat got 10 votes instead of 0 and the total votes cast was indicated as 40.
 115. On cross-examination by M/s Hashi for the petitioner he testified that voting commenced at 8.30 a.m. and closed at 7.30 p.m. he stated that he corrected the errors and counter-signed in presence of agents.
 116. RW 9 Samira Abdishukri testified that she was deployed as a presiding officer to Dadantalai Polling Station. On 10th August, 2022 she proceeded to the station where voting went on smoothly. The voters were identified through the Kiems kit. They used 2 Kiems Kit. The first one identified 54 voters and malfunctioned. A replacement was brought through which 249 voters were identified bringing a total turnout of 303 voters. She filled the Form 35A and handed it over to Deputy Returning officer.
 117. On cross-examination by Issa for 5th Respondent, she stated that the first Kiems kit was used from 8.30 a.m. to 11.30 a.m. when it stopped working. The Deputy Returning Officer sent another kit at 3.30 p.m. and they voted upto 2 a.m. She filled Form 35A and the results were registered voters 503. Boray – 149, Salat – 00, Keynan – 151. Total No. of valid votes cast 301, rejected 2. The total No. authenticated by the 2 Kiems Kit 302.
 118. RW 10 Feisal Abdi Billow was deployed as Presiding Officer to Orote Primary School Polling Station. On 10th August, 2022 he arrived at the polling station and opened the polling station at 10.31 a.m. to 7.30 p.m. but the single registered voter did not come to vote. He recorded the results and filled Form 35A and handed it over to Deputy Returning Officer.
 119. RW 11 Omar Noor Abdille was the Presiding Officer of Masalale Mobile Polling Station Stream 2 of 3. He proceeded to the polling station on 10th August 2022 and voting started at 8.30 a.m. and closed at 8.40 p.m. the delay in starting the voting was due to a mix up as he had carried 2 Senator boxes and left behind the one for Member of County Assembly. At 7 p.m. he announced that the station will close at 7.30 p.m. after lapse of 11 continuous hours of voting and asked voters to be on the queue. At 7.30 p.m. he closed and everyone on the queue voted. The counting of the votes was done smoothly and announced and filled the Form 35A which was signed by the petitioner's agents. He denied the allegations of vote swapping.
 120. On cross-examination by Issa for the 5th Respondent the stated that the voters were identified through Kiems kit. After closer of the polling, counting of the votes followed and he filled Form 35A. The results were No. of Registered voters 509, Ali Boray – 34, Salat – 00, Dr. Keynan – 294, Rejected – 0. The total should be 328 not 324 as indicated. The agents who signed were all from the ODM party. He stated that Noordin Ibrahim Mohamed (PW 7) was not an agent as the agents were Abdulahi Ahmed Bilal Abdi, Sauda Said for ODM Party.
 121. He stated that he had seen the document on page 142 of Petitioners bundled. It is not his document, his signature is not there. He denied swamping the votes of the petitioner to be the ones for the 5th Respondent.
 122. Cross-examined by M/s Hashi for the petitioner he stated that Masalale Mobile Polling station is inside the compound with other Polling Stations. He admitted there was an error in recording and 4 votes were not accounted for but the error did not affect the results each candidate garnered.
 123. In re-examination by Mr. Mwititi, he stated that the form by petitioner's witness at page 142 of the petition is not genuine as it does not show what the candidates garnered.



124. RW 13 Gullet Osman Gure adopted his affidavit sworn on 24th September, 2022 as evidence in chief. He testified that he was deployed as a Presiding Officer to Dela Yarey Polling station. He went there on 10th August, 2022 and voting commenced at 7.30 a.m. while voting was going on Noor Billow an agent of the petitioner came and alleged that some ballot papers cast for Member of National Assembly had been placed in a wrong box. He engaged in a confrontational with an election observer who advised him not to encourage violence. As a result, a commotion ensued and people forcefully entered the hall and attempted to damage election materials.
125. The clerks and police secured the election materials, voting was stopped. He called the Deputy Returning Officer who sent additional Security and arrests were made. Calm returned at 10 a.m. and ballot boxes were delivered by the Deputy Returning officer and voting resumed and continued upto 8 p.m. when it was closed. Counting of the votes was done, Form 35A filled and was signed by agents and was delivered to the Deputy Returning Officer.
126. On being cross-examined by Issa for the 5th Respondent he stated that voting started at 7.30 a.m. and voters were identified by Kiems kit. He stated that the petitioner's agent was Ruweitha Farah (PW 6). He also saw Noor Billow the Chief Agent come and observed the voting and left. When Noor came back chaos erupted, 10 people had voted. When the ballot boxes were replaced, voting continued. The results from the polling station after the counting were; registered voters – 399, Boray – 010, Salat – 00, Dr. Keynan – 251. Total Valid Votes Cast 361. The agents who signed the Form 35A were Abdi Kher (ODM), Mahat Osman (Jubilee), Ahmed Ali Abdi (Kanu).
127. Upon being cross-examined by M/s Hashi, he confirmed he is a voter at Dela Yarey Polling Station and he was the last to vote. He stated that there were cases of assisted voters who were assisted by officers in front of the agents. He stated that when Noor Billow came and made allegations of Member of Parliament votes being put in wrong boxes, an observer Mr. Adow confronted him. Voters from another polling stations Della Primary are the ones who invaded the hall and started kicking the ballot boxes. When the ballot boxes were replaced, the ballot boxes in damaged boxes were removed and placed in the new boxes. The replaced ballot boxes were brought by IEBC Logistics Officers with Police in armored vehicles. He explained that he signed the Form 35A but by error signed where Deputy Presiding Officer was to sign. He confirmed there was one stray ballot of MCA found in the ballot box of Member of National Assembly.
128. RW 12 C. I. Thomas Simbiri was invited by court to produce a report he had authored concerning the security incidents in the county which he produced as Exhibit 5. In the report, he detailed incidents of Pre-election violence. He testified that for the violence on 8th August, 2022 at the CDF hall 4 persons were charged, on violence at Dela Yarey 3 were charged and for violence on 11th August, 2022 at the Tallying Centre, the matter is still under investigations. On the burning of CDF Hall on 24th August, 2022, 5 people have been charged.
129. RW14 Maryan Hassan Mohammed the Deputy Returning Officer, Eldas Constituency gave evidence, and 3rd Respondent testified that she was appointed Deputy Returning Officer and reported to Eldas on 5.5.2022 and was involved in the recruitment of Presiding Officers and Deputy Presiding Officers. She stated that application for the position was to be done on IEBC Portal. Shortlisting of the candidates was done on 17.6.2022 and interviews were held on 20th – 23rd June 2022. They shared the names with the Political Parties. The Petitioner filed Garissa Petition No. 14 of 2022 and wrote a letter of complaint to the Commission.
130. She testified in preparation for the elections to be held on 9.8.2022, she was at the CDF Hall on 8.8.2022 where they were to issue election materials to Presiding and Deputy Presiding Officers whose



names and stations had been posted on the notice board. The Petitioner came to the CDF Centre and challenged the Presiding and Deputy Presiding Officer's list. There were demonstrations outside the compound. The Petitioner came and spoke to the Constituency Returning Officer Abdibashir Al Noor. She testified it was only the Petitioner who was complaining to the Returning Officer. There then erupted violence.

131. As a consequence of the violence, Electoral Materials were not issued to the P.O's and DPOs on the morning of 9th August 2022, the 2nd Respondent, Ali Noor the Returning Officer stepped aside. Being his Deputy she took over his responsibility. The election was postponed from 9th to 10th by the Chairman of IEBC.
132. On 10.8.2022 the Elections proceeded and she did not receive any complaint from Petitioner. She was at the Tallying Centre Tallying of Member of National Assembly started at 6am in the morning of 11.8.2022. The Petitioner came to the Tallying Centre at 7pm on 11.8.2022 when she was about to complete announcing for Constituency remaining with the last 4 polling stations. She had received and verified results from the 72 polling stations.
133. The Petitioner went to the dais and complained of vote swapping. She asked him for the copy of the form issued at the Polling station to compare with what she had. He said he did not have. There was violence and one of her officers was shot. The Petitioner then told her that if she wanted peace, she should not announce the results. She had done the Tallying and the result were:

Ahmed Boray – 6838
Salat - 66
Adan Keynan -7517
Rejected votes 94
134. She declared the results at the County Returning Office on 13.8.2022 and issued the 5th Respondent with the certificate. She testified that after the declaration, the Electoral Materials were kept in the CDF Hall. On 19.8.2022 she received information that Materials were not safe and she asked that logistics officers to transfer them to Wajir. Before that was done on 24.8.2022 the Hall was set on fire and all Electoral materials stored there were burnt.
135. On being cross examined by Ms Hashi for the Petitioners she agreed that a Petition is an audit by the court of an election. She stated that it is IEBC which recruits and trains Presiding and Deputy Presiding Officers. They recruited 149 Presiding and Deputy Presiding Officers who were trained between 31st July to 3rd August. Among the P.O and DPOs were teachers, County employees and that there is no law forbidding them. The Training was done by IEBC Officers and SETs who has been trained.
136. She addressed and responded to the alleged discrepancies in total No. of votes cast in Biad Primary Buladila Admin, Masalale Primary and ICF Primary. She referred to her exhibits. On allegations of vote swapping the 3rd Respondent stated that she did not make any changes to the forms from the Polling Stations. On where she made the declaration. She stated that she did it at County Tallying Centre in Wajir Town on 13.8.2022 because it was impossible to do it at Eldas CDF Hall because of the violence.
137. On being re-examined by Mr. Mwiti she stated that the Petitioner complained that 68 of the 72 Presiding Officers were affiliated to the 5th Respondent. She stated the list produced by the Petitioner was for Persons trained and not for Presiding Officers and Deputy Presiding Officers deployed their polling station is not shown. She stated that despite request by Petitioner she did not alter the list to accommodate his complaints.



138. She denied that she deployed any person who was not trained as Presiding or Deputy Presiding Officers. She stated she deployed Presiding Officers and Deputy Presiding Officers to Orote and Dela Yarey Polling Station and received results for the 6 elections.
139. She stated that at the time Petitioner arrived at the CDF Hall. On 11.8.2022 at 8pm, 72 Polling Stations had been verified and announced on 68 of them. The 4 polling stations whose results had been tallied but not announced were; Towit Primary, Are Sabaj Primary, Waradey Primary and ICF Primary.
140. On the results of Masalale she stated that it is in the form 35A she produced as exhibit, 15 genuine and bears the OR code. On the form produced by the Petitioner, she stated it is not genuine as it is not a copy but a photo which is not legible with all particulars and the QR code has No. 35 which is number for all A series forms. She stated she has perused the form and noticed that it does not disclose what each candidate got, no summary of results, no signatures of P.O. or D.P.O.
141. On threats to her by Petitioner she stated that Petitioner threatened her in the hall and in the Land Cruiser where he urged her not to announce the results. She was on 12.8.2022 airlifted by helicopter from Eldas to Wajir County Tallying Centre where she declared the results. She stated that she had A Series form from where the results from the Polling stations were tallied and we do not need the ballot boxes and Kiems Kit to know the votes cast and who won. On whether there was an error in date of election on Form 35C she stated that she filled the form on 13.8.2022 and gave the date of gazetted day for the election.

5TH RESPONDENT'S CASE

142. The 5th Respondent Adan Keynan Weliye filed an affidavit sworn on 29.9.2022 which he adopted as his evidence in chief. He testified that in August 2022 election he was a candidate for Member of National Assembly for Eldas Constituency under the Jubilee Party. The Petitioner was also a Candidate under the ODM Party. Upon the conclusion of Elections and Tallying the Constituency Returning Officer declared the following results.

Ahmed Boray – 6838

Salat - 66

Adan Keynan -7517

He was then issued with Certificate of Elected Member of Parliament for Eldas Constituency.

143. On the specific allegation by the Petitioner in the Petition, he deponed that there was no vote swapping as alleged and that the votes announced at the Polling Station were the same announced at the Tallying Centre. At Dela Yare it is true that there were chaos and election Ballot Boxes were destroyed which were replaced and voting continued after calm was restored. He stated that 3 people were arrested who are known supporters of the petitioner.
144. On the announcement of the results he stated that he was at the Tallying Centre when Petitioner alleged that his votes from Masalale Mobile Polling station and Waradey Polling Stations were swapped and announced as his. Due to the chaos the declaration of the winner would not have been possible hence the decision to do so at the County Tallying Centre in Wajir Town.
145. On alleged variance of votes in 6 Polling Stations named, he stated that the Presiding Officer signed the form 35A which were signed by ODM Party agents and that the allegations of variance is non-existent.
146. On alleged Police intimidation he stated that isolated Security incidents were contained by Police and were all instigated by the Petitioner. On disenfranchisement of voters he stated that the election in the



constituency was postponed from 9.8.2022 to 10.8.2022 due to Security and that Petitioner has not given particulars of Polling Stations where voters were disenfranchised.

147. On security of election materials, he stated that he is aware that on 24.8.2023 the building housing the material was attacked and electoral materials stored therein destroyed. On the issue of recruitment and deployment of Presiding Officers and Deputy Presiding Officers he stated that the issue was litigated in Garissa Petition No. 14 and cannot be reopened. He however stated that he had no role in the recruitment training and deployment of Presiding Officers and Deputy Presiding Officers. He stated that on 10.8.2022 he voted at Eldas Primary Polling Station and during the day visited 15 polling stations where voting was going on well.
148. On being cross examined by Mwititi for 1-4th Respondent he stated that there were incidences when his campaign was disrupted or supporters attacked by the Petitioner's supporters. He named them as 28.6.2022 at Masalale town, 1.7.2022 at Basir town and 6.8.2022 at Eldas Town. He stated that on 8.8.2022 he was not at CDF Hall or even on 9.8.2022.
149. On being cross examined by M/s Moturi for the Petitioner he testified that he applied and was enjoined in Garissa Petition No. 14 of 2022 and he is aware of the allegation made therein. He confirmed that it was within the Petitioner's rights to withdraw the Petition. He however denies that 15 of the 17 Presiding officers were affiliated to him in Elnur Tula Tula, Della and Eldas Ward.
150. On further cross examination by M/s Hashi for Petitioner, he stated he had seen the allegation of vote swapping at Masalale Polling Station where it was stated that Boray garnered 294, Salat 00 and Keynan 33. He stated the alleged form was not from IEBC and the correct votes garnered were Boray 34, Salat 00 and Keynan 294. He confirmed that in Masalale 1 of 3 and 2 of 3 the Petitioner won and that the pattern is not unusual.
151. He stated that IEBC results for Warade Polling station are the correct ones and not those stated by the Petitioner's Witness. On 11.8.2022 the 5th Respondent stated that he was at the CDF Tallying Centre with chief agent but did not enter the hall. He was following the results as posted by his agents in a WhatsApp group which was consistent with what the DRO was announcing. He saw the Petitioner go into the Hall and 5th Respondent left the venue at 7pm.
152. On the issue of bloggers he stated that some are known to him and he had complained to Police over the message they post on the Social Media Platforms. He stated he has annexed Facebook post of Dr. Ahmed Boray Alale and Omar Sheikh Ali. He denies that he is the one who planned the attack and burning of the CDF Centre or stood to benefit from its burning.
153. 5th Respondent's Rw 1 Said Abdille Mohamed stated he was appointed as a polling agent for Jubilee party stationed at Biad Primary Station, El Nur/Tula Tula ward. He stated he arrived at his polling station on 10th August, 2022 at 8.00am and submitted his Letter of Appointment and Oath of Secrecy to the Presiding Officer who admitted him to the polling station by signing the polling day diary. He stated voting commenced at 9.30 am and continued smoothly and closed at 5.00pm after all voters were able to vote. He stated at close of voting 30 of the 33 registered voters at the polling station had turned up to vote. He stated counting of the Member of National Assembly votes started and went on smoothly after which results were declared. He produced copy of the Form 35A as EX-1.
154. On cross examination by Mr. Mwititi for 1st-4th Respondent he confirmed that everyone who voted was identified by the KIEMS Kit and everyone on the queue voted. He testified counting of votes started at 8.30pm with presidential then for Member of National Assembly that lasted 30minutes.



155. He testified that the results announced were as follows; Ahmed Boray Arale 18, Salat Omar Haji-0 and Aden Keynan-12. He confirmed there is overwriting in the results and the same has not been countersigned by the Presiding Officer. He testified that none of the agents present objected to the results or seek a recount. He confirmed that he signed the form. He testified that he does not agree that at polling station votes were more than the registered voters.
156. He testified the Kiems Kit was available for any agent who wanted to take statistical summary but none of the agents took a photo of the statistical summary of the dashboard at the close of counting but he recorded in his notebook but he has not attached it to his affidavit.
157. On cross examination by Ms. Hashi for the Petitioner. He confirmed he was a supporter of the 5th respondent but he did attend his campaign rallies. He testified that he did not go to the CDF tallying centre at any point. He confirmed at his polling station everything went on smoothly. He testified about the numbers of voters stated under paragraph 7 of his affidavit, he gave that information to his chief agent but it is not attached to his affidavit. He testified if the results announced at the polling station do not tally with the results at the tallying centre then those are not results from the polling station.
158. 5th Respondent's RW2 Abdi Malik Ahmed Muhumed stated he was polling agent at Junction polling station and produced his letter of appointment as EX-4 and Oath of Secrecy as Ex-5. He stated voting commenced at 10.00am and continued smoothly and closed at 11.00pm and everyone who was on the queue by was allowed to vote.
159. He stated counting of votes of Member of National Assembly went on smoothly in presence of agents and the results were announced. He produced annexed copy of the Form 35A.
160. On cross examination by Mr. Mwititi for 1st -4th respondents, he confirmed that everyone was identified by the Kiems Kit and voting ended at 11pm. He confirmed the results as announced at the polling station were as follows; Registered voters 559, Rejected votes-0, Number of valid votes -371. Arale Ahmed-131, Salat Omar-000 and Wehliye Adan Keynan-240.
161. On cross examination by Ms. Muturi for the Petitioner, he testified that he signed the results annexed to his affidavit as agent number two on the list on behalf of Jubilee. He read out his ID Number as 33526041 but the one captured in the Form is 33626041, he stated this was an error it was meant to be 5 and not 6. He confirmed that he took a picture of statistical summary from the dashboard but he has not annex it to his affidavit.
162. 5th Respondent's RW 3 Edow Mohamed Abdi stated he was a polling agent at Anole Primary Polling Station. He produced his letter of appointment as Ex-7 and Oath of Secrecy as Ex-8.
On 10th August he arrived at his polling station at 6.30am and voting started at 8.30am. He stated each voter who was on the queue by 5.00pm was able to vote and voting ended at 2.00AM. He stated counting of votes started soon and went on smoothly and agents of petitioner were present too. He produced the Form 35A of results as exhibit-9.
163. On cross examination by Mr.Mwititi for the 1st -4th Respondent he confirmed voting started at 8.30am upto 2.00am. He confirmed that the Kiems KIT was used in identification of all voters and it went low on charge and it was recharged. He confirmed there was no violence and counting of votes started at on 11th August, 2022 at 2.10am with presidential then they counted for Member of Parliament for about 40minutes. He testified the results were as follows; Ahmed Arale-255, Salat Omar-001 and Aden Keynan-175. He testified that the results were announced in his presence and other agent Mohamed Maalim agent for ODM. He confirmed he signed Form 35A. No one objected or sought a recount of the results.



164. On cross examination by Ms. Muturi for the petitioner he testified that on 10th August, 2022 during voting process the voters were identified by the Kiems Kit. He confirmed last person voted at 2.00am next day. He confirmed he is aware the polling station was to remain open for 11 hours continues but it closed at 7.30pm.
165. On re- examination by Mr. Issa for 5th Respondent he testified that all voters managed to vote up to 2.00am and that neither the Petitioner nor the 5th Respondent had an issue with the results as announced.
166. 5th Respondent's RW4 Jimale Mohamud Abdullahi stated he was appointed polling agent at El-nur Primary Polling Station. He produced his letter of appointment and Oath of Secrecy as Ex-10 and Ex-11 respectively. He stated on 10th August, 2022 he arrived at El-Nur Primary Polling Station and voting started at 11.30am and continued smoothly and peacefully and voting ended at 10.30pm. He stated that counting of votes for Member of National Assembly proceeded smoothly in presence of agents and concluded at 5.00am on 11th August, 2022. He stated that results were announced and agents present signed the Form 35A. He produced Form 35A as Ex-12.
167. On Cross examination by Mr. Mwiti for the 1st to 4th Respondent he testified that on 10th August, 2022 voting commenced at 11.00am and he was admitted to the polling station by the Presiding officer. He testified voting ended at 10.30pm and at end of voting agents were not denied opportunity to take a photo of statistical summary.
168. He confirmed they took a break of 30 minutes and they counted the votes for Member of Parliament at 2.30am and concluded at 5am. He testified results were as follows; Boray-167 Salat-001, Keynan -242, Total Votes - 410 votes, rejected votes 5 and total votes cast-415. He confirmed these were the results and they were announced in presence of agents and they signed the form. He testified the elections were free and fair.
169. On cross examination by Ms. Muturi for the Petitioner he confirmed that he attended the rally in Masalale and Petitioner's supporters disrupted their rally. He confirmed on 10th August 2022 he arrived at the polling station and voting commenced at 11.00am and he is aware station has to remain open for 11 hours continuous. He testified that the station should have closed at 6.30 pm. He confirms the KIEMS Kit worked properly and he did not check the statistical summary of the Kit.
170. The 5th Respondent's RW5 Said Mohamud Abdullahi stated he was duly appointed polling agent at Biladul Amin polling station and was issued with appointment letter produced as Ex-13 and Oath of Secrecy as Ex-14 that was used to admit him to the station on 10th August,2010. He stated counting of votes of Member of Parliament ended at 9.00am on 11th August, 2022. He stated that results were declared as per Form 35A attached to his affidavit and marked Ex-14 and agents of Petitioner did not raise objection to the result.
171. On Cross examination by Mr. Mwiti he confirmed elections were held on 10th August, 2022 and he was admitted to the polling station by Abdulahi Ibrahim the Presiding Officer. He testified all voters were identified by KIEMS Kit and voting ended on 11th August, 2022. He confirmed there was interruption to charge the Kiems Kit at 10pm. He testified the results were follows; Boray 092 Salat 000 Keynan 287 Rejected votes 11 Total votes 390.He testified nobody challenged the results. He confirmed he signed as agent number 5 and 2 ODM agents signed the form.
172. On cross examination by Ms.Hashi, he confirmed there was a delay to charge the Kiems Kit for about 10 minutes and after charging voting continued smoothly. He testified he could not tell the number of



- voters who had voted by that time because he did not check Kiems Kit dashboard to record statistical summary.
173. He testified at the time of low charge there were people were on the line and at end of voting he checked the dashboard of KIEMS KIT at 1.00am. He confirmed he has not attached the statistical summary. He testified they were allowed to access
 174. The 5th Respondent's RW 6 Abdi Abass Abdullahi stated he was appointed as polling agent for Dadantalai Primary Polling Station. He produced letter of appointment as EX- 16 and Oath as Ex-17. He stated on 10th he arrived at his polling station and voting started at 8.30am and went on smoothly and all voters were identified by KIEMS KIT and voting ended at 2. 00am.He stated counting of votes for Member of National Assembly started thereafter and the results declared and agents present signed the Form 35A produced as EX-17.
 175. On cross examination by Mr. Mwititi for 1st-4th respondent,he confirmed on 10th August, 2022 he went to the polling station and was admitted at around 8.00am by the Presiding Officer. He testified that voting started at 8.30 a.m. He confirmed they used 2 Kiems Kit in voting process. The 1st Kiems Kit had indicated 54 voters before it broke down. It was replaced and 249 voters were identified using the 2nd Kiems Kits. He testified Voting stopped at 2 a.m. and everybody on the line voted and were identified using the Kiems Kit and total number identified was 303 and voting was peaceful. He testified he checked the counterfoils booklet. He testified that counting started at around 2.30 a.m. for Presidential then counted the results for Member of Parliament which were as follows; Boray- 149, Salat -01 and Keynan-151. There were 2 rejected voters. The total No. of votes case = 303.
 176. The Presiding and Deputy Presiding Officer signed the form 35A and Muktar Ahmed signed for ODM party while he signed for Jubilee and there was a UDA agent who signed too. He testified that no one challenged the results or sought recount of the votes. He was referred to page 22 Table 5 (Petitioner's bundle) and asked to set out results and he read them as follows; No of registered voters -503 and confirmed it is same as one on IEBC Form. Votes cast is 249. Which is different from the one on IEBC Form and total votes cast is 303 on both form. He testified the variance of 54 claimed by Petitioner is was what was contained in first Kiems Kit.
 177. On cross examination by Ms Hashi he testified he is not a Keynan supporter and he has campaigned for others and attended several rallies. He confirmed he did not attend a rally on 28th June, 2022 for 5th Respondent. On 1st July, 2022 he was in Lakole Basil rally for 5th Respondent rally. He testified Officers were present but he does not know the number and he cannot confirm if Sambiri is police officer and said was arrested. He testified disruption was by Boray's supporters and he identified them by the t-shirts they were wearing.
 178. He confirmed he also attended rally on 6th July, 2022 at Eldas Town by 5th respondent from 3 p.m. and there were disruptions. He testified he was at the polling station between 8th -11 August, 2022 and at no time did he go to the tallying Centre. He confirmed the 1st Kiems Kit stopped working but does not know the time. He confirmed he did not take a picture of the statistical summary but saw the Number 54. The replaced kit was brought at around 4 p.m. he confirmed in his affidavit he did not make mention of 2 Kiems Kits but when we finished voting he saw the summary and he did not take any photograph and he does not know if the breakdown of Kiems Kit was recorded in the polling station diary. He testified the form he produced is the one he signed.The comments on it is that the counting process was smooth and there is no comment that they used Kiems Kits.
 179. On Re-examination by Issa for 5th Respondent he testified the two Kiems Kit were supplied by IEBC and the 1st identified 54 and 2nd identified 149. No voting took place until the 2nd Kiems Kit was



- brought. The margin between Boray and Keynan was 2 votes. The ODM agent did not ask for the results and did not object to the results. The agents were shown as summary of the 2 Kiems Kits. There was no variance at the station and the Petitioner must have forgotten about the details in 1st KIEMS Kits while claiming variance.
180. The 5th Respondent's RW7 AbdiNasir Bulle Mohamed stated he was appointed jubilee polling agent for Warade Primary Polling Station and produced letter of appointment and Oath of Secrecy as Ex-19 and Ex-20.
181. He stated on 10th August 2022 he arrived at his polling station at 6.00am and voting commenced at 9.00am and continued smoothly and closed at 9.00pm. He stated Member of National Assembly votes were counted at 9.30pm and results declared as shown in Form 35A produced as EX-21.
182. On cross examination by Mr. Mwiti for 1st -4th Respondent he testified that voting started at 9.00 a.m and there was no interruption and results were as follows; Boray-093;Salat 01 and Keynan 197. There were 3 rejected votes so the total was 294. The results were read in presence of agents and nobody objected. He was referred to results on page 277 of the Petition as produced by PW1 and he testified those were not the results and the Form is not one that was issued at the polling station.
183. On cross examination by Ms. Hashi for petitioner he testified that he was at the Masalale rally on 28th June, 2022 and Boray supporters stormed their vehicle. He testified that on 1st July, 2022 there was a rally at Basil and Boray supporters caused chaos and in the rally for 6th August, 2022 Boray supporters caused chaos and he was injured but he did not report to police. He confirmed on 10th August, 2022 he arrived at Warade Polling Station and voting started at 9 a.m. up to 9 p.m. He confirmed that Abdikadir Haji Obegu (RW 7 gave evidence (Page 154 of Respondent) stated counting stated at 10 p.m. with Presidential.
184. He stated that in paragraph 7 (page 122) he averred it started at started at 9.30 p.m. but it was an error. He confirmed he left the station at 11pm before signing the Form 35A. He confirmed he is a Jubilee agent and signed on behalf of Jubilee. He confirmed there is no jubilee agent indicated in the Form attached to his affidavit and the identity card in the form is 3497033 while the identity card in oath of secrecy is 33706824 and they are identical. He denied he is 2 people in one.
185. On Re-examination by Issa he confirmed on 10th August, 2022 I was present at the polling station and was there throughout. The true results are the ones in page 127.
186. The 5th Respondent's RW8 Abdirahman Salat Maalim testified that he was appointed jubilee polling agent at Masalale Mobile Polling Station 2 of 3 and he produced appointment letter as EX-22 and Oath of Secrecy as EX-23. He stated the arrived at the polling station on 10th August 2022 at 6.30am.
187. Voting started at 8.30am and went on smoothly and ended at 8.30pm. Counting for Member of National Assembly started at 3.00am and results were declared as indicated in Form 35A annexed to page 120 of 5th Respondent bundle of documents and it be marked as EX-24.
188. It took 1½ -2 hours and it was done in his presence and several agents present too and among them was Sauda Adduraham but cannot remember all the names. He testified he did not see Noordin Ibrahim (PW 7) who is a known blogger but does not know him at a personal level. He confirmed results as announced as follows; Boray -34, Salat – 00, Keynan - 294 and Total =328.
189. He testified he has seen the form in page 83 of 1st – 4th respondents' documents and it reads Boray - 34, Salat - 00, Keynan -294 Total 328.



190. He confirmed the form is signed by Abdraham Mohamed, Saudia Said, Balal Abdi. It is the same information as in IEBC document in page 83. He testified the Form produced by Noordin Ibrahim as PW 7 page 142 of the Petition is not clear and the same is not signed by the Presiding Officer. He testified he will not say there was swapping of results. The elections were free and fair. In the comments: He wrote Counting process were smooth. On the form on page 142 of the petitioner's bundle. "He stated this form I do not see what each candidate got. It does not show where presiding officer, agents signed. I cannot see the comment. I will not say there was results stamping".
191. On being cross examination by Ms. Muturi he confirmed that he was not present when the Presiding Officer was filling form 35A, but saw it. He did not sign as an agent results on page 120 of 5th Respondent bundle of documents and the agents signed 10th August, 2022 and he was not present. He confirmed Omar Noor was the Returning Officer. He confirmed he was appointed as agent for Masalale Mobile and the Chief agent sent him to Masalale 2 of 3. He testified he is not aware that Nordin Ibrahim was ODM agent and only 3 ODM agents signed the form. He confirmed in Masalale primary school there were 5 polling station namely Masalale Primary, Masalale Mobile 1, 2, 3 and does not remember the other one.
192. He testified he is aware of allegations of swapping of results in Masalale Mobile 2 of 3. And does not know results of Masalale mobile 1 of 2 and 2 of 3. When the results were read out to him he testified that it is not strange for Boray to lose in one stream while he won with a landslide in other stream. He confirmed that he was assisted by Guled Ali but he did not sign the Form too because he the one to sign.
193. He confirmed that on the form the total votes cast is 328 but at bottom it reads 324 as the total, a discrepancy of 4 votes and that is a mathematical error.
194. On re-examination by Mr. Issa he testified that the results are transcended to the B series is the individual candidates' results per. He confirmed in form 35B (page 40 of IEBC document) results for the Masalale mobile are as follows.

Registered voters - 509

Boray 34

Salat 0

Keynan 294

Total votes 328

And no votes were lost.

195. He confirmed he was present at the polling station. And went for health break and when he came back the Presiding Officer had already filled the form and they could not alter it. He confirmed the form is not signed by Jubilee agent.
196. The 5th Respondent's RW 9 Hussein Farah Guliye stated that he was appointed as a polling agent for Jubilee Party for Della Yare polling station on 3rd August, 2022. He testified he was issued with letter of appointment and Oath of Secrecy he produced it as EX- 25 and 26 respectively. He stated he arrived at his polling station on 10th August 2022. Voting process commenced at 7.00am and continued smoothly until 8.30am when there was disruption was caused by Mr. Noor, the Petitioner chief agent and Mr. Siyat Abdi, chief agent for ODM party protested. He stated this caused the voters to storm the polling station and ballot boxes destroyed. He stated he saw Hassan Hussein Elmi who jumped through the window and Shale Gedi and Mohammed Billow who were arrested and he came to learn later they were



charged with destruction of ballot papers. He stated the police officers assisted the Presiding Officer and Clerks in protecting the ballot papers and election material until reinforcement arrived and calm was restored. He stated voting continued smoothly and closed at 8.30pm. He stated counting was done as announced as shown in Form 35A annexed and marked EX-27.

197. On cross examination by Mwititi he testified that voting started at 7.00am and went on smoothly until there was interruption at 8.30am. He confirmed the interruption was by Noor and Siat and their grievance was that the Presiding Officer placed the ballot paper in the wrong ballot box. He testified that at this point almost 10 votes had been cast and chaos lasted one hour and ballot boxes were damaged but they were replaced by IEBC logistic officers after 30 minutes. He testified PW6 Ruweitha Farah was agent at the beginning and when she left she never came back after the commotion. He confirmed voting closed at 5.00pm and people voted at 8.30pm and he is not aware there is anyone who did not vote. He confirmed results were announced as follows;

Boray 010

Salat 000

Keynan 351

Total 361

and he left before signing the form and it was signed by Mahad Osman the other Jubilee agent.

198. He was cross examined by Ms. Hashi for the Petitioner and he confirmed he was Jubilee Party agent and kept eye on 5th Respondent votes. He testified he signed the polling station diary. He testified out of the 10 who voted he does not remember how many were assisted and does not remember the assisted voters coming in with relatives to assist them. He testified Mr. Noor came to the polling station and spoke to the presiding officer and they were claiming that some of the ballot papers were put in wrong boxes. He testified that ballot boxes were replaced at 10.00am and voting resumed and he does not know Abduba (RW2) and he would be wrong if he stated no voting was going on at 2.30pm. He confirmed voting went on up to 8.30pm. He confirmed counting of Member of National Assembly lasted 50 minutes. He testified he was present when results were announced as they are shown in the Form 35A of IEBC document. He confirmed he did not sign the form but Mahat signed for Jubilee. He testified he saw PO file in the Form and wrote 361. He confirmed the name of Presiding Officer fill in the form.
199. The Respondent's RW10 Mohammed Bulle Muhumed stated he was Chief Agent of Jubilee Party. He produced his appointment letter as Ex28. He stated the Petitioner and his supporters during campaigns embarked on a campaign to fan disaffection for 5th respondent. He stated the 5th respondent held campaigns on various dates and they were disrupted by the Petitioner and his supporters. He stated that on 10th August, 2022 the jubilee agent reported voting had started early in various polling stations and a few started late. He stated visited various polling station to see progress and he received report that Della Yarey Polling Station at about 8.30am there was disruption but later on voting resumed. He confirmed he went to CDF Hall tallying and arrived at 6.00pm on 10th August, 2022 with his agents to confirm results submitted to the constituency Returning Officer but since results had not arrived he left and came back on 11th August 2022 at 8.00am and results from polling stations had started being announced by the 3rd respondent.
200. He stated the petitioner's agent disputed results for Masalale Mobile Polling station 2/3 and Waradey Polling station where they claimed results had been swapped but they had no proof. He stated at 10.00pm all results for 72 polling stations had been tallied and announced by the 3rd respondent and when the Petitioner realized he had lost he stated protest and made it impossible for last results to



- be declared. He stated 3rd respondent announced declaration will be made at Wajir County Tallying Centre. He stated on 12th August 2022 together with his team they travelled to Wajir County Tallying Centre and the results for Member of Parliament were declared on the morning of 13th August, 2022 at 11am and 5th respondent was declared the Member of National Assembly elect for Eldas Constituency.
201. On cross examination by Mr. Mwititi for the 1st to 4th respondents he stated. “I was present in all the 3 rallies and in the rally on 6th August, 2022 the petitioner was present. He reported these incidences to police and have OB No. 4/29/6/22 at Malalale Police Station, OB No. 3/2/7/22 at Bashir police station, OB 6/7/8/22 at Eldas Police station. He testified Nordin Ibrahim Mohamed (PW 7) is was one of the bloggers of the Petitioner.”
202. He testified that there are allegations of swamping of Masalale mobile 20G 2 and Waradey Polling and he was present when they were announced. The results of Masalale 2 of 3 were announced by DCRO between 5.30 – 6 p.m. On 11th August, 2022. She was announcing in batches. After Masalale 2 of 3 was announced the petitioner’s agents complained that the results had been swapped. They were asked to produce a carbon copy but could not produce. The 5th Respondent was not present. He testified results for Waradey were announced at 7 p.m. together with others. The agents for the petitioner claims it was swamped. The 5th Respondent and petitioner were not in hall. He testified after 30 minutes the petitioner came and sat at the podium next to the DCRO. There was commotion and police tried to contain it. The petitioner took the microphone and addressed the people. He claimed that vote swamping and ballot stuffing was happening at the Tallying Centre. Lights were switched off and there was chaos. He confirmed results for 72 polling station had been announced. It is not true that 52 polling stations had been announced.

Constitutional Principles in Elections

203. Article 38 of *the Constitution* of Kenya guarantees the political right of every Kenyan citizen. It provides that every citizen has the right to free, fair and regular elections based on universal suffrage and free expression of the will of the electors.
204. Article 81 of *the Constitution* of Kenya provides for the general principles of the electoral system as follows: -
- (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.
205. Article 86 of *the Constitution* of Kenya mandates the 3rd Respondent to ensure that among other things, the election system used is simple, accurate, verifiable, secure, accountable and transparent.

Burden and standard of proof

206. It is now well settled that election disputes are sui generis. The question of burden and standard of proof was settled by the Supreme Court in Odinga and Another Vs Independent Electoral



and Boundaries Commission & 2 Others; Aukot & Another (Interested Parties); Attorney General & Another (Amicus Curiae) as follows;

“(152) We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt. Consequently, we dismiss the petitioners’ submissions that the Court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities.”

207. Section 83 of the *Elections Act* provides for nullification of elections. It states that a Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that-

- (a) the election was conducted in accordance with the principles laid down in *the Constitution* and in that written law; and,
- (b) the non-compliance did not substantially affect the result of the election.

208. In the case of John Munyes Kivonga vs. Josephat Kolil Nanok the Court held as follows on the burden of proof;

“On the burden of proof it is settled law that burden of proof is on the person who alleges. In *Moses Masika Wetangula vs. Musikari Nazi Kombo & 2 Others* (2015) eKLR the court stated: -

“[118] It is clear that the Court of Appeal was mindful of the foregoing principles, judging from their pronouncement in the following passage:

“Section 107 of the *Evidence Act* legislates the obvious principle that he who alleges a fact has the burden of proving his allegation. In election petitions, it is the petitioner who, on one or more grounds, seeks the nullification of an election. The burden is therefore, upon the petitioner to prove his allegations: and the standard of proof in election petitions is generally to the satisfaction of the Court, higher than a balance of probabilities but not to the level of beyond reasonable doubt. See *Raila Odinga v IEBC & Others* and *Joho v. Nyaga*.

“However, if there are allegations of commission of election offences in an election, the law requires that those allegations be proved beyond reasonable doubt. In other words, the standard of proof required in allegations of commission of election offences made in election petitions is beyond reasonable doubt.”

The burden, therefore, is on the Petitioner to prove to the satisfaction of the court the grounds upon which he desires the court to find that the elections did not comply with *the constitution* and other electoral laws, in that there were irregularities and illegalities which affected the outcome of the election.”



209. Justice Mwangi, in further clarifying the law held that the Petitioner must prove that the alleged irregularities did affect the results in a manner that did not reflect the will of the people. In the case of *Abdirahman Adan Abdikadir & Another vs. Independent Electoral & Boundaries Commission & 2 Others* the Honourable Judge held;

“32. So, it is the petitioner's burden to establish, not only that there were irregularities, illegalities, violations, omissions and malpractices in the conduct of the Ruaraka Parliamentary election, but that these affected the outcome or result of the election. As earlier stated, the proof must be at the level of beyond a balance of probabilities but not above the level beyond reasonable doubt. It must be proved that these alleged irregularities, illegalities, malpractices and violations did in fact affect the result in such a manner that they did not reflect the will of the people Only upon establishing the foregoing to the satisfaction of the court, will the evidentiary burden shift to the respondents to establish the contrary

210. From the pleadings, evidence and submissions the court distilled the following issues for determination in this petition.

- a. Swapping of results
- b. Results in stations where elections allegedly not held
- c. Variance of votes
- d. Disenfranchisement of voters
- e. Police intimidation and violence
- f. Declaration of results
- g. Security of election materials
- h. Election offences

A. SWAPPING OF RESULTS.

211. In the petition the petitioner alleges that there was what he called swapping of votes. This is where the results originally declared by the presiding officer to be for the Petitioner at the polling station were later announced at the tallying centre as being results for the 5th Respondent and those announced at the polling station for the 5th Respondent are announced as for the petitioner by the Deputy Returning officer. In other words, the votes garnered by candidates are exchanged and announced at the tallying centre. The Petitioner identified the polling station affected by the swapping as;

- I. Masalale Mobile Polling Station Stream 2 of 3
- II. Waradey Polling Station

Masalale Mobile Polling Station Stream 2 of 3

212. For a party to prove vote swapping as a ground in a petition, he needs to adduce evidence to show.

1. That the Petitioner or his agent was at the subject polling station as agent or party.
2. That the agent saw and signed the form 35A filled at the polling station



3. That the results announced at the polling station were the correct ones read from the form 35A the agent has signed
 4. Evidence that the results declared at the tallying centre are different from what was announced at the polling station or that they have been inter-changed.
213. The main witness for allegation of vote swapping at Masalale Mobile stream 2 of 3 was PW7, Noordin Ibrahim Mohamed. He testified that there was vote swapping in results of Masalale 2 of 3 polling station. Upon cross-examination by Mwiti for the 1st -4th Respondent on this issue he stated that he was an ODM Party Agent but did not attach his letter of appointment.
 214. He further stated he went to Masalale mobile Polling Station where he was supposed to be an agent for Stream 2. He stated he had been appointed by ODM party as agent at Masalale. He averred the 5th Respondent people did not stop him from entering the station. He averred further the presiding officer allowed him in. He averred the counting process went on smoothly and announcement of results was done smoothly. The presiding officer filled the information in Form 35A and he was issued with a carbon copy of 35A. He took a photograph of the same form and which is now attached in page 142 of the petition. He testified from his document that the results were; Boray, 294, Salat- 00, Keynan – 34. He was given a carbon copy. He gave the carbon copy to Abdille Yusuf, the Chief Agent who did not testify.
 215. RW 11 Omar Noor Abdille was the Presiding Officer of Masalale Mobile Polling station Stream 2 of 3. He testified the counting of the votes was done smoothly and he announced and filled the Form 35A which was signed by the petitioner's agents. He denied the allegations of vote swapping. On cross-examination by Issa for the 5th Respondent the stated that the voters were identified through Kiems kit. After closer of the polling, counting of the votes followed and he filled Form 35A. The results were No. of Registered voters 509, Ali Boray – 34, Salat – 00, Dr. Keynan – 294, Rejected – 0. The total should be 328 not 324 as indicated. The agents who signed were all from the ODM party. He stated that Noordin Ibrahim Mohamed (PW 7) was not an agent as the agents were Abdulahi Ahmed Bilal Abdi, Sauda Said for ODM Party.
 216. He stated that he had seen the document on page 142 of Petitioners bundled. It is not his document, his signature is not there. He denied swamping the votes of the petitioner to be the ones for the 5th Respondent.
 217. On Cross-examination by M/s Hashi for the petitioner he stated that Masalale Mobile Polling station is inside the compound with other Polling Stations. He admitted there was an error in recording and 4 votes were not accounted for but the error did not affect the results each candidate garnered.
 218. In re-examination by Mr. Mwiti, he stated that the form by petitioner's witness at page 142 of the petition is not genuine as it does not show what the candidates garnered.
 219. Ms. Hashi for the Petitioner submitted that in Masalale 2 of 3 polling station the results announced at the polling station were; Boray 294. Salat 00 and Keynan 33 but what was announced at the CDF Tallying Centre was Boray 33, Salat 00 and Kenyan 294. The Petitioners witness PW1 annexed a document he stated was a photograph of the original 35A he was issued with and stated that it bore the security features of the Form 35A for the polling station.
 220. Ms. Hashi submitted during Cross Examination the 3rd Respondent testified that one of the security features on a form is the Quick Response Code (QR Code) in which the code of the specific polling station is embedded. The 3rd Respondent was shown the Petitioner's Exhibit 16 at Page 142 and the



Respondent's Exhibit 14 at page 83. The two forms were scanned and returned the same code: 008 037 0182 011 02 35A. The code breakdown is as follows:

008-County Code -Wajir

037-Constituency Code -Eldas

0182- Ward Code-Lakoley South/Basir Ward 011- Polling station Number

02- Stream two in this polling station

35A- Form A series for the Member of National Assembly.

221. Mr. Mwiti for the 1st -4th Respondent in his submission on the issue stated three issues arise here is adverse inference has to be made on the failure to produce a carbon copy and submitted that if indeed the carbon copy of the Original Form 35A had been produced in Court, it would have demonstrated without reasonable doubt that the results that appear in the certified copy at page 83 of the 1st to 4th Respondent Response are the only true and correct results that were announced and declared at the Polling Station. The allegation of result swapping would fall. Secondly, the photograph produced as Exh. 14 does not disclose the crucial information of the candidates and their results, the declaration part of the Form that would ordinarily disclose the signature of the Presiding Officer and the names of the agents who signed the form is not visible
222. Mr. Mwiti submitted the Form that PW7 said had been enlarged (enlargement is alteration) by his camera that failed at the most inopportune time does not also disclose the details of the Form 35A Serial Number. The 3rd Respondent who was RW14 said that that was not an IEBC Form because it did not have the 8 security features of a result declaration form and that PW7 did not produce any certificate of electronic evidence under Section 78, 78A and 106B of the Kenyan *Evidence Act* that is a mandatory requirement for the admissibility of the electronic or digital print out or extract that is Petitioner's Exhibit 14.
223. Mr. Issa for the 5th Respondent submitted adopting a similar approach as Mr. Mwiti on the evidence of PW7 and the photograph he produced. Counsel submitted that over the years the IEBC has sought to improve the verifiability of the election and the results announced thereto by taking deliberate measures to ensure results are verifiable. One of the measures includes enhanced security features on the result declaration forms such as a QR Code to identify the Polling Station, a UV light reader, anticopying feature, a unique tapering serial number, and the IEBC water mark. Counsel submitted the photograph of Forms 35A filed by the Petitioner on page 142 did not have all the security features and the same were allegedly photos of original Forms. Counsel submitted that the exercise by the Petitioner was calculated to hoodwink and mislead this Court. He submitted it is obvious that a photocopy of the carbon copy with the QR code could be made but the results distorted. No explanation has been given why the carbon copies with all the clear features was not filed in court. He submitted why did the Petitioner opt to use unclear photographs? The answer is simple and clear. The photographs were digitally altered to mislead the court and this explains why certificates of authenticity were not filed.
224. PW7 who produced the document on being cross-examined by Mr. Issa on his document he stated;
- “I have seen this document of form 35A (page 142). I cannot read the serial number. I cannot read the station number. This is an enlarged form. The names of agent is not in the form or of the name of the Presiding Officer. The declaration is not true depending on the



angle of taking the photo. I can see the number of votes for each candidate. I can see number of votes. 507 - rejected ballot 00.

This is results (page 83 IEBC'S bundle). The Serial No. NA 012262. Polling station code 0008037018201102. This one is from River road. It is not the correct form. It is signed by Abdulrahim Mohamed for ODM, Sunda, Abi all ODM”.

225. When shown the Form 35A on Page 83 of the respondent's bundle he stated; “the results for Masalale Mobile 2 of 3 (page 83) indicates that the counting process went on smoothly. Boray received 34. There is no cancellation. Salat00 there is no cancellation. Adan Keynan 294 there is no cancellation. The form disclosed names of agent and parties. There are 3 ODM Agents with signatures. It bears an IEBC stamp. This was not the result that was announced. I did not challenge the announced results. He read results from form 35A where I signed. I was given a Carbon copy of the results which I took to Abdile Yusuf our chief agent. I took images of the results. I accompanied the IEBC officers from Masalale to Eldas CDF Centre. There were no detours. I accompanied them until I was dropped outside. I was not at the Tallying Centre when the results were announced”.
226. Heavy reliance was placed by the Petitioner on the document produced in page 142 as basis for proving allegation for vote swapping. As I understand the Petitioner in his evidence is stating that at Masalale Polling Station, the Form 35A which was filled by the presiding officer and signed by the petitioner's agent and from where he announced the results is different from the one produced by the Returning Officer and from where she read the result at the tallying centre.
227. In this petition, PW7 Noordin Ibrahim Ahmed stated that he was the ODM Party agent at Masalale Stream 2 of 3. He stated he was at the polling station and signed the Form 35A. He produced a photograph of the Form 35A on Page 142 of the Petition. Upon being shown the photograph RW11 Omar Noor the Presiding Officer stated that the photograph;
1. The serial number cannot be read
 2. Does not have name of agent who signed
 3. The name of the presiding officer and signature is not shown.

228. PW7 who produced the document on being cross-examined by Mr. Issa on his document he stated;

“I have seen this document of form 35A (page 142). I cannot read the serial number. I cannot read the station number. This is an enlarged form. The names of agent is not in the form or of the name of the Presiding Officer. The declaration is not true depending on the angle of taking the photo. I can see the number of votes for each candidate. I can see number of votes. 507 - rejected ballot 00.

This is results (page 83 IEBC'S bundle). The Serial No. NA 012262. Polling station code 0008037018201102. This one is from River road. It is not the correct form. It is signed by Abdulrahim Mohamed for ODM, Sunda, Abi all ODM”.

229. When shown the Form 35A on Page 83 of the respondent's bundle he stated;

“the results for Masalale Mobile 2 of 3 (page 83) indicates that the counting process went on smoothly. Boray received 34. There is no cancellation. Salat00 there is no cancellation. Adan Keynan 294 there is no cancellation. The form disclosed names of agent and parties. There are 3 ODM Agents with signatures. It bears an IEBC stamp. This was not the result that was announced. I did not challenge the announced results. He read results from form 35A where I signed. I was given a Carbon copy of the results which I took to Abdile Yusuf



our chief agent. I took images of the results. I accompanied the IEBC officers from Masalale to Eldas CDF Centre. There were no detours. I accompanied them until I was dropped outside. I was not at the Tallying Centre when the results were”.

230. PW 7 readily admitted that his name is not in the Form 35A produced by the presiding officer of Masalale Mobile 2 of 3 as an agent. The agents who signed the Form 35A are; Abdirahman, Sauda Said and Bilal Abdi all from ODM. His name is not in the Form or even the alleged photograph he produced which does not in any case show the names of agents. The witness testified that what he tendered is photograph of a document which was generated electronically and therefore there was need for a certificate under section 78,78A and 106 of the *evidence Act*. In this case no certificate was produced.

231. The Court of Appeal in *County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others Civil Appeal Nos 17 and 18 of 2015* [2015] eKLR stated as follows:-

“In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions in sub-section 106B (2) of that Act to vouchsafe the authenticity and integrity of the electronic record sought to be produced.

“In relation to this case, the relevant conditions in that section are (a) if the computer output was recorded by a person having lawful control over the computer used; (b) if the output was recorded in the ordinary course of that person’s activities using a computer or some other electronic devise and fed into a computer that was properly operating throughout the material period; and (c) if that person gives a certificate that to the best of his knowledge, the output is an electronic record of the information it contains and describes the manner in which it was produced.”

232. In *Dziwe Pala Zuma and Suleiman Ali Mwanguku v IEBC and 2 Others, Mombasa Election Petition E002 of 2022*, a decision delivered in February, 2023 the court held as follows:-

“Be that as it may, it is crucial to bear in mind that electronic evidence can be easily manipulated, using computers or other electronic gadgets or instruments. Thus, the reliability and integrity of the electronic evidence from its generation, processing, communication through to maintenance and custody to eventual production in court must be ascertained before the court can determine that electronic evidence is admissible and what weight to attach to it”.

233. The witness admits that what he produced is a photograph which had crucial information in Form 35A not visible. He admitted he printed the photograph and gave it to counsel. This was by way of electronic processing which required a certificate. No such certificate of electronic evidence was tendered or produced.

234. I find that the document in page 142 of the Petitioner’s bundle is not accompanied with a certificate and therefore cannot be used as evidence to prove swapping of votes.

Warade Polling Station

235. PW1 Mohamed Sheikh Omar was the Petitioner’s agent at Warade polling station. He testified that he was present when voting and counting of the votes was done.



236. After the counting the presiding officer filled the information in Form 35A and announced the results garnered by each candidate were; Registered votes-473, Boray-197, Salat-1 Keynan-93 and rejected 3. Valid votes cast 291. He was issued with carbon copy which he took a photo and gave the carbon copy to chief agent, Abdile Yusuf Mohamed. The photograph is what he has produced in page 277 of the Petitioner's bundle.
237. RW7 Abkadir Haji Omar, the presiding officer testified that after counting after the voting and counting he announced the votes garnered by each candidate as follows;

Registered voters 473

Ahmed Boray 093

Salat 001

Dr. Keynan 194

Total Valid cast 291

Total Votes Cast including rejected 294

Form 35A was signed by agents including Mohamed Shekhia Omar (PW 1) for the petitioner. He stated that he handed the petitioner's agent the copy of results and denies that the photograph of the document produced in page 142 of Petition's bundle is genuine. He stated that what is in the document is not the results he announced.

238. On being cross-examined by M/s Hashi for petitioner he stated that voters at the polling station were identified by Kiems kit which worked properly. He, however, stated that some voters could not be identified by Kiems kit he used the Presiding Officers pass-word and they voted.
239. On the issue of votes garnered by each candidate he stated that the results he provided in Form 35A which he produced is genuine and no other. He stated that Form 35A original is given to Returning Officer, at Tallying Centre, one copy placed in ballot box and rest given to agents. He confirmed that petitioner's agent received a carbon copy.
240. PW 1 on being shown the photocopies of the Form 35A he produced at page 277 which he said was the one issued by the Presiding Officer and on which he relies to show swapping he stated: - "At the end of counting the ballots is returned to box and we were given Form 35A. I saw him fill the form 35A. We were around 6 agents. The presiding officer recorded results in our presence. He gave us a carbon copy. The carbon copy is not in the petition. What is on page 277 is what I received. The serial number is not clear. In my EX-3 at page 277. My name appears as number 3. The agent is Abdinasir Mohamed Sheikh. The signature in my affidavit is different from the one by IEBC in page 53 in the IEBC bundle of document. I took a photograph of the original Form 35A".
241. From the evidence, the petitioner is relying on the document at page 277 stating that it is the photograph of the copy of Form 35A issued to his agent. The agent PW 1 admits he signed a Form 35A at the polling but avers it is not the one produced by the Presiding Officer RW 7 Abkadir Haji. He seeks to prove that what he produced in page 277 is the authentic results. He readily admits that what he has attached is not the Carbon Copy he was given which he gave to the Chief Agent Abdile Yusuf who was not a witness in this petition. He admits that what he produced is a photograph of that form which he took and he printed. The document on page 277 was therefore obtained by Electronic process. As I have stated above, this is a document required by the *Evidence Act* to be accompanied with an electronic evidence Certificate. The same has not been tendered or produced and in the absence this document on page 277 cannot be admissible in evidence to prove the allegation of swamping.



B. Variance of votes

242. The Petitioner in the petition stated that during the independent tallying he noticed there were variance between the registered voters, voters authenticated by KIEMS KIT and votes cast according to Form 35A. He stated that he noticed the variance in Biad Primary-10, Biladul Amin Primary stream 1 Of 2-132, Junction Primary 44, Anole Primary 5, Elnur Primary 13 and Dadantalai Primary 54.

1) Biad Primary

The Petitioner's Counsel submitted that RW8, the Presiding Officer for Biad Primary Polling Station testified that she is an employee of the Wajir County Service Public Board. Upon cross examination she was emphatic that she did not alter any result from the polling station. She produced the result form 35A for Biad Primary as Exhibit 11 at page 172 of the 1st-4th Respondents' Response to Petition.

FORM 35A SERIES –

The number of registered voters were 33.

Number of valid votes cast was 30

Counsel submitted it has an alteration without countersigning which on the face of it shows that Omar Salat's 10 votes were donated to Adan Keynan to give him a total of 12 votes. This Presiding Officer is among those who were mentioned in Garissa Petition 12 of 2022 as public officers and campaigners of the 5th Respondent. This Presiding Officer is among those who were mentioned in Garissa Petition 12 of 2022 as public officers and campaigners of the 5th Respondent.

243. Mr. Mwititi for 1st -4th Respondents submitted the Petitioner won at this Polling Station. He has not challenged the result from the Polling Station in his petition and neither did he challenge the recruitment, deployment and competency of the Presiding Officer RW8 at the Station. He submitted if this Polling Station was to be eliminated from the final tally for any reason, the 5th Respondent would increase his margin of victory. Mr. Mwititi submitted in the results FORM 35A produced as an exhibit, Ahmed Boray Arale got 18 Votes, Salat Omar Haji got 00 votes while Adan Keynan Wehliye got 012 votes. The recorded total is 30 votes. He submitted this disproves the allegation by PW9 THAT 40 Voters were recorded in the Form 35A as having voted at the polling station. The FORM 35A is signed by 6 agents and this included 3 ODM Party agents, the Petitioner's party. No agent challenged the result or requested for a recount at the Polling Station.

244. Mr. Mwititi submitted the Petitioner in their submissions alleged that there was an error in recording of the results in the Form 35B. However, a look at the results in the said Form that was produced as an exhibit by RW14 show that the individual return for the three candidates did not change. However, the total cast vote was recorded as 40 something that RW14 explained as an arithmetic error that did not affect any individual results of the candidates.

245. The complainant by the presiding officer of the error has been sufficiently explained and I find the explanation credible.

2. Biladul Amin Primary Stream 1 of 2.

246. The Petitioner contends that in Biladul Amin there were registered votes 560, voters authenticated by KIEMS KIT 258. Total votes cast 390 and therefore there was variance of 132.



RW6 Abdulahi Ibrahim Mohamed the Presiding Officer gave evidence in court and stated that it is not true that the total number of voters was more than 390. According to him the results he announced were;

No of Registered Voters 560

Ahmed Boray 092

Salat Omar 000

Dr. Wehliye Keynan 287

247. From the evidence which is not disputed, the total registered voters Biladul Amin Primary polling station stream 1 of 2 is 560. The total number of voters who voted in Election Day were 390. The allegations that there was variance is not in my finding true and the complaint is misplace as the number of those who voted does not exceed the number of registered voters.

3. Junction Primary Polling Station

248. In Junction Primary Polling Station, the Petitioner testified that there was variance. He stated that the registered voters were 559, authenticated voters through the KIEMS Kit 327, Total Votes cast 371 and therefore there was variance of 44.

249. The Petitioner in being cross examined by Mr. Issa on this stated that from the IEBC Response, the Total registered votes 559. Results were Ahmed Boray 131, Salat 01 and Dr. Keynan 371 then stated;

“It does not exceed the registered voters. Nobody has testified about Junction Primary”

In respect of Junction polling station I find as the petitioner stated there was no variance.

4. Anole Primary Polling station.

The petitioner stated in evidence that he had no complain over Anole Primary.

5. El nur Primary Polling Station

in El nur Primary polling station, the petitioner testified that there were total registered voters 595 voters authenticated through KIEMS Kit 402 total votes cast 415 variance 13. He stated that the results for the candidates were;

Ahmed Boray-167, Salat 001, Dr. Keynan 242. He admitted that his 2 ODM agents signed the Form 35A.

From the Form 35A provided at page 155. The total registered voters were 595. Boray-167, Salat 001, Dr. Keynan 242 Total 410.

It is indicated in Form 35A that there were 5 rejected votes and no disputed votes. With the addition of 5 rejected votes, the total is 410. The total registered voters were 595. I therefore find no variance as alleged by the petitioner.

6. Dalantalai Primary polling station.

In Dalantalai polling station the petitioner testified that there were total registered voters 503, authenticated voters per KIEMS Kit 249, Total votes cast 303 variance 54. The petitioner contends that 54 votes were not authenticated by the Kiems Kit.



250. Samira Abdishukri, was called as RW9 and testified on behalf of the 1st to 4th Respondents that there were 503 registered voters, 303 voters were identified through the Kiems Kit and there were 2 rejected votes. She also testified that she used two Kiems Kit on the day with the first one being used between 8.30AM and 11.30AM and used to identify 54 voters. She used the second Kiems Kit from 3.30PM to 2.00AM that was used to identify 249 voters. This was in her affidavit at paragraph 7.
251. RW9 testified that after the breakdown of the first Kiems Kit it could not be repaired and a decision was taken to deliver and use a second one and that the second one starts the count afresh. This is not information that is recorded in the result declaration form but in the Polling Station Diary.
252. The explanation by the presiding officer tallies with the record in Form 35A signed by the Petitioner agent. The explanation of this 54 votes authenticated in the 1st KIEMS Kit is credible and I do find there was no variance as alleged by the Petitioner.

C. No Elections Held

253. The Petitioner in his evidence testified that no elections were held in two polling station.

1. Della Yarey Polling Station
2. Orote Polling Station

The Petitioner's counsel submitted Dela Yarey Submitted it is trite that the validity of the entire election process in Eldas Constituency ought to leave a paper trail that it is verifiable from the primary Form 35A series. She submitted, for Della Yarey, the Respondents have presented fictitious forms before this Honorable Court to hoodwink this Court that there was an election at Della Yarey. Counsel submitted for purely argument's sake if at all the elections resumed at Della Yarey (which is not true) the forms 35A as presented cannot stand as the results returned before this Honorable Court. The last solemn act of assurance to the voter by the Presiding Officer of signing the declaration form is non-existent.

254. She submitted the numbers therein are not a product or expression of the free and sovereign will of the people of Eldas Constituency. She submitted in the compound hosting Della Yarey polling station, there are other two polling stations, Della Primary Polling Station and Haragal Dam Polling Station. The results for the three polling stations are as follows:

- a. Della Primary Polling Station at page 72 of the 1st to 4th Respondents' Response to Petition
 - Ahmed Boray Arale-159 votes
 - Omar Salat Haji- 000 votes
 - Adan Wehliye Keynan- 157 votes 55% voter turnout
- b. Haragal Dam West Polling Station page 73 of the 1st to 4th Respondent's Response to Petition
 - Ahmed Boray Arale-20 votes Omar Salat Haji - 000 votes
 - Adan Wehliye Keynan- 19 votes 60% voter turnout
- c. Della Yarey Station at page 48 of the 1st to 4th Respondents' Response to Petition
 - Ahmed Boray Arale-010 votes
 - Omar Salat Haji-000 votes
 - Adan Wehliye Keynan- 351votes Despite violence 90% voter turnout



255. Thus, is it inconceivable how in 2 polling stations in the same compound, Della Primary Polling Station and Haragal Dam West the Petitioner would garner the highest votes in and then loose in a landslide manner in Della Yarey Polling Station.
256. Mr. Mwiti for 1st -4th Respondent submitted RW13 testified that these voters surrounded the Dela Yarey voting hall and then without warning breached the window wire mesh and entered the Polling Station. He testified that he secured the Kiems Kit and the polling clerks secured the unused ballot papers. Counsel submitted he testified the Ballot Boxes were damaged with their lids being broken but their content remained intact. He told the court that no election material left the Polling Station and the police officers present protected the election officials and the election material. It was his evidence that the commotion inside the hall took like 10 minutes before the police officers removed the perpetrators from the hall.
257. Mr. Mwiti submitted RW13 testified that at around 10AM the Ballot Boxes were replaced by RW14 who sent a security officers and an IEBC official to deliver six Ballot Boxes. He testified that they transferred the ballot papers from the damaged Ballot Boxes into the freshly delivered Ballot Boxes in the presence of agents who were still at the Polling Station. He testified that this did not amount to casting votes afresh. All this was intended to ensure that voters cast their vote.
258. Mr. Mwiti submitted RW13 testified that voting went on smoothly until 10 PM and that he voted last. There was an attempt to interrupt the counting process when stray ballots were retrieved from the Member of Parliament Ballot Box.
259. Mr. Mwiti submitted he confirmed that he filled in results declaration forms for the 6 electoral positions including the Form 34A for the presidential election that was verified at the National Tallying Centre at the Bomas of Kenya. There was no allegation that no presidential election took place at Dela Yarey. Mr. Mwiti there would have been a feast of elections for all the electoral positions from any of the 62 candidates involved in all the 6 elections at Dela Yarey if there had been no election there.
260. The events from the evidence of the witnesses and what is not contested is as follows;
1. Dela Yarey polling station is in a compound with two (2) other polling stations i.e Della polling station and Haragai Dam West polling station. The 3 polling station are within less than 100 meters from each other in the same compound.
 2. Voting in the 3 polling station started peacefully on 10.8.2022
 3. The Petitioner's agent in Dela Yarey polling station was PW6- Ruweitha Farah.
 4. There was disruption of voting when allegations were made by the Petitioner's agent (Ruweitha Farah) that assisted voters were placing votes at the wrong ballot boxes.
261. The 1 -4 is not disputed by witnesses of both parties. What is disputed is whether voting resumed after the disruption. RW6 Ruweitha Farah Aboi, who was petitioner's agent testified that the chaos stated at around 10.00am and lasted for 30 minutes and election materials were destroyed.
262. By this time 10 voters had voted. She left her polling station Dela Yarey and went to Della Primary Polling Station with other ODM agent. She stayed there until the next day at around 1.00pm. By her own admission she did not go back to Dela Yarey after the initial chaos.
263. RW13 Guleid Osman Gure the Presiding Officer Dela Yare polling station testified he heard the petitioner's Agent make allegations that some Ballot being placed in another Ballot Box. An observer confronted him. The allegation was not true. The voters at Della Primary were incited and they came



- to Dera Yarey polling station. The voters on the queue started shouting and removed the window wire mesh and came in. They started kicking the ballot boxes and interrupted the voting.
264. By that time, 10 people had voted through the KIEMS KIT. Ballot boxes were damaged. He secured the KIEMS Kit and the materials in the hall. The chaos lasted upto 9.30am. The security officers pushed the people outside. He called the DRO and informed her, the ballot boxes were replaced. He secured the 10 ballot votes and placed them in a new ballot box. Voting resumed at around 10.00 and some agents who left came back, others did not come back.
265. Osman Muhumed(PW3) gave evidence at 1.30pm voting process was going on and allegation that there was no human activity is not true. I did not see anybody taking a video even when we had stopped temporarily. At page 126 is copy of the results for Dela Yarey Polling Station and they are as follows; Registered Voters-399, Boray-010, Salat 000 and Keynan 351. Total 361.The agents were;
- Abdi Kher for ODM
Mahat Osman-Jubilee
Ahmed Ali Abdi-KANU
266. When we were counting the counting, people in the window were shouting. The counting went on smoothly, the results were not challenged. I announced the results and took the results to the tallying centre.
267. PW4 Albashir Gunow Abdi testified that he was a registered voter in Dela Yarey and went to vote on 10.8.2022 at 6 a.m. He joined the voters and voting started. A commotion and chaos erupted at the polling station which lasted for about 40 minutes. At 2pm he saw military officers. He spoke to the presiding officer to vote but was not allowed. He stayed there for 24 hours but did not vote and left for Nairobi.
268. The evidence given by the Petitioner witnesses that there was no election at Dela Yarey has been rebutted by the Presiding Officer. He confirmed there were agents including one party agent for ODM who signed the Form 35A. None of their agents gave evidence that the results they signed were fictitious as the Petitioner alleged. I find this ground not proved.
269. Orote for Orote it is evident that although the IEBC deployed officers for the polling station, this single registered voter did not turn up. This most expensive voter in Kenya did not turn up and the Petitioner cannot blame IEBC. I am satisfied that the IEBC was not to blame.

D. Disenfranchisement of voters

270. The Petitioner complaint is that the 1st Respondent through the presiding officer denied registered voters their Constitutional right to vote by not opening polling station, delaying voting and preventing people in the queue from voting in several polling stations. In his evidence the Petitioner named the polling station as Masalale which closed at 7.30pm instead of 8.00pm and Orote polling which did not open at all.

The issue of Orote polling station has been dealt elsewhere in this Judgement. On the issue of Masalale Polling Station, starting late and closing early, RW11 Omar Noor Abdile the Presiding Officer testified that voting opened at 8.30am. He told those voters voting was to end at 7.30pm after 11 hours of voting.



This however was misunderstood and he explained that everybody on the queue will vote. Everybody on the queue by 7.30pm was allowed to vote. None of the witnesses testified that he was on the queue and was not given opportunity to vote. I find this allegation not proved.

E. Police Intimidation and Violence

271. The Petitioner testified that there was police intimidation at the behest of the 5th Respondent and the OCPD Wajir East Mr. Onsando who used violence and brutality to the voters in Eldas Constituency. He singled out police brutality at Eldas Constituency Tallying Centre, at Anole Primary School where police ordered voters to stop voting.
272. That there was an issue of insecurity in the constituency prior to and during election is not disputed. Indeed, the election was postponed from 9th to 10th by the chairman IEBC because of insecurity. Indeed, this incident occasioned the preparation of a report by DCI. Titled; Brief Report on Incidences which occurred at Eldas Sub-County During Campaign/Election Period dated 14.9.2022 by Thomas Simbiri the SCCIO Eldas. He gave evidence in court and produced the report.
273. From the evidence and report, it is clear there was violence which was politically motivated or agitated by politics and which the police with assistance of other units were able to control it and where perpetrators were identified, they were arrested and charged.
274. I note the Petitioner in his evidence stated that on 8.8.2022 there was chaotic scenes at the CDF Hall where he had gone to protest to the returning officer. The police intervened and he was rescued. On 11.8.2022 at the CDF Constituency Tallying Centre, he was present in the hall protesting what he termed as vote swapping by the Deputy Presiding Officer, when the hall was attacked and gunshots fired and Mr. Kanyari was shot. The Petitioner was rescued by the OCPD who made arrangements for him to be taken home.
275. The police presence in this incidents greatly assisted in managing the situation and cannot by any stretch of imagination be termed as intimidation.

Police were performing their constitutional duty and in this case without excessive force and managed the security situation adequately. I find allegation of police intimidation not proved.

F. Election Offences

276. The Petitioner in his Petition faults the 3rd Respondent for failing to perform her duties in accordance with Regulation 3 and 83 of the (Election) General Regulations 2012 and making false returns contrary to section 6(a) of the *Election Offences Act* 2016. He contends that the Presiding Officers at Masalale Stream 2 of 3 and Waradey polling station announced the votes garnered by him and that at the tallying centre the 3rd Respondent announced his results as those of the 5th Respondent and vice versa. He contends that was an election offence committed by the 3rd respondent.
277. RW14 Maryan Hassan Mohamed, the 3rd respondent and Deputy returning officer testified that the petitioner raised that issue with her at the tallying centre. She stated

“those 2 forms are different. The one at page 53 was the one presented. I did not swap the results. The Petitioner stated that I had swapped. I asked him for a carbon copy but he did not give any. I was not able to give the final declaration as it became violent and a person was shot. Petitioner was called by the agents. I was about to declare the winner when petitioner came. I told them I could not declare the winner and that I will make it at the County Tallying Centre”.



278. The contention by the Petitioner is that it is the 3rd respondent who committed an election offence. Section 6(a) of this Election Act 2016 provides;

A member of the Commission, staff or other person having any duty to perform pursuant to any written law relating to any election who—

- a. makes, in any record, return or other document which they are required to keep or make under such written law, an entry which they know or have reasonable cause to believe to be false, or do not believe to be true commits an offence and is liable on conviction, to a fine not exceeding two million shillings or to imprisonment for a term not exceeding five years or to both.

279. This court has made a finding elsewhere in the judgement that the issue of vote swapping has not been proved it therefore follows that this court does not make any adverse finding under section 87 of the Election Act to refer the matter the office of DPP for further action.

G. Security of Election Materials and application for scrutiny and recount

280. In Paragraph 86 of the Petition the Petitioner averred that on 11.8.2022 while at Eldas Tallying Centre lying on the floor, he saw the OCPD and individuals in plain clothes carrying boxes with election materials out of the hall. He therefore sought the court to make an order for protection of materials and scrutiny of the votes in event of a recount the election would be found to be free, fair, credible and verifiable.

281. Application by Counsel for the Petitioner was made and the court issued order of custody, preservation and security of the materials.

282. The materials were directed to be placed under the custody of the Senior Principal Magistrate Wajir. Hon. Aganyo the SPM visited the CDF Hall in company of representative of the parties.

283. In her report dated 17th November, 2022 he informed court that the CDF Hall had been set on fire on 24.8.2022 and all the election materials stored therein destroyed. During the hearing both the Petitioner and Respondents testified that it is true that the hall was set on fire on 24.8.2022 and the property inside destroyed. In fact, it became apparent that all parties knew that even when the application for preservation was being made. It is only the court that that did not know.

284. M/s Hashi submitted that this court should determine the verifiability of the elections for Member of National Assembly of Eldas constituency and whether security of the election materials was compromised. Counsel submitted that the Results of 3 polling stations was challenged in the Masalale Mobile 2 of 3, Waradey Primary Polling Station and Della Yarey Polling station. In the first 2 of the petitioner's alleged incidents of vote swamping and in Della Yarey he alleged there was no election.

285. Counsel submitted that the only way to resolve that dispute is by way of scrutiny and recount. Counsel relied on several authorities where courts have made decisions on recount and scrutiny and the purpose of the exercise. Counsel submitted that she is aware and the court received a report by Hon. Oganyo that there were no election materials at the CDF Hall as the same were burnt down on 24th August, 2022. Counsel further submitted that the burning would have been authored by the 5th Respondent who had influence over the CDF office and facilities and stood to benefit from the destruction or disappearance of the materials immediately after gazettelement. Counsel submitted that the 1st – 4th Respondents failed in their duty to safeguard materials. Finally, counsel submits that in the absence of the election materials, the elections falls short of being verifiable.



286. Mr. Issa for the 5th Respondent submitted that an order of scrutiny is not only granted as of right but it is a discretionally order granted by court once a party satisfied the court he had laid sufficient basis for the same. Counsel submitted that in the subject status of Masalale Mobile 2 of 3, Waradey Primary, the petitioner did not lay any ground for scrutiny as the documents relied on were not carbon copies of the Form 35A issued by the Presiding Officer. Counsel submits that the burning of the materials was aimed by petitioner to appeal to court that the elections were not verifiable.
287. This court made a ruling on scrutiny declining the same and indicted that the reason would be in this judgment. Scrutiny and recount is provide for in Rule 33 of the Elections (Parliamentary and County Election) Petition Rules, 2013 read as follows:-

“Scrutiny of votes.

1. The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.
2. Upon an application under sub-rule (1), the court may, if it is satisfied that there is sufficient reason, order for a scrutiny or recount of the votes.
3. The scrutiny or recount of ballots shall be carried out under the direct supervision of the Registrar and shall be subject to directions as the court may give.
4. Scrutiny shall be confined to the polling stations in which the results are disputed and shall be limited to the examination of
 - a. the written statements made by the presiding officers under the provisions of the Act;
 - b. the copy of the register used during the elections;
 - c. the copies of the results of each polling station in which the results of the election are in dispute;
 - d. the written complaints of the candidates and their representatives;
 - e. the packets of spoilt papers;
 - f. The marked copy register;
 - g. the packers of counterfoils of used ballot papers
 - h. the packers of counted ballot papers;
 - i. the packers of rejected baller papers; and
 - j. the statements showing the number of rejected ballot papers.”

288. The first pre-requisite before an order of scrutiny is made is that the materials stated in Rule 33(4) is available. In this case, for that report by Hon. Aganyo and an admission of both petitioner and respondent, the materials were burnt when the CDF Hall where they were stored was burnt down by an attacker using Rocket lugged grenade. This is the information both parties were aware of. The order of scrutiny and recount could not be made in the circumstances.



H. Illegal Declaration of Results

289. I have considered submissions under this head. It is clear from elsewhere in the judgment the events that occurred at the Eldas Tallying Centre on 11th August, 2022. The Petitioner in his evidence and all witnesses testified that there was chaos at the tallying Centre. The 3rd Respondent on the morning of 12th August, announced that declaration would be done at the county Tallying Centre in Wajir. M/s Hashi submitted that the County tallying Centre, Wajir was not the designated and gazetted for Eldas constituency and, therefore, the declaration of results made there was unlawful.
290. Mr. Mwititi for the 1st – 4th Respondents in his submissions alluded to the events of 11th August, 2022 at the CDF Hall and not that Deputy Returning Officer announced that due to the violence and insecurity, the declaration will be done at the County Tallying Centre. This was done on 13th August, 2022 and the petitioner had notice.
291. There is no doubt that the reason why declaration was not made in that night are known to the parties. There was need for change of venue due to insecurity which fact was communicated to the parties. The County Tallying Centre at Wajir was a gazetted Office for the county for all elections including Presidential, Senator, Governor and Women Representative. I find it was the most appropriate venue in the event as in this case the gazetted constituency Tallying Centre could not be used. In any event, that choice of venue did not have any effect on the results of the election.

Election Petitions are not ordinary suits. Though they are disputes in rem, fought between certain parties, elections petitions are nonetheless disputes of great importance - *Kibaki Vs Moi*, Civil Appeal No. 172 of 1999. This is because when elections are successfully challenged, by-elections ensue which not only cost the country colossal sums of money to stage but also disrupt the constituents' social and economic activities. It is for these reasons that I concur with the Elections Court's decision in *Wanguhu Nganga & Another Vs George Owiti & Another*, Election Petition No. 41 of 1993, that election petitions should not be taken lightly. Generalized allegations as the ones made in this petition are not the kind of evidence required to prove election petitions. As I said, they should be proved by cogent, credible and consistent evidence."

292. An election court can only disturb the outcome of an election where the petition has sufficiently proved that the election was conducted in a manner that violates *the constitution* and the law or that there were irregularities and allegations which affected the integrity of the electoral process. As was stated in *Gatirau Peter Munya Vs Dickson Mwenda & 2 Others*, Supreme Court Petition No. 2b of 2014; -

"(216) It is clear to us that an election should be conducted substantially in accordance with the principles of *the Constitution*, as set out in Article 81 (e). Voting is to be conducted in accordance with the principles set out in Article 86. The *Elections Act*, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.

(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. In this regard, we stand on the same plane as the learned Judges in Morgan, Opitz and Nana.

- (219) By way of example, if there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial Court would not be justified, merely on account of such shortfalls, to nullify such an election. However, a scrutiny and recount that reverses an election result against the candidate who had been declared a winner, would occasion the annulment of an election. Examples of irregularities of a magnitude such as to affect the result of an election, are not however, closed.
- (220) Where an election is conducted in such a manner as demonstrably violates the principles of *the Constitution* and the law, such an election stands to be invalidated.”

Final Disposition

293. The parties brought issues for determination by this court.

1. On the issue of Swamping of votes in Masalale Mobile 2 of 3 and Warade Polling Station, I find that the same has not been proved.
2. On the issue of variance between number of registered voters and votes cast where the votes cast were more than registered voters in 5 polling station. I find this is not true and any discrepancies have been adequately explained.
3. On the issue of no election were held in Orote and Dela Yarey polling stations. I find the allegations not proved. Even if I were to find that the IEBC results in Dela Yarey were not genuine (which I do not) and the 10 votes given to Petitioner and the 251 given to 5th Respondent removed from the final tally, the 5th Respondent would still be the one leading and winner.
4. On Violence, I find that there were incidences of violence which were adequately contained and did not affect the voting or the results of the election.
5. On the issue of disenfranchisement of votes, I find the same not proved.
6. On Election Offences committed by 3rd Respondent in swamping of votes, I find this not proved.
7. On the declaration of results at County Tallying Centre instead of Eldas CDF Hall. I find this was a practical and appropriate in view of events at the County Tallying Centre.
8. On the issue whether the election is verifiable in view of the destruction of the electoral materials, I find that the elections can and is verifiable from the documents produced by the parties and in possession of the IEBC.

294. After evaluating the petition, the response, the evidence and submissions. I am satisfied that the election for Member of National Assembly election held on 10th August, 2022 in Eldas Constituency was conducted substantially in accordance with the principles of *the Constitution* and the Electoral laws. Any irregularities noted did not affect the outcome of the elections and this petition is not allowed.



295. On the issue of costs, the same are at the discretion of this court but under Section 84 of the Act, the costs, incidental to a petition shall follow the event. In this case I order that the cost for 1st – 4th Respondent and 5th Respondent should be paid by the Petitioner.
296. Rule 30(1) (b) of the Petition rules empowers the court to set the maximum of costs payable. I, therefore, under Rule 30 (1) (b) I cap costs for 1st – 4th Respondents at Kshs. One Million (Ksh.1,000,000/-) and for 5th Respondent at Kshs. One million (Ksh.1,000,000/-).
297. The Deputy Registrar of this court shall tax the Bill of Costs under Rule 31. The money deposited in court by Petitioner can be utilized for the payment of costs to the Respondents.

The Certificate of determination of the petition be issued.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF MARCH, 2023.

.....

S N RIECHI

JUDGE

