



**Adam v Jiir & 3 others (Election Petition E008 of 2022)  
[2023] KEHC 1640 (KLR) (3 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1640 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
ELECTION PETITION E008 OF 2022**

**GMA DULU, J**

**MARCH 3, 2023**

**IN THE MATTER OF THE ELECTIONS ACT, NO. 24 OF 2011 LAWS OF  
KENYA AND THE ELECTIONS (GENERAL) REGULATIONS, 2012 AND  
ELECTION (PARLIAMENTARY AND COUNTY) PETITION RULES, 2017.**

**AND**

**IN THE MATTER OF THE ELECTIONS FOR GOVERNOR, WAJIR COUNTY,  
COUNTY NO. 8 HELD ON 9TH AUGUST 2022 AND 10TH AUGUST 2022.**

**BETWEEN**

**HASSAN MOHAMED ADAM ..... PETITIONER**

**AND**

**AHMED ABDULLAHI JIIR ..... 1<sup>ST</sup> RESPONDENT**

**AHMED MUHUMED ABDI ..... 2<sup>ND</sup> RESPONDENT**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 3<sup>RD</sup>  
RESPONDENT**

**COUNTY RETURNING OFFICER, WAJIR COUNTY MOHAMED ADAN  
ALI ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. This petition dated 8/9/2022, was filed on 9<sup>th</sup> September, 2022 by the Petitioner herein, a candidate in the Wajir County Gubernatorial Elections held on 9<sup>th</sup> (and in Eldas Constituency 10<sup>th</sup>) August 2022. Through the petition, the petitioner has contested the return by the 3<sup>rd</sup> respondent Independent Electoral and Boundaries Commission (IEBC) announced by the 4<sup>th</sup> respondent – County Returning



Officer of the 1<sup>st</sup> and 2<sup>nd</sup> respondents as having been elected as the Governor and Deputy Governor of Wajir County respectively.

### The Petition

2. In the petition, the petitioner sets out the election results announced by the 4<sup>th</sup> respondent, the Returning Officer, on behalf of the 3<sup>rd</sup> respondent, for each of the gubernatorial candidates to be as follows:-

No.	Name of Candidate	Votes
1	Siyad Abdile Abdullahi	2,864
2	Hassan Mohamed Adam	27, 224
3	Abdullahi Ibrahim Ali	15,486
4	Mohamed Ibrahim Elmi	21,047
5	Ahmed Abdullahi Jiir	35,533
6	Mohamed Abdi Mahamud	521
	Ugas Sheikh Mohamed	8,086
	Ahmed Ali Mukhtar	21, 859
	Sirad Osman Warfa	234
	TOTAL	132, 854

3. After alleging in the petition several illegalities and irregularities in the conduct of the elections, the petitioner asked this court to issue the following orders:-
- A declaration do issue that the failure by the 3<sup>rd</sup> respondent to comply with section 44(1) of the *Elections Act* and Regulations 69(1)(d) of the *Elections (General) Regulations 2012* violated Articles 81(e)(ii)(iv)(v) & 86 of the *Constitution*.
  - A declaration do issue that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were not validly elected as the County Governor and Deputy Governor and the result declared by the 4<sup>th</sup> respondent on 12/08/2022 is null and void.
  - An order be issued by this honourable Court setting aside the result declared by the 4<sup>th</sup> respondent on 12/08/2022 and fresh elections for Wajir County Governor to be conducted.
  - An order directing the 3<sup>rd</sup> respondent to deliver up to court for scrutiny and recount, all the written complaints of the candidates and their representatives, packets of the spoilt votes, marked copy register, packets of counterfoils of used ballot papers, packets of counted ballot papers, packets of rejected ballot papers, polling station diaries and the statement showing the number of rejected ballot papers in the following polling stations:



- i. Masala Primary
  - ii. Eldas Secondary
  - iii. Bulla Shair
  - iv. Banadir Primary School
  - v. Anole Dam
  - vi. Della Yarey
  - vii. Majabow Center
  - viii. Tito Centre
  - ix. Banane Primary
  - x. Basir Dispensary
  - xi. Griftu Secondary
  - xii. Tula Tula Primary
  - xiii. Abaq Mathobe
  - xiv. Tula Tula Dam
  - xv. Tula Tula Health Centre
  - xvi. Mirgo Harun Primary
  - xvii. Tula Tula Secondary
  - xviii. Towhid Primary
  - xix. Towfiq Primary
  - xx. Tula Tula Township Primary
- e. An order directing the 3<sup>rd</sup> respondent to deliver up to court for scrutiny, all the original copies of forms 32A used in the election to authorize manual identification of voters and copies of polling station diaries in the following polling stations:
- i. Masalale Primary
  - ii. Eldas Secondary
  - iii. Bulla Shair
  - iv. Banadir Primary School
  - v. Anole Dam
  - vi. Della Yarey
  - vii. Majabow Centre
  - viii. Tito Centre
  - ix. Banane Primary



- x. Basir Dispensary
  - xi. Griftu Secondary
  - xii. Tula Tula Primary
  - xiii. Abaq Mathobe
  - xiv. Tula Tula Dam
  - xv. Tula Tula Health Centre
  - xvi. Mirgo Harun Primary
  - xvii. Tula Tula Secondary
  - xviii. Towhid Primary
  - xix. Towfiq Primary
  - xx. Tula Tula Township Primary
- f. An order directing the 3<sup>rd</sup> respondent to deliver up to court, all ballot boxes and packets of counterfoils of used ballot papers for the gubernatorial election in the following polling stations for inspection, scrutiny and recount of all valid votes and on such terms as it deems fit:
- i. Dadantalai Primary
  - ii. Garsechukala Primary
  - iii. Towfiq Centre
  - iv. Junction
  - v. Anole Secondary School
  - vi. Aresa Wajiyao Primary School
  - vii. Masalale Mobile 1
  - viii. Biladul Amin Primary 1
  - ix. Lakole South Primary School
  - x. Baji Dam
  - xi. ICF Primary 1
  - xii. El-Nur Primary 1 of 2
  - xiii. Wajir Secondary School 1 of 2
  - xiv. Baraza Park 2 of 4
  - xv. Furaha Girls Secondary School
  - xvi. Township Primary School 1 Of 2
  - xvii. Ama Primary School 2 Of 2
  - xviii. Kachara North Center



- xix. Livestock Market 3 Of 3
  - xx. Boa Primary
  - xxi. County Council Market 1 Of 2
  - xxii. Hadado South Market 1
  - xxiii. Garsekhoftu Primary 1
  - xxiv. Wajir Girls Secondary 1 of 3
  - xxv. Lagbogol Primary 1
  - xxvi. Laghdima Primary 2
  - xxvii. Macaney Centre 1
- g. An order directing the 3<sup>rd</sup> respondent to deliver up to court for scrutiny all the KIEMS Kits and or SD cards used/deployed in the following polling stations indicating the total number of voters captured under the KIEMS Kits and the same be scrutinized by the court:
- i. Dadantalai Primary
  - ii. Junction
  - iii. Aresa Wajiyaqo Primary School
  - iv. Biladul Amin Primary 1
  - v. ICF Primary 1
  - vi. Wajir Secondary School
  - vii. Baraza Park
  - viii. Township Primary School
  - ix. Ama Primary School
  - x. County Council Market
  - xi. Wajir Girls Secondary 1
- h. An order be issued granting the petitioner 48 hours from date of supply to inspect, scrutinize and recount, as the case may be, for the foregoing information and to file such affidavits as may be necessary from the said exercise.
- i. The respondents be condemned to pay your petitioner's cost and incidentals to this petition in any event
- j. Such further, other and consequential orders as this Honourable Court may lawfully make.
4. The petitioner avers in the petition that the Wajir Gubernatorial election was not conducted and carried out in accordance with the provisions of the Constitution, the Elections Act, the Election (General) Regulations, and the principles laid down therein or any law relating to the conduct of elections. That the election was also not conducted in accordance with the decisions of the Superior Courts.



5. The broad grounds relied upon in the petition are; (1),intimidation and misinformation of voters, (2), gross discrepancies in the statutory forms, (3) Improper counting, tallying and tabulation of results (4)failure to deploy KIEMS Kits, and (5)inflation of vote numbers through the use of supervisor method of voter identification.
6. The petition was filed with a supporting affidavit sworn on 8/9/2023 by the petitioner Hassan Mohamed Adam, who deponed that he was one of the candidates for the seat of Governor Wajir County under Jubilee Party. The affidavit also contains a table of the election results for all candidates as announced by the 4<sup>th</sup> respondent the Returning Officer, Wajir County. The deponent also amplified in the affidavit the grounds of the petition above.

### **Responses to the Petition**

7. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a joint response dated 22/09/2022, and denied all the allegations made against them by the petitioner and in particular responded to the averments relating to the postponement of elections in Eldas Constituency, clan dynamics, intimidation, misinformation, undue influence of voters, voter turnout and failure to deploy KIEMS Kits. The response was accompanied by witness affidavits and annexures.
8. The 3<sup>rd</sup> and 4<sup>th</sup> respondents on their part also filed a joint response, dated 26/09/2022, and denied each and every allegation of fact set out in the petition. They averred that the Wajir Gubernatorial election process was backed by an elaborate electoral management system in compliance with various electoral laws, which system included several layers of safeguards to ensure an open, transparent, participatory and accountable system, to guarantee free and fair elections pursuant to Article 81 as read with Article 86 of the Constitution. The response was also accompanied by witness affidavits and annexures.

### **Directions**

9. The petition was first mentioned in court on 6/10/2022. During the second mention on 14/10/2022 for pre-trial directions, the court was informed that the petitioner had filed two applications both dated 11/10/2022, one for leave to file additional witness affidavits, and the other being an application for scrutiny. The court allowed the application for leave to file additional witness affidavits and directed that the application for scrutiny would be heard after the closure of witness evidence. The petitioner later, with leave of the court, amended the application for scrutiny.

### **The Trial**

10. The petition thereafter proceeded for hearing whereupon 16 witnesses testified orally for the petitioner, 6 witnesses for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, and 15 witnesses for the 3<sup>rd</sup> and 4<sup>th</sup> respondents respectively.
11. After the closure of the oral witness testimonies, the court considered the amended application for scrutiny dated 10/12/2022 and ordered that limited scrutiny be conducted in twelve (12) polling stations. The scrutiny was presided over by the Deputy Registrar of this court and subsequently, detailed reports were filed by the Deputy Registrar and supplied to the parties counsel. Counsel for the parties then filed written submissions to the petition which included submissions on the scrutiny reports.
12. It has to be recorded here that the ruling on the application for scrutiny above had the effect of determining prayers (d), (e), (f), (g) and (h) of the petition, which will thus not be the subject of determination in this judgment, as they have been spent.



### **Submissions of Counsel for the parties**

13. Parties' counsel filed their respective submissions, which they highlighted virtually on 15/02/2023. For the record, the petitioner was represented by Mr. M. Sallah, Hussein Kuso, Mary Munjogu, Mr. S. Mbatai and led by Mr. Issa Mansur. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were represented by Mr. Omwanza Ombati, Mr. M. Dayib, Mr. B. Onderi and Mr. Benjamin Kuso. The 3<sup>rd</sup> and 4<sup>th</sup> respondents were represented by Mr. Mahat Somane and Mr. A. Nura and Mr. J. Olaha.
14. I will not reproduce the evidence and submissions here, as I will deal with them together with pleadings while considering the issues.

### **Issues for Determination**

15. In my view, three (3) issues are for this court's determination:-
  - a. Whether illegalities and irregularities were committed in the Wajir Gubernatorial elections as alleged and if yes, what the effect is.
  - b. Whether the Wajir Gubernatorial elections were conducted substantially in accordance with the Constitution and election laws.
  - c. What orders should this court issue.

### **The legal Framework**

16. Before I go into considering and determining the issues, I find it prudent to set out the legal framework applicable in considering and determining electoral disputes.
17. The general principles applicable in election disputes resolution are captured in the Constitution, the written law and decided court cases.
18. Article 1(2) of the Constitution of Kenya, 2010 specifically provides that "The people may exercise their sovereign power either directly or through their democratically elected representatives." Consequently, the importance of the electoral process to the electorate cannot be overemphasized as it is an instance where the people of Kenya exercise their sovereign power directly. It is imperative to state that in the election cycle, such exercise of the people's sovereign power is done only once every five (5) years, and the representatives elected are to be in office until the next election cycle.
19. Article 38 of the Constitution codifies the following political rights that are available to all citizens;
  - "(38) Every citizen is free to make political choices which include the right-
    - (1)
      - (a) to form, or participate in forming, a political party;
      - (b) to participate in the activities of, or recruit members for a political party; or
      - (c) to campaign for a political party or cause.
    - (2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for-
      - (a) any elective public body or office established under this Constitution; or



- (b) any office of any political party of which the citizen is a member
- (3) Every adult citizen has the right, without unreasonable restrictions-
  - (a) to be registered as a voter
  - (b) to vote by secret ballot in any election or referendum ; or
  - (c) to be a candidate for public office or office within a political party of which the citizen is a member and, if elected, to hold office.

20. In order to realize the rights above, the *Constitution* has further provisions in Articles 81 and 86 as follows:-

81. The electoral system shall comply with the following principles:-

- (a) freedom of citizens to exercise their political rights under Article 38:
- (b) not more than two thirds of the members of elective public bodies shall be of the same gender;
- (c) fair representation of persons with disabilities
- (d) universal suffrage based on the aspiration for fair representation and equality of vote; and
- (e) free and fair elections which are:-
  - (i) by secret ballot
  - (ii) free from violence, intimidation, improper influence or corruption
  - (iii) conducted by an independent body;
  - (iv) transparent; and
  - (v) administered in an impartial, neutral, efficient, accurate and accountable manner.

86 Voting

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

- (a) whatever method is used the system is simple, accurate, verifiable, secure, accountable and transparent;
- (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station,
- (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
- (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials”.



21. Apart from the above constitutional provisions, there are other written laws and subsidiary legislations enacted by Parliament to provide a comprehensive framework for the conduct of elections. In that regard, the *Elections Act* (No. 12 of 2011) ranks high among the laws applicable in determining election petitions. Through the election disputes resolution (EDR) process therefore, Courts have an important mandate of determining the will of the people through the electoral process. In this regard, Section 83 of the *Elections Act* provides the yardstick upon which the Court balances the rights of the petitioner on the one hand, and the sovereign power of the electorate on the other. The section provides as follows:

“ 83. Non – compliance with the law

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

22. Thus even where illegalities or irregularities have been proved in an election petition, the court will still have to determine whether the said illegalities or irregularities affected the declared results of the election.

### **Burden of proof**

23. It is the petitioner who bears the burden of proving the grounds upon which the petition is anchored. The petitioner must show, through clear evidence, that there were breaches of the Constitution and other electoral laws. It is important to note that the burden of proof entails the legal burden of proof and the evidential burden of proof. In this regard, in *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 others* (2013) eKLR- Raila 1, the Supreme Court held *inter alia*:-

“...a Petitioner should be under obligation to discharge the initial burden of proof, before the Respondents are invited to bear the evidential burden.....

It is, thus, not in doubt that at the point where the Respondent would fail without further evidence, the Respondent should discharge the evidential burden through offering evidence in rebuttal. If the Respondent offers no evidence in rebuttal, judgment may be entered against him on the basis of the preponderant evidence adduced by the Petitioner. The Petitioner will not succeed because the Respondent has not offered evidence in rebuttal but because the Petitioner has proved his case to the required standard of proof, and the absence of evidence in rebuttal by the Respondent only sanctifies the confidence of the court to enter judgment in favour of the Petitioner. Of the essence is that the evidential burden is the obligation of the Respondent once it has been properly created by the evidence tendered, and failure to discharge the evidential burden disadvantages the Respondent with the result that he fails and the Petitioner succeeds.

### **Standard of proof**

24. In the same case of Raila 1, the Supreme Court aptly summarized the standard of proof as follows;

“(36) The standard of proof refers to the level or degree of proof demanded by law in a specific case in order for the party to succeed. It is now settled that in election petitions, the standard of proof in allegations other than those of



commission of electoral criminal offences is higher than that of balance of probabilities required in civil cases although it does not assume the standard of beyond-reasonable-doubt. However, where the Petitioner alleges commission of criminal offences, the standard of proof on the criminal charges is beyond-reasonable-doubt.”

## **Analysis and Determination**

### **a. Whether Illegality and irregularities were committed in the Wajir Gubernatorial Elections as alleged and if yes, what the effect is.**

25. The petitioner has listed a number of alleged illegalities and irregularities, and I will deal with each of them in turn.

#### **Supervisor mode of identification**

26. At paragraph 50 of the Petition, the petitioner complained that the 3<sup>rd</sup> respondent IEBC abused the supervisor mode of voter identification in the twenty four (24) polling stations listed therein. He pleaded that the IEBC, through its Presiding Officers, irregularly authorized and permitted a disproportionately high number of voters to vote without having been biometrically identified using the KIEMS Kit.
27. In this regard, the 3<sup>rd</sup> respondent (IEBC) responded that this allegation was untrue as supervised voting was done in accordance with the law and all corresponding form 32A's duly filled. It was also their response that respective party agents were present to ensure that every process was above board. The 1<sup>st</sup> and 2<sup>nd</sup> respondents did not make a formal response to the allegations.
28. The following witnesses testified on the issue:
29. On this complaint the petitioner relied on only one witness Pw16 the petitioner himself. He said that the polling stations where the 1<sup>st</sup> respondent got many votes are the ones where many voters were subjected to supervisor voting. He said that the supervised voting was the means through which vote padding was achieved. On being asked about his understanding of supervised voting he said that if one is not identified electronically then they use the alpha numerical method which requires some level of documentation.
30. RW 8, Maulid Mohamed Ibrahim, was the Presiding Officers (PO) at Bukuma polling station. He confirmed that he was trained on how to approve voters whose biometrics were not identified by the KIEMS Kit. That he was also trained on how to fill form 32A on the supervisor mode of voting. He said that he was supplied with only three (3) form 32A's by the IEBC but supervised 23 voters. He agreed that he did not fill any forms for 20 voters. He also agreed that from his training, it was mandatory for him to fill the form 32A before issuing any supervised voter with ballot papers.
31. Further, it was his evidence that he requested for additional forms from the Constituency Returning Officer (CRO) but he was advised to use plain papers and design the forms. He could not remember the exact number of the forms he designed, but added that he designed only one A4 paper form where he listed all the voters whom he supervised. On further cross examination, he said that using the form was a mere administrative act which was not compulsory.
32. RW 9, Zeinab Muhumed Ahmed, was the PO at Eldas Polytechnic polling station 1. She confirmed that she was trained on how to use the KIEMS Kit by the IEBC. She was given four forms for the supervisor mode of voting, but 10 voters used that mode. She testified that in their training, they were told that it was not a requirement to fill form 32A for all supervisor assisted voters. On being pressed



- about the person who gave them the training, she said that it was her personal decision not to fill the forms. Further, she explained that filling those forms was time consuming and it caused delays, so she thought that it was necessary to process the voters since the said voters had passed through the KIEMS Kit which had the record of the number of voters authorized by the P.O. She however agreed that from her training, form 32A was an accountability document. In re-examination, she clarified that the KIEMS Kit contained the accountability mechanism for voters authorized by the Presiding Officer (P.O).
33. RW 17, Salim Bilali, was the Returning Officer of Wajir East Constituency. He was also a lead trainer at the IEBC. At the time of testifying, he had been appointed as the lead trainer for Marakwet East Constituency where a by-election had been scheduled to take place in January 2023. Among the groups to be trained by him were; the Support Election Trainers (SETS), Presiding Officers, Voter Educators and clerks.
  34. He testified that, if a voter's biometrics could not identify him through the KIEMS Kit, the KIEMS Kits automatically takes the user to supervisor validation mode as the voter's name and ID number are in the KIEMS. At that point, he testified, the PO was required to fill a supervisor validation form confirming that the voter could not be identified by biometrics but was at the polling station and was authorized to vote.
  35. When he was referred to a document at page 177 of the IEBC response, he confirmed that it was the one which the POs were supposed to fill. He confirmed that the voter's details to be entered in the form were; surname, other names, gender, ID/passport number and voter's thumbprint. Further, he testified that the requirement of a thumbprint was to confirm that a particular voter was present at the polling station. Specifically, he testified that the form filling mechanism was meant to ensure that there were no ghost voters. He also confirmed that the filling of the form was required to be witnessed and that the agents or voters on the queue could act as such witness. He confirmed that before issuing the ballot papers to the voter's, name the form had to be filled. He said that in as much as the voter could be in the register, it was important to ensure that the person presenting the ID and the person voting was one and the same. He confirmed that what he told the Court was from the training which had been given to all the POs and clerks just before the election. On further cross examination, he said that the form was administrative and not mandatory.
  36. It was also his evidence that there were six spare KIEMS kits per ward and that in the event of failure by all; the Returning Officer (RO) would escalate it to the Commission which would then authorize the use of other mechanism apart from the KIEMS Kit. He testified that there were sufficient validation forms for each and every polling station in his constituency.
  37. RW 21, Martin Nyaga Wachira, was an ICT expert from IEBC as well as a trainer. He testified that in his understanding of complimentary system, it is the system used where electronic voter identification is not done. That 'alphanumeric' method is where the KIEMS Kit is not used. He said that a complimentary mechanism is where identification happens outside the KIEMS kit. He maintained that the alphanumeric search was the use of the printed register and that form 32A was to be filled only in instances where KIEMS Kit had completely failed. He testified that there was another form known as the 'supervisor validation form' which was meant to be filled where the biometrics failed. This form, he said, was administrative and its use optional. He explained that the validation form was a research and development tool to enable IEBC improve its systems.
  38. Further, he testified that while using the supervisor mode, the photograph of the person being cleared to vote is meant to authenticate that the person was actually at the polling station. According to him,



all that information is stored in the KIEMS Kit which takes the operator through the process and in the event that the voter's face is not captured, the kit cannot proceed further.

39. The submissions on this allegation are as follows;
40. The petitioner's counsel submits that if a KIEMS Kit fails to identify a voter biometrically, the procedure to be followed to identify and validate the voter was set out in a Memorandum, by the IEBC, dated 27<sup>th</sup> July 2017 which was incorporated in the case of *National Super Alliance (NASA) Kenya Independent Electoral and Boundaries Commission & 2 Others*(2017) eKLR and reiterated by the Court of Appeal in the *United Democratic Alliance Party v Kenya Human Rights Commission and 12 Others* (2022) eKLR. Paragraph 5 (b) of the memorandum states as follows:

Where a voter cannot be identified using biometrics, the Presiding Officer shall use a complimentary mechanism of alphanumeric search in the presence of agents and the voter shall fill form 32A before being issued with six ballot papers;

41. They submit that from the above Court of Appeal decision, it was mandatory for the IEBC to fill the Form 32A's where supervisor method of identification of voters was used before issuing the six (6) ballot papers. He contends that the IEBC was aware of the decision as its ICT expert (RW 21), made a deposition on it at paragraph 9 of his affidavit.
42. The petitioner submits also that the evidence in support of this allegation is credible and as such, the evidentiary burden had shifted to the IEBC to show that they had complied with the mandatory legal requirement.
43. He submits that the Presiding Officers, in the listed twenty-four (24) polling stations, irregularly validated voters through the supervisor mode of identification without filling the corresponding Form 32A's and / or the Supervisor Validation Forms as required by law and as a result, the number of people who voted in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent was inflated to the petitioner's detriment. He contends that the elections in all the polling stations identified are neither verifiable nor accountable. He submits that the very few forms tendered in evidence by the IEBC is an affirmation of his complaint that voting in the listed polling stations was irregular.
44. He cites the case of *Nixon Ngikor Nicholas Independent Electoral and Boundaries Commission & 2 Others* (2018) eKLR where the Court of Appeal opined as follows;

“It is clear that Regulation 69 would apply in the instance that a voter presents himself to the polling station and then not identified by the KIEMS kit. It is for that reason that the voter would require to first place their finger on the finger print scanner, and then, where the kit fails to identify them, then the Presiding Officer would “(ii) complete verification Form 32A in the presence of agents and candidates;” The election court did not err in finding that regulation 69 applies to instances where a voter is for whatever reason, not identified.”

45. The petitioner submits that the evidence tendered by the IEBC witnesses about the form being administrative and optional should be disregarded as it is a departure from their response to the petition. He relies on the decision of the Supreme Court of India in *Arikala Narasa Reddy Venkata Ram Reddy Reddygari and Another* where it was stated that:

‘In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely



to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party.’

46. It is also petitioner’s submission that from the scrutiny reports, it is apparent that the IEBC disregarded the mandatory procedure affirmed by the Court of Appeal. He submits that the 5,864 votes garnered by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the 24 polling stations should be disregarded and that will have a significant impact on the results returned. He cites the case of *Abdirahman Ibrabim Mobamud v Mohamed Ahmed Kolosh & 2 Others* (2019) eKLR where the election for the Member of National Assembly for Wajir West was nullified by the High Court, the decision was overturned by the Court of Appeal and then the High Court decision was subsequently upheld by the Supreme Court which stated as follows;

“(66) On the foregoing basis, is it the case that the appellant herein should have been declared to be the winner, on account of the election irregularities at Qara Polling Station” The 2<sup>nd</sup> and 3<sup>rd</sup> respondents, while acknowledging that the voting process at Qara entailed certain deficiencies, contested the appellant’s prayer that he be, on that account, declared to have been the winner. They called for fresh election in Wajir West — on the basis that the Court can only declare a winner after recount, where the winner became apparent. This is, to us, a standpoint of credibility, as it is clear that the process of scrutiny has not pointed to any contestant as the winner: the position is blurred and distinctly uncertain. Such doubt is based on certain specific indicators. The total number of votes registered at Qara was 628, out of which 458 turned out to vote. Yet the votes cast rose to 590. The votes cast, moreover, could not be attributed to the candidates individually. Now considering the margin of votes between the appellant and the 1st respondent in the remaining 74 Polling Stations, the Qara vote had the potential to shift victory to either side. The irregularities at the Qara Polling Station, therefore, had affected the entire election process.

(67) It is our finding, in the circumstances, that the election for the seat of Member of Parliament for Wajir West Constituency, was not conducted substantially in accordance with the terms of the Constitution, and more specifically, those of Articles 81, 82 and 86 of the Constitution, which had been transgressed. It is quite clear that the irregularities at Qara Polling Station did affect the outcome of the election.”

47. The petitioner submits that the KIEMS Kit dashboards relied upon by Pw16 are admissible as evidence because the source was stated and certificate of electronic evidence attached. He contends that the respondents did not raise any objection at the pre-trial stage and they cross-examined him extensively on the same. Further, he contends that the IEBC did not produce any dashboards in rebuttal. He relies on the High Court decision in *Mable Muruli Wycliffe Ambetsa Oparanya & 3 Others* (2013) eKLR where it was held thus;

“From the pleadings herein I do note that the applicant was aware of the production of the CDs. The 1<sup>st</sup> respondent did respond to those allegations extensively. His witness also attacked the authenticity of the CDs. During the pre-trial the 1<sup>st</sup> and 2<sup>nd</sup> respondents did not raise any issues relating to the CDs and by then they had already filed their responses and respective affidavits....



With regard to the request by the respondents to expunge the paragraphs relating to the production of the CDs, I do find that the reasoning is grounded on technicalities. Even if the CDs are produced and watched by the court that does not mean that the court will automatically be convinced with what it will see. Article 259 of the Constitution requires courts to dispense justice without undue regard to technicalities. Shutting out the CDs on the basis that they were not authentic or the gadgets used have not been described will be tantamount to obstructing substantive justice...

The essence of justice is that a party should be able to approach the court and present his or her case. Such presentation should be supported by his or her oral evidence, electronic and documentary evidence. On the other side the defendants or respondents should also be accorded an opportunity to produce their evidence. By the end of the day each party should be able to go back home satisfied that they have presented their case to the court and the court was able to take their evidence. This is in line with the provisions of Article 50 which gives the right to every person to have any dispute resolved by application of the law in a fair and public hearing before a court. Shutting out the electronic evidence will make the petitioner go back home while nursing the notion that the court did not take her evidence. In Presidential Election Petition No. 5 of 2013 Nairobi the court was able to view electronic evidence and such issues as the authenticity of the evidence did not arise.”

48. Further, he submits that the authenticity and veracity of the dashboards was justified and confirmed by scrutiny of the KIEMS Kit.
49. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents have relied on Regulation 69 (1)(e) of the *Elections (General) Regulations* for the submission that form 32A applied to instances where a voter couldn't be identified totally via the KIEMS Kit and the printed register had to be resorted to. They contend that the regulation doesn't apply to instances where a voter could not be identified via his/her biometrics, but could be identified by the alphanumeric search on the KIEMS Kit.
50. They submit that the regulations are not up to date with the developments made to the KIEMS Kit which incorporated fail-safes where the biometric search was unsuccessful-the supervisor validation mode. It is their submission that the institution to be blamed for this is Parliament.
51. They submit that it is a matter of public record that the National Assembly and Senate failed to pass National Assembly Bill No. 3 of 2022-The Elections (Amendment) Bill, 2022, in time for the elections conducted in 2022. The Bill sought to amend inter alia, section 44 of the Elections Act and it also provided that the complimentary mechanism would be set out in the regulations.
52. They submit that at around the same time, the IEBC tabled its proposed regulations with Parliament for approval as statutory instruments, which proposed amendments sought to make provision for the steps to be taken if the primary mode of electronic voter identification had failed (i.e biometrics), which was the alphanumeric search followed by Presiding Officer validation.
53. They submit that the regulations were however not passed within the period specified in section 109(3) of the *Elections Act* and as such, the amendments proposed on the identification of voters' process-through KIEMS Kit-could not be adopted for the 2022 elections. They contend that despite all that, an election still had to be conducted across the Republic lest a Constitutional crisis arises.
54. They submit that the Court granted scrutiny of the 12 out of 24 cited polling stations and from the reports, it is evident that there was a tally in the number of voters as per the KIEMS Kit, forms 37A, polling day diary and the recount.



55. They submit also that the petitioner's reliance on the KIEMS dashboard document was improper as he admitted that he did not take those photos. That the document is inadmissible hearsay and cannot be relied on as it offends section 106B of the *Evidence Act*.
56. Counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents submits that any purported non-compliance with the Court of Appeal decision in the UDA case (supra) cannot nullify the elections in Wajir County. They contend that the Court of Appeal incorrectly stipulated the filling of form 32A for electronic identification by the KIEMS Kit through the alphanumeric method of identification.
57. They submit that, apart from the fact that the Court of Appeal ruling was released merely hours before the election, the matter is still before the Court of Appeal pending judgment and is yet to be determined on its merits.
58. They submit that noncompliance with the above court decision had no bearing on the outcome of the elections herein, and it has to be weighed against the Constitutional right to vote. Further, they submit that the petitioner failed to understand the difference between form 32A and the supervisor validation form.
59. They submit that filling form 32A after identification of a voter through the alphanumeric system, amounts to incorrectly documenting that a voter identified by the KIEMS was identified through a manual register.
60. They submit that the Court of Appeal ruling was issued on the eve of the elections after all the PO's had been supplied with election materials and compliance with it was near impossible. In the circumstances, they contend that the IEBC conducted the elections as best as it could.
61. They submit further that this Court also has to be alive to the fact that there is existing legislation in the form of section 44 of the *Elections Act* (which describes the use of KIEMS Kit to include the Alphanumeric identification as part of electronic identification) and section 44A of the *Elections Act* which gives life to regulation 69 and which describes the manual register as the complimentary system of voter identification. That regulation 69 which is drawn from section 44A of the *Elections Act* places the requirement of filling form 32A squarely in the event the manual register is deployed.
62. It is their emphasis that IEBC did not fill form 32A's in all the six tier elections held in the whole country, and that there was no difference, malice or prejudice on the Wajir Governor seat. They insist that the supervisor validation forms were not mandatory and contend that as an independent body, they can make decisions on how to conduct elections with the resources they have as long as the same does not compromise the integrity of the elections.
63. They submit that according to the evidence of their ICT expert (RW 21), biometric identification can fail because of several factors including manual labour. They cite a paper on Fingerprint ErrorRate on Close Non-Matches<sup>1</sup>; Jonathan J. Koehler,<sup>2\*</sup> Ph.D; and Shiquan liu, 3 Ph. D. August 2020 which states that;

“The accuracy of fingerprint identifications is critically important to the administration of criminal justice. Accuracy is challenging when two prints from different sources have many common features and few dissimilar features. Such print pairs known as close non –matches (CNMs) are increasingly likely to arise as ever-growing databases are searched with greater frequency. In this study, 125 fingerprint agencies completed a mandatory proficiency test that included two pairs of CNMs. The false positive error rates on the two CNMs were 15.9% (17 out of 107, 95% C.I; 9.5%, 24.2%) and 28.1% (27 out of 96, 95% C.I; 19.4%, 38.2%), respectively. These CNM error rates are (a) inconsistent with the popular notion



that fingerprint evidence is nearly infallible and (b) larger than error rates reported in leading fingerprint studies. We conclude that when the risk of CNMs is high, the probative value of reported fingerprint identification may be severely diminished due to an elevated false positive error risk. We call for additional CNM research, including a replication and expansion of the preset study using a representative selection of CNMs from database searches.”

64. They submit that the error margin of up to 38.2% in the above study is significantly higher than the margin in the Wajir gubernatorial election.
65. I have perused and considered the pleadings, the evidence on record, the scrutiny report and the submissions of counsel for the parties and there is no doubt in my mind that the IEBC did not comply with requirement set out by the Court of Appeal ruling in the UDA case (*supra*). The same position has already been taken by this Court in the ruling on scrutiny. For clarity, the Court of Appeal ruling outlined the following steps with regard to identification of voters by IEBC:
  - a. Presiding Officers must ensure that voters are identified by Biometrics upon production of an identification document used during registration. Biometric verification is a primary mode of identifying voters.
  - b. Where a voter cannot be identified using Biometrics, then the Presiding Officer shall use a complementary mechanism of alphanumeric search in the presence of the agents and the voter shall fill form 32A before being issued with the six ballot papers.
  - c. The Presiding Officer will resort to the use of the printed register of voters after approval from the Commission upon confirmation that the KIEMS Kit has completely failed and that there is no possibility of repair or replacement.
  - d. The contents of the said Memo dated 27th July, 2017 shall be adhered to by all concerned persons in application of Regulations 69 and 83 of the [Elections \(General\) Regulations, 2012](#).
66. In making a determination on this issue, this Court has been urged to consider various things, including the omissions by Parliament and the difference between form 32A and the supervisor validation form. The glaring fact however, is that the evidence and submissions of IEBC are a total departure from their pleadings. Their response, as captured elsewhere above, was that the supervised voting method was done in accordance with the law and corresponding forms 32A's duly filled. Accordingly, their evidence should have been along those lines because they are bound by their pleadings.
67. The Court of Appeal ruling above was the guiding and binding law as at the time of conducting the 2022 General Elections and it has been demonstrated that the IEBC was aware of it. A lot of arguments have been made with regard to the phrases ‘complimentary mechanism’ and ‘alphanumeric search’ and it is apparent from the evidence that ‘alphanumeric search’ was also a form of identification by the KIEMS Kit. While presenting their witnesses during the trial, the IEBC attempted to demonstrate that the KIEMS Kit had an inbuilt accountability mechanism but their witness RW 17 was specific that the requirement to fill a form was meant to ensure that there were no ghost voters. I found the evidence of this particular witness to be important in light of his experience and role at IEBC.
68. According to their ICT expert (RW21), there was a further requirement to take the voter’s photo after the alphanumeric search in order to ensure that such voter was actually present at the polling station. I have looked at the document at page 177 of the IEBC response. It is titled ‘KIEMS SUPERVISOR



VALIDATION FORM'. The first part of it contains details of the County and polling station. The second part provides as follows:

“This is to confirm that the voter whose particulars are indicated below was identified alphanumerically by search in the electronic voter identification device and was validated using the supervisor mode in respect of the above polling stations.”

69. The third part is about particulars of the voter which include the voter's thumbprint and then there is a part for witnesses. This might be a form proposed for supervisor validation voting, but which was not approved by Parliament or adopted in law. Thus its use is not backed by law.

70. In my view, there was a clear mischief which was meant to be addressed by paragraph (b) of the Court of Appeal ruling. According to the IEBC, the requirement to fill form 32A after alphanumeric search was an incorrect stipulation by the Court. However, it is important to note that the Court of Appeal adopted a memo which had already been prepared by IEBC in 2017; hence the choice of words cannot be blamed on the Court. In my view therefore IEBC was bound to comply with the Court of Appeal ruling.

71. The KIEMS Kit dashboard images were hotly contested but I note that this Court took a position in the scrutiny ruling as follows;

“Having considered the evidence and submissions tendered, this Court cannot rely on the dashboard photos for the reason that they were taken by alleged agents who were never called as witnesses. Also, the fact that some ballot boxes were brought to the tallying centre on 10<sup>th</sup> August late in the night per se also does not establish a basis for scrutiny, knowing that there was evidence of insecurity in the area and that elections in parts of the County were held on 10/08/2022. I find that no basis for an order of scrutiny. I will disallow prayer (b)”

72. The scrutiny results for the 12 polling stations ordered by the court are as follows:



Polling Station	No. of Supervisor Authorised Voters (As per the PSD)	No. of Supervisor Authorised Voters (As per the KIEMS Kit)	No. of Supervisor Authorised Voters (physical Forms counted)	No. of Duly filled Form 32A (As per the PSD)
Arbajahan Pry Sch 1	40	40	31	0
Arbajahan Pry Sch 2	48	48	19	1
Arbajahan Pry Sch 3	33	38	38	0
Adan Awale	134	134	0	0
Elkali	48	48	0	0
Athibohol Primary	156	146	17 (2 of them not stamped)	0
Griftu	40	40	40	0
Jagahir Dam	368	38	0	0
Baji Mobile	Not Indicated	47	1	0
Bukuma	0	23	0	0
Kurman Centre	14	14	14	0
Hadado Wagberi 1	0	50	0	0

73. From the scrutiny report it is obvious that only 1 torn 32A was filled in , Arbajahan Primary Sch 2 for supervisor validated voters.
74. This court finds that IEBC failed to fill form 32A for supervisor validated voters. However, there is no evidence that there was vote inflation or padding as a result of the failure to fill form 32A, in the respective polling station.

#### **Failure to deploy KIEMS Kits**

75. The petitioner avers that KIEMS Kits were not deployed in all the 24 polling stations listed at paragraph 37 of the petition. In their response, the 1<sup>st</sup> and 2<sup>nd</sup> respondents stated that they were aware that KIEMS Kits were deployed countrywide and Wajir County was not an exception. On their part, the 3<sup>rd</sup> and 4<sup>th</sup> respondents averred that KIEMS Kits were used in all the listed polling stations save for Tito Centre where there was complete failure of the Kits and the Presiding Officer (PO) of the polling station obtained clearance to use the manual register from the Returning Officer (RO), Eldas.



76. The following witnesses testified with regard to this allegation;
77. Ahmed Bashir Abdi (PW2) was a candidate for the Member of National Assembly seat in Wajir East Constituency. He testified that he visited Sabuley 1 & 2, Jogbaru 1 & 2, Barwaqo Fresh Market, Barwaqo Livestock and Furaha Mixed polling stations where he was shocked to find Presiding Officers using the manual register instead of KIEMS Kits. He testified that he was aware of the legal obligation for the election officials to cross out the manual register even as they used the KIEMS Kit.
78. Muhammed Yakub Abdille (PW3) testified that at Wajir Girls Secondary School, a group of people had been gathered at a corner of the polling station and the Presiding Officer explained to them that their thumbprints could not be captured by the KIEMS Kit. He also testified that he voted at the same Wajir Girls Secondary School and that he was identified using the Electronic Voter Identification machine. Further, he initially testified that the people who had gathered at a corner were dismissed without voting, but upon further cross examination; he agreed that they were allowed to vote though they were not identified through the kits.
79. Farhan Abdi Bula (PW4) was the Chief Agent for Jubilee Party in Wajir West Constituency. With regard to Athibohole Market polling station, he testified that an agent called and informed him that he was fearing for his life after raising the issue of KIEMS Kit failure. He also testified that he visited the polling station but on being cross examined as to what happened during his visit, all he said was that an agent was fearing for his life. He did not say anything about KIEMS failure.
80. Adan Abdirahman Yusuf Gedi (PW5) was an MCA agent for UDA party at Qara polling station where he voted. In cross examination, he said that he used KIEMS Kit and had no problem with it. In re-examination, he said that the KIEMS Kit had a problem and there was a delay, because it was functioning on and off, but voting would continue even when it was off.
81. PW8, Abdurashid Adan Hassan was the petitioner's agent at Abaq Mathobe polling station where he also voted. He testified that he did not use KIEMS Kit to vote and was informed that it was not working. He used a manual register together with other voters. He confirmed that no one was turned away from voting in that polling station.
82. PW9 was Maash Abdi Muhumed. His evidence was that he voted at Eldas Primary polling station on 10/08/2022 and was not identified using KIEMS Kit. He was only asked for his ID and issued with ballot papers. He confirmed that the people on the queue voted.
83. PW10 was Guliye Khalif Abdi, a registered voter at Towfiq Primary polling station. His evidence was that during the voting, he did not put his finger anywhere. That he voted using his ID card and was not given any document to sign.
84. PW11 was Abdi Hakeem Ibrahim Muhammed, a registered voter at Majabow Centre. He testified that his thumbprints were not used to identify him. He said that the polling clerks took his ID Card and gave him six papers. He confirmed that he was not at the polling station throughout from the time it opened to the time it closed. However, he said that the voter before him and the one after him did not use KIEMS Kit. He said that the three people who did not use KIEMS Kit were the basis for his conclusion that KIEMS Kit was not deployed in that station.
85. PW12 was Abdi Omar Madi, a registered voter at Anole Dam polling station. His evidence was that he did not use KIEMS Kit to vote but nevertheless, he exercised his right to vote as a Kenyan. He said that there were many other voters behind him who were not identified by KIEMS Kit. He also heard the locals saying that they did not use KIEMS Kit.



86. The petitioner (PW 16) exhibited what he referred to as KIEMS Kit dashboard images as annexures HMA 9-14. The polling stations covered by those images are Biladul Amin Primary 1, Baji Dam, Lakole South Primary, Aresa Waji, Wajir Girls Secondary and Township Primary polling stations.
87. The submissions on this allegation are as follows;
88. Relying on section 44 of the *Elections Act* (the Act) and Regulation 69(1)(d)(e) of the *Election (General) Regulations* (the Regulations), the petitioner’s counsel submits that the use of technology in elections is mandatory.
89. The petitioner’s counsel submits that the respondents did not call witnesses to rebut the petitioner’s allegation despite having had an opportunity to do so. It is also their submission that from the dashboard images, it is clear that the KIEMS Kit, were used selectively and not used to identify all the voters. They rely on the case of *Edward Tale Nabangi v James Lusweti Mukwe & 2 Others* (2018) eKLR for the submission that disputed votes in polling stations where KIEMS Kits were not used should be disregarded completely. In that case, the Court of Appeal expressed itself as follows:
- (37) Persons who were not electronically identified were not eligible to vote. By allowing such people to vote and the subsequent tampering with the KIEMS kit was a serious breach of the constitutional principles of transparency, accuracy and accountability of the electoral system and of the Elections Act. That is sufficient ground for annulling the results of the six polling stations which were affected.
90. They submit that any issue pleaded and not controverted by the respondent is presumed to be admitted. They rely on the case of *Daniel Kibet Mutai & 9 Others Attorney General* (2019) eKLR where the Court of Appeal stated:-

“(34) The position before us is that the appellants averred to certain facts under oath in an affidavit.

These facts were not controverted by the respondents either through an affidavit in response or through cross examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted. Secondly, a question arises regarding the weight or probative value of the averred factual evidence. In other words, are the facts as averred in the affidavits sufficient to prove the appellants’ claims”

(39) In effect although the respondent disputed the appellants’ claim, the facts alleged in support of the claim were not disputed. In this regard the appellants’ case was distinguishable from the case of *Margaret Wanjiru Ndirangu and 4 others v Attorney-General Nairobi*, (supra) that was relied upon by the trial Judge, and in which a replying affidavit sworn by a deputy director in the Kenya Police Service was filed denying the allegations that were made in the affidavits sworn in support of the petitions. In the appeal before us not only was no replying affidavit sworn, but the respondent to some extent pleaded justification. This means that the respondent was asserting that assuming that the facts were as alleged they were justified in the actions taken. We come to the conclusion that the appellants’ affidavits not having been challenged by



the respondent, the facts averred were essentially admitted. The learned Judge erred in rejecting the affidavit evidence as they formed an appropriate basis for the claim.

91. The 1<sup>st</sup> and 2<sup>nd</sup> respondents' counsel submit that the proviso to section 44 of the Act allows the use of complimentary mechanisms hence their contention that Parliament's intention was that suffrage rights should be respected and not limited unjustifiably.
92. They submit that failure to use the KIEMS Kit would not per se be a violation of the law as complimentary mechanisms are firmly anchored in the statutory and regulatory framework. They rely on the Supreme Court decision in Raila 2 (Supra) to wit;

“It follows therefore that the complimentary mechanism in section 44A need not be similar, same, akin or parallel to the one set out in section 44 of the Act. All that is required for that mechanism is that it should add to or improve the electronic mechanism in section 44 of the Act. But at the same time, be simple, accurate, verifiable, secure, accountable and transparent. It should allow the citizens to fully exercise their political rights under Article 38 of the Constitution.”
93. The 3<sup>rd</sup> and 4<sup>th</sup> respondents submit that none of the witnesses testified to the use of the manual register and that in all the affidavits, the only evidence of use of the manual register was a blurry picture of a book placed on a desk.
94. I will start by dealing with the polling stations mentioned by PW2 as it is evident that none of them is listed in paragraph 37 of the petition. A cardinal rule in EDR is that parties are not allowed to travel outside their pleadings and as such, it doesn't matter that PW2 talked about them. As long as they were not pleaded, his evidence goes to no issue.
95. The other polling stations which were mentioned by various witnesses but are not in paragraph 37 are; Wajir Girls Secondary School, Qara, Eldas Primary, Baji Dam, Lakole South Primary, Aresa Waji and Township Primary. Similarly, any evidence regarding them goes to no issue.
96. According to the petitioner, the Court should disregard the results in all the 24 polling stations because the IEBC did not controvert the evidence. I have already demonstrated that most of those polling stations were not mentioned in the petition. It appears as if the petitioner was not very sure of his list at the time of drafting the petition. Be that as it may, my view is that only five (5) polling stations qualify for consideration by this Court. They are; Abaq Mathobe, Towfiq Centre, Majabow Centre, Anole Dam and Biladul Amin Primary 1.
97. As for Biladul Amin Primary 1, the IEBC disowned the KIEMS Kit dashboard image that was exhibited by the petitioner. I have already indicated the position taken by this Court with regard to the dashboard images.
98. However, the IEBC called the Deputy Returning Officer of Eldas Constituency, Mariam Hassan Mohammed (RW 19). She testified that in Biladul Amin Primary 1, two KIEMS Kits were used because at some point, the first one failed. That she had instructed the PO to halt the voting as they waited for replacement of the Kit but the PO requested to proceed because the voters were desperate. She sought clearance and temporarily allowed him to proceed but the Kit was replaced about 30 minutes later.
99. In my view, the totality of the evidence of the petitioner's witnesses was that some KIEMS Kits had experienced malfunctioning. There is however no evidence that IEBC failed to use KIEMS Kits in



any of the alleged polling stations. The law is also clear that where KIEMS Kits fail, alternative voting procedure can be used. The allegation is not proved.

### **Alterations in Form 37A's**

100. At paragraph 43 of the petition, the petitioner complained that in the listed 40 polling stations, alterations were made on form 37A's without corresponding countersigning.
101. The 1<sup>st</sup> and 2<sup>nd</sup> respondents denied the contents of paragraph 43 and put the petitioner to strict proof.
102. The response by the 3<sup>rd</sup> and 4<sup>th</sup> respondents was that the errors by POs can be explained on account of human error which is bound to happen due to the long working hours. Further, it was their response that the results recorded tally with the total valid votes and the valid votes for each candidate.
103. The submissions on this allegation are as follows'
104. The petitioner's counsel submits that the alterations in the impugned polling stations are irregular and they raise serious issues regarding the credibility and authenticity of the results. They cite the case of *Abdikhaim Osman Mohammed & Another v Independent Electoral and Boundaries Commission & 2 Others* (2014) eKLR wherein the Court of Appeal held as follows:

“In James Omingo Magara v. Manson Nyamweya & 2 Others, Civil Appeal No. 8 of 2010, this Court held that when a document is not signed by its author, it means that the author does not own it. It follows therefore that in this case the forms 35 with no presiding officer's signature were worthless and their results should have been excluded from the final tally. In the same vein, the absence of countersignatures against alterations, especially where such alterations related to votes garnered by the candidates, the result of the election on those forms were unverifiable.”
105. I did not see any submissions from the respondents on this allegation.
106. I have perused the forms exhibited in the petition as HMA-7 and indeed, the forms have alterations which have not been countersigned. The only two forms countersigned are for Lagbogol South Centre and Malka Gufu Primary School 2.
107. It is to be noted that most of the alterations are with regard to the votes garnered by the candidates and the section titled 'Polling Station Counts'. The section contains:-
  - a. Total Number of registered voters
  - b. Total Number of Rejected Ballot Papers
  - c. Total Number of Rejection Objected To Ballot Papers
  - d. Total Number of Disputed Votes
  - e. Total Number of Valid Votes Cast.
108. The PO for Badadi polling station, Mohamed Omar Keinan-RW 15, testified that from his training, any alteration in the result declaration form was to be done at the polling station and required to be countersigned. He agreed that there was an alteration in his form which he did not countersign and attributed it to human error.
109. The Returning Officer for Wajir North Constituency, Mathew Kamau Thiga-RW 20, affirmed that without countersigning, it would be impossible to tell the stage at which the alterations were made.



110. It is trite that the results recorded in form 37A are the basis of establishing the will of the people. I will thus rely on what the law says with regard to collation, tabulation and transmission of results. In this regard, Section 39 of the Act provides as follows:

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

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

- i. tallying, announcement and declaration, in the prescribed form, of the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the County Assembly;
- (ii) collating and announcing the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly and
- (iii) submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county returning officer.

(1B) The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.

(1C) For purposes of a presidential election the Commission shall —

- a. electronically transmit, in the prescribed form, the tabulated results of an election for the President from a polling station to the constituency tallying centre and to the national tallying centre;
- (b) tally and verify the results received at the national tallying centre; and
- (c) publish the polling result forms on an online public portal maintained by the Commission.

111. The import of the above statutory provisions is that, apart from the Presidential election, the counting, tallying and transmission of results for all the other elective posts is a manual exercise.

112. In Gubernatorial elections, the votes at the Polling Station are counted and recorded in Form 37A. Each Form 37A is forwarded to the Constituency Tallying Centre where the Constituency Returning Officer tallies all the results from all the polling stations and records them in Form 37B. Forms 37B from all the Constituency Tallying Centres are then forwarded to the County Tallying Centre where the County Returning Officer tallies all the results from the Forms 37B and announces the election results based on Form 37C.

113. Coming back to the petitioner's complaint it is true that alterations in that forms 37A were not countersigned, I note that in all the exhibited forms, the total votes from all the candidates are in agreement with the total number of valid votes cast. No witness said that the tabulation of form 37A's in a particular polling station was at variance with what was recorded in 37B. Assuming that some of the alterations happened before the form 37A's got to the Constituency Tallying centre, the effect would be to alter the candidates' results in the 37B. There is no indication that any candidate or his/



her agent complained about variance in the number of votes recorded. I believe that the candidates had agents and they were also doing their independent tallies, hence it would be easy to point out anomalies at the earliest opportunity.

114. Accordingly, I find that IEBC officials failed to countersign alterations in form 37A as alleged. I am convinced that the alterations were caused by human errors which are excusable because elections are not perfect, and the mere absence of countersigning of the alteration herein did not affect the election results.

### Rejected Ballots

115. At paragraphs 27 and 28 of the petition, the petitioner averred that the rejected ballots in Wajir West Constituency were not declared in form 37C despite the majority of voters being illiterate. He averred that historically, the Constituency had experienced a high number of spoiled and rejected ballots. He averred that the rejected ballots were irregularly factored in to favour the results of the 1<sup>st</sup> Respondent. He listed 10 polling stations in which he averred that the rejected ballot papers in form 37A were not recorded in form 37C. In total, he avers, that 45 rejected ballots were not reflected in form 37C.
116. The 1<sup>st</sup> and 2<sup>nd</sup> respondents denied the allegations and put the petitioner to strict proof.
117. The 3<sup>rd</sup> and 4<sup>th</sup> respondents responded as follows:
- a. The same is an error of data entry of the rejected ballots in form 37C.
  - b. The number of rejected ballots was captured in the form 37B of Wajir West Constituency as 76 ballots.
  - c. The number of rejected ballots in each polling station was captured in each of the forms 37A in Wajir West Constituency and collated into the form 37B at the Constituency Tallying Centre.
  - d. The rejected ballots have no bearing on the results of the election and the same does not affect the valid votes cast for each candidate and therefore have no effect on the overall results.
118. The petitioner did not submit on this allegation.
119. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submit that the petitioner did not claim that the rejected votes were his or the votes of another candidate.
120. They also submit that the petitioner did not call a single witness from the listed polling station to testify in support of the claim. They cite the Supreme Court decision in Raila 1 (*supra*) for the submission that data specific allegations must be proven beyond reasonable doubt. They contend that in the absence of any single piece of evidence to support the statistical claim, the petitioner cannot be said to have met the required standard proof for this complaint.
121. They submit further that rejected ballots do not count towards any candidates' tallies or affect the winning threshold in a gubernatorial election hence nothing turns on this allegation.
122. The 3<sup>rd</sup> and 4<sup>th</sup> respondents did not submit on this allegation.
123. I observe that the petitioner did not call any evidence to demonstrate how the rejected ballots were factored in to favour the 1<sup>st</sup> Respondent. Be that as it may, the manual process of transmitting results from 37A's to 37B and subsequently form 37C is in my view, not beyond human errors. Also, the



observation from the Supreme Court in *Raila 2 (supra)* is in agreement with the 1<sup>st</sup> and 2<sup>nd</sup> respondents' submissions that indeed, rejected ballots count for nothing in an election. The court stated -

“As we have stated, comparative jurisprudence from New Zealand; Canada; the United Kingdom; Ireland; the Netherlands; India and South Africa shows that rejected votes count for nothing. In the circumstances, we cannot see how a rejected vote, a vote which is void, a vote that accords no advantage to any candidate, can be used in the computation of determining the threshold of 50% + 1.”

124. I am thus of the view that this complaint of the petitioner is misplaced, and was not proved.

#### **Voter Intimidation and Mis-information**

125. This complaint is contained in paragraphs 19 to 26 of the petition and is specific to Eldas Constituency. The petitioner avers that the postponement of the Eldas election and clan dynamics played a role in abetting the intimidation and mis-information.

126. In response, the 1<sup>st</sup> and 2<sup>nd</sup> respondents averred that the postponement of the elections in Eldas Constituency affected all the candidates and it cannot be deemed to have prejudiced the petitioner alone or to have conferred advantage to any candidate.

127. They aver that every registered voter has the right to vote for the candidate of their choice irrespective of the clan dynamics.

128. The 1<sup>st</sup> respondent specifically denied ever intimidating or misinforming voters in person, through proxies, agents or supporters. He also denied ever convening or being a party to a meeting at Tula Tula Township in the company of Mohamed Elmi where he allegedly addressed the crowd and asked them to vote for him.

129. The 3<sup>rd</sup> and 4<sup>th</sup> respondent stated that the postponement of the elections in Eldas constituency was done in accordance with the law. That the violence alluded to occurred outside the Constituency Tallying Centre (CTC) and the IEBC officers and all election materials remained barricaded inside the CTC under the protection of armed security officers.

130. It was also their response that the said violence occasioned delay in dispatching electoral materials to the various polling stations hence the decision to postpone the elections to 10/08/2022.

131. The accounts by witnesses were as follows:

132. Bishar Billow Ahmed (PW 6) was the petitioner's agent at Tula Tula Township polling station and a registered voter at Tula Tula Secondary polling station. With regard to Tula Tula Township, he testified that at the beginning of voting, majority of the voters were voting for the petitioner and he knew that because they were being assisted and would shout their preference. There were no incidences until about 11.05 am.

133. He said that at around 11.05am, there was some commotion outside and upon checking, he was shocked to find Abdi Karim Ahmed standing next to a probox vehicle. Abdi Karim was well known to him and he told voters that he had just been dropped by Mohammed Elmi who sent him to tell them that he (Elmi) had conceded defeat. That Elmi also told the voters to vote for the 1<sup>st</sup> respondent in order to prevent the Ogaden candidate from winning. He confirmed that Karim was a prominent campaigner for Mohammed Elmi. The voters agreed to shift support from their preferred candidate to the 1<sup>st</sup> respondent. On further cross examination, he agreed that he was not an expert on Somali culture.



134. Further, he testified that he also saw a lady giving money to the voters but agreed that he had not indicated her name in his affidavit.
135. At mid-day, he went to Tula Tula Secondary polling station where he encountered a polling clerk by the name Abdullahi Abdirahman. The clerk informed him that he should vote for the 1<sup>st</sup> respondent.
136. He also testified that he saw the 1<sup>st</sup> respondent shouting and instructing voters to vote for him. On further cross examination, he said that it was not the 1<sup>st</sup> respondent but another person on the window who was telling the voters inside how to vote. He said that he met the 1<sup>st</sup> respondent near the gate of Tula Tula Secondary School.
137. It was also his evidence that on the Election Day, 10/08/2022, the 1<sup>st</sup> respondent and Mohammed Elmi addressed a crowd in Tula Tula Township and asked them to vote for the 1<sup>st</sup> respondent.
138. He testified that at the gate of Tula Tula health center, he met Abdulrahman Ali and Yakub Abdullahi Guno in a Suzuki Alto motor vehicle. They informed him and the voters that the Degodia had decided to support the 1<sup>st</sup> respondent. On further cross examination, he agreed that he was not at that polling station and was not aware as to whether the petitioner had called a witness to support the allegations.
139. Abdullahi Mohamed Abdullahi (PW7) was the petitioner's agent at Faryar Centre, Tula Tula ward in Eldas Constituency. His evidence was that there were about 10 Degodia clan elders who were moving from one polling station to another. He agreed that he had not named the polling stations and stated that he meant the three polling stations within Tula Tula Primary. Further, he testified that they approached voters on the queue and solicited them to vote for the 1<sup>st</sup> respondent in order to prevent the Ogaden Candidate, Ahmed Wera, from winning. That the elders misinformed the voters that the Ogaden community was leading. That they also asked him to vote for the 1<sup>st</sup> respondent. He agreed that he had not indicated that in his affidavit.
140. On further cross-examination, he agreed that he had not indicated the names and number of those elders in his affidavit. He said that he knew them physically but did not know other details like their names, ID numbers and so on.
141. It was also his evidence that as a result of the misinformation, the voters on the queue started to discuss the possibility of an Ogaden candidate becoming Governor. He said that he tried to take photos of the elders but they were very sensitive and prevented him from doing so.
142. Further, he testified that at the time of counting, Dr. Hassan got 9 and Sirad got 1 but at the time of writing, the PO wrote 1 for Dr. Hassan and 7 for Sirad. He protested but was not heard. He said that he did not sign the form 37A together with other agents. On being asked whether he had indicated that in his affidavit, he replied in the negative. He agreed that by the time the voters were being misinformed, IEBC had not made any official communication.
143. It was also his evidence that the 1<sup>st</sup> respondent visited a nearby polling station that was within the school on the voting day. That he was given such information by other agents after the exercise but personally, he never saw 1<sup>st</sup> respondent.
144. He testified that he reported the incident to the security man and PO.
145. Abdirashid Adan Hassan (PW 8) was a Jubilee Party agent at Abaq Mathobe polling station. He testified that on the voting day, he saw the 1<sup>st</sup> respondent at Tula Tula Primary school at around mid-day. He was referred to the evidence of PW6 who testified about seeing the 1<sup>st</sup> respondent at Tula Tula Secondary at the same mid-day. His response was that the two stations were very close and the 1<sup>st</sup>



- respondent had a car, so he could be in one station for five minutes and the other station for another five minutes. On being asked whether candidate Hassan Elmi was next to the 1<sup>st</sup> respondent, he said ‘no’.
146. Further, he testified that the polling clerks were asking voters to vote for the 1<sup>st</sup> respondent in order to stop the Degodia candidate from Wajir South from winning the seat. It was also his evidence that the PO prevented him from recording his complaint on form 37A.
147. Maash Abdi Muhumed (PW 9) was a registered voter at Eldas Primary polling station. His evidence was that while in the queue, he saw a group of men led by Mr. Mohammed Nur, who were known to him, and who were in the campaign team of Ugas Sheikh Mohamed influencing the voters to vote for Ahmed Abdullahi Jiir. On being asked to confirm that his affidavit talked about the election of 09/08/2022, he said that it was a mistake and that he was in Court to testify on what happened on 10/08/2022. Further, he said that it was well known that the Eldas election was done on 10/08/2022.
148. He confirmed that he did not see the 1<sup>st</sup> respondent on that day and that Mohammed Nur was not an agent of the 1<sup>st</sup> respondent. He also confirmed that Ugas Sheikh Mohamed and 1<sup>st</sup> respondent were competing against each other. He did not know who was leading by 9<sup>th</sup> or 10<sup>th</sup> August 2022. Form 37A for Eldas polling station was shown to him and he confirmed that the petitioner got 164 votes while the 1<sup>st</sup> respondent got 184. The total votes cast were 398. He also confirmed that two Jubilee agents had signed the form.
149. The submissions on this allegation are as follows:
150. The petitioner submits that an election becomes invalid where any candidate uses any intimidation or improper influence to affect or influence voters to vote for or not to vote for a particular candidate. That Article 81(1)(e) of the Constitution outlaws the use of improper influence to affect the outcome of an election.
151. He submits that in the Northern Eastern part of the Country where the Somali community is predominant, politics are clan based and clan dynamics have a significant role in the outcome of elections. That the Degodia clan are the majority in Wajir County followed by the Ogaden and Ajuran clans respectively. He cites the case of Mohamed Ali Mursal Saadia Mohamed & 2 Others (2013) eKLR and notes that the 1<sup>st</sup> Respondent in the present Petition was the 3<sup>rd</sup> Respondent in that case. The Court (Mutuku J) stated as follows;
- “One more thing before I stop on this issue. This court takes judicial notice of clan dynamics in this part of this Republic. Whether for Governor or any other elective position, the voting patterns are dictated by clan dynamics. It is almost certain that any candidate with the backing of the majority clan wins. One may say this is not good for democracy but then one should not lose sight of the fact that it may take this country quite some time before the monsters of tribalism and clanism are eliminated.”
152. He submits that just like the 1<sup>st</sup> respondent, he hails from the majority Degodia clan. That his evidence and that of the 1<sup>st</sup> respondent showed that clan and sub-clan interests have influence on politics and voting patterns in Wajir County. That the two of them also sought endorsement from Degodia clan elders and the endorsement had a major impact on the decision of the voters.
153. He submits that the adjournment of the elections in Eldas Constituency created an opportunity for the 1<sup>st</sup> respondent and his agents/supporters to disseminate misinformation and intimidate voters. That riding on clan dynamics, the voters were misled to believe that the UDA Candidate, Hon. Muktar Ahmed Ali, who hails from the Ogaden Clan was leading and the only Degodia candidate likely to



- win was the 1<sup>st</sup> Respondent. He contends that all the Jubilee candidates in the various elective posts in Eldas Constituency garnered the most votes except in the gubernatorial election.
154. He submits that the IEBC did not call the Presiding Officers in Tula Tula Secondary, Faryar Centre, Tula Tula Primary and Eldas Primary, to rebut the evidence of mis-information and voter intimidation in these polling stations.
155. He submits that he got 3260 votes while the two Ogaden candidates combined got 78. He contends that this is an illustration of misinformation and attributes his votes to early voters before the misinformation spread like bushfire.
156. He submits that the intimidation and misinformation were electoral malpractices which substantially and materially affected the outcome of the electoral process in the Wajir Gubernatorial Election.
157. The 1<sup>st</sup> and 2<sup>nd</sup> respondents submit that intimidation and misinformation are election offences and as such, the petitioner bears the burden of proving them beyond reasonable doubt. They rely on the Supreme Court decision in [Alfred Nganga Mutua & 2 Others v Wavinya Ndeti & Anor](#) (2018) eKLR where the Court held that:
- “It is now settled law in this country, (see Raila 2013 and many authorities following it as well as section 107(1) of the Evidence Act), that the burden of proof lies upon the party alleging a fact to prove it to the required standard. It is also settled law (see Raila 2017), that the standard of proof of any election offence or quasi criminal conduct is that of beyond reasonable doubt.”
158. They submit that the witness testimonies were wanting and not cogent hence the allegations of intimidation and misinformation remain unproved to the required standard.
159. The 3<sup>rd</sup> and 4<sup>th</sup> respondents submit that any election offence pleaded must be proved beyond reasonable doubt. They submit that to sustain a charge of bribery in an election petition, it is necessary that the bribery be directly linked to the candidate. They cite the case of [John Okello Nagafwa v IEBC & 2 Others](#) (2013) eKLR where the Court (Tuiyott J) stated that:
- “It bears repetition that for a charge of bribery to be sustained against a candidate, it needs to be proved to the required standard that he personally bribed or that a bribe was given with his knowledge and consent or approval by his agents.”
160. They submit that intimidation and coercion of voters are serious electoral offences yet no such incidences were reported to the IEBC or relevant authorities.
161. It is not in dispute that the complaint by the petitioner constitutes a criminal offence. Section 10 of the [Elections Act](#) provides as follows:
- “(1) (1) A person who, directly or indirectly in person or through another person on his behalf uses or threatens to use any force, violence including sexual violence, restraint or material, physical or spiritual injury, harmful cultural practices, damages or loss or any fraudulent device, trick or deception for the purpose of or on account of;
- a. inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election.”



162. Sub-section (3) provides that:

“A person who directly or indirectly by duress or intimidation

- a. Impedes, prevents or threatens to impede a voter from voting or;
- b. in any manner influences the result of an election, commits an offence.”

163. Accordingly and as correctly submitted by the respondents, the petitioner had the burden of establishing the allegation beyond any reasonable doubt.

164. I have considered the evidence by the witnesses, and my understanding of the complaint, is that voters in various polling stations in Eldas Constituency were misinformed that a candidate from the Ogaden clan was in the lead and as such, it was important for the Degodia to consolidate their support behind the 1<sup>st</sup> respondent. The Court was told that the Degodia clan is the majority in Eldas Constituency and since the politics and voting patterns in that area of the country are highly influenced by clan dynamics, the voters fell for the misinformation, and voted for the 1<sup>st</sup> respondent to the detriment of the petitioner. It is also part of the complaint that voters were bribed.

165. PW6 was the one who allegedly witnessed several relevant incidents. Starting with the gentleman known as Abdi Karim, PW6 confirmed that this gentleman was a chief campaigner for Mohamed Elmi (another gubernatorial Candidate). According to PW6, Elmi had conceded defeat and had embarked on solicitation of votes on behalf of the 1<sup>st</sup> respondent. I found his evidence hard to believe because, in cross examination, it was revealed that Mohamed Elmi was a strong contender and had a good chance of winning the election if voters in Eldas voted in his favour. It was demonstrated that he was the leading candidate in Wajir North, Tarbaj, and had substantial votes in Wajir East Constituency. It was therefore unlikely that he would abandon the contest on the Election Day and shift support to the 1<sup>st</sup> respondent.

166. It was also demonstrated that apart from PW6, there was another Jubilee party agent at Tula Tula Township polling station and he signed form 37A. The commotion caused by Abdi Karim would not have escaped his attention and at the very least, he should have been called as a witness to corroborate PW6’s testimony

167. As for the lady who was allegedly giving money to voters, I did not hear PW6 saying that she was an agent of the 1<sup>st</sup> respondent or that she was personally known to him. The evidence with regard to the lady was also not consistent. On one hand, PW6 said that she was known to him because she was a local but he refused to provide her name. He said that he was withholding the information for security reasons. On the other hand, he said that the lady was from Nairobi and he only got to know her after doing his research. It is noteworthy that PW6 was able to give clear details about other people that allegedly committed malpractices, but for some reason, he did not have any detail about the lady. In short, the allegation of bribery was not proved to the required standard.

168. As for the polling clerk who was allegedly soliciting votes on behalf of the 1<sup>st</sup> respondent, PW6 said that he recorded the incident as well as all the other incidents in the agents’ checklist. On being asked why he had not produced the checklist, he said that he had given it to his lawyers. Such an important piece of evidence should have been produced in court, unless of course it did not exist.

169. As to whether the 1<sup>st</sup> respondent shouted at voters and instructed them to vote for him, again, PW6 was not consistent. He changed his evidence midway and said that it was not the 1<sup>st</sup> respondent but a person who was at the window. No nexus was established between the person at the window and 1<sup>st</sup> respondent. Apart from that, I can’t help but wonder about the audacity of that person. These polling stations had security officers and I doubt they would have allowed such an incident to just



- occur. Arrests would have been made and it would have really helped the petitioner's cause to produce evidence of such arrest.
170. As to whether the 1<sup>st</sup> respondent solicited for votes in the company of Mohammed Elmi at Tula Tula Township, I have already stated that it was unlikely for Elmi to concede at the very last minute considering that his chances of winning the election were good.
171. As regards the incident at Tula Tula Health centre about the two men in a Suzuki Alto, PW6 agreed that he was not at that place hence his evidence was not helpful.
172. As for PW7, his evidence was not credible for his failure to indicate the names of the clan elders in his affidavit. The evidence was an afterthought.
173. As for PW8, his oral evidence was not specific as to what the 1<sup>st</sup> respondent was doing at Tula Tula Primary. In any event, there is nothing unlawful about a candidate's presence at any polling station on election day.
174. As for PW9, the people who were allegedly canvassing for the 1<sup>st</sup> respondent belonged to the campaign team of another gubernatorial candidate (Ugas Sheikh). This version was almost similar to the one of Mohammed Elmi and is simply incredible to me. Secondly, form 37A of Eldas primary polling station shows that the petitioner and 1<sup>st</sup> respondent got 164 and 184 votes respectively. In my view, such results are inconsistent with the existence of influence. Thirdly, the form was signed by two Jubilee Party agents hence indicating that the entries were acceptable.
175. From the totality of the forgoing, in my view, the allegation of misinformation and intimidation of voters was not proved beyond reasonable doubt.
176. With regard to the effect of the postponement of the election in Eldas, it is in the public domain that the Supreme Court pronounced itself on the issue during the 2022 presidential petition. The Court found that the IEBC had the Constitutional and legal authority to postpone that election. I will thus not delve into that here. I will only say that there is no tangible evidence that it favoured any particular candidate.

### **Violence in some parts of Wajir East Constituency.**

177. This complaint is contained in paragraph 19 of the petition. The petitioner avers that on 6<sup>th</sup> and 8<sup>th</sup> August 2022, there were a number of militia attacks in Khorof Harar Ward of Wajir East constituency. That despite a recommendation for postponement of the elections, the IEBC proceeded with the elections to his prejudice.
178. In response, the IEBC averred that the insecurity situation in Khorof Harar Ward is constant and not brought about by elections. That there was no immediate cause to justify postponement of elections in that area.
179. The witness accounts on this allegation were as follows:
180. PW 13 was Osman Khalif Habashow, a registered voter at Konton Primary School. He testified that at 5.00pm, KDF officers ejected voters from the polling stations and voting did not resume until 5.45pm. At 7.00pm, voting was once again interrupted and did not resume again.
181. PW 14 was Ahmed Mohamed Nur, a registered voter at El-Kusow Village in Wargadud Ward in Tarbaj Constituency. He testified that while on his way to El-Kusow on 8<sup>th</sup> August 2022, the lorry (KCP 307P) he was travelling in was attacked and burned down by militia on the road between Konton and Qarsa village. He testified that the gun men warned the passengers in the lorry against voting.



182. PW15, Maash Mohamud Muhumed, was the petitioner's agent at Konton Primary School. He testified that the polling station was opened at 9.30am and closed at 7.30pm. At the closing time, the Kenya Defence Forces officers started to beat the more than 150 voters who were still on the queue. The voters protested and demonstrated but they were forced out of the polling centre. While all that was happening, the voters and polling officials remained inside the polling stations. Further, he testified that all those voters who were removed had not voted. He said that those voters recorded their displeasure to him the following day and he recorded their details. He exhibited a list of (MM4) ninety-seven (97) voters who were disenfranchised and denied their right to vote. He also testified that he was denied the opportunity to record any comments on the form 37A by the Presiding Officer.
183. It was also his evidence that he reported the incident at Khorof Harar Police station and the OB number was at paragraph 12 of his affidavit
184. The petitioner, PW16, testified that about one week to the election, politically motivated attacks started to sprout in the ward. He testified that he was informed about the security incident in Khorof Harar ward. He reached out to the Returning officer of Wajir East who promised to consider the situation but no action was taken.
185. The 1<sup>st</sup> respondent, RW2, testified that he was aware of the security incident in Khorof Harar but also said that it happened on a road far away from polling stations. Further, he said that his agents used the same road afterwards because it had been secured.
186. Yahya Dahiye (RW6), the 1<sup>st</sup> respondent's chief agent at the Wajir East Constituency Tallying Centre, testified that the security incident happened on the road between Qarsa and Konton, about 20 or 30 kms away from the polling station. He said that the incident occurred a day and a half before the voting started. He said that such incidences are common since it is a border area and life doesn't stop. Further, he said that IEBC materials were airlifted to Konton from Wajir town due to the security incident.
187. It was also his evidence that Wajir County would never hold elections if the same were to be postponed because of insecurity.
188. Salim Bilal (RW17) was the Returning Officer of Wajir East Constituency. He conceded that he could not testify to the incidents at Konton polling station in Khorof Harar Ward. He confirmed the petitioner reached out to him with respect to the security situation in Khorof Harar Ward. He testified that in Khorof Harar Ward, election materials had to be air lifted to some polling stations. He also testified that the Presiding Officer Konton polling station was best placed to testify on the situation in the polling station. He however confirmed that the polling station was closed prematurely.
189. The submissions on this complaint are as follows:
190. The petitioner submits that despite the IEBC being aware of the insecurity situation in Wajir East Constituency, no measures were taken to ensure the security of voters in Khorof Harar Ward neither was voting adjourned to ensure normalcy had returned. They contend that the consequential effect was to deny voters the chance to vote. Further, they contend that the IEBC should have adjourned or postponed the elections in Wajir East Constituency until the insecurity situation was under control. It is also their contention that the insecurity in Wajir East Constituency was more significant than the violence that prompted the postponement of elections in Eldas Constituency.



191. They relied on the case of *John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 Others* (2017) eKLR where the Supreme Court held as follows with regard to the duty of the IEBC to ensure that voters are guaranteed the right to vote:

“[288] As to who should guarantee the right to vote, Article 21(1) of the *Constitution* requires the State and State Organs to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights. The Constitution and statute law charge the IEBC, a State Organ established under Article 88 of the *Constitution*, with the responsibility of safeguarding and guaranteeing the enjoyment of the political rights of the Kenyan people.

[289] This is the position in other jurisdictions as well. In the case of *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* (CCT 03/04) [2004] ZACC, the Constitutional Court of South Africa thus observed:

“The right to vote by its very nature imposes positive obligations upon the legislature and the executive... this right which is fundamental to democracy requires proper arrangements to be made for its effective exercise. This is the task of the legislature and the executive which have the responsibility of providing the legal framework, and the infrastructure and resources necessary for the holding of free and fair elections.”

192. From the totality of the evidence on record, what I can distill is that the security incident happened somewhere along the road. It happened about one day before the elections, it was a substantial distance from the polling stations and it did not interfere with distribution of election materials because the same were airlifted. I am not convinced that the incident would have justified the postponement of the election in the whole constituency. It is a contrast to the situation in Eldas constituency where the election officials and materials could not leave the Constituency Tallying centre due to the violence around the said tallying centre where election materials were stored.
193. As for the list produced by PW15, the same was not convincing as only one voter listed therein was called as a witness. At the very least, it should have contained the signatures of the alleged voters. The allegation of more than 100 voters being turned away would surely have been known by agents of other candidates as well as those other candidates. The upshot is that this allegation was not proved to the required standard.

### **Disproportionately High Turnout in Wajir West Constituency.**

194. This complaint is contained in paragraphs 29 and 30 of the petition. The petitioner avers that there was a disproportionately higher turnout in Wajir West Constituency of 68.6% compared to the national average of 64.5% and the average for the rest of Wajir County including the Wajir urban electoral units. He avers that it was a glaring anomaly for the 1<sup>st</sup> respondent to garner almost 90% of the votes cast in most of the polling stations in Wajir West and attributes that to electoral malpractice and stuffing of ballot paper by IEBC officials.
195. In response, the 1<sup>st</sup> and 2<sup>nd</sup> respondents averred that the petitioner is not a demographic expert and as such, the allegation remains his own opinion. They aver that it was absurd for the petitioner to omit his presumptive strongholds liked Tarbaj and rural areas of Wajir East Constituency where he garnered more votes than the 1<sup>st</sup> respondent.



196. They averred that garnering 90% of the votes cast is not an indicator of electoral malpractice but a pointer of a candidate's acclaim and voter satisfaction/approval.
197. The 3<sup>rd</sup> and 4<sup>th</sup> respondents averred that the turnout in Wajir West Constituency was well within the National average and there was nothing abnormal about it. They denied that the 1<sup>st</sup> respondent garnered almost 90% in most of the polling stations and averred that the same does not reflect in his vote's percentage which is 56.8%.
198. The witness accounts on this complaint are as follows;
199. RW1 was Ahmed Hussein Mohammed, the Chief Agent for the 1<sup>st</sup> respondent in Wajir West Constituency. He agreed that the figures given by the petitioner at page 13 of the petition are statistically correct but also said that there was nothing untoward or misleading about the voter turnout in Wajir West. He testified that all the candidates got high percentages from their home constituencies hence comparable to what the 1<sup>st</sup> respondent got in Wajir West.
200. Further, he testified that the 1<sup>st</sup> respondent's support was concentrated in the wards which the petitioner is challenging. He said that Wajir West has 31, 234 registered voters and the valid votes cast were 21, 519 which translates to 68%. The 1<sup>st</sup> respondent got 12, 258 votes which translates to 56%. He testified that if indeed the 1<sup>st</sup> respondent got 90% in most polling stations in Wajir West, the same would not reflect 57% overall.
201. RW2 was Ahmed Abdullahi Jiir, the 1<sup>st</sup> respondent. He testified that Wajir West is his home constituency and it is predominantly Degodia but there is significant Ajuran minority. That his sub-clan Mattan is also pre-dominant and he also had the backing of the entire Degodia group in Wajir West. Further, he said that the other significant non Mattan group is the Gabres who are his maternal uncles and they were backing him to the tilt. Further, he said that his votes were statistically comparable to what he got in 2017 and 2013.
202. He wondered how his average turned out to be 57% in Wajir West if the petitioner's allegation was anything to go by.
203. RW6 was Yahya Mohammed Dahiye, the Chief Agent of the 1<sup>st</sup> respondent in Wajir East Constituency. He testified that he had interacted with form 37B of the Wajir West Constituency and it had no indication that the 1<sup>st</sup> respondent got 90% in most polling stations in Wajir West. He said that all the information with regard to voter turnout was in the forms and the forms were available to the Court. Further, he said that any sound and competent person would have access to the same information.
204. Basically, this issue turns on vote numbers. I have perused the annexure marked AH-5 at page 168 of the 1<sup>st</sup> and 2<sup>nd</sup> respondents' response, which has not been contested. It is a form 37C which obviously contains the tabulation from all the six constituencies. From the totality of the evidence on this issue, the following figures can be distilled:



Constituency	Registered voters	Valid Votes Cast	% Voter turnout	Votes for the 1 <sup>st</sup> respondent	% Vote Turnout for the 1 <sup>st</sup> respondent
Wajir West	31,234	21,519	68.89	12,238	56.87
Wajir South	58,077	35,011	60.28	4,513	12.89
Wajir North	33,927	21,321	62.84	1,888	5.56
Wajir East	35,794	22,127	61.82	6,816	30.80
Tarbaj	25,267	18,821	74.49	1,371	7.28
Eldas	23,359	14,005	59.96	8,707	62.17

205. From the figures which have not been disputed, it can't be said that the 1<sup>st</sup> respondent got 90% in most polling stations in Wajir West Constituency; otherwise, his overall percentage would not have been 57%. With that, the allegation of ballot stuffing or padding falls by the wayside, notwithstanding the fact that it was not proved and was not specific to any polling station.

**b. Whether the Wajir Gubernatorial elections were conducted substantially in accordance with the Constitution and election laws.**

206. In determining this issue the court is duty bound to rely on the considerations and determinations made on illegalities and irregularities in the elections in question.

207. This court has listed all the complaints or allegations of the petitioner, and made determinations on each of them.

208. This court has found that two of the petitioner's complaints were proved. The first is that the 3<sup>rd</sup> respondent did not comply with the legal requirement of filling form 32A with regard to voters who voted through the supervisor validation method. The second is that the 3<sup>rd</sup> respondent did not comply with the requirement to counter signing alterations made in form 37A.

209. I have to be guided by the provisions of section 83 of the Elections Act which states as follows –

83. No election shall be declared to be void by reasons of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election. On this same statutory legal principle.

I also rely on the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji* (2014) eKLR.

210. I find no non-compliance with the constitution. But there was certainly non-compliance with legal provisions as I have already stated above.

211. I note that other than the two proved illegalities and irregularities above, there is no evidence on record to show or even suggest that any particular voter who was not registered voted in the election. No evidence that the people who voted at any polling station were more than the recorded voter turnout.



No evidence also that voters in any polling station exceeded the number of registered voters. There is also no evidence that any of the two illegalities and irregularities committed by the 3<sup>rd</sup> respondent as established by evidence, conferred an advantage or a disadvantage on any of the candidates.

212. In those circumstances, I thus find that the elections herein were conducted substantially in accordance with the Constitution and election laws, the above two illegalities and irregularities notwithstanding.

**c. What orders should this court issue?**

213. Having found as above that the herein election was held substantially in compliance with the Constitution and the law, I hold that the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent were validly elected as the Governor and Deputy Governor of Wajir County.

214. It follows that the only issue that remains, is to do with costs. Courts have held that costs follow the event. I will thus award the costs to the respondents to be paid by the petitioner, but will cap the costs to four million shillings of which, two million will be to 1<sup>st</sup> and 2<sup>nd</sup> respondents and two million to the 3<sup>rd</sup> and 4<sup>th</sup> respondents.

215. Before I conclude, I wish to express my appreciation to the parties who conducted themselves with sobriety throughout the proceedings. I also thank all counsel for the high degree of professionalism displayed and respect both to the court and among themselves. I will further thank all judiciary staff who were deployed to assist this court in this case, for their commitment and dedication.

216. The final orders of this court are thus as follows:-

- a. The petition herein is hereby dismissed.
- b. The gubernatorial elections held on 9<sup>th</sup> and 10<sup>th</sup> August 2022, in Wajir County were constitutionally and legally conducted.
- c. The 1<sup>st</sup> and 2<sup>nd</sup> respondents herein were validly elected as Governor and Deputy Governor of Wajir County.
- d. The petitioner shall bear the costs of the petition assessed at shillings Four Million, with shillings Two Million payable to the 1<sup>st</sup> and 2<sup>nd</sup> respondents jointly, and shillings Two Million payable to the 3<sup>rd</sup> and 4<sup>th</sup> respondents jointly.
- e. A certificate of determination in accordance with section 86(1) of the Elections Act will issue to the Independent Electoral and Boundaries Commission and the Speaker of the Senate.

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 3<sup>RD</sup> DAY OF MARCH 2023  
MILIMANI NAIROBI.**

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**GEORGE DULU  
JUDGE**

