



**Kidero & another v Independent Electoral and Boundaries Commission & 4 others
(Election Petition E001 of 2022) [2023] KEHC 1570 (KLR) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1570 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
ELECTION PETITION E001 OF 2022
RE ABURILI, J
MARCH 7, 2023**

BETWEEN

DR. EVANS ODHIAMBO KIDERO 1ST PETITIONER

DR. ELIJAH ODONDI KODOH 2ND PETITIONER

AND

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

**COUNTY RETURNING OFFICER, HOMABAY COUNTY FREDRICK
APOPA 2ND RESPONDENT**

GLADYS ATIENO NYASUNA WANGA 3RD RESPONDENT

JOSEPH OYUGI MAGWANGA 4TH RESPONDENT

ORANGE DEMOCRATIC MOVEMENT PARTY 5TH RESPONDENT

JUDGMENT

Introduction

1. An election is like a coin with two sides. There is always a winner and the other. An election is also a process. It is not just a one-day event. It is for that reason that the *Constitution* and the law have set parameters or thresholds that an election must meet in order for it to be considered to be a valid election. There are many players in an election which is managed and supervised by an election management body. In the Kenyan context, the electoral management body (EMB) is the Independent, Electoral and Boundaries Commission-IEBC which is constitutionally mandated to ensure that elections are conducted in accordance with the *Constitution* and the law. There is also the National government machinery that is supposed to provide security and other logistical resources. In addition, and more importantly, are the candidates that vie in elections and significantly, the voters



as well as independent observers and the respective candidates' or political parties' agents. All these players are critical in an election and contribute immensely in ensuring an independent, accountable, free, fair, credible and verifiable election.

2. On the 9th day of August 2022, the people of Homabay County, just like all other Kenyans within its boundaries and in the diaspora constituency, went to the ballot to exercise their constitutionally guaranteed democratic right of electing their leaders who are to serve them in the various six political positions and in the governance of their county and country at large for the next five years.
3. In the case of Homabay County, the election that is under challenge vide this petition is that of Hon. Gladys Atieno Nyasuna Wanga and Hon. Joseph Oyugi Magwanga, the 3rd and 4th respondent as governor and deputy governor for Homabay County respectively, as declared on the 12th August 2022 by the 1st and 2nd Respondents IEBC and its official, the County's Returning Officer, Mr. Fredrick Apopa, following the general elections that were held on 9th August 2022.
4. The Homabay County Governor's seat attracted three candidates and at the conclusion of voting, counting and tallying, the respective candidates garnered votes which were declared as follows:

Candidate Votes Garnered

Gladys Atieno Nyasuna Wanga 244,559

Evans Odhiambo Kidero 154,182

Mark Charles Rabudi 1,244

5. The 3rd respondent Hon. Gladys Atieno Nyasuna Wanga was therefore declared the winner by virtue of the total number of votes that she garnered. being the highest. This declaration was made by the 2nd respondent who was a duly appointed agent of the 1st respondent and Returning Officer for Homabay County. The 3rd respondent Gladys Atieno Nyasuna Wanga was subsequently gazetted as a duly elected governor for Homabay County.
6. Aggrieved by the results of the said gubernatorial elections, the Petitioners herein Dr. Evans Odhiambo Kidero who ran as Governor and his running mate Dr. Elijah Odondi Kodoh, on an Independent ticket, and who came second in line, filed this Election Petition on 9th September 2022, challenging the declaration of the 3rd & 4th Respondents by the 1st and 2nd respondents as the validly elected Governor and Deputy Governor respectively, for Homabay County.

The Petitioners' Case

7. The two petitioners Dr. Evans Odhiambo Kidero and his running mate Dr. Elijah Odondi Kodoh vide their Petition dated 9/9/2022 and filed on the even date, level several allegations against all the Respondents. They alleged that had there been a free and fair nomination process conducted by the Orange Democratic Party-ODM, the fifth respondent herein, then they would have trounced their opponents and clinched the 5th Respondent's ODM party ticket but that unfortunately, the 5th Respondent decided to unilaterally and conspiratorially issue a direct ticket to the 3rd Respondent Hon. Gladys Atieno Nyasuna Wanga, much to the disappointment and frustration of the Petitioner's supporters, who would have loved the opportunity to show their support for the 1st petitioner in a competitive voting exercise.
8. The petitioners in their joint petition alleged that the 1st petitioner subsequently opted to run for the seat of governor as an independent candidate. The 1st petitioner who also swore the affidavit in support of the joint petition deposed that Hon. Gladys Atieno Nyasuna Wanga, the 3rd Respondent and the



leadership of the 5th Respondent ODM party, knowing how popular the 1st Petitioner had become amongst the people of Homabay, were not happy with his decision to run as an Independent Candidate and swore to, by any means necessary, ensure that the ODM Party candidate, the 3rd Respondent herein, won the election through legal and extra-legal means.

9. The petitioners alleged that the 3rd Respondent's ratings plummeted exponentially due to the act of by-passing universal suffrage and obtaining a direct nomination from the 5th Respondent and thus the 3rd respondent resorted to campaigns characterized by premeditated, widespread violence against the petitioner and his supporters in contravention of Section 11 (a) & (c) of the [Elections Offences Act](#), 2016.
10. It was further alleged by the petitioners that after realizing that the campaigns of intimidation were not bearing fruit, the 3rd respondent enlisted the support and influence of the leader of the 5th Respondent, former Prime Minister, Rt. Hon. Raila Amolo Odinga, who went on a campaign trail for her in the county and made a rallying call that the voters should elect only the 5th Respondent's candidates within Homabay County and further made intemperate, vituperative and potentially inciteful remarks against anyone opposing the candidacy of the 3rd Respondent, which remarks were made on the 18th of April 2022 at Nyasore Primary School in Kabondo-Kasipul Constituency, Kabondo-West Ward during the funeral service of the late Paddy Ahenda.
11. The 1st petitioner further alleged that the said remarks by the ODM party leader specifically targeted his candidacy and amounted to intimidation and improper and/or undue influence on the electorate contrary to the basic principle of the electoral system under Article 81(e)(ii) of the [Constitution](#) and further that the remarks also amounted to discrimination against the Petitioner's candidature based on ethnic origin and political affiliation contrary to Article 27(4) and (5) of the [Constitution](#) of Kenya, 2010 as well as a violation of the petitioner's right under Article 38(1)(c).
12. The petitioners further claimed that the election for governor of Homabay County was marred with violence and did not meet the basic threshold under Article 81 (e)(ii) of the [Constitution](#) of Kenya 2010 thus, it could not be termed to have been a free and fair election. It was their case that the violence alluded to not only led to serious voter suppression, but allowed time for the goons to blatantly conduct a coup on certain polling stations, meting out violence on certain officials of the 1st Respondent, holding others at gun-point as they entered results, flagrantly hijacking and commandeering vehicles of the 1st Respondent to unknown destinations while transporting election materials from the polling stations to the tallying centers and intimidating and/or working in collusion with certain officials of the 1st Respondent to either deny access to the petitioner's agents at the polling stations or ejecting them in other instances.
13. The petitioners attributed the violence to the 3rd respondent on the grounds that firstly, that she stood to benefit most from the systematic plan; secondly, that in concert with the 5th Respondent, the 1st Respondent and various of its officials, the 3rd Respondent filled polling stations across the county with agents, amounting to more than 6 in a polling station in certain instances, that purported to be her agents, yet the law only allows her one agent, and that the agents indicated that they were agents of the 5th Respondent ODM, yet the party had expressly written to the 1st Respondent stating that they would not be sending agents to polling stations this election cycle and that each candidate was to get their own agents and thirdly, that the 3rd respondent's husband was witnessed moving around the county with a pack of goons meting out violence and terror in several polling stations.
14. Further in regard to the issue of multiple agents, the petitioners averred that these "strangers" coordinated with the "Men-In-Black" to have the Petitioners' agents violently ejected from several polling stations.



15. It was the petitioners' case that the Respondents jointly and severally violated the Electoral Code of Conduct, violated several provisions of the *Elections Act* and that they may have committed electoral offences under sections 10 and 11 of the *Election Offences Act*, 2016 that warrant further investigations and eventual prosecution.
16. The petitioners asserted that the gubernatorial election process of 9th August 2022 in Homa-Bay County particularly in polling stations such as Oyombe Primary School, Akala Primary School, Ligisa Primary School, Sindo Youth Polytechnic, Alara Kokayo Primary School , Ongeti Primary School, Ringa Primary School and Kanyamwa Kologi Ward, Kanyaluo Ward were marred with massive electoral malpractices, irregularities and fraud in violation of the constitutional requirement of a free, fair, transparent, verifiable and credible elections.
17. It was the petitioners' further case that the 1st Respondent had, through its County Returning Officer, who is the second respondent herein, failed to ensure that the announcement and declaration of the results of the Homa-Bay County Governor elections of 9th August 2022 were declared within the scope of the Law and that the purported declaration in Forms 37A's, 37B and 37C were manifestly invalid. The petitioners thus averred that the 1st and 2nd Respondents contravened section 39 (1) (A) and (B) of the *Elections Act* and section 83 of the *Elections (General) Regulations*, 2012.
18. The petitioners averred further that the Homabay gubernatorial elections were not conducted substantially in accordance with the statutory and constitutional principles and secondly, that the non-compliance substantially and/or materially with the law and the *Constitution* affected the result of the elections and that consequently, the 3rd Respondent's election ought to be nullified.
19. The Petitioners impugned the counting and tallying that was done by the 1st and 2nd Respondents on allegations that the process was marred with padding of votes, transmission of false results, exaggeration of voter turn-outs, irregular and unlawful assisted voting and unlawful ejection of political party agents.
20. Regarding vote padding, the petitioners specified that in Ringa Polling Station, the results were changed on Form 37B with Rabudi's votes switched to Hon. Gladys Wanga's ending up with Hon. Gladys Wanga getting 258 votes and conversely Rabudi getting 0 votes contrary to the entries in form 37A as declared by the Presiding Officer at Ringa Polling Station.
21. The petitioners further averred that padding of votes was evident from the comparison of the valid votes cast across different elective positions which difference in the number of votes could not be accounted for as every voter was handed six (6) separate ballot papers for the six (6) elective posts.
22. Further, the petitioners averred that there were serious and glaring inconsistencies on the number of votes cast and that there were more votes cast than were identified by KIEMS kit implying that there was voter inflation and potential ballot stuffing.
23. It was the petitioners' case that the 3rd and 5th Respondents through their agents directly and/or indirectly, violated the provisions of Article 81(e) (ii) of the *Constitution* by engaging in wanton acts of violence culminating in the death of one Kepha Ouma and that the acts of violence culminated in voter suppression and apathy as voters, especially supporters of the Petitioners, fearing for their lives, did not come out to vote as was expected under normal circumstances.
24. In this regard, the petitioners averred that the violence witnessed on the election date impeached the integrity of the Gubernatorial Elections held in Homa-Bay County on the 9th of August 2022.



25. The petitioners further averred that most of their duly appointed agents were unlawfully ejected from their polling stations/tallying centers of assignment by the presiding officers, the 5th Respondent's agents and the 3rd Respondent's agents; thus denying the Petitioners' agents the opportunity to oversee the whole electoral process and access/approve the declared results and further that the unlawful ejection of party agents was part of a well-orchestrated plan to subvert the sovereign will of the Homa-Bay County electorate.
26. Further, it was the petitioners' case that in all the polling stations from where their agents were ejected, it was reported either 100% or near-100% results in favour of the 3rd Respondent; which dubious results were not replicated across the other elective posts.
27. Regarding the role of agents, the petitioners further averred that their agents were unable to observe the voting processes, the counting and the tallying of the gubernatorial results in the affected polling stations; that they were also unable to sign the Forms 37A and thus there was doubt as to the credibility of the results entered in the respective Forms 37A.
28. It was the petitioners' case that there were several instances of irregular, unprocedural and unlawfully assisted voting and that all the voters who were being assisted by the Presiding Officers were assisted on condition that they had to vote for the 3rd Respondent as observed at Kojwach Primary School in Rangwe Constituency and Dudu Primary School.
29. The petitioners further asserted that when their agents complained on the irregular assisted voting, the presiding officers ejected them from their polling stations of assignment without justification.
30. The Petitioners averred that there were a number of alterations in forms 37As contrary to the Electoral regulations and that some alterations were not countersigned by the various presiding officers of particular polling stations. It was their case that the stated alterations were made in favor of the 3rd Respondent to give her unfair advantage.
31. Further, the petitioners averred that where they garnered majority of votes, their results were swapped with impunity by the fraudulent presiding officers and/or deputy presiding officers and that this was discernible from the face of the different Forms 37A.
32. The petitioners further averred that the 3rd Respondent and her agents, especially the 3rd Respondent's Husband, moved all around the County in a motor vehicle with goons unleashing violence on the Petitioners' supporters and out- rightly giving out bribes to induce voters to vote for the 3rd Respondent.
33. For the foregoing reasons, the petitioners sought various declarations including a declaration that the elections in Homabay County were not conducted in accordance with the *Constitution* and the law and for the nullification of the said election. They also prayed for the costs of the Petition. The final prayers sought by the petitioners against the Respondents are as follows:
 - a. Election material including electronic documents, devices and equipment for the Gubernatorial elections within 48 hours to facilitate a thorough scrutiny thereof;
 - b. Immediately upon the filing of the Petition, the 1st and 2nd Respondents do produce, avail and allow access for purposes of inspection of all the logs of any and all servers hosted by and/or behalf of the 1st Respondent in respect of the Gubernatorial elections in Homa-Bay County;
 - c. An order of preservation of all the election materials relating to the 2022 gubernatorial elections in Homa-Bay County.



- d. An order be and is hereby made for forensic audit, scrutiny, re-count and re-tallying of all the returns with respect to the polling stations referred to in paragraphs 138, 139 and 177 of the Petition;
- e. An order be and is hereby made for scrutiny and forensic audit of all equipment, system and technology used by the 1st Respondent in the Gubernatorial Election including but not limited to the KIEMS kits, the Server(s);website/portal;
- f. An order be and is hereby made consequent upon the nullification of the declaration of results by the 1st Respondent directing the 1st Respondent to tally and verify the count and declare the 1st and 2nd Petitioners as duly elected as Governor elect and Deputy Governor elect respectively;
- g. A declaration be and is hereby made in the alternative that the Gubernatorial election held on 9th August, 2022 in Homa-Bay County was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void.
- h. A declaration be and is hereby made that the 5th Respondent violated the Petitioners' rights against equality and discrimination based on political affiliation contrary to Article 27(4) and (5) of the Constitution of Kenya, 2010
- i. A declaration be and is hereby made that the 3rd and 5th Respondent violated the Petitioners' rights under Article 38(1)(c) to campaign for a political party or cause.
- j. A declaration be and is hereby made that the 3rd Respondent was not validly declared as the Governor elect and that the declaration made on 12th August, 2022 is invalid null and void a initio.
- k. A declaration be and is hereby made that the 3rd and 5th Respondent may have committed electoral offences under Section 10(1)(a) & (b) of the Election Offences Act, 2016 in the impugned Gubernatorial elections of Homa-Bay County that took place on 9th August 2022
- l. A declaration be and is hereby made that the 3rd and 5th Respondents may have committed electoral offences under Section 11(a) &(c) of the Election Offences Act, 2016 in the impugned Gubernatorial elections of Homa-Bay County that took place on 9th August 2022
- m. An order be and is hereby issued quashing the Certificate issued to the 3rd Respondent and Gazette Notice Number 9933 dated 19th August, 2022 (Vol. CXXIV-NO. 67) declaring the 3rd Respondent as the Governor.
- n. An order be and is hereby made directing the 1st Respondent to organize and conduct a fresh Gubernatorial Election in strict conformity with the Constitution and the Elections Act.
- o. A declaration be and is hereby made that the decision by the 1st, 2nd 3rd and 4th Respondents jointly and severally committed election irregularities.
- p. An order directing the Director of Criminal Investigations to investigate possible election offences committed by agents of the 1st Respondent, 3rd and 4th Respondents and/or their agents and the Director of Public Prosecution to prosecute those found culpable.
- q. Costs of the Petition; and
- r. Any Other and/or further order that the Court deems just and fit to grant in the circumstances.



34. In support of the above averments, the 1st Petitioner testified and called 13 witnesses and their testimonies are summarised herein below:

The Petitioners' oral-viva voce and documentary Evidence

35. PW1 Andolo Dan Ojijo, an IEBC official testified on oath adopting his witness affidavit duly filed in court with the petition and stated that he participated in the election as the Presiding officer at Ongeti Primary school, in Kochia ward. He stated that he opened his polling station at exactly 6.03 a.m. and that voting went on smoothly until 3 p.m. when the 3rd respondent's Agents demanded that he allows voters without National identity cards to vote which he declined and this caused tension and chaos prompting him to seek advice from the Rangwe constituency Officials WhatsApp group platform.
36. PW1 testified that the 3rd respondent's agents' unruly conduct persisted throughout the voting period until the closure of the polling at 5.03 p.m. prompting him to postpone the commencement of vote counting for about an hour although counting eventually started at 7.30 p.m. and lasted up to 11.24 p.m. It was his testimony that just before they could seal the governor's ballot box at the end of the counting, the 3rd respondent's goons arrived armed with guns and crude weapons and asked for him.
37. PW1 testified that he was surrounded at gun point with his assailants saying in dholuo: "ja ongeti ma a kabondo ni e ma theko dwa ketho nwa tich..Mama Gladys Wanga oorwa mondo watere aora oluch." translated into English (that this person from Ongeti Kabondo is the one troubling us. He wants to spoil our work. We have been sent by Mama Gladys Wanga to take you to river Oluch.) He further testified that while some of the goons held the rest of his officers at gun point, two of them pushed their gun muzzles on his neck and stomach and tased him with an electric Taser gun which they had, alleging that he had been aiding voters in favour of Dr. Evans Kidero.
38. PW1 testified that the goons threatened to kill him and throw his body in River Oluch if he did not comply with their demand that he awards all votes cast in the gubernatorial race at that polling station to the 3rd respondent and nil votes to the petitioner. He testified that fearing for his life he complied and filled the form 37A as demanded i.e. giving Hon. Gladys Wanga – 350 votes Dr. Kidero – 000 votes.
39. PW1 testified that he reported the incident to his superiors and after 40 minutes, a police vehicle arrived and took them to the tallying center from where he prepared Form 37A. He testified that he prepared the Form under threat at the tallying center and not at the polling Station on the advice of the Returning Officer. He testified that the goons took over the ballot box, switched off the lights and sealed the ballot box. He reiterated that he reported the incident to the police at Korero. It was his testimony that he continues to fear for his life.
40. PW1 further stated that at the Tallying Centre, he told the Returning Officer that results in the Form 37A did not tally with what was recorded in the tallying sheets and sought guidance and assistance and that the Returning Officer directed him to report the matter to Rangwe Police Station where his statement was recorded at about 2.00 a.m. on 10th August 2022. He further testified that he handed over the original Form 37A that he had been forced to alter to the police officer.
41. PW1 testified that he went back to the Tallying Centre and prepared a fresh form 37A reflecting the correct results which were as follows: Wanga - 235 votes, Dr. Kidero - 115 votes then forwarded the results to the Returning Officer for announcement.
42. On being cross-examined by Mr. Olendo counsel for the 1st and 2nd respondents, PW1 reiterated his testimony in chief and further stated that the elections were conducted properly. He denied helping the Petitioners or the 3rd respondent and stated that he was carrying out his duties. PW1 further stated



- that he conducted the elections but they were not done in a free and fair manner because supporters of candidates were chasing the agents of the other candidates.
43. PW1 further stated that at the Ongeti Primary School polling station, there was no free and fair election because of the violence. He stated that vote counting was peaceful. It was his testimony that despite the threats and intimidation, he transmitted the correct results to the constituency tallying center.
 44. When cross-examined by Senior Counsel Mr. Kanjama for the 3rd and 4th respondents, PW1 stated that his role as a Presiding Officer was to be the polling station manager as all staff at the polling station were under his directions, including the agents and observers. He stated that he was to coordinate matters of security and that he had one police officer at the Ongeti Primary School polling station which had only one stream.
 45. PW1 further stated that the Ongeti Primary School polling station had a fence and that the entrance was restricted only through the gate. He stated that there were no restrictions on who could access the compound. He denied instructing the police officer to restrict access to the compound but stated that the police officer was securing the polling station. He denied seeing any guards in that school.
 46. It was his further testimony in cross-examination that he had a polling station diary (PSD) and that he was to record all incidents in the Polling Station Diary (PSD). He testified that he recorded the incident of being attacked at gun point in the PSD. He stated that he recorded that vote counting was peaceful. It was his testimony that he declared all the 6 results verbally and also filled results for all contested positions except for the governor. It was his testimony further that the results form for Ongeti Primary School that he filled and handed over to the constituency returning officer showed the accurate results for Ongeti primary school Polling Station. He further stated that he handed over those results to the constituency returning officer, which results he tallied and that he had since seen them.
 47. PW1 stated that each candidate had one agent except the current governor who had two agents after he expelled one. He stated that the candidates for Member of County Assembly- MCA and National Assembly had agents but candidates for both the Senate and Presidency had no agents. It was his testimony that they started vote counting at 7pm peacefully but it became chaotic and rowdy though there was no violence. He testified that he was surrounded by goons who switched off lights after two minutes. He stated that the goons wore big jackets and caps and that he saw a short gun, a pistol placed on his neck. He testified that he gave all this information to the police in his statement although he did not have the said statement for production in court as evidence.
 48. In cross-examination by Mr. Okello advocate for the 5th respondent, PW1 stated that by the time the goons arrived at the polling station, he had not signed Form 37A but had completed counting the votes for the governor and was still signing the tallying sheet. He stated further that when he was attacked, he had not entered the results in form 37A. He testified that immediately he arrived at the tallying center, he informed them that he had wrong results. PW1 further stated that there was minimal voting after 3pm because of chaos and that some voters were turned away by the supporters and agents who were at the door. He further stated that the security officer controlled the line but was overpowered from around 3pm. He stated that he had had two booklets of Form 37A, one of 1 and one of 2 which were similar but with different serial numbers. He stated that the agents picked one copy and left with the forms which they forced them to sign. It was his testimony that the right Form 37A had the signature of one agent and that he, PW1, signed it at the tallying center. He further stated that the one he was forced to sign was signed by both agents of the 3rd respondent to the exclusion of the petitioners' agents who ran away when the goons arrived.
 49. In re-examination, PW1 restated his testimony in chief and further testified that the Form 37A which he signed at the Tallying Centre was only signed by ODM agents. He further stated that since the



election petition was filed, the 1st respondent had never called him to give his side of the story and that despite his reporting to the police and Deputy Returning Officer, nobody contacted him to follow up on this matter. It was his testimony that every candidate was to have one agent but that the 3rd respondent had two agents. He stated that he allowed the second agent in the room because the agent continually threatened him.

50. PW2 Maurice Odhiambo Gambi testified after adopting his witness affidavit that he was the youth coordinator and his role was supervision of elections in Suba North for the 1st petitioner and that they oversaw the voting process. He testified that on election day at 2pm, one of their agents, Martin Shikuku, called him and informed him that two Chiefs were handing out money to people to vote for the current governor, Hon. Gladys Wanga. He testified that he rushed to the scene and when the two chiefs saw him, they jumped onto a motor cycle and escaped.
51. PW2 identified the chiefs as Mboya and Kaota and further stated that the incident occurred at Wakondo primary school polling station. He testified that he saw people take money from the two chiefs and put in their pockets. He further testified that the chiefs knew him well so they got on one motor bike and left. It was his testimony that he then went to the polling room and the Presiding Officer showed him a man whom she said had disturbed her and asked him to tell the man to leave. PW2 testified that the man had an ODM tag and was known as Alphonse Okuku.
52. He testified that he was also called to Kisui primary school, where he went and found a lady known as Agnes giving out money. He testified that he asked her to leave but she declined. PW2 testified that the following day, he reported to Mbita Police Station and was given an OB number. He testified that the counting in the same polling station delayed until 4am and that he went and reported to the Deputy OCS who ordered them through the DCI to expedite the counting. PW2 testified that his cousin who was in Wanga's camp informed him not to use his car but to use public means because he was a marked person. PW2 further testified that two of their agents also reported to him that they were denied copies of Form 37A at Mbita tallying center the following morning after elections.
53. In cross-examination by Mr. Olendo counsel for the 1st and 2nd respondents, PW2 admitted that only agents were accredited to enter the polling stations in a representative capacity and that one would not be allowed to enter any polling stations except when one is voting in that polling station. He reiterated that they were denied access to the polling station although he had a letter from his candidate as a supervisor, in Suba North.
54. PW2 stated that he was not a registered voter at Wakondo primary polling station and that he went there because he had a letter from his candidate although he did not annex the letter to his affidavit. He further stated that Brian Otieno Weke was not the petitioner's Chief agent for Suba North.
55. It was his testimony in cross-examination that the petitioner's agents were denied access to the polling station although he did not name the specific polling station. He stated that most polling stations had finished counting by 4pm and that they had issues with two polling stations. He testified that he reported the bribery incident on the 10th but did not report the incident to the Returning Officer or to the Police at the polling station.
56. He stated that Alphonse had a tag of the ODM party and further that ODM party fielded candidates for all elective positions. He further stated that anybody with an ODM tag could represent any five candidates. He admitted that he had not seen the Form 37A and that he was not aware of the alterations therein. PW2 stated that his complaint was that their agents were denied access to the polling station and signing of Form 37A. He stated that he was not contesting the results. He testified that there was no direct threat directed at him and that he did not mention his cousin's name for security reasons.



57. In cross-examination by counsel for the 3rd and 4th respondents, PW2 reiterated his testimony in chief. He further stated that the two chiefs bribing voters were 50-60 meters away from him. He clarified that it was the chief and his assistant and that they had money in their hands. He admitted that he did not hear what they were saying and how much money they were giving out. PW2 declined to name any person who received the money from the said chiefs and further stated that he only knew the chief. He stated that he did not photograph them nor did he take the number plates of their motorcycle.
58. PW2 testified that a Presiding Officer, Agnes, pointed out Alphonse to him who was disturbing the voting process by whispering in people's ears and giving out money at Usare primary school. He stated that he did not know if Okuku was a voter at the polling station and further admitted that he did not see Okuku giving out any money.
59. He stated that he voted at Usare primary school in the morning where there was delay in voting and counting in one room for the governor's elections but that the others were counted. He denied that the delay was caused by the 3rd and 4th respondents' agent and further stated that there was no violence on the part of the 3rd and 4th respondents' agents.
60. PW2 further stated that he did not notice any discrepancy between Form 37A and Form 37B for Suba North. He testified that at Wanga Primary School, their agents were denied the opportunity to sign Form 37A but that they observed the process of tallying until the end. He testified that their agents informed them that the results announced were the same as what was counted. He further stated that at Usare Polling Station 3, their agents agreed with the results. In re-examination, PW2 reiterated his testimony in chief.
61. PW3 Dickson Ouma Ayuo, the petitioners' agent in Ligisa Primary School polling station in Kochia ward testified that on the 9th August 2022, he went to the polling station where voting went on well from 6am to 5pm when voting closed. He testified that before the actual counting, at around 6.30pm, George Wanga, the 3rd respondent's husband, entered the room and requested them to hasten the counting of votes then he left. It was his testimony that they continued with counting then George Wanga returned, accompanied by other men who also entered the room and forcefully ejected PW3 from the room despite PW3 showing them the letter allowing him into the room.
62. PW3 testified that he was village mates with George Wanga and that he was with him during the 3rd respondent's campaign for position of woman representative for two terms. He testified that the other men who were in the company of George Wanga were not known to him and they roughed him up and ejected him out. He testified that they took his phone from his pockets and beat him thoroughly. He further testified that he was surrounded by people such that he could not move in any direction.
63. PW3 testified that he sought treatment as he was bleeding from his mouth. He testified that his assailants used metal rods to hit his head and his right thigh and that a friend, Dominick Onyango, emerged from nowhere and saved him. It was his testimony that a pistol had been drawn and pointed at him and that he asked them why they were killing him. He further testified that he raised his hands and someone said, "usimuue" so he jumped over the fence and landed on the other side of the school. It was his testimony that the goons ran after him. PW3 testified that he reported to Rangwe Police Station at about 8:40 pm in the night but never got any assistance as he was asked to name the person who beat him which he could not as he only knew George Wanga who had brought the goons.
64. In cross-examination by Mr. Olendo counsel for the 1st and 2nd respondents, PW2 stated that he arrived at the polling station on the election day and was let in after showing a letter of appointment from his candidate. He further admitted that his name was missing from the Polling Station Diary as the petitioners' agent.



65. It was his testimony that voting was peaceful and that the incident he alleged happened during counting of the votes. He testified that he had not availed any treatment notes before court as evidence of his injuries.
66. When cross-examined by counsel for the 3rd and 4th respondents, PW3 stated that the counting process was interfered with after he was ejected from the room. When shown a copy of Form 37A, he acknowledged that one Brian Adams signed as an agent of Dr. Kidero and that the Presiding Officer's comments were "counting continued well, one ballot rejected." PW3 confirmed that Brian Adams was an agent and that he signed the Form 37A. He further stated that he was ejected during the counting of presidential votes and did not witness the counting of gubernatorial votes.
67. PW3 stated that the goons who went to the polling station with George Wanga were not known to him which was at variance with the treatment notes dated 9/8/2022 in which he told the hospital that: "assaulted by people allegedly known to him..." He testified that when he jumped over the fence, he got to Rodi and that he was found by people who knew him lying on the road. It was his testimony that Dominic saw him being beaten in the school compound but outside the room although he could not tell what he was still doing in the school after voting.
68. In cross-examination by counsel for the 5th respondent, PW3 stated that he was not given any document by IEBC to show that he was an agent of Dr. Kidero. He stated that at 7.30pm, goons went to the Polling station and pulled him out of the room and that he never returned to that polling station. He stated that he did not take any video of the occurrence as his two phones were taken away. It was his testimony in cross-examination that he went to Rodi after being assaulted at Ligisa and reported at Rangwe police station. He further admitted that there was a police station at Kochia but he did not report the assault there. PW3 reiterated his testimony in chief, in re-examination.
69. PW4 Samuel Obunga Milama testified that he participated in the elections as the chief agent for Dr. Evans Kidero, the first petitioner herein and a gubernatorial candidate, Homabay County. It was his testimony that his role and duties as the chief agent were to supervise all other agents, to ensure material was obtained in the right way and at the right time by agents. The materials included tags; moving round the polling stations to check how elections were going on and report to the County Returning Officer who would in turn report to Dr. Kidero. He testified that he was also to be at the tallying center to see how the process was ongoing in Gwasssi North Ward. PW4 stated that he was not able to perform his duties effectively because he was missing an agent's identification card which the IEBC was to issue to him but it did not.
70. It was his testimony that on the 8/8/2022, he visited IEBC's returning officer to collect the tags for himself and the other polling agents but that the Returning Officer told him that the tags were meant for political party agents and not for independent candidates. He stated that as a result, on the 9/8/2022, he was denied access to the polling stations right from the 1st polling station and that he received telephone calls from his agents who were in other polling stations to the effect that they had been denied access because they had no tags as agents. He testified that as agents, they were to witness the process of election from 6-30am but only got access at around 8.30am, when the IEBC Returning Officer instructed that agents be allowed in polling stations.
71. PW4 testified that despite this challenge, he was never allowed into any polling station. He testified that he was to be at the Suba South Constituency tallying center by 5pm but was not allowed into the tallying center because he had no tag identification card. He testified that he pleaded with police officers at the gate and showed them his letter of introduction.



72. He further testified that while at the tallying center, he observed that the Returning Officer was receiving and stamping forms being brought from the constituency polling stations but when he demanded to be allowed to verify those forms, the Returning Officer at Tonga Secondary school refused.
73. In cross-examination by counsel for the 1st and 2nd respondents, PW4 reiterated his testimony in chief. He further stated that he could not tell if the issue of stamping of forms affected the results. When cross-examined by counsel for the 3rd and 4th respondents, PW4 further stated that he did not see the Returning officer alter the results and that out of 133 polling stations, he only saw forms for 5 polling stations being rubber stamped. In cross-examination by counsel for the 5th respondent, PW4 reiterated his testimony in chief and repeated his testimony in re-examination.
74. PW5 Maurice Onyango Osodo testified that he was involved in the election as part of Dr. Evans Odhiambo Kidero's security and mobilization team stationed at Shauri Yako Primary School Polling Station. He testified that on election day, he reported to his Polling station at 6:00 am and proceeded to vote and immediately thereafter he went about his allocated security duties. It was his testimony that at around 10:00 am, a black motor vehicle, Land Cruiser, arrived at the Polling Station gate and inside the said motor vehicle, he could clearly see three people seated at the back.
75. PW5 testified that he was able to see and identify George Ouma Miyare, an aspirant for the position of Homabay Member of Parliament seated together with two ladies. He testified that the entry of George Ouma Miyare into the polling station inflamed the supporters of his opponent Honourable Peter Kaluma and a standoff ensued between the two parties. He further testified that the vehicle was blocked and forced to reverse and leave the polling station.
76. PW5 testified that immediately the aforementioned motor vehicle left, another motor vehicle, a white Toyota Probox Registration Number KCW 571 managed to squeeze through the gates of the Polling Station. He testified that inside this motor vehicle, he saw three people, one woman and two men and that at the back, he could clearly see white ballot papers, three ballot boxes, IEBC tags and a note book with white papers inside it. He testified that the sight of these election materials inside this motor vehicle caused a huge uproar as people surged forward and surrounded the motor vehicle with some people demanding to know from the occupants what they were doing with the election materials.
77. It was his testimony that the lady inside the motor vehicle tried to explain that they had been sent by the returning officer to deliver election materials to that Polling Station during which time some youths managed to open the boot of the motor vehicle, took the election materials out of the car, kicked and broke open the contents of the ballot boxes. PW5 testified that as soon as the contents were spilled out, he managed to see ballot papers, some of them marked in favour of Gladys Wanga and others not marked. He further testified that in the ensuing melee, the lady inside the motor vehicle ran to a nearby police officer for assistance and subsequently, the Presiding Officer called police officers who responded immediately and arrived in a Land Cruiser and whisked the occupants of the Probox away and collected some of the strewn election materials.
78. It was his testimony that the General Service-GSU officers were subsequently called in to restore calm and that voting ended at about 3:00 pm followed by counting at about 6.00 pm which proceeded until 5.00 am the next morning when Dr. Evans Kidero was declared the winner in all the stations at the Polling Centre.
79. In cross-examination by counsel for the 1st and 2nd respondents, PW5 stated that he was to entice voters to vote for the 1st petitioner and that he did the mobilization before the voting started but not within the polling stations. He further testified that he understood fully the rules that after he voted, he was



- supposed to leave the polling station. PW5 denied running a parallel security from the police. PW5 further stated that after the police left, he heard supporters of Wanga saying that there was no way Kidero would win the elections. It was his testimony that the violence did not affect voting in that polling station.
80. In cross-examination by counsel for the 3rd and 4th respondents, PW5 stated that the incident occurred inside the compound of the polling station while he was at the gate. He further testified that he did not know what was happening inside the polling station but that the violence interrupted the voting process. PW5 stated that after the police took away the materials, voting resumed. He stated that the Probox arrived at 10am and people resumed voting at 1 pm and voted until 3pm. PW5 further stated that the Presiding Officer witnessed what was happening. He further acknowledged that there was no mention of violence or the Probox in the Polling Station Diary. PW5 further stated that when the GSU arrived, they told people to leave the polling center and nobody came in to vote until 5pm. He testified that he remained outside the perimeter fence until 6am and saw the counting through the perimeter fence which was made of grass.
81. In cross-examination by counsel for the 5th respondent, PW5 stated that the stand-off at the polling station was between the supporters of Hon. Peter Kaluma and George Ouma Miyare. He further testified that after 5 pm, he went behind the polling station window. It was his testimony that by around 6am in the morning, counting was completed. He stated that he was at the polling station during the counting and did not witness any violence. He reiterated that the counting went on smoothly. In re-examination PW5 reiterated his testimony in chief.
82. PW6 John Ogina Nyabola testified that he was involved in the elections as he was the chairman of ODM for Ndhiwa sub-county. He testified that after the nominations, he was surprised when a report was given that he was no longer the ODM Ndhiwa sub-county chairperson because he was allegedly dead but that when the party realized that he was alive, he was allowed to continue.
83. PW6 testified that the opaque activities of the ODM party led to the issuance of a direct party nomination ticket to the 3rd respondent on the 31st May, 2022 and arising from the above, he left the party and formed forces with like-minded persons to support the candidature of the 1st petitioner, a decision that nearly cost him his life.
84. He testified that on the night of 7th – 8th August 2022, there were people who said that voting must be 5- piece in Ndhiwa constituency although he did not know them. He testified that Joseph Mwai was killed using pangas and as members of the party, he knew they would all be killed. He further testified that he was attacked too by people who surrounded his home forcing him to flee.
85. In cross-examination by counsel for the 1st and 2nd respondents, PW6 denied that the matters he raised in his affidavits happened way before 9/8/2022 or that those matters ought to have been settled during party nominations. He stated that as people of Homabay, a candidate whom they did not want, meaning Gladys Wanga, was imposed on them and that his friend was killed because those people who went there wanted 5-piece voting.
86. In cross-examination by counsel for the 3rd and 4th respondents, PW6 stated that he joined the ODM party in 1992 in his capacity as a village elder. He stated that he was still the chairperson of Ndhiwa constituency ODM party, a position he was elected to in 1992. It was his testimony that after each candidate gave out money for nominations, ODM came up with its own candidate through a direct ticket, which was not right and that the people of Ndhiwa felt that they had lost. He stated that as an official of the ODM party, he did not complain because the county party chair was Gladys Wanga.



87. He reiterated that the ODM party gave them a candidate whom they did not agree with and so they all left the party and did not vote for Wanga, in protest. He reiterated that he left the party after the nominations because ODM party did not allow the people of Ndhiwa to elect a candidate of their choice. PW6 testified that he knew that where there is a dispute between and among members and the political party, the party has mechanisms for resolving those disputes.
88. When cross-examined by counsel for the 5th respondent, PW6 stated that the nominations in Homabay county were not conducted according to the wishes of the people.
89. In re-examination, PW6 stated that he did not leave the ODM party but was chased. He further testified that he knew that the ODM party constitution provides for direct nomination of candidates but that, that only works when other candidates have not paid their nomination fee which was not the case for the position of governor for Homabay County. He testified that he was not happy with that because the will of the people was not considered.
90. PW7 Kachiawo Atieno Rachael testified that she was an agent at Akal polling station located in Akala Primary in Ndhiwa constituency, for Dr. Evans Kidero. She testified that she reported at the polling station at 5.00am and found Risper Oyoo, the Presiding Officer who gave her a book to sign in after she had shown her agent credentials. She testified that voting started at 6.00am and continued peacefully until 2pm when a voter came in and was given ballot papers, which she marked and after casting, the voter remained with 3 ballot papers. PW7 testified that they alerted the other agents and the Presiding Officer of the incident. It was her testimony that the three extra ballot papers were for MP, Governor and MCA. She further testified that when they inquired from the Presiding Officer, she told them to be calm as she was consulting.
91. PW7 testified that suddenly, chaos erupted outside the polling station within the center and she saw many youths carrying pangas and rungu chasing one youth towards the school latrine. She testified that the Presiding Officer told them not to get out so they remained inside. She testified that she heard gunshots upon which she called their chief agent but could not reach him so she called their sub county coordinator, Gideon Oswaro. It was her testimony that voters started running away at around 3 pm and voting did not continue.
92. PW7 testified that the Presiding Officer told them that she was instructed to carry all the materials to the tallying center and that two vehicles arrived and all materials and the Presiding Officer and ODM agents entered therein and they left. She testified that the Independent candidate agents were not allowed to board the vehicle because the Presiding Officer said that she did not know them. It was her testimony that more chaos erupted as youths advanced towards them and she ran for her life as the police also left the polling station.
93. She testified that she recognized a few youths who were attacking them as ODM youths. She further stated that immediately the violence erupted, the voting stopped because voters ran away and all ballot materials were carried away. She testified that she never made it to the tallying center and that she was never called to go and finish the exercise.
94. In cross-examination by counsel for the 1st and 2nd respondents, PW7 stated that the three extra ballot papers were marked for Wanga for Governor, Hon. Owaga for MCA and Hon. Martin Peter Owino for MP. She testified that she was in the polling station when the youths stormed the Polling Station chasing one youth prompting everyone to run for their lives including those who were in the line to vote.
95. She testified that she could not recall seeing IEBC officials sealing the ballot boxes. It was her testimony that she never signed Form 37A because she had run for her life and had left the polling station. She



- testified that the process of voting stopped at about 3pm although the polling was to stop at 5pm. She testified that votes were not counted at the polling station.
96. In cross-examination by counsel for the 3rd and 4th respondents, PW7 denied being the only one who abandoned the polling station in light of the signature of Kennedy Orwa Ochieng on the certificate of closure.
 97. Cross-examined by counsel for the 5th respondent, PW7 stated that the Form 37A for all three polling stations at Akala Primary School were signed and that she was not among the signatories. She testified that there was no violence in Akala 003 but only tension. She testified that some of the voters who had not voted went home after the violence erupted. She further stated that violent youths got into the polling center and not the polling station.
 98. In re-examination, PW7 stated that the observer who found some tension over identity cards pointed at her saying ‘young lady, if you die today, you will leave your husband and children so, you should talk and agree as agents.’ She testified that the said observer also spoke to them in Dholuo saying that all the remaining ballot papers must be marked and that “Raila’s votes cannot remain without being cast.”
 99. PW8 George Ochieng Okech testified that he was deployed as the 1st petitioners’ agent at Nyakongo Primary School Polling Station. He testified that he reported to the polling station at 6.00am and signed in after which they were told by the Presiding Officer that as agents for independent candidates, they were not to talk to the IEBC officials. He testified that there was no problem before the voting started but after the voting started, he raised a concern on what the ODM agents were doing and he was told not to talk.
 100. He testified that at around 1pm, Jeff Ongoro, an ODM candidate got in and told PW8 to go slow on the issue because they were confirming the blurred ballot papers. It was his testimony that he told them to leave him alone as he was on duty. PW8 testified that Ongoro returned at around 3pm and offered him Kshs. 10,000 so that he could cease being an agent for Dr. Evans Kidero but that he declined the offer.
 101. PW8 testified that one Victor Okello Aoro grabbed his shirt and pushed him into a vehicle and drove off. He testified that the vehicle was inside the polling station and that there were 4 men in that Motor vehicle who took his phone and deleted everything then drove PW8 away saying he should not go to the polling station and that they were doing him a favour.
 102. PW8 testified that his abductors later released him after driving him for 30 minutes to Wikondiek and that he called his supervisor Jack Osoro then reported the incident to Kendu Bay police station before proceeding to a friend’s place.
 103. In cross-examination by counsel for the 1st and 2nd respondents, PW8 stated that Hon Wanga was consulting with Ondiek who was at the polling station though he could not tell what they were discussing. He stated that he assumed that they were confirming the number of ballot papers used. It was his testimony that he told the Presiding officer and she stopped the agent. PW8 reiterated that Jeff Ongoro offered him a Kshs. 10,000 bribe and that his friend Mark told him that other agents were also offered the bribe.
 104. It was his testimony that his abductors never harmed him and that they deleted messages which he had sent to Obala, another independent candidate as well as all his other messages. PW8 denied planning his abduction.
 105. In cross-examination by counsel for the 3rd and 4th respondents, PW8 stated that it was wrong for ODM to have more agents in the polling stations. He further stated that Jeff was an ODM candidate for the



- MCA position and thus PW8 could not tell why Jeff approached him instead of the MCA agents. He further stated that there was tension after he was held by the shirt upon refusing to take the bribe. He admitted that he never made a report to the police concerning offer of a bribe and further that he did not see the Registration number of the vehicle of his abductors. He denied having had his own issues with his abductors.
106. In cross-examination by counsel for the 5th respondent, PW8 stated that voting was smooth from the time he arrived at the polling station and that at around 3pm, there was commotion when he exchanged words with the MCA inside the polling station causing voting to stop. He testified that he reported his abduction to the police station and also told them about the bribery claims. PW8 reiterated his testimony in chief in re-examination.
 107. PW9 Silas Okinyi Rawo from Kokwaro location, Kabondo Kasipul constituency, Homabay County testified that he joined politics as a youth winger in 1968. He testified that he was a member of all Odingaism parties, going back to Kenya Peoples Union -KPU which was started by Jaramogi in 1966 to the current one led by Raila Amolo Odinga. It was his testimony that the Luo community loves Raila and accepts everything he tells them but that ODM now appears to be Odinga's personal party thus many good people have now left the party.
 108. It was his testimony that ODM did not carry out nominations as it called candidates and gave them tickets and told other aspirants to step down as they would be given government jobs in the new administration while others were abused. He testified that the 1st petitioner vied as Governor on an Independent ticket and that the 1st petitioner was given the name 'Andhoga', and branded 'Msaliti' and traitor of the Luo community.
 109. PW9 further testified that more than 35% of voters did not vote because the people were told that even if Kidero won the elections, he would not be announced as the winner and people were threatened that they would be forced out of Luo land. He testified that the 3rd respondent was not nominated by the people in 2022 but rather got her ticket from Nairobi. It was his testimony that he voted for Raila but with a heavy heart because Raila denied them their democratic right to choose their own candidate.
 110. In cross-examination by counsel for the 1st and 2nd respondents, PW9 stated that Dr. Kidero lost elections because of Raila and ODM's influence. In cross-examination by counsel for the 3rd and 4th respondents, PW9 stated that during the campaign period, he heard ODM candidates saying that people should vote six piece and not for Independent candidates. He further stated that he was called and told to stop supporting Dr. Kidero. He however declined to name those who called him.
 111. In cross-examination by counsel for the 5th respondent, PW9 stated that although the petitioners had not petitioned against Raila Odinga, Raila contributed to all these issues and to Kidero's loss because on 18/4/2022, Raila went to a funeral in Kasipul Kabondo and announced that voting should be for six piece and that they ought to vote for mama.
 112. PW9 further stated that he was aware that in March, there was a consensus meeting to draw candidates but he did not attend and that there were deliberations which urged other candidates to pave way for the 3rd respondent which the 1st petitioner did not attend.
 113. In re-examination, PW9 stated that at the funeral, Raila labelled Independent Candidates as traitors ('Andhoga') and this made people believe that Independent candidates were bad. He stated that ODM was not a democratic party because it took people's money but denied them the opportunity to be nominated.



114. PW10 John Okambo Kisiara testified that he participated in the elections as an agent for Evans Odhiambo Kidero at Sindo Polytechnic, the 1st stream. He testified that he reported to the polling station at 6am and proceeded to the polling area as per the directional sign but found it closed. He testified that voting started at 7am but he was not allowed in because he only had a letter from Dr. Kidero and from an advocate and did not have a tag so he was denied entry.
115. He further testified that voting went on smoothly until 4.00 p.m. when a group of rowdy youths armed with crude weapons (stones, metal bars and rungas) invaded the Polling Station forcing them to close the station and further that voters and election officials and agents ran away for their safety leaving the two Presiding Officers behind. He testified that the situation was later managed and contained by the area Chief and the Police.
116. It was his testimony that upon his return to the Polling Station, he noticed that the ballot boxes for the Governor and Women Representative positions had fallen down and as a result, some voters did not see the ballot boxes and thereby went away without casting their votes in the two boxes. He testified that he immediately drew the attention of the Presiding Officer to this but the Presiding Officer very rudely and arrogantly brushed him aside.
117. PW10 testified that when counting of the votes began at around 5 p.m. youths armed with crude weapons started throwing stones at the counting hall thereby creating a very chaotic and dangerous atmosphere. He testified that he was denied a chance to take a photo or have a copy of form 37A by the presiding officer despite having signed it and that the Presiding Officer further denied him the opportunity to use his seal on the governor's ballot box.
118. In cross-examination by counsel for the 1st and 2nd respondents, PW10 stated that voting started at 7am because the doors to the stream were locked until the chief went and broke the padlocks to allow people access the room. He stated that he could not confirm if voting went on smoothly from 7am to 4pm because he was locked out. He further stated that there was no issue between 7 – 8am but that at about 4pm, youths went there with crude weapons.
119. It was his testimony that the rowdy youths were mentioning Wanga's name so he gathered that they were her supporters. He stated that he was taken out of the polling station when voting started.
120. In cross-examination by counsel for the 3rd and 4th respondents, and shown the Polling Station Diary (PSD) for Sindo Youth polytechnic, PW10 identified his signature. It was his testimony when shown the Form 37A for Sindo polling station 001 that he could see his name and phone number though he stated that the signature present was not his. When shown the PSD for Sindo Youth Polytechnic polling station stream 3, PW10 stated that he could not see any comments on the incident that he had described. He stated that voting stopped at Sindo Youth Polytechnic 001 at 5pm after they stayed out for a while and no people were getting in to vote.
121. In cross-examination by counsel for the 5th respondents. PW10 stated that he said the polling station was opened at 7.00am because the door to the polling station was locked. It was his testimony that at the onset of the violence, they all ran out of the polling station and the clerks of IEBC were the ones picking the spilt materials and returning them into the ballot boxes. He testified that he ran out at 4pm and when he returned, he saw ballot boxes fallen on the ground.
122. It was his testimony that he did not have time to go and report to the police as he was under the command of IEBC and he could only inform his chief agent Mr. Milama. He testified that he voted at Sindo Polytechnic and that he observed from Gindo secondary school some activities and later he was told that Wanga's people were the ones voting from there on 8/8/2022 and were being paid Kshs. 2000. He stated that he did not report the incident to the police. He further stated that he was denied



- a chance to take a photo of Form 37A and that he did not sign it although he could see his name on the form. PW10 reiterated his testimony in chief, upon being re-examined.
123. PW11 Lameck Oketch Odhiambo testified that he was an agent for the petitioners at Rungu Polling Station. It was his testimony that everything went on well on election day from morning till 11pm when they were told to sign an empty form 37A before votes were cast. He testified that he later realized that there was an error on the form specifically that votes were wrongly placed but that the votes assigned to Dr. Kidero were correct.
 124. He testified that Dr. Kidero had 048 votes, Charles Rabudi had 000 and Wanga had 256 but in Form 37A it was indicated that Wanga had 000, Rabudi 258 and for Dr. Kidero 048. He testified that had he complained, the supporters outside would have done something to him. It was his testimony that as agents, they were not allowed to enter the tallying center.
 125. In cross-examination by counsel for the 1st and 2nd respondents, PW11 stated that voting went very well and that the results were announced. It was his testimony that the Form 37A presented to him before court and signed off by the Presiding officer showed the correction and reflected the correctly announced results. He stated that he was not allowed at the tallying center so he was not in a position to know what transpired.
 126. In cross-examination by counsel for the 3rd and 4th respondents as well as counsel for the 5th respondent, PW11 reiterated his testimony in chief. In re-examination, PW11 stated that there was only one signature next to the correction and that he did not know whose signature it was as he was not there when the corrections on Form 37A was being made and further that there was no name next to the said signature. He further stated that the results he was shown on Form 37B were not the correct results as they were not the results he saw and took the photo of at the polling station. It was his testimony that the presiding officer asked them to sign the form because other agents wanted to leave and that they had to sign the form prior to leaving.
 127. PW12 David Obonyo Mireri testified that prior to the 9th August 2022 he was the campaign coordinator for Dr. Kidero in Kabondo Kasipul and that during the elections, he was the chief agent for the sub county. He testified that his duties were to identify and recruit polling agents, train them and ensure they were supplied with food and that they reached polling centers/Polling stations timely so as to ensure accountability and transparency of the counting process.
 128. It was his testimony that he was based at the tallying center at Ringa and could move around the polling centers. Regarding the issue of accreditation badges, he stated that the petitioners' agents were frustrated because they were not issued with badges. He testified that on the 8/8/2022, the agents were to be at the polling centers and meet polling officers and discuss processes and he requested Mr. Orage to issue them with badges but he told them that he had no badges and advised them to use appointment letters and oaths of secrecy to access the polling stations.
 129. PW12 testified that however, on voting day at 5:30am, agents called him appearing distressed, saying they had no badges yet other agents had them and that despite presenting their appointment letters and oaths of secrecy, they were disallowed in. He testified that he eventually managed to communicate with the Returning officer at 8:30 am and he allowed their agents to enter the polling stations.
 130. He testified that when he saw the discrepancy in the Form 37A from Rungu Polling Station as sent to him by his agent and what was being announced, he protested and the Returning officer placed it aside and made some alternations.
 131. On cross-examination by counsel for the 1st and 2nd respondents, PW12 stated that according to the PSD for Ringa 001, their agent was allowed in at 5:30am, while at Ringa 2, their agent Winnie Atieno



- Ochieng clocked in at 5:12, at Ringa 003, their agent Seth Onyinge clocked in at 0507hours and at Ringa 4, their agent Patrick Odhiambo clocked in at 0548hrs. He further stated that he witnessed bribery by one Isaiah Ogera who was not a registered voter in that polling station so he tried to access the polling station to inform the presiding officers but was not allowed so he turned to calling the returning officers. He testified that he was aware of the results in Rungu polling station as he was informed by his agent Lameck and that he knew that Wanga got 00 votes in that polling station.
132. PW12 further stated that there was a police report made in the OB about violence and the incidences that happened and that he personally went to the OCS Ringa and asked him whether he had been compromised to which the OCS responded by saying that in Kenya it's the system that matters.
 133. In cross-examination by counsel for the 3rd and 4th respondents, PW12 stated that he was appointed as chief agent two weeks to election. He further stated that apart from Rungu, he had not raised any issue with other polling stations. He testified that in Kasipul Kabondo constituency, Dr. Kidero got less than 15,000 votes while Wanga got about 31,000 votes. He stated that they were complaining because Wanga's votes at Rungu were changed from 00 to 258. He further stated that there were malpractices and stuffing of ballots for Wanga that could only be evident from the KIEMS kits. PW12 stated that he had not given the names of the person he saw dish money to the youths or the specific people who were receiving money to go and give to voters.
 134. In cross-examination by counsel for the 5th respondent, PW12 stated that he raised issues of bribery in three polling stations. He further stated that he witnessed violence at Kojwach primary whereas in Dudu primary School Polling station, he personally did not witness bribery but the same was reported to him. He stated that he reported the matter to the police station after the election date on the afternoon of the 10th August 2022.
 135. PW12 further stated that the money was being issued by youths in public. It was his testimony that there were people who told him that they were bribed although he had not named them. He stated that nobody recorded a statement with the police regarding bribery.
 136. In re-examination, PW12 stated that he did witness bribery at Omino polling center where he saw Isaiah Ogeya, someone well known to him, engaging in bribery. He testified that he saw Isaiah getting money and giving to youths and then they would go to vote. It was his testimony that he discussed with Isaiah and they agreed that what he was doing was not right as violence might erupt. PW12 testified that Isaiah promised to leave the polling center but that PW12 left him at the center
 137. It was his further testimony that he made two reports in reference to that OB, one about a voter who was being told to vote for the 3rd respondent and when he refused, he was assisted and the second when his personal assistant was attacked. He further testified that he reported the bribery incident to the Returning Officer. He stated that while voting was going on, there was no major activities till evening
 138. PW13 Enosh Ongweya Bolo adopted his witness affidavit and testified inter alia, that he was involved in the last general elections as the chief strategist and chief county agent for the 1st petitioner. He testified that his duties involved leading and managing the other agents to ensure the process was smooth. He stated that he was also involved in the training and issuance of appointment letters to the agents and following their training, they were advised to get in touch with the Returning Officers so that they also get badges for all agents as well as their own.
 139. He testified that before the election day, he contacted the 2nd Respondent who promised to supply them with badges on 7th August 2022. However, that come the 8/8/2022, his agents complained that they had not been issued with the badges so he contacted the Returning Officer who informed him that all badges were finished so he only gave PW13 a badge and promised that the other agents would



be allowed into the Polling Stations upon presentation of oaths of secrecy and letters of appointment by the respective candidates.

140. PW13 testified that he acted upon that assurance of the Returning Officer and informed all his constituency agents that they would be facilitated before accessing the Polling Stations. He testified that on 9/8/2022 at around 5am, he began receiving calls from constituency chief agents and Polling Station agents that they had been denied access to the Polling Station because they had no badges. He testified that he called Mr. Apopa the 2nd respondent herein and informed him of the complaints and Mr. Apopa directed him to contact the Presiding Officers specifically to resolve the issue and that some presiding officers accepted the letters of appointments and oaths of secrecy while others declined to accept.
141. He testified that the Polling stations opened at 6am and his agents were kept waiting for three hours and as a result, the agents were unable to execute their duties including ensuring their presence when ballot boxes were being opened. He testified that he voted at Homabay primary school, passed by the Governor's office and went to Rongo primary school polling station at 8.30am where he found voters looking agitated. It was his testimony that on inquiry, they informed him that a Presiding Officer had told them that they should vote six piece and further that the ODM agents were influencing voters to vote 6-piece. PW13 testified that he went and discussed the issue and the issue was calmed except one Okumu who continued doing the same until he was ejected by the youths and when he got out of the polling station, Okumu and PW13 discussed the issue and the situation calmed.
142. It was his testimony that at 10am while at Ololo, his chief agent at Ndhiwa called and said that one of the agents, Winnie had called him saying he had been denied entry and when he went there, he was assaulted. He testified that he went to Malela where he was denied entry despite showing his badge. He testified that he retreated and called his Presiding officer who said he was coming with the OCS and the OCPD.
143. PW13 testified that after about 45 minutes, the body guard for Hon. Martin Owino (Ndhiwa MP) arrived and ordered youths to go and get the materials. He testified that he then called the County General Investigations officer and explained to him what had happened and the Officer informed PW13 that he would call the OCS and the OCPD but nothing happened. He testified that he drove home and never got any intervention from the GSU. The court at this juncture observed that the witness recounted account by account of his affidavit of 7/9/2022 very vividly which affidavit had been adopted as evidence in chief.
144. PW13 testified that he also received a phone call from one Agent at Shauri Yako Primary School Polling Station who informed him that some goons in a white Probox attempted to introduce marked ballot papers into the polling station but were thwarted by the youths who damaged the ballot papers. It was his testimony that after about 15 minutes, he was informed by the same agent that the 3rd respondent's goons led by one Abdi had invaded the polling station. He testified that he managed to reach out to Inspector Albert Tum and Inspector Silas who were in charge of GSU officers deployed at the County Tallying Centre and that the two officers responded and ensured peaceful voting and vote counting at the polling station.
145. PW13 testified that he later proceeded to the returning officer, Mr. Apopa, and briefed him and while still in Mr. Apopa's office, Mr. Apopa received a phone call from the Ndhiwa Returning Officer, Ms. Rebecca Abwaku regarding the invasion of Akala Primary School polling station and Mirogi Tallying Centre by gun wielding goons. He testified that he left for Mirogi and just before reaching Mirogi Centre, a gang of armed goons who blocked the road at the bridge identified and stoned his car but after reporting the matter to IP Albert Tum, GSU officers were sent to clear them off the road.



146. In cross-examination by counsel for the 1st and 2nd respondents, PW13 stated that for what they had highlighted, their agents were not admitted in the polling stations before voting began. He further stated that he did not witness the voters being incited to vote 6-piece. He further stated that he had not given the details of the vehicle from which an AK47 rifle was pointed at him or any photos as evidence thereof due to that fact that the gun was pointed at him. He further testified that he had not listed the polling stations where double marking was being done or where their agents were denied Forms 37A.
147. On cross-examination by counsel for the 3rd and 4th respondents, PW13 stated that he was aware that the ODM party pushed for consensus. He testified that in pushing for consensus, the petitioner advocated for peaceful management of nominations but that ODM did not settle on consensus but forced consensus. He testified that his candidate was never invited and not being happy with the process, the 1st petitioner chose to leave the party to exercise his constitutional right. PW13 testified that the 1st petitioner wrote and sent his resignation letter in May 2022. He further testified that he was aware that any party dissatisfied with the process could appeal using the internal dispute resolution mechanisms provided for within the party constitution. He further testified that the 1st petitioner did not exercise the option of appealing to the Political Parties Disputes Tribunal but instead wrote to the Registrar of Political Parties and became an independent candidate.
148. PW13 testified that in Malela primary school, their agent did not participate the whole day. He testified that their agents were trained to write comments in the PSD and that most of them complied by signing therein. He further stated that Gladys Wanga defeated Kidero and that they did not have a different set of figure or totals of votes. PW13 denied deploying their own security. He stated that he did not reach Mirogi as the road was blocked by goons who were harassing motorists.
149. On being cross-examined by counsel for the 5th respondent, PW13 admitted that he knew that ODM as a party could give a direct ticket to a candidate. He testified that he was not aware that the petitioner challenged the nomination of the third respondent and that he was aware that there were channels for challenging decisions made by party organs. He stated that they opted to exit ODM party and go independent. It was his testimony that they enjoined ODM to this petition because of its role after the nominations on their influence of the outcome of the elections. He stated that ODM should campaign for its candidates but within the law.
150. PW13 testified that acts of bribery were only reported to him by Hon. Gamba in Suba North though he did not get the names of people who were being bribed or the amounts being given out as bribe. He testified that he only received one photo of the county Returning Officer Mr. Apopa receiving a bribe in his car. It was his testimony that ODM influenced elections through violence, 6-piece narrative and coercion. He stated that he didn't see the 3rd, 4th and 5th respondents instruct anyone to cause violence. In re-examination PW13 reiterated his testimony in chief.
151. PW14, the 1st petitioner herein, Dr. Evans Odhiambo Kidero testified that in the year 2022, he ran as an independent candidate for Governor of Homabay county and that prior to that, he expressed interest to run on an ODM party ticket as he was an ardent member of the party. He testified that he ultimately ran as an independent candidate because he was surprised to learn that one candidate had been given a direct ticket. It was his testimony that after the decision by ODM to give the 3rd respondent the ticket, he resigned from ODM and applied to be an independent candidate. He testified that he had paid his nomination fees of Kshs. 500,000 for Governor and his running mate paid Kshs. 250,000, which monies remained unrefunded to date. Dr. Kidero testified that his candidature was received with a lot of happiness and encouragement as the Homabay people had not seen development as expected and had also not felt the impact of devolution despite receiving money from the National Government.



152. Dr. Kidero testified that the direct ticket given to Hon. Gladys Wanga angered the people and they expressed themselves in various ways. He testified that his supporters were treated with a lot of violence in gatherings, campaigns, homes, in their individual capacities across the eight sub counties by ODM party fundamentalists and the candidate supporters. It was his testimony that in the videos annexed and marked as EOK 4(a) & EOK 4(a), senior officials of ODM made derogatory remarks of him and against the people of Homabay. He further testified that on the 18/4/2022, in Sindhoro in Kasipul Kabondo, the ODM party leader made a statement that those running on a ticket other than ODM were as stupid as their mother. He testified that culturally, one cannot abuse another by his mother's name.
153. Dr. Kidero further testified that starting from 8/8/2022, there was a premeditated, planned and executed effort of robbing the people of Homabay their will. He testified that they had county, sub county chief agents and 1228 polling agents but that on 8/8/2022, he received a report that there were no badges for them. He testified that agents were promised that they would nonetheless be allowed into the polling stations upon production of the oaths of secrecy, appointment letters and National Identity Cards but that instead, they were only allowed access into the polling stations late after interventions.
154. PW14 testified that various polling stations experienced incidents of violence the effect of which was to restrict the voting as his supporters especially women did not come out to vote and in places like Akala, voters would leave the queues. He testified that his agents were also thrown out of the polling station and so they were not part of the process of counting, tallying and declaration of results. He testified that if the voting process was marred by violence, then the results that came out were tainted and therefore unacceptable. Dr. Kidero testified that the sovereign will of the people of Homabay was subverted.
155. The 1st petitioner further testified that in several polling stations, the votes cast were not proportionate to the people who visited those polling stations. He testified that he wrote to IEBC asking for the information which the IEBC are mandated by Article 88 of the Constitution to supply but he never got them. He testified that unable to get Data from IEBC, he looked for it through other means since as it was a public document available with other public bodies and not subject to the Data Protection Act.
156. The 1st petitioner produced videos marked EOK 6(a) and EOK 7 (a) to show that violence was not foreign in the ODM party against anybody deemed not to be supporting the party. In video EOK 6(a), the petitioner testified that it portrayed "men in black" who were to scuttle elections against those who were threatening to win the elections contrary to the party wishes whereas video EOK 7 (a) according to the 1st petitioner, showed leaders of the party confessing clearly that violence was premeditated, planned and executed.
157. The 1st petitioner also produced and played video EOK 5(a) in which he alleged that the ODM party leader at the funeral of Paddy Ahenda stated that those people who were opposed to Nyagaya were stupid like their mother. He testified that the party leader was not specifically referring to him as stupid but to those people who were not championing the cause for the 3rd respondent. It was his testimony that when goons hear such pronouncements from leaders then it manifests in the elections. He produced and played into court EOK 8(a), a video of a lady being interviewed and complaining of violence during the period of party primaries.
158. He further produced as an exhibit and played video EOK 9(a) that showed a lady being interviewed by KTN News journalists and who appeared injured on her face and right hand. The petitioner testified that the lady was a supporter of another candidate who was not the ODM party's favourite. Dr. Kidero also produced and played a video marked EOK 5 (c) in which the person was saying that there was no way a person who was not an ODM party member could get the Governor's seat.



159. In cross-examination by counsel for the 1st and 2nd respondents, the 1st petitioner stated that there were several malpractices such as violence that marred the election. He further stated that there were irregularities as set out in the witness affidavits. He stated that his agents were denied access to the polling stations. However, he was shown polling stations where his agents accessed the stations early prior to voting. He stated that he had not named his agents who were chased from the polling stations or the polling stations they were chased from but they had been named elsewhere.
160. It was the 1st petitioner's testimony that allegations made from paragraph 74-104 of his petition referred to pre-election malpractices and that as at 9/8/2022, he had no pending case or dispute before any tribunal relating to pre-election malpractices. He testified that he wrote to IEBC for supply of electoral materials but that he was not given but that he got the data from the presidential election petition. He stated that the KIEMS Kit were universal.
161. PW14 testified that IEBC tried and conducted elections and how it was done fell on the 2nd respondent with the process erroneously returning the 3rd respondent as the winner. He denied that his witnesses failed to report the alleged incidents real time but that what was important was that reports were made.
162. In cross-examination by counsel for the 3rd and 4th respondents, PW14 reiterated his statement and evidence in chief and stated that he was surprised that his county chief agent never signed the results yet he was at the Tallying Centre. He further stated that there was no testimony given by his witnesses that he disagreed with. It was his testimony in cross-examination that the election process was also important as per Maraga J, the former Chief Justice. He however confirmed that from the legible copies that his counsel filed in court, there were stamps and signatures of presiding officers and his agents whom he acknowledged for example at Wanga and Sindo Youth polytechnic polling stations where two and three Independent candidate's agents signed F37As.
163. In relation to the KIEMS kit data that he produced, it was his testimony that the IEBC had not produced any contrary data. He stated that the actual quantum would be determined. He further denied the fact that they used the fact that the 3rd Respondent was only married and not born in Homa-Bay County to campaign against her and that that was not the reason the party leader was forced to intervene. He also denied using the 3rd respondent's gender to malign her.
164. It was his testimony that it was not true that the 3rd respondent was leading in the Opinion polls with 57%. He further testified that if the voters of Homa-Bay voted 6 piece, then they were not exercising their democracy because they were forced and not voting freely. He stated that in Homa-Bay, the people voted six piece through threats and intimidation. He stated that if votes for the 3rd respondent were erroneously recorded and taken away, they should have been returned to her in a regular manner. He testified that he did not make any complaint in writing, until the time of elections.
165. Regarding the video marked C1 in which he was addressing the public saying that voting was going on smoothly, he testified that he believed in those remarks. He also testified that he did not see the video marked C2 in which the 3rd respondent was addressing the public saying they wanted as ODM to mount peaceful campaigns devoid of any violence. He testified that he had evidence of the 3rd respondent's agents engaging in violence.
166. In cross-examination by counsel for the 5th respondent, the 1st petitioner stated that this was the first election where he was an independent candidate not supported by the ODM party. He stated that he had not set out provisions of Articles 22, 165(3) (d) of the *Constitution* that had been violated but had set out provisions of the *Election offences Act*. The 1st petitioner testified that he was unhappy with the manner of nomination that took place that made him run as an independent candidate as well as the subsequent violence meted out on his party supporters.



167. He further stated that the manner in which the 3rd Respondent was nominated was not consistent with the ODM constitution. He admitted that direct nomination was provided for under the ODM constitution. He further stated that he did not challenge the nomination process because he knew nothing would come out. It was his testimony that he was not challenging the outcome of elections on the basis of bundled nominations but only used the nominations to lay a basis. The 1st petitioner further stated that he was disappointed that the ODM nomination certificate went to the 3rd Respondent but that it was incorrect to say that the instant petition was a continuation of the challenge to the nomination process.
168. It was his testimony in cross-examination that Mr. Ojijo was coerced to sign Form 37A which was blank. He further stated that the speakers in the videos he produced before court were not witnesses in this petition. The petitioner further stated that the videos were to demonstrate the nature of violence within the ODM party. He testified that there was no nomination for Governor and further that there was no violence during nomination for Governor.
169. The petitioner further stated that Raila Amolo Odinga was not a party to this Petition. He denied making any scandalous allegations concerning Raila Odinga and stated that they only complained against his undue influence. He further stated that he used Raila's portrait because he was his Presidential Candidate and that in any case, Raila never protested the petitioners' usage of the portrait.
170. In re-examination, the 1st petitioner reiterated his testimony in chief and further stated that what he had placed before court were not mere irregularities but fundamental complaints on both the numbers and integrity of the process. He testified that he was not involved in the consensus building process and that he was called by the party leader at 2:43 P.M when the meeting was ongoing while in another Board meeting. He stated that he had not been invited to that meeting prior.
171. The 1st petitioner stated that because of violence, the County Commissioner called for a meeting which had to be rescheduled due to Mama Ida's visit but eventually never materialized because there were issues of funding by IEBC. He further testified that he was disappointed with the nomination of the 3rd respondent because the process was not free and fair. He stated that if the party was going to use direct nomination, they should not have invited the Candidates and taken their nomination fees. He testified that the party's decision was announced as a consensus but later it turned out to be a direct nomination. It was his testimony that violence caused voter apathy because of fear and it made them lose the presidency.

The 1st and 2nd Respondent's Response to the Petition

172. The Petitioner's Election was opposed by all the Respondents. The 1st and 2nd Respondents filed response to the petition as well as witness affidavits annexing documents which were adopted as evidence in chief and exhibits respectively, in support of their side of their side of the story.
173. In the response affidavit sworn by Mr. Fredrick Apopa, the County Returning Officer for Homabay, it was the respondents' contention that the election of the Governor of Homa Bay County was conducted in a free, fair, credible, transparent, accurate and verifiable manner, that met the constitutional threshold and that the 3rd Respondent was validly and lawfully declared the winner on 12th August, 2022.
174. The 1st and 2nd respondents further contended in their deposition that the 3rd Respondent was declared the winner having garnered a total of 244,559 votes against the Petitioner who garnered 154, 182 votes and one Mr. M. Charles Rabudi who garnered 1,244 votes. They stated that the 3rd Respondent won by a margin of 90, 371 votes.



175. It was their further case that the voter turnout in Homa Bay County in the gubernatorial election was 76% compared to the national voter turnout of 64.77%. They averred that the affidavits by the Petitioners' witnesses were not backed up by any evidence, were riddled with hearsay evidence, suppositions, theories and an attempted choreographed account of events and that neither did they proffer any viable evidence to impugn the election of the 3rd Respondent as conducted by the 1st and 2nd Respondents.
176. Regarding the pre-election disputes issues raised by the petitioners in paragraphs 85 to 106 of the Petition, the 1st and 2nd respondents contended that the same were pre-election disputes whose resolution was provided for in the Constitution, the Political Parties Act and the Elections Act and not within the instant Petition.
177. It was the 1st and 2nd Respondents' case that the 1st Respondent IEBC is also an arbiter of pre-election disputes and that the Petitioners never lodged any complaint or pre-election dispute with the IEBC for resolution and therefore in light of the doctrine of exhaustion, this court could not entertain a dispute whose resolution channel is established in law, before the petitioner exhausting those avenues.
178. The 1st and 2nd respondents further contended that the video clips produced and played in court by the Petitioners did not specify the dates that they were recorded whereas the said videos were mostly recorded in the run up to the 2013 general elections and had nothing to do with the 2022 general elections. It was their case that the videos were not recorded by the Petitioners or any of their agents. Further, that none of the video clips presented by the petitioners relate to the eve of the voting day, the voting day and process or the days after the voting.
179. They further contended that no report or formal complaint of violence, intimidation, voter suppression, improper influence, corruption or any allegation of infringement of the Electoral Code of Conduct (the Code) under the Second Schedule to and Section 110 of the Elections Act, was ever made by the Petitioners or their agents to the 1st respondent for action. They further averred that the 1st and 2nd Respondents did not witness any incidents of violence or breach of the Code that would have prompted the IEBC and the 2nd Respondent to ascertain the breach and punish the perpetrator suo motu as provided for under the Electoral Code of Conduct.
180. Regarding the alleged death of Kepha Ouma, the 1st and 2nd respondents contended that there was no evidence adduced by the petitioners that the alleged death was related to the impugned elections. Further, that there was no legal provision in the electioneering process for the recruitment of youths as security agents and thus if at all the said Kepha Ouma died, then he did so while executing an illegal enterprise
181. Regarding the claims of bribery as alleged by the petitioners, the 1st and 2nd respondents averred that no evidence was adduced to substantiate the same. They further averred that neither the Petitioners nor their agents made any formal report of any bribery or improper influence of voters to the 1st respondent or to the police.
182. The 1st and 2nd Respondents further averred that no voter was ever intimidated to attend any polling station as evidenced by the voter turnout in the stations where the Petitioners alleged that there were threats and actual violence. They asserted that for example, in Nyakango Primary School in Karachuonyo Constituency, the voter turnout was 76.7%, in Akala Primary School in Ndhiwa Constituency the voter turnout was at 67.2% and in Ligisa Primary School in Rangwe Constituency the voter turnout was at 69%.



183. The 1st and 2nd Respondents contended that there was no evidence of polarization or inflammatory galvanization, intimidation, coercion, violence and terror in Luo Nyanza as alleged by the Petitioners as there were candidates who were elected as independent candidates or under other political parties other than the 5th Respondent ODM party.
184. It was further contended that the Petitioners' allegations of voter suppression and fear of violence was further unsubstantiated as voters came out to vote and in certain instances preferred the Petitioners over the 3rd Respondent like in Homa Bay Town Constituency where the Petitioners won by 22,553 votes against the 3rd Respondent's 20,943 votes. It was further asserted that no incident of violence or disruption of peace or voting was witnessed or reported at Akala Primary School and that all election materials were at all times before, during and after voting, in the custody of the Presiding Officer and under the tight security of the police.
185. It was further contended by the 1st and 2nd respondents that from the Form 37A's filed by the Petitioners, the elections in Akala Primary School Polling Station went on smoothly to completion and that the agents duly signed the Form 37A's. They further contended that only a minor incident as recorded in Form 37A was witnessed in stream 2 at Akala Primary School that halted the election momentarily but did not interfere with anything, with voting proceeding after the police restored order. The 1st and 2nd respondents further averred that no incidents occurred at Ligisa Primary School Polling Station and no report of anybody being assaulted was made to the Presiding Officer or to the Police.
186. It was further contended that bribery was a serious criminal offence that cannot be proved by mere allegations without substantiation. They stated that no incident or voter bribery was recorded or reported at Wakondo Primary School Polling Station. They further averred that no agent was ever ejected from or denied access to any polling or tallying center and that all the Petitioners' accredited agents who availed themselves at the polling or tallying centers duly signed the relevant Forms.
187. Regarding the alleged result and vote padding, manipulation and swapping of results without countersigning, the 1st respondent stated that it executed its mandate strictly in accordance with the Constitution and the law in the conduct of election of the Governor of Homa Bay County and that the results were duly declared. It was their case that the allegations of massive electoral malpractices, irregularities and fraud were mere allegations without any substantiation and that no iota of evidence of ballot stuffing was availed by the Petitioners.
188. It was further contended that the counting and tallying of votes was done in a transparent manner as verified by the agents and that no candidate's votes were inflated, altered, manipulated, or padded as alleged by the Petitioners. They further averred that the candidates' agents signed Form 37A's and 37B's that confirmed that they were satisfied with the counting and tallying of the results at the various levels as envisaged by the electoral laws. They further averred that the results contained in Form 37A's and 37B's accurately reflected the count of the votes cast in favour of each party.
189. It was further averred that it was human to make some clerical errors taking into consideration the working conditions and environment coupled with political pressures although that cannot be misconstrued to have been done intentionally so as to favour any candidate. It was their case that no agent was refused or denied an opportunity to verify and/or authenticate the alterations.
190. The 1st and 2nd respondents further asserted that there was no complaint made to the 1st Respondent on any violence or voter suppression before, during and after elections. They contended that it was not a mandatory requirement for Form 37A and 37B to be signed by all the agents for the Forms to



- be valid and further that the law provides that failure by an agent to sign the Form does not invalidate the results.
191. The 1st and 2nd respondents further averred that they were the ones in exclusive custody of the KIEMS kit and in possession of the data contained in the KIEMS kit and thus there was no way the Petitioners or anybody else could access the data to make comparisons as made in table A at paragraph 138 and table B paragraph 139 of the Petition and that those comparisons and deductions were false and baseless and only meant to found a ground for scrutiny.
 192. The 1st and 2nd respondents further contended that no Returning Officer and/or Deputy Presiding Officer accepted and/or tallied returns from polling stations where the votes allegedly exceeded the number of registered voters and therefore the provisions of Regulation 83 of the Election General Regulations, were not breached. They further stated that no vote count exceeded the number of registered voters in any specific polling station.
 193. It was the 1st and 2nd respondents' case that all Form 37B's were officially received and authenticated by the County Returning Officer by signing the taking over certificate and that there is no mandatory requirement for Form 37A and 37B to be signed by all the agents for them to be valid. Further, that the law provides that failure by an agent to sign the Form does not invalidate the results. The respondents contended that Form 37C confirms that no vote was altered or swapped to favour any particular candidate.
 194. Regarding the alleged unlawful ejection and denial of entry and access of agents from and to polling stations and tallying centers, the 1st and 2nd respondents stated that pursuant to Regulation 62(1)(c) of the General Regulations, an authorized agent cannot be excluded from a polling station and further that Pursuant to Regulation 62(2) of the General Regulations, only one agent for each candidate or each political party that takes part in that election, is allowed in a polling station.
 195. It was the 1st and 2nd respondents' case that the 5th Respondent fielded candidates in all the six elective seats and pursuant to Section 30(2) of the *Elections Act*, it was authorized to have six agents for each of the candidates unlike the 1st Petitioner who only had one candidate and therefore only authorized to have one agent per each polling station.
 196. Regarding the alleged irregular assisted voting, it was the 1st and 2nd respondents' case that where the Presiding Officer was to assist a voter in the compartment then the candidates' agents must also be present and that in the past election, the agents never made any formal complaint of any irregular or unlawful assistance in voting. They further stated that there was no evidence that anybody was forced to vote for any particular candidate in the process of being assisted to vote.
 197. It was their case that there was no evidence or anything to suggest that any vote was stolen in the Homa Bay Gubernatorial Elections. The 1st and 2nd Respondents averred that if there was any irregularities or illegalities, the same did not affect the final results of the gubernatorial election. They further averred that the Petitioners had not presented any substantial evidence to invalidate the election of the 3rd Respondent as the Governor of Homa Bay County.
 198. In support of their case and position as above, the 1st and 2nd respondents called three witnesses whose testimony is summarised herein below:

The 1st and 2nd Respondents' Affidavit and *viva voce* Evidence

199. DW1, Fredrick Apopa, the County Returning Officer (CRO) for Homa-Bay County and the 2nd respondent herein testified on his own behalf and on behalf of the 1st respondent. He adopted his



- witness affidavit and stated that he was in charge of elections of 9th August 2022 in Homa-Bay County. It was his testimony that the 1st respondent trained agents for parties and independent agents in the month of August at 3 levels, the County, constituency and all polling station agents. He testified that the training involved requirements for one to be admitted into polling stations as agents. It was his testimony that contrary to the allegations by the petitioners that their agents were denied access to the polling station or admitted late, DW1 testified that he had produced documents of Polling Station Diaries showing the time that the agents were allowed into the Polling Station which was not as alleged.
200. DW1 further testified that they facilitated the process of access to the polling stations despite the fact that the 1st respondent found that some of the petitioners' agents had no Oaths of Secrecy or official appointment letters from their respective candidates.
 201. Regarding allegations of violence at Ongeti Polling Station, DW1 testified that the presiding officer never contacted him and further that it was abnormal that the presiding officer delivered documents to the police without giving the 1st respondent copies but acknowledged that it was commendable that despite the allegations, the presiding officer managed to return the correct results.
 202. Regarding the incident at Akala Polling Station, DW1 testified that from the Polling Station Diaries, the incident happened outside the Polling Station hence it did not interfere with the polling which was going on and that the incident was beyond their control. He further testified that in Akala 3 of 3, there was a report of more ballot papers issued to a voter but this was a result of clerical error occasioned by fatigue and did not relate to the gubernatorial elections.
 203. In respect of Ligisa Polling Station, DW1 testified that the petitioners' witness was not an accredited agent as evidenced from the Polling Station Diary PSD and thus it was not clear whether the alleged violence took place.
 204. On the alleged violence at Shauri Yako Polling Station, DW1 testified that no one could have accessed the tallying sheet at 10.00 a.m. and that the said documents do not in any way relate to the 3rd and 4th Respondents. He testified that on the allegation that a Probox motor vehicle entered the polling Centre with election materials, the 2nd Respondent testified that the Probox Vehicle was a rapid response vehicle to deliver replacement ballot boxes.
 205. On his alleged communication in the presence of Enosh Bolo, DW1 stated that communication with his officers was confidential and he therefore could not have been on a loudspeaker to allow interested parties to hear his conversations.
 206. On the alleged alterations to forms at Rungu, DW1 stated that the Form 37A annexed to Mr. Obonyo Mirere's Affidavit and DW1's own Form 37A produced were the same only that Obonyo's was incomplete. He further testified that the presiding officers are allowed to make corrections to ensure completeness of the documentations for example if certain entries are not correct or an agent brings to his attention or if the form is not duly stamped or not fully signed, they ensure completeness of documents. He testified that where the Form has results which have been announced, then the Presiding Officers cannot change it. DW1 testified that when collating results into Form 37C, he is allowed to change results after looking at Form 37A and Form 37B. He testified that he corrected the error in Form 37C. He further testified that the allegation that the Returning Officer stamped the Form 37As at the Tallying Centre was not true because the Returning Officer was not allowed to hold the Presiding Officer's Stamps as the said stamp does not leave the polling station to the tallying Centre.
 207. It was the testimony of the 2nd respondent that there were no single polling stations where the number of votes cast were more than those registered voters and further that there was no variance between the numbers in the KIEMS kit and those who voted. He further testified that the only situations where



- there would be a variance between KIEMS kit and the votes cast would be where a person spoilt their ballot and was issued with another ballot paper, secondly, where one marks a ballot paper but places it in the wrong ballot (stray ballot) and thirdly, where the ballot is marked wrongly so it is rejected (spoilt ballot).
208. On the petitioners' allegations that the IEBC officers were assisting voters in favour of the 3rd Respondent, DW1 stated that this was not true as there were two agents allowed per candidate and that all of them would witness the voter assistance and that since all of them would be interested in that assisted voter, they would be vigilant hence the voter could not be assisted to favour of one candidate over the other.
209. It was DW1's testimony that the allegations that some agents of the petitioners did not sign Form 37A's was not true as he had presented to court the said forms which were signed by the Petitioner's agents and further that one does not have to sign if one was not present and that in any case, refusal to sign by agent only call for comments for refusal to sign but does not invalidate the results.
210. On being cross- examined by counsel for the petitioners, DW1 denied treating the petitioners with contempt. It was his testimony that he instructed his Returning Officers that ODM candidates would send their agents, not as ODM agents but specific agents for specific ODM candidates. He further testified that the incident testified to by Rachael Kandiwo was not a major incident considering that voting progressed and that in one of the PSDs, it was stated that calm was restored after 30 minutes whereas in others it was not stated what followed. He testified that the incident stated by PW1 was not brought to his attention and that he only learnt about it in court.
211. Regarding the similarity in the handwritings of agents and party names in the PSD's, it was DW1's testimony that the Presiding Officer can task the clerk to write the names but cannot sign on behalf of the agent. He further testified that there was no way one could doctor the PSDs because each Polling Station has its own PSD. DW1 denied doctoring the PSDs so as to defeat this Petition. He testified that the final place for results to be declared was at the polling station and that an error could not be altered at any other place other than at the polling station.
212. In cross-examination by counsel for the 3rd and 4th respondents, DW1 stated that he was not aware of any dispute filed by the Petitioner following the nominations and that no formal complaint was sent to him or to the Commission. He further confirmed that there was a reported incident at Akala 2 polling station which disrupted voting momentarily but the situation was put under control and that polling went on at Akala 1, 2, 3 and agents witnessed the process to the end.
213. Regarding Ongeti primary school incident, DW1 stated that he knew about the incident way after the voting and conclusion of the exercise and after results had been declared. He stated that he was not aware of any forms filled under the compulsion of agents for the 3rd and 4th Respondents and that there was no evidence of follow up at the police station of what happened. It was his testimony in cross-examination that the IEBC chairman issued directions on handling of forms and as such, he did not know how PW1 got 2 sets of forms.
214. Regarding the Shauri Yako incident, DW1 stated that he had not seen any pre-marked ballot papers in favour of the 3rd & 4th Respondents and further that the petitioners' witness testified that the papers he saw marked were white in colour whereas the gubernatorial ballot papers were blue. He stated that the vehicle attacked at Shauri Yako was a quick response vehicle delivering material to the polling station, a process that also involves agents. DW1 testified that at Shauri Yako Polling Station, the Polling Stations that had a delay had polling extended up to around 6.00 pm before the counting began at 7.00 pm.



215. It was his testimony that in case of inconsistency between form 37 A and 37 B, he would go by the results in form 37A. He further stated that he would not enter results in form 37C that were not stamped and signed by the Presiding Officer such as those provided by the petitioners in this case.
216. In cross-examination by counsel for the 5th respondent, DW1 stated that ODM was keen on the outcome of elections because they had sponsored candidates. He further stated that there were 6 elective positions in contestation at the same Polling Stations and that any issues around late opening or disruptions affected candidates in all the 6 elective positions. It was his testimony that it was incorrect to say that a voter would be assisted only in respect of Governor's position. DW1 further stated that he had not received any report on the alleged bribery and that none of the petitioners' witness said anything that would materially alter the declared results. In re-examination, DW1 reiterated his testimony in chief.
217. DW2 Lawrence Okumu Barasa testified that in the 9th August 2022 election, he was the gazetted returning officer for Rangwe constituency in Homa-Bay County. He denied receiving any report from PW1 and testified that he only received a Form 37A from PW1 for the gubernatorial elections. It was his testimony that at 11pm, PW1 posted a message on their WhatsApp group saying he was under threat so he, DW2, mobilized security who rescued Dan to the tallying Centre where he presented Form 37A and the PSD for Ongeti Primary School Polling Station to DW2. He testified that they then started processing the results alongside other results and that after PW1 had submitted the results, they cleared him to go for dinner and PW1 then left the Tallying Centre.
218. In cross-examination by the petitioners' counsel, DW2 reiterated his testimony and further stated that he informed PW1 to report to the police. It was his testimony that PW1 never reported back to him whether he went to the police or not and that although he was in touch with the OCPD, she never informed him of any follow up by PW1.
219. In cross-examination by counsel for the 3rd and 4th respondents, DW2 stated that he never received any information of disturbances from PW1 that could have affected voting or of the conduct of the 3rd respondent's agents. DW2 reiterated his testimony when cross-examined by counsel for the 5th respondent and in re-examination.
220. DW3 Risper Oloo testified that she was the Presiding Officer for Akala Polling Station 03 during the August 9th 2022 general elections. She testified that at about 4pm, the Deputy Presiding Officer who was assisting a lady voter noticed that the said voter had erroneously been given 2 ballot papers for the presidential candidates instead of one. She testified that the deputy presiding officer raised the issue and it was rectified by withdrawing the extra presidential ballot paper.
221. DW3 testified that they confronted the clerk who had issued the extra ballot paper and established that the same was an oversight due to fatigue as they had been working since 4am. She further testified that at around 4.45pm, while they were inside the polling station, they heard skirmishes outside and saw people/goons in the field trying to make their way towards the polling Centre so they quickly moved and secured the election materials as the police worked to restore calm.
222. It was her testimony that she informed the Constituency Returning Officer who responded and went with security back up and dispersed the crowd. She testified that after calm had been restored, they proceeded with the vote count and the same was conducted peacefully. She testified that the skirmishes did not affect the voting as it happened 15 minutes to the closing of voting and that there were no people in the queue.



223. In cross-examination by counsel for the petitioners, DW3 reiterated her testimony and stated that she could not remember an incident of a person bringing many Identity Cards and asking for voting without the voters themselves. It was her testimony that since the ballot paper had not been marked, they retrieved it and gave it back to the clerk who placed it into the booklet for Presidential candidates.
224. In cross-examination by counsel for the 3rd and 4th respondents, DW3 stated that PW7, Rachael Kandiwao came with her identification card and entered the details plus her telephone number in the PSD. She stated that she did not exclude the agents who failed to sign the PSD from undertaking their responsibilities as polling agents. It was her testimony that the attack took around 10 minutes and that the attackers were throwing stones on top of the roof. She stated that since the windows of the polling station they were in were wide open, they had to lie down. She stated that no unauthorized person entered the polling station where they were. DW3 further stated that thereafter, there was no interruption and that some people who were in the line voted. She testified that she never identified any of those goons and that she did not know why they were throwing the stones.
225. In cross-examination by counsel for the 5th respondent, DW3 reiterated her testimony in chief. In re-examination, it was DW3's testimony that PW7 had testified that she reported to the polling station at 5am.

The 3rd & 4th Respondents' response to the petition

226. The 3rd and 4th respondents filed their response to the petition dated 18th September 2022. It was their case that the 3rd Respondent was lawfully and rightfully nominated by the 5th Respondent as its Gubernatorial candidate for Homabay County pursuant to Article 23 of its Party primaries and nomination rules, 2022.
227. They further averred that neither the Petitioners nor members of the party invoked the party dispute resolution mechanisms set out under the ODM Appeals Tribunal Rules or the Political Parties Disputes Tribunal Act to challenge the 3rd Respondents' nomination. It was their case that this Honourable court has no jurisdiction to entertain matters relating to nomination issues arising from the party primaries.
228. It was their further contention that their election was the result of legitimate and robust campaign efforts and reflected the sovereign will of the people of Homabay County. They further averred that their campaigns were peaceful and free from violence and that whereas the elections were not perfect, if there was violence at any rally, the same was insignificant, isolated and did not affect the voting, counting of votes or outcome of the election. They further stated that if any violence was witnessed in the Petitioners' campaigns, the same was, from the Petitioners' own evidence, the result of competition between supporters of different candidates embedded within the Petitioners' campaign and/or occasioned between candidates seeking other elective positions not related to the Gubernatorial elections.
229. The 3rd and 4th respondents further averred that the purported evidence of violence during pre-nomination and election campaigns related to the 2013 or 2017 elections and that in any event, that was secondary evidence of persons not witnesses in these proceedings and was thus inadmissible and did not meet the standard of proof of election offences in Election Petitions.
230. The 3rd & 4th Respondents averred that the Rt. Hon. Raila Odinga, the party leader of ODM was not a party to these proceedings and that therefore, countenancing the scandalous allegations against him amounted to condemning him unheard contrary to Articles 47 and 50 of the *Constitution* and thus the Petitioners' decision to make derisive remarks against the Party leader was mischievous and deliberately



- intended to abuse these proceedings for ulterior political purposes and amounted to an abuse of court process.
231. It was the 3rd and 4th respondents' case that the ODM Party Leader was entitled by Article 16 as read with Article 7(1)(d) of the ODM Constitution to drum up support for all ODM Party and Azimio candidates without prevarication. The 3rd and 4th respondents further contended that the mere fact that all candidates or a majority of them in some polling stations were ODM candidates cannot, without more, be evidence of violence.
 232. The 3rd and 4th respondents averred that no cogent evidence was adduced to the effect that the Petitioners' agents were ejected from polling stations so as to disturb the outcome of the elections in over 1,228 polling stations in Homabay County as in any event, pursuant to regulation 62(3) of the *Elections (general) Regulations*, the mere absence of agents at a polling station cannot invalidate the results of an election at the said polling station.
 233. It was their case that the alleged incident of vote swapping to the detriment of Mr. Rabudi, was in actual fact a minor error of original entry to the detriment of the 3rd Respondent in two polling stations only and that the totality of the evidence available clearly demonstrated that it was inconceivable that the said Mr. Rabudi could have garnered over 250 votes in one polling station and 2 votes in another polling station within the same centre.
 234. Regarding the allegations of vote padding as laid out by the petitioners in paragraph 135 of the petition, the 3rd & 4th Respondents averred that the table demonstrated that the Gubernatorial election had the lowest number of votes cast relative to other positions and that holistically construed, the deviation was negligible and within a reasonable margin that could be accounted for by stray ballots, rejected votes, or even errors in the recording of votes cast in the statutory forms in the other elections and further that the said deviations even if construed in favour of the Petitioner would still not affect the outcome of the election as overwhelmingly returned by the people of Homabay County.
 235. It was their case that the purported comparison of variance of votes cast in different elective positions per se could not be a ground to nullify the results of one election as against the other as each election result must be challenged on its own grounds.
 236. The 3rd and 4th respondents further averred that the allegations of voter suppression in paragraphs 141-143 of the Petition were unsubstantiated and devoid of empirical or scientific basis and further that the Petitioners had never vied for elections in Homabay County and thus the averment that Kologi Kanyamwa ward was their stronghold had no empirical, historical or scientific basis.
 237. The 3rd & 4th respondents further averred that if indeed there was voter suppression in any ward, the same would have been presumed to have affected all candidates equally and the Petitioners were thus put to strict proof of the contrary.
 238. It was their case that from a cursory look at form 37C, the Petitioners performed dismally relative to the 3rd Respondent in 95% of polling stations in the county including those in which no allegations had been made that their agents were ejected. They further averred that a cursory review of a majority of the forms that were allegedly not signed by the Petitioner's agents revealed that the same were duly endorsed by the Petitioners' agents and in some instances signed by more than two of the said petitioners' agents.
 239. The respondents further contended that the averments of assisted voters being assisted in favour of the 3rd respondent lacked in specificity and that in any case, any voters that were assisted were lawfully assisted in the presence of all available agents and none of the assisted voters had been called to elucidate further on being coerced to vote in a certain manner.



240. In response to the videos annexed to the 1st Petitioner's affidavit marked EOK4(a), EOK5(a), EOK5(d), EOK6(a), EOK7(a), EOK8(a), EOK10(a) and EOK11A, the respondents contended that the said videos were inadmissible in evidence and of no probative value to these proceedings. The 3rd & 4th Respondents contended as follows regarding the aforementioned videos:
241. That EOK4(a) related to party primaries and confirmed that the Petitioner de-campaigned the 3rd Respondent on account of her gender, the video marked EOK5(a) had been conveniently abridged and confirmed that the party leader's remarks were made in defence of the constitutional ideals of equality before the law and non-discrimination on the grounds of sex, marital status, ethnic and social origin and that in any case, the Party Leader was exercising his political rights and freedom of speech and opinion.
242. The respondents further averred that video marked EOK5D related to remarks made by Hon. Ogindo and Senator Kajwang in exercise of their political rights and freedom of expression and that the said speakers were rightfully campaigning for the ODM Party as they were entitled and obligated to by the ODM Constitution.
243. In regard to the video marked EOK6(a), it was the 3rd and 4th respondents' case that the said video related to the events at an ODM National Delegates Convention in 2014 while the video marked EOK7(a) related to a KTN News feature 'untold stories' on the 2014 ODM convention and that the interviewees in the said videos were not witnesses in these election proceedings.
244. The 3rd and 4th respondents further stated that the videos marked EOK8(a) and EOK410(a) related to the ODM Nomination process in Ndhiwa Constituency whereas the 3rd Respondent was awarded a direct nomination and therefore the purported instances of violence in Ndhiwa had no correlation with the said elections and that in any case, the allegations of violence could not be verified from the said videos. They further averred that the video marked EOK11(a) related to remarks by the 1st Petitioner after announcement of results and that everything he said in the video had not been made out in the petition.
245. The 3rd and 4th respondents asserted that if there were any alterations of the total number of votes cast in any forms, the same was because of minor summation errors and did not affect the individual votes garnered by each candidate and further that the same errors were also not systemic or widespread as to affect the validity or credibility of the elections. It was their case that all statutory forms were duly signed and stamped by electoral officers as by law required and that if any was not so signed or stamped, it was not systemic or widespread as to affect the results of the impugned election.
246. The 3rd & 4th Respondents further asserted that the Gubernatorial elections in Homabay county was free, fair, credible, transparent, accountable and verifiable and that the results announced and declared therefrom is a true and accurate reflection of the will of the people of Homabay County. The 3rd and 4th Respondents averred that the Petitioners failed to establish by evidence or otherwise that they were entitled to the orders sought by law prescribed.
247. In support of their case, the 3rd and 4th Respondents filed witness affidavits. The 3rd Respondent testified and called 14 witnesses whose testimony is summarized herein below:

The 3rd and 4th Respondents' witnesses' affidavits and viva voce Evidence

248. DW4, Aloyo Joseph Odira adopted his witness affidavit and testified that he was appointed as the 3rd respondent's polling agent for Shauri Yako 01 of 5 Polling Stations in Shauri Yako. It was his testimony that he reported to the station at 5am and found IEBC officials. He stated that he signed in as an



- agent at around 6am and voting started soon thereafter. He testified that he witnessed an incident of a commotion involving a Pro-box motor vehicle at around noon. It was his testimony that he was in Polling Station 01 and so he walked to where the Probox was before it was attacked. DW4 testified that the youths were shouting in dholuo “Wanga is stealing votes” then they took the empty ballot boxes and destroyed them. It was his testimony that he never saw any ballot papers. He reiterated that no ballot papers were found in the Probox motor vehicle.
249. DW4 testified that the lady who was there with a security officer identified herself as an IEBC Official and stated that there were no marked ballot papers. He further testified that voting was going on and that nobody got out of the Polling Station. He further testified that the disturbance took place for about 20-30 minutes then calm was restored and that voting was closed at 6pm. He testified that he was present when votes were counted at his Polling Station and that after signing form 37A, he left Shauri Yako at around 3.30 a.m.
250. In cross-examination by counsel for the petitioners, DW4 reiterated that the Probox came into the polling Centre at Shauri Yako carrying IEBC empty ballot boxes. He further stated that the security officers informed him that the Probox was in the service of IEBC, carrying electoral materials to support the voting process, but not ballot papers. It was his testimony that there were no missing materials during voting which went on smoothly and further that he was never informed by the Presiding Officer of insufficiency of the electoral materials.
251. In cross-examination by counsel for the 1st and 2nd respondents DW4 stated that he reported to the Polling Station at 5.30am and that agents were being allowed in the Polling Station after presenting identification documents as required. He further stated that the petitioners’ agents were allowed in the Polling Station. He stated that he saw empty, transparent containers - ballot boxes which could be seen through. It was his testimony that all poll agents were allowed to sign the PSD and that the Presiding Officer never denied any agent the opportunity to sign in the PSD.
252. DW4 further stated that the Petitioners’ agents were present during voting and counting and that they signed Form 37A. He further stated that he was the first agent to sign the form and that the options were to indicate party name or Independent candidate. He further stated that his candidate’s party was ODM and that is what he indicated.
253. In cross-examination by counsel for the 5th respondent, DW4 stated that in this particular Polling Station, Dr. Kidero got 235 votes while Hon. Wanga got 195 votes. He stated that Hon. Kidero had more supporters in this Polling Station. He further stated that he witnessed the counting of votes and that any agent who was present would sign. DW4 reiterated that he witnessed the commotion but that it never affected any voting or counting process. He stated that the voting was smooth inside the Polling station throughout as the incident happened at the polling Centre and not at the polling station. It was his testimony that Maurice Osodo was a supporter of Dr. Evans Kidero but not an agent. He stated that Maurice was outside the polling station. He further stated that there was no material associated with any candidate on that material date.
254. In re-examination, DW4 testified that he was not aware that the IEBC officials had requested for more materials. He stated that there were 5 polling stations and he was at Polling Station 1.
255. DW5 Gladys Atieno Nyasuna Wanga, the 3rd Respondent herein adopted her witness affidavit and testified that she declared her intention to run for office of Governor of Homa-Bay in late 2020 on the ODM party ticket and that she was aware that there were 8 other candidates vying for the ODM ticket. She further testified that the National Governing Council for the ODM party met in Nairobi, a meeting that both the 1st petitioner and herself attended, where it was agreed to have nomination by (i) consensus; (ii) Direct ticket; (iii) nomination by delegates and (iv) Universal suffrage by party members.



256. The 3rd respondent produced video evidence marked C1 in which the 1st petitioner could be seen and heard speaking just before the nominations and stating that they should not give the party leader a hard time but sit down and reach consensus on who was to carry the party ticket. She testified that she was aware that the ODM party used a consensus process. It was her testimony that the outgoing Governor was tasked by the NEC to reach out to aspirants and on the 3rd March 2022, they were called to a consensus meeting including the 1st petitioner.
257. It was her testimony that Dr. Oburu Odinga and Governor Awiti reported that they had reached out to the 1st petitioner as tasked and further that the party leader called the 1st Petitioner who promised to go to the meeting but he eventually did not show up. She testified that the meeting held discussions and finally, all the aspirants present agreed to back her and the 4th respondent for the party ticket for the position of Governor and Deputy Governor respectively. It was her testimony that the party leader commented that had the 1st Petitioner attended and registered his objection; another method would have been considered.
258. The 3rd respondent denied that there was violence that affected the outcome of the elections. She testified that no violence could have been present when her target was women voters during campaigns. She denied interfering with the ODM party as well as the voters.
259. It was the 3rd Respondent's testimony that she was not aware of the party's culture of violence that allegedly helped her to win the elections. She stated that the Kasarani video produced and played by the petitioners was probably taken in 2014 because it was not dated and further that the video did not relate to election of Governor at Homa-Bay. Regarding the video of a woman speaking in Ndhiwa, it was the 3rd respondent's testimony that the said video could not have been related to the gubernatorial nominations since the process was done by consensus. She further testified that the video had nothing absolutely, relating to her election as Governor.
260. The 3rd respondent testified further that she prepared thoroughly for the elections and had agents, two per polling station all who were accredited. It was her testimony that she had not seen any results contested by the Petitioners. She testified that the allegations about Rungu Polling Station were wrong. It was her testimony that failure by agents to sign forms does not invalidate results but that the valid results must be signed and stamped by the Presiding Officer. She further testified that the Petitioners never produced any invalid results as alleged.
261. It was her testimony that the allegations that violence lead to low turnout was not correct as Homabay County had the highest turnout above the national average. The 3rd respondent testified that her video marked C(iii) showed her during the campaign trail calling for peaceful process while video marked EOK 4(a) and 5(a) showed a few people protesting her being awarded the direct nomination ticket and that video 5(a) showed the Rt. Hon. Raila Amolo Odinga at a funeral addressing the mourners of Paddy Ahenda and that it was misleading for the Petitioners to say that the party leader had insulted anybody not supporting ODM.
262. In cross-examination by counsel for the petitioners, the 3rd respondent denied being the senior most official of the ODM party in Homa-Bay stating that Hon. John Mbadi was senior to her. She admitted being a staunch supporter of the Rt. Hon. Raila Odinga and that she was aware that his main complaint was against the IEBC in the manner it conducted the elections for president.
263. In regard to the commotion that occurred at Shauri Yako Polling Station, it was her testimony that she was not competent to answer to the administrative arrangements of IEBC and that only IEBC could explain on what they do in terms of distribution of polling materials. Regarding the alleged violence at Akala Primary School, it was her testimony that she did not understand how her campaign and team



- were associated with the violence and further that she had not seen any evidence to the effect that voters were prevented from voting by the alleged violence.
264. The 3rd respondent further stated in response that she had two agents per polling station but that at any one given time, there was one agent at the Polling Station and the two would take turns. It was her testimony that she was aware that the Petitioners had made claims of inconsistencies but that it was not possible that there was ballot stuffing or generation of votes because his agents signed the Form 37As.
265. Responding to a question regarding the KIEMS kit data, she stated that the same were illegally obtained because the electoral body did not supply the data. She further testified that she was given a direct ticket following a process of discussion, consultation and consensus. It was her testimony that there were no other women interested in the nomination for governor on the ODM ticket. She further testified that she knew John Ogina Nyabola an ODM party member who had been removed as branch chair. She testified that she had no relation with the branch.
266. In cross-examination by counsel for the 1st and 2nd respondents, DW5 stated that there was no contestation on her nomination as a candidate to vie for governor. She further stated that no summons had been filed or served on her as a result of the allegations of violence. It was her testimony that on the election day, she was with her husband, George Wanga, and their children and that they voted and went back home. She further stated that her husband had not been summoned over any allegations of violence.
267. The 3rd respondent testified that no evidence had been adduced before court linking her or her associates with the alleged violence. She further stated that she never facilitated any voter bribery during the elections and that she closed her campaigns and only paid her agents. It was her testimony that she had no report lodged against her to the IEBC or against her agents on voter bribery. She further stated that the election of 9th August 2022 were free and fair to a great extent and that in her assessment, the voting system was simple. It was her testimony that the votes cast were entered correctly and where there were issues, the same were corrected. She stated that the results were promptly announced at the Polling Station and no report of any dispute was reported to her. She stated that the agents for all parties signed the results and further that the collation of results were accurate.
268. In cross-examination by counsel for the 5th respondent, the 3rd Respondent stated that she had grown up through the ranks of the ODM party. It was her testimony that the primary consideration for ODM was the popularity of the candidate with the people and that a few opinion polls in Homa-Bay County showed that she was ahead of the 1st Petitioner. She further testified that her nomination was never challenged and that two days after her nomination, the 1st Petitioner announced his decamping.
269. The 3rd respondent stated that the videos produced in this court did not show any violence relating to the elections of 9th August 2022. She stated that the 1st Petitioner was a life member of ODM and a Governor in Nairobi in 2013 and a candidate in 2017 which he lost. She testified that the reason the 1st petitioner said that ODM is a violent party was because he lost the ODM ticket.
270. It was her testimony that the allegations raised by John Ogina Nyabola were not linked to the gubernatorial elections in Homa-Bay County but internal party dispute that could be resolved within the party dispute machinery. She testified that the elections were peaceful and that there were previously peaceful elections in Homabay till the 1st petitioner vied. She further testified that she was not aware of any violence instigated by the police. In re-examination, the 3rd respondent reiterated her testimony in chief.
271. DW6 Selphas Ouma testified that he voted in Rungu 02 polling Station where he also acted as an agent for Hon. Gladys Wanga who was vying for Governor. He further testified that Rungu Polling



- Station 02 was opened at 6am when people started voting and that voting proceeded well without any incidents until 5pm when the polling station closed then ballot boxes were opened and counting of votes started from President first ending with those for Governor. He testified that Lameck Oketch was the 1st petitioner's agent at the said polling station.
272. It was his testimony that the declared votes at the station were; Wanga 258, Rabudi 00 and Kidero 48. He testified that during signing of Form 37A, he noticed that the Presiding Officer had entered the results for Wanga to be for Rabudi and vice versa. He testified that he asked the Presiding Officer to correct the error and the correction was done. It was his testimony that no one complained against the correction including Lameck who was the 1st petitioner's agent and who agreed that there was an error. He testified that the correction was done according to the declared results. DW6 testified that the results in Form 37C reflected the correct results for the 3rd respondent i.e. 258 votes.
273. In cross-examination by counsel for the petitioners, DW6 stated that he was present when Form 37A was filled and the subsequent alterations made. He testified that he saw Form 37C at the polling station but later stated that he did not know the difference between Forms 37B and 37C. It was his testimony that he left the Polling Station at 11am.
274. In cross-examination by counsel for the 1st and 2nd respondents, DW6 stated that he was in the presence of other agents at Rungu Polling Station including those of the 1st petitioner and further that they slept at Rungu Polling Station. It was his testimony that the 1st respondent's officers gave all of them the opportunity to sign the PSD. He further testified that the corrections on Form 37A were done at the polling station prior to him signing the Form when he noticed the error.
275. In cross-examination by counsel for the 5th respondent and in re-examination, DW6 reiterated his testimony in chief.
276. DW7 Wycliffe Otieno testified that he was appointed as the 3rd respondent's agent at Rungu Polling Stations 01 of 2. He testified that he got to the Polling Station at 5am and voting started at 6am and proceeded peacefully until 5pm when polling was closed. It was his testimony that at the close of voting, they were given the procedure by IEBC on how to go about the counting of votes starting with the president's and ending with Governor's. He testified that the 3rd respondent got a total of 248 votes, Rabudi got 3 votes while Dr. Kidero got 71 votes. It was his testimony that the 1st petitioner's agent Paul Ochieng wrote his name but copied DW7 and wrote 'ODM' in the position where the party name was to be indicated.
277. In cross-examination by counsel for the petitioners, DW7 testified that the column on disputed votes on Form 37A was not correct. He further stated that the agent who signed for Dr. Kidero was Paul Ochieng and he indicated the party name to be ODM. He reiterated that Paul Ochieng himself confirmed on that day that he was an agent for Dr. Evans Kidero.
278. On cross-examination by counsel for the 1st and 2nd respondents, DW7 stated that he was present throughout from the voting to the counting of votes. He confirmed that there were 7 disputed votes that were captured in the Form 37A not four. In re-examination, DW7 stated that he had not seen any challenge to the results in Rungu 01.
279. DW8 Elly Otieno Nyiero from Kalogi Kanyamwa ward, Ndhiwa constituency testified that he was the chief agent for the 3rd respondent in Ndhiwa constituency. It was his testimony that he was present at the Constituency tallying Centre during tallying and declaration of results and upon conclusion of the exercise and that he appended his signature on form 37B. DW8 testified that regrettably, when it was clear that the results were not in the Petitioners' favour, their agents simply left the tallying center



- and did not bother to append their Signatures to the form 37B despite witnessing the whole process of verification and tallying.
280. He further testified that there were negligible instances of alterations on forms but which were not widespread or systemic and which were mostly summation or entry errors that were countersigned by the presiding officers and signed by the candidates' agents. He further testified that a majority of the Petitioners' agents signed form 37As and that those who did not sign were either absent from the polling station at the time of signing or simply refused to sign without giving reasons. DW8 testified that the results in form 37B tallied with all results in form 37A from polling stations in Ndhiva Constituency. He further testified that allegations of violence had not been proved through cogent or reasonable evidence. He testified that in any case, most of the said disturbances were occasioned by local rivalries in elections other than Gubernatorial elections and were accordingly not within the control of the 3rd Respondent or any of her agents.
281. In cross-examination by counsel for the petitioners, DW8 stated that there were 207 polling stations in that constituency and that the 3rd Respondent had two agents assigned per polling station but only one was to be at a polling station at a particular time. He further stated that they had their own agents for the 3rd respondent and other ODM candidates had their own agents. He testified that the agents for the 3rd respondent signed on her behalf and that the 3rd respondent was an ODM candidate and thus other ODM agents could have signed on behalf of the 3rd respondent.
282. DW8 further testified that it was not true that the agents who did not sign were denied the right to sign. He stated that if the agent was not in the room then obviously they could not have signed.
283. Regarding the violence at Akala primary school polling station, DW8 testified that he went there and saw a group of youths exchange words but that the police arrived and restored calm.
284. In cross-examination by counsel for the 1st and 2nd respondents, DW8 stated that all the Form 37As presented at the Constituency Tallying Centre were all signed and stamped. He confirmed that the independent candidates' agents were present and they signed. He further testified that an agent could state the name of the independent candidate or name of party sponsoring the candidate. It was his testimony that the gubernatorial elections in Homabay were peaceful and conducted in accordance with the law. He further stated that he was not aware of any report made to the police or any OB number given.
285. In cross-examination by counsel for the 5th respondent, DW8 testified that at Akala Primary Polling Station, there were commotions outside the polling centre between 4 – 4.30pm when a majority of the people had voted but that the police arrived and restored calm and everybody went back. It was his testimony that he never received any report of violence or bribery other than the Akala incident. He further testified that they only deployed agents for the 3rd respondent while other candidates vying on the ODM ticket had their own agents. In re-examination, DW8 reiterated his testimony in chief.
286. DW9 Roselyne Agengo testified that she was an agent for the 3rd respondent for Adongo polling station 1 of 2. She testified that polling was peaceful and that voting continued until about 7.30pm then they counted votes until 9pm on 9/8/2022. It was her testimony that after counting, Kidero got 252, Rabudi got 4 votes. Gladys got 81 votes. She testified that they were two agents in the polling center., with the other agent, Julius Ouma, in polling station 02.
287. In cross-examination by counsel for the petitioners, DW9 reiterated her testimony. Cross-examined by counsel for the 1st and 2nd respondents, she stated that she neither saw nor heard the supporters of the 3rd respondent campaign at the polling station nor did she hear the presiding officer telling voters to vote six piece. It was her testimony that she never saw anyone being bribed to vote and added that



- no complaints of bribery were raised. She further stated that she did not know anyone by the name George Okumu. She reiterated her testimony when cross-examined by counsel for the 5th respondent as well as in re-examination.
288. DW10 Tom Owino Ondiek testified that he was the 3rd respondent's agent at Nyakango Primary School polling station. He testified that on 9/8/2022, he went to the polling station at Nyakango at 6.am where he found IEBC officials already in the polling station and agents for other parties and candidates in the compound. It was his testimony that they were called by the IEBC presiding officer to submit their appointment letters before they were given forms to sign.
289. It was his testimony that he knew the petitioner's agent, George Oketch Ochieng, very well. DW10 denied George Oketch's allegations of conversing with IEBC, of a vehicle entering the polling centre and a bribe of Kshs. 10,000 being given or that he was hijacked/abducted and taken away after he refused to take a bribe. He further testified that voting ended at about 6.30pm but that at about 3pm, George Ochieng was tired so he left the hall and was relieved by Ezra Ayugi who eventually signed the Form 37A.
290. In cross-examination by counsel for the petitioners, DW10 stated that George was not abducted but left the hall as if he was going for a short call. He reiterated that when George left, he was replaced by Ezra Ayugi at about 3pm on 9/8/2022.
291. In cross-examination by counsel for the 1st and 2nd respondents, it was his testimony that as an agent, he had his accreditation documents and was allowed into the polling station. He testified that voting and counting was peaceful. He further stated that they were trained that they could talk to the presiding officer if there was any issue. DW10 further testified that in his view, IEBC conducted elections properly.
292. He further stated that out of the many agents in the polling station, only one had raised issues. It was his testimony that the agent who replaced George stayed in until the end of the process. He reiterated that they were never bribed and further that he had never been summoned to record a statement on abduction report and never heard of any agent who was called to record a statement over an abduction.
293. In cross-examination by counsel for the 5th respondent, DW10 stated that he knew the other agents in the polling station because they hailed from the same village and were his cousins. He reiterated his testimony in re-examination.
294. DW11 Godfrey Ogweno Owili testified that he was an agent for the 3rd respondent at Ligisa 01 polling station. He testified that he entered the polling station at 6am and found the presiding officer and his team. It was his testimony that they registered themselves present and that he was at the polling station at 7.30pm when counting of presidential votes was ongoing.
295. DW11 testified that he never saw Dickson Ouma Ayuo, who is well known to him, at the polling station at the time that Dickson alleged that he was at the polling station. DW11 further denied that goons went to the polling station armed with guns. It was his testimony that counting of votes ended at about 10.00pm. He further testified that the petitioners' agent whom he knew well and was present, signed Form 37A for the petitioner, was Brian Adams.
296. In cross-examination by counsel for the petitioners, DW11 stated that he could not remember how many people were identified manually and how many were identified by KIEMS KITS. In cross-examination by counsel for the 1st and 2nd respondents, DW11 testified that polling and counting of votes went on well and that every agent was given a chance to sign Form 37A. DW11 reiterated his testimony in cross-examination by counsel for the 5th respondent.



297. DW12 Alfred Ochieng Omusi testified that he was a voter and an agent for the 3rd respondent in stream 1 of Ngeri Primary School. In cross-examination by counsel for the petitioners it was his testimony that he reported at the polling station at 5am and signed the PSD. He testified that the entire process was peaceful and free from violence.
298. He further stated that he was present at the polling station from morning till the following day at 1.00 am despite the lack of his name at pages 15, 24 and 29 of the PSD. He explained that this meant that he did not certify the serial numbers of ballot boxes after counting of the votes cast.
299. In cross-examination by counsel for the 1st and 2nd respondents, it was his testimony that he got the Form 37A from IEBC and that the form was filled at the polling station and also signed by the presiding officer. He stated that the form captured the results as announced. He reiterated that there was no violence or voter intimidation at the Ngeri polling station. It was his testimony that the petitioners' agent's name appeared at page 10 of the PSD showing that he was admitted to the polling station at 5.40am.
300. In cross-examination by counsel for the 5th respondent, DW12 testified that it was not true that Lameck was denied entry at the polling station. He further stated that he never witnessed any shouting or chanting of ODM by youths at his polling station and that neither did he witness anybody wearing the ODM attire. It was his testimony that the Presiding Officer never informed them of any incident or concern at the polling station.
301. In re-examination, it was his testimony that there were other independent candidate agents who had not deposed any affidavits confirming what Mr. Milama alleged to have transpired at DW12's polling station. He further testified that he saw Lameck throughout the voting process and during counting although his name did not appear in some places in the PSD. He further testified that Lameck was present when the results were announced as evidenced by the fact that he signed Form 37A.
302. DW13 Quinter Achieng Opiyo testified that she participated as an agent for the 3rd respondent at Wira polling station. She testified that she reached the polling station at 5am and found other agents, the presiding officer and the voters. It was her testimony that she remained outside and at 6.30am, they were given the form/letter, which enabled them to enter into the Hall.
303. DW13 testified that the voting commenced at 6.45am. She also stated that she knew Elphas Ogidi very well as he was the agent for the 1st petitioner. He further testified that Elphas went to the polling station at 6.30am and that they entered the polling station at the same time and he was inside the voting place. She further testified that she knew Samuel Milama who was also the 1st petitioner's agent and that he went to the polling station at 11am. It was her testimony that she never saw any incident of people shouting ODM, ODM. She testified that she never saw youths stopping Milama and that he stayed at the polling station for about 10 minutes.
304. It was her testimony that at Wira, the polling station is located on a hillside with the road passing by so one would see anyone very well. She testified that voting ended at 5pm. It was her testimony that Ogidi Elphas signed Form 37A for the 1st petitioner and she signed for the 3rd respondent. In cross-examination, DW13 reiterated her testimony.
305. DW14 George Akeyo Wanga testified (after objections on whether he could testify in view of the allegations that he was sited right in court when D5 the 3rd Respondent who was his wife was testifying) that he participated in the 9/8/2022 election as a voter and a supporter of his wife, the 3rd respondent, who was contesting for the governor's seat. He testified that he voted at Alara primary school sometime between 10am and 11am in the company of his wife and their two kids then they went back home. He



testified that he was never present at Ligisa Primary Polling Station contrary to the allegation by the prosecution witnesses. He further testified that at 7.30pm, he was at home. DW14 denied knowing Dickson Ouma Ayuo and stated that he came to know him after the instant petition was filed.

306. In cross-examination by counsel for the petitioners, DW14 admitted that the accusations against him were serious and that he had not provided his location at the time he was alleged to have committed the act that was alleged against him.
307. In cross-examination by counsel for the 1st and 2nd respondents, DW14 stated that he was never charged with any criminal offence relating to the incidence at Ligisa and further that he was not aware of anyone charged for the said alleged offence. When shown the PSD for Ligisa Primary School Station, DW14 acknowledged that Dickson Ayuo's name was not listed in the PSD as at the time of opening and closing of the polling station as an agent or otherwise.
308. In cross-examination by counsel for the 5th respondent, DW14 reiterated his testimony. In re-examination, it was DW14's testimony that had he walked into the polling station at Ligisa and caused violence as alleged, then the same would have been noted in the PSD.

The 5th Respondent's Response to the petition

309. The 5th respondent filed its response dated 19th September 2022. It was contended that its Constitution allows it to choose the mode of nominating its candidates for various elective positions and that consequently, the 3rd Respondent was nominated through direct nomination, a process recognised by both statute and the 5th Respondent's Constitution.
310. The 5th respondent further contended that as a political party, the singular and most important objective as set out under its constitution is to inter-alia, field candidates in all elective offices at National and County levels and to form a Government which is achieved through persuading voters to vote for its candidates.
311. The 5th respondent denied that its party leader made remarks that were "intemperate, vituperative and inciteful" and further contended that the remarks, if at all, were in their ordinary and natural meaning an answer to the derisive campaign rhetoric against the 3rd Respondent as a woman and an 'outsider' spouse who could not be elected as the Governor in Homabay County.
312. The 5th respondent contended that the 3rd Respondent's nomination was a first for a woman in the County and heralded a new beginning in the County and indeed, the Western region as the first female Governor in Homabay County. The 5th respondent further averred that the 3rd Respondent's nomination was duly approved by the Party's National Elections Board and the 5th Respondent's Central Committee as a result of unprecedented consensus amongst all but one candidate for the same ticket, the Petitioner herein.
313. It was the 5th respondent's case that there was no rational connection between a direct nomination and the purported allegations of violence alluded to by the Petitioners. Further, it was asserted in contention that the 3rd Respondent was nominated as the most qualified candidate owing to her splendid track record as a dependable, accomplished, respected, steadfast legislator in the 11th and 12th Parliaments and a loyal member of the 5th Respondent ODM party and in addition, as a woman, the 3rd Respondent represented an important interest group of the Party and was therefore an ideal candidate for the furtherance of the party's objectives of fostering inclusivity and improving gender representation in elective positions in Parliament.



314. The 5th respondent averred that the nomination of the 3rd Respondent was not the subject of any challenge by any person or body at the ODM Party Appeals Tribunal or indeed any competent court of law and consequently, this court lacks jurisdiction to entertain such a challenge in the first instance or at all.
315. The 5th Respondent pleaded that as a popular Party of choice in the country, nomination by the Party was often highly competitive and characterized by robust and vibrant campaigns by aspirants and that the Petitioners characterization of ODM as a historically violent party was incompatible with the popularity of the party amongst citizens of all walks of life in homogenous counties like Homabay as well as in cosmopolitan counties like Nairobi and Mombasa.
316. It was their case that the characterization of the Party and its leader as a Luo Party is incompatible with the Party and its leader's chequered history of success across the country and that since 2007, the ODM party has been the most dominant party in national and county elections countrywide and enjoys near homogenous support in and out of the so-called Luo Nyanza. It further averred that the petitioners' statement that the ODM Party is intolerant to non-ODM members lacks in legal or empirical basis
317. The 5th respondent further averred that pursuant to Article 16 as read with 7(1)(d) and 11 of the ODM Constitution it was also the duty of the Party Leader and all members and leaders of ODM to campaign for all ODM candidates and any other candidate affiliated to the Azimio La Umoja One Kenya Coalition Party without prevarication.
318. The 5th Respondent pleaded that it was not privy to the allegations of violence by any ODM aspirant during the campaigns and put the Petitioners to strict proof of their allegations. In addition, it was pleaded that the residents of Homabay County and citizens at large freely and without inducement attended the Party leader's rallies and at all times retained the free will and power to determine their leaders of choice by secret ballot thus the allegations of undue influence were, in any event, speculative and unfounded.
319. It was the 5th respondent's case that its party leader was not a party to these proceedings and countenancing the scandalous allegations against him condemns him unheard contrary to Articles 47 and 50 of the Constitution.
320. In response to the videos annexed to the 1st Petitioner's affidavit marked EOK4(a), EOK5(a), EOK5(d), EOK6(a), EOK7(a), EOK8(a), EOK10(a) and EOK11(a), the 5th respondent averred that the said videos were inadmissible in evidence and were accordingly of no probative value to these proceedings.
321. In support of its case, the 5th respondent called one witness whose testimony is summarised herein below.

The 5th Respondents' witness' affidavit and viva voce Evidence

322. DW15, Anthony Matum Okechi, the Director, legal and Parliamentary Liaison at the ODM National Secretariat testified that ODM, the 5th respondent, conducted its nomination of candidates in accordance with the law, the Party constitution and nomination Rules. He testified that the 5th respondent's Party Primaries and nomination rules provide for modes of nominations of candidates. DW15 testified that in the instant case, consensus was adopted as a mode of nomination. He further testified that there were negotiations, which led to the settlement on the 3rd Respondent as the ODM candidate in this case.
323. It was his testimony that the party has many mechanisms for settling disputes first of which was mediation by the party leader, mediation by the Central Committee and the Party's National Appeals



- Tribunal which resolves disputes relating to elections. He testified that no aspirant for Homa-Bay Gubernatorial elections petitioned whether orally or in writing for resolution of any dispute within the Party.
324. Regarding the violence alleged to have been perpetuated by the party during the nomination period, post nomination and the alleged botched elections, it was his testimony that there was no proof that there was violence perpetuated by members of the party and that if it had been perpetuated by members of the party, then the law of the land would have taken its course.
325. As regards the video produced and played by the petitioners on the ‘men in black’, DW15 testified that nowhere in those videos was it shown that those individuals were members of ODM. He further testified that no militia or other group exist to perpetuate violence of any kind, and that if there was violence, the Petitioner had not demonstrated that the perpetrators were members of ODM or that they were acting under instructions of ODM officials or the party organ.
326. Regarding the allegations against the 5th respondent’s party leader, Hon. Raila Amolo Odinga, it was the testimony of DW15 that the party leader had an obligation, like other members to promote ideals of the party including campaigning for the party’s candidates, popularizing the party and combating propaganda that was detrimental to the ideals of the party and further that whatever the party leader did for Homa-Bay was the same that he did for other ODM candidates in the Country.
327. As regards the allegations that the 5th respondent enjoyed a cult like following, DW15 testified that it was unfortunate that those terms were being used against a party and party leader who was doing what the Constitution allowed him to do. He further testified that the party and party leader enjoyed unassailable support throughout the Country which support the Petitioner had been a beneficiary of and only made a U-turn when another candidate was nominated.
328. DW15 testified that the 5th respondent was surprised to be dragged in the instant petition and further stated that the Petitioner had the opportunity to have his grievances ventilated through Party internal dispute resolution mechanisms but that he instead opted to leave the party. The witness urged this Court to discharge the 5th respondent from the instant petition as the issues raised against the 5th Respondent ought to have been canvassed somewhere else.
329. In cross-examination by counsel for the petitioners, DW15 stated that he had not attached the Party Primary Rules to his affidavit. He testified that all the aspirants for gubernatorial seat on ODM ticket in Homa-Bay were required to pay Kshs 500,000 for Gubernatorial seats, as a commitment, money that was to be used in nomination using universal suffrage.
330. It was his testimony that that indeed the 3rd Respondent sat in the Central Committee but it was not correct to say that the 1st Petitioner would not have gotten Justice simply because the 3rd respondent was a member of the Central Committee. He testified that the practice by the Central Committee was that if an issue touched on one of its members, then the member sat out of the proceedings. DW15 testified that there were also the Party Appeals Tribunal and the Political Parties Disputes Tribunal.
331. DW15 stated that the nomination fees were refundable and that in this case, they refunded because the party rules provided for refund where universal suffrage was not used for nomination of candidates. He further stated that he had not attached any evidence of instances where the Petitioner carried out a decisive campaign against the 3rd Respondent as a woman and an outsider.
332. It was his testimony that the 5th respondent had women candidates in party primaries in Busia and Migori Counties who were not nominated. He noted that in Busia County, Universal suffrage was used while in Migori County, a direct ticket was given to Mr. Ochillo Ayako. He further testified that



ODM wrote to IEBC that it would not be sending agents of the Party in all the polling stations and as such, party candidates were to field their own agents. He further stated that in that case, the ODM party should not be held accountable because of the misconduct of the agents. It was his testimony that accordingly, the presiding officer was to ask for appointment letters from the party before admitting the agents into the polling stations.

333. DW15 testified that after the unfortunate events of 2014 at the 5th respondent's National Delegates Conference (NDC) at Kasarani as evidenced in the petitioners' video as played into court, and marked EOK 6(a), the party appointed a taskforce to investigate what happened and that the task force submitted the Report to the appointing authority and communicated internally within the different layers of the party.
334. DW15 stated that the Petitioner had not demonstrated that the ODM party committed the violence and further that violence was committed by individuals who could be held to account by state agencies. He stated that the party has internal dispute resolution mechanisms and that the Petitioner had a duty to follow up on any issues, which had not been adequately resolved.
335. In cross-examination by counsel for the 3rd and 4th respondents, DW15 reiterated his testimony in chief and further stated that he was aware that each agent was allowed to indicate the name of a party or independent candidate and as a result, agents for ODM candidates could be up to six at each polling station. He further stated that the 1st petitioner never filed any dispute with the 5th respondent. It was his testimony that they learnt of the 1st petitioner's resignation from the party through the media. He further testified that since 2014, the 5th respondent never had any repeat of what happened at the NDC 2014.
336. DW15 further stated that there were other women candidates but the party did not issue direct tickets to them because there were parameters applied as it was not just about a gender test but loyalty test as well as participation in the party issues. He testified that the 3rd Respondent demonstrated that she was a strong candidate as she had demonstrated leadership and further, that she was polled to be ahead of other candidates in popularity. In re-examination DW15 reiterated his testimony.

The Petitioners' further affidavits in response to the Respondents' responses and witnesses' affidavits

337. The petitioners filed further affidavits dated 14th October 2022 to the respondents' response to the petition. In the further affidavit of PW1 Andolo Dan Ojjo which he also testified to in chief, cross-examination and re-examination, he deposed that after recording his statement at Rangwe Police Station under OB number 09/10/08/2022 at 10.52hrs, which OB he produced as an exhibit, the police asked him to hand over the original Form 37A that he had been forced to alter and that he did so together with his Deputy Presiding officer.
338. PW1 stated that the chaos witnessed at Ongeti Primary School Polling Station negatively affected the integrity, impartiality and independence of the gubernatorial election as the environment was unsuitable for conducting free and fair elections. He stated that the fear of violence at the polling station made many voters not to turn up to vote.
339. PW1 produced screenshots of his WhatsApp messages to the Rangwe Constituency WhatsApp group platform in which he had sought advice following the eruption of the chaos and the resultant tension at Ongeti Primary School Polling Station.
340. PW2 Maurice Odhiambo Gambi produced via his further affidavit an extract of the OB number 13/10/08/2022 that he was given after reporting the allegations of bribery and vote buying allegedly



- undertaken by the area chief Mr. Mboga and Mr. Kaoto at Wakondo Primary School Polling Centre. He averred that he made the report at 1309hrs.
341. PW3 Dickson Ouma Ayuo on his part produced treatment notes from Samarimed Centre and Nursing Home located at Rodi Kopany where he deposed that he sought treatment after being beaten by goons sent by the 3rd respondent's Husband, one Mr. George Wanga, who PW3 stated was campaigning for the 3rd respondent.
342. PW3 deposed that he reported the incident of violence that he experienced at Ligisa Primary School Polling Station at Rangwe Police Station but that the police declined to take his statement or even issue him with an OB number.
343. PW4 Samuel Obunga Milama swore in his further affidavit, naming the presiding officers who he stated arrived at the tallying centers with forms stamped as if they had been unstamped. He provided the names as follows: Magara Matoke Jared – Olando 2 Primary School Polling Station; Charity Nabalayo – Ligongo Primary School Polling Station; Shadrack Ochieng – Kumbata Primary School Polling Station; Kennedy Adongo – Shanjwero Primary School Polling Station and Tom Nyatta – Olando 1 Primary School Polling Station
344. PW5 Maurice Onyango Osodo who was based at Shauri Yako Primary School Polling Station further deposed that the motor vehicle that he referred to in his testimony as ferrying ballot boxes was motor vehicle registration number KCW 571K, chassis number NCP50 -0137608 that belonged to Cornel Omondi Opiyo. PW5 produced a copy of the certificate of official search for the said motor vehicle.
345. PW6 John Ogina Nyabola deposed via his further affidavit that the chaos witnessed at his Bar and the death of Kepha Ouma negatively affected the integrity, impartiality and independence of the gubernatorial election as the violence made the environment unsuitable for the conduct of free and fair elections. He further deposed that the fear of violence at the polling station made many voters not turn up to vote.
346. PW8 George Ochieng Okech swore a further affidavit to the effect that the Victor he referred to in his first affidavit was one Victor Aoro Okello, an agent of the 5th respondent. He further produced an extract of OB number 34/9/8/2022 from Kendu Bay Police Station of the report he made about his abduction.
347. PW9 Silas Okinyi Rawo deposed that he was a member of the 5th respondent ODM Party and was member number 02803751 as was evidenced by the membership card annexed to his further affidavit. PW9 further produced a copy of a certificate of membership to the NDPK party dated 2nd January 1998.
348. He further deposed that the nominations carried out by the 5th respondent in Homa Bay County in 2013, 2017 and 2022 were undemocratic, marred with violence, abduction and intimidation and that the candidates that the 5th respondent preferred were given direct tickets. He further deposed that the 5th respondent labelled any person not vying on its ticket as being a non-luo, a mole, a traitor and unfit to lead.
349. PW10 John Okambo Kisiara deposed further that the rowdy youths who caused chaos at Sindu Youth Polytechnic Polling Station were; Harry Obado, Killion Mingusa, Auta Otieno and Odhiambo Mingusa.
350. He further deposed that the agents who ran away from the Polling Station as a result of the violence were; Akombe Rose, Paul Bensuda Otieno, Pascal Onyango and Rose Atieno. PW10 further deposed that Jane Obilo and Maurice Otieno were the election officials who ignored him when he informed



them of the ballot boxes that had been overturned and the ballots strewn on the floor. He further deposed that Maurice Otieno denied him a chance to seal the ballot box and take a photograph of Form 37A. PW10 further deposed that people voted a day before the election on the 8th of August 2022 at Gingo Secondary School Polling Station.

351. PW11 Lameck Oketch Odhiambo deposed that the polling station he was referring to was Rungu Primary School Polling Station and not Ringa Polling Station. He further deposed that he was asked by the presiding officer at Rungu Polling Station, Sarah A. Okello, to sign a blank Form 37A before the votes cast were entered therein.
352. PW12 David Obonyo Mireri deposed that he made inquiries via text message to the Returning Officer of Ringa Primary School Polling Station, Fredrick Otieno Orage, regarding the issue of badges as the petitioners' agents were being denied access to various polling stations. He reiterated that the unlawful ejection and consequent absence of the petitioners' agents in various polling stations affected the end results of the gubernatorial elections as the petitioners' agents were not represented during opening of ballot boxes, casting of votes, sorting, counting and tallying of votes.
353. PW12 further produced OB number 04/10/08/2022 of a report he made at Ringa Police Station regarding the chaos at Ober Primary School Polling Station where a voter who allegedly refused to vote 6 piece was allegedly beaten up by rowdy ODM youths who were singing and chanting the names of the 3rd and 4th respondents.
354. PW13 Enosh Ongweya Bolo via his further affidavit produced a letter dated 25th July 2022 addressed to the County Elections Manager providing a list of County Chief Agent as well as their Constituency agents as well as a list of the petitioners' agents in each constituency.

The Petitioners' Written Submissions

355. The petitioners in their rather very lengthy written submissions dated 9/1/2023 and which I have summarised as most of it comprises the evidence adduced by the witnesses for the petitioners and the respondents posed several questions and identified the following fifteen (15) key issues for determination:
 - i. Whether the elections conducted in Homa Bay County were free and fair; free from violence, intimidation, improper influence or corruption in accordance with the dictates of Article 81(c)(ii) of the [Constitution](#).
 - ii. Whether elections in Homa Bay County were administered in an impartial, neutral, efficient, accurate and accountable manner in accordance with the dictates of Article 81(c)(vi) of the [Constitution](#).
 - iii. Whether the elections in Homa Bay County were transparent in accordance with Article 81(c)(iv) of the [Constitution](#).
 - iv. Whether the elections in Homa Bay County were conducted by an independent body in accordance with Article 81(c)(iii) of the [Constitution](#).
 - v. Whether the elections in Homa Bay County complied with the principle of freedom of citizens to exercise their political rights under Article 38 and Article 81(a) of the [Constitution](#).



- vi. Whether in the election in Homa Bay County IEBC ensured that the voting method used and the system are simple, accurate, verifiable, secure, accountable and transparent in accordance with Article 86(a) the Constitution.
 - vii. Whether in the election in Homa Bay County IEBC ensured that the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station in accordance with Article 86(b) of the Constitution.
 - viii. Whether in the election in Homa Bay County IEBC ensured that the results from the polling stations are openly and accurately collated and promptly announced by the returning officer in accordance with Article 86© of the Constitution.
 - ix. Whether in the election in Homa Bay County IEBC ensured the that appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials in accordance with Article 86(d) of the Constitution.
 - x. Whether there were irregularities and illegalities committed in the conduct of the Homa Bay County 2022 Governor Election.
 - xi. Whether the irregularities and illegalities committed in the conduct of the Homa Bay County 2022 Governor Election impacted the integrity of the election.
 - xii. Whether electoral offences were committed in the conduct of the Homa Bay County 2022 Election for Governor and by whom.
 - xiii. Whether the 3rd and 4th Respondents were validly elected as Governor and Deputy Governor respectively in the Homa Bay County 2022 election for Governor.
 - xiv. Whether the election for Governor conducted in Homa Bay County in 2022 should be nullified and a fresh election organised and conducted in strict conformity with the Constitution.
 - xv. Who should bear the costs of the Petition?
356. I have combined these issues in my summary consideration. On the aspect of violence, it was submitted that PW1's polling station was invaded by the 3rd Respondent's goons and forced to alter results in favour of the 3rd respondent. That in the circumstances, he was forced to alter and present a fraudulent Form 37A. That these incidences were reported where the constituency returning officer mobilised security to accompany the witness to the tallying centre. The petitioners enumerated various polling stations where violence was witnessed.
357. On the issue of whether the violence affected the voters' right to vote; and therefore, absence of a free and fair election it was submitted that the violence was established beyond any doubt and the burden shifted to the Respondents to dispute this evidence.
358. The petitioners' counsel submitted that the Court cannot ignore violence that affected certain parts of the County, denying those citizens the enjoyment of their fundamental right to vote thus quantitatively affecting the result of the election. Counsel cited Article 21 of the Universal Declaration of Human Rights (UDHR) and Article 25 of the International Covenant on Civil and Political Rights (ICCPR) which variously provide for every citizen's right to vote in an election.



359. It was submitted that violence in any part of the County undermines the integrity of the election in the entire county and to condone any level of violence is to undermine the fundamental right to universal and equal suffrage. They further argued that the treatment of the petitioners' agents in the entire election showed a deliberate scheme to give advantage to the 3rd & 4th Respondents to their detriment.
360. It was further submitted that violence disrupted voting, counting, declaration and forced tallying of results to be conducted at the tallying centre in contravention of Article 86(b) of the *Constitution*. According to the petitioners, in the cases of violence reported, the respondents failed to call the presiding officers of the affected polling stations and this court is therefore entitled to enter an adverse inference against the respondents in line with Section 112 of the *Evidence Act* and as stated in the cases of *Nesco Services Limited v CM Construction [EA] Limited* [2021] eKLR and *Kimotho v KCB* (2003) 1 EA 108.
361. On the validity of results declared, the petitioners submitted, giving an example of Ongeti Primary School polling station where the presiding officer was allegedly forced to make a false return. It was submitted that this is contrary to the law that requires declaration to be made at the polling station as was held in the case of *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR.
362. Counsel for the petitioners argued that the 1st & 2nd Respondents did not challenge this evidence as they deliberately failed to call witnesses within their control who could rebut the allegation and or crucial documents such as the Polling station diaries which could shed light on the events at the polling station. They urged that this Court therefore ought to draw a negative inference against the 1st & 2nd Respondents for their failure to adduce evidence within their custody and control which could prove or disprove the Petitioners' claims. That the third respondent especially, did not make any rebuttal of such evidence. In support of this contention, the petitioners relied on the case of *Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others* (2015) eKLR.
363. Further submission was that a further irregularity was observed during scrutiny where it was also observed that the aperture seals of the ballot box are different from what is recorded in the PSD while the side seals are not recorded in the PSD.
364. On the aspect of bribery, it was submitted that there were several instances of bribery as witnessed by the petitioner's witnesses perpetrated in favour of the 3rd respondent in Wakondo Primary School and Kisui Primary School polling stations which incidences were reported to the police. In support of this, the case of *Simon Nyaundi Ogari & Another Versus Hon. Joel Onyancha & 2 Others* [2008] eKLR was cited.
365. It was submitted that bribery is an election offence under section 9(1) of the *Election Offences Act*, 2016 and that Section 9(1)(a) thereof specifically makes it an offence when a person directly or indirectly offers a bribe to influence a voter to vote or refrain from voting for a particular candidate or political party; or, (b) in any manner unlawfully influences the results of an election. That from evidence adduced, the suspicious conduct of the two chiefs jumping on their motor bike and fleeing the scene, it is quite clear that they unlawfully attempted to influence the outcome of the said election and therefore violated section 9(1)(a) and (b) of the Act.
366. Citing the cases of *Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others* [2015] eKLR and *Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others* [2014] eKLR, the petitioners submitted that a finding of the existence of bribery in an election vitiates the election in that a connection was established between the incident and the 3rd Respondent's agents who threatened PW2 so as to stop the witness from monitoring and responding to instances of electoral malpractices including bribery. The



- petitioners therefore invited the Court on the basis of what they considered to be the uncontroverted evidence to find that the allegations of bribery were proven and to proceed to nullify the election.
367. On the allegation that the IEBC refused to furnish independent candidates' agents with badges for example PW-4 being denied one by the constituency returning officer because he was not a political party agent, and that he was also denied access to polling stations on the same ground as he did not have the badge hence the Petitioners' agents were not able to witness the process of election from the moment the polling station opened, the opening of ballot boxes, noting the seals, it was submitted that this was calculated to interfere with the results of the election.
368. It was further submitted that there were motor vehicles carrying election materials on the polling day. An example was given of a motor vehicle which allegedly brought election materials which included three ballot boxes and ballot papers allegedly marked in favour of the 3rd Respondent at Shauri Yako polling station. It was submitted that this incident proves the fact of ballot stuffing in the election, which conduct is unlawful on the part of IEBC which did not call any witness to clear the air on this serious matter.
369. According to the petitioners, that alleged incident at Shauri Yako Polling station shows the environment under which the election was conducted and IEBC's role in the impugned election. That in the premises, IEBC was directly and squarely involved in the malpractices complained of in the impugned election.
370. It was also submitted that in some cases, a voter was issued with extra ballot papers which incidences were not captured in the PSD, coupled with the anomalies in the records in the PSD which justify the Petitioners' claim that the system was not secure, accountable or verifiable. That this cast doubt on the PSD and the authenticity of the entries in the PSD.
371. As regards the manner of filling Form 37A in some polling stations, it was submitted that in Rungu Primary School polling station 2 of 2, Lameck Oketch Odhiambo was the Petitioners' agent testified that all agents were asked to sign a blank Form 37A because some of the agents wanted to leave. That in such a case, the results were altered to correct the mistake made at the polling station.
372. The petitioners submitted that the various witness account demonstrate that the IEBC failed to administer the election in an impartial, neutral, efficient, accurate and accountable manner in accordance with the Article 81(e)(vi) of the *Constitution*.
373. On the issue of variance between the KIEMS logs and the total number of votes cast, it was submitted on behalf of the petitioners that in instances where more votes were cast, than were identified by the KIEMS kit, is an indicator of voter inflation/ballot stuffing and votes cast in favour of the beneficiary candidate are unlawfully increased. That instances where the KIEMS logs show that the number of voters identified through KIEMS is more than the actual number of votes cast signifies voter suppression. In such instances, it was submitted that the votes cast for the candidate to be disadvantaged are unlawfully reduced to suppress the actual votes cast.
374. It was therefore submitted that the differences brought out by the Petitioners was between the total votes cast and the number of voters identified through KIEMS, which when proved, would suggest vote tampering either through inflation or suppression. In support of this assertion, the petitioners generated a tabulated format of the registered voters in each constituency as contrasted to the number of valid votes cast as captured in the KIEMS Kit and explained that the difference points out to malpractice of either ballot stuffing of voter suppression.
375. On the issue of Voter identification, KIEMS and KIEMS kit, it was submitted that the issue of voter identification is integral to the allegation made by the Petitioners and the significance of the



KIEMS logs and the differences discussed above. That at every polling station, every voter must first be identified through the Kenya Integrated Election Management System (KIEMS) before they are allowed to vote mainly through the KIEMS kit. That where biometric identification fails, the voter will be identified alphanumerically using data which is also stored in the KIEMS. That it is now trite that all voters' details are domiciled in the KIEMS and that there is no separate register known as a manual register. That a printed register is the same register of voters kept in the KIEMS and that no person can be allowed to vote if their details/records do not appear in the KIEMS.

376. It was submitted that the irregularities borne out by the variances now proved and as found through the Scrutiny Report render the outcome of the election unverifiable.
377. On the 3rd & 4th Respondents claim that they won on the basis of the numbers, it was submitted that this was erroneous as stated in *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & Another* [2017] eKLR and *Benard Shinali Masaka v Boni Khalwale* (*supra*).
378. Submitting on the aspect of party nominations and whether it affected the elections for governor in Homa Bay County, the petitioners referred to the Report of the Independent Review Commission on the General Elections held in Kenya on 27 December 2007 (Kriegler Report) for the proposition that the issuance of a direct ticket to the 3rd Respondent did not go down well with a majority of the electorates in the County and poisoned the election environment. That public statements by the ODM party leader before the elections set the stage for a very toxic and violent atmosphere and was no surprise when violence broke out in a coordinated manner across the County in the period leading to and during the elections.
379. Citing the case of *Christopher Odhiambo Karani v David Ouma Ochieng* (*supra*), it was submitted that the acts and omissions rendered the elections unconstitutional and invalid for they created a toxic electoral environment out of which the 3rd, 4th and 5th respondents should not be allowed to benefit from. Further reliance was placed on the case of *Christopher Odhiambo Karani v David Ouma Ochieng & 2 Others* [2018] eKLR.
380. On the issue of agents, it was submitted that ODM as party had earlier indicated that it was not deploying agents in polling stations, rather each candidate was at liberty to appoint their own agents though in many polling stations, the ODM agents were in charge and the presiding officers being afraid, failed to manage them leading to chaos. On this contention, he cites *Mahamud Mubumed Sirat v Ali Hassan Abdirahman & 2 Others* [2010] eKLR. That the lack of clarity on which agent was acting for who, meant that it was difficult to have accountability in the polling station or who to be held responsible. It was therefore submitted that in some instances more than two or three ODM agents were being allowed access into the polling station per candidate, while the petitioners' agents were being denied thus violating section 30 of the *Elections Act*.
381. On the aspect of jurisdiction, the petitioners' counsel submitted that the Respondents' assertion that the petition raises pre-election disputes is erroneous given that there is no nomination dispute between the Petitioners and the 5th Respondent. That the Petitioners' complaint relates to instances of violence and intimidation that was meted on them and their supporters by the 3rd and 5th Respondents on the election day. It was their position that this court is the right forum since they are inviting this court to determine whether there was a possibility of commission of election offences by the 3rd and 5th Respondents which they claim to have been occasioned by their decision to vie as independent candidates after losing out in the party primaries.



382. In support of this argument, the petitioners’ counsel drew a distinction of jurisdiction by citing the provisions of Section 87 of the *Elections Act*, 2011 which bestows upon the court with the authority to inquire into whether an electoral malpractice of a criminal nature may have occurred, Section 40 of the *Political Parties Act*, 2011 which delineates the jurisdiction of the Political Parties Disputes Tribunal and Section 4 of the *Independent Electoral & Boundaries Commission Act*, 2011 which provides for the Commission’s functions. It was submitted that given the above, neither the Political Parties Dispute Tribunal nor the Independent Electoral and Boundaries Commission has the requisite power to ascertain whether an electoral malpractice may have occurred.
383. Further reliance was placed on the cases in *Chege v Independent Electoral & Boundaries Commission* [2022] KEHC 239 and the Supreme Court’s decision in *Moses Masika Wetangula v Musikari Nazi Kombo & 2 Others* [2015] eKLR.
384. On the irregularities and illegalities pointed out, the petitioners urged the court to draw an inference of explicit admission of such irregularities by the respondents due to their failure to call key witnesses such as the Returning Officers or presiding officers of the polling stations which were adversely mentioned for purposes of responding to the Petitioners’ claims. Counsel relied on the case of *Jobo vs Nyange & Another* (2008) 3 KLR (EP) 500 where the Court drew a classification of errors twofold; innocent errors though negligent and deliberate irregularities or forgeries. That in the instant petition, the errors fall in the second category giving the example of an incident where a presiding officer testified that he was violently attacked, assaulted and forced to change the election result thus subverting the will of the people.
385. Counsel further submitted that courts take the drastic step of invalidating a noncompliant election because of the grave consequences that would emanate from allowing a non-compliant election to stand. They relied on cases of *Reuben Ndolo vs Dick Wathika & 2 Others* EP 11/2008 (Nbi) and *William Kabogo Gitau v George Thuo & 2 Others* [2010] eKLR.
386. On the Scrutiny and Recount Report, it was submitted that the report makes 2 crucial findings thus; firstly, some of the findings are not supported by the primary documents, which are the scrutiny checklists/forms developed to guide the scrutiny exercise, and secondly, if the report is at variance with the primary documents what was therefore observed casts doubt on the integrity of the Report. Instances are given where such variance is observed relating to the scrutiny of the SD cards which were not available in some polling stations, counterfoils which were missing in some instances and the element of forms 37A which is submitted to have been either scanned copies and or carbon copies as opposed to original forms. The petitioners urged the court to look at the primary data supplied against the report.

The 1st & 2nd respondents’ written Submissions

387. The 1st and 2nd respondents filed their written submissions and framed the following issues for determination in this Petition:
- a. What is the burden and standard of proof in Election Petition?
 - b. Whether the Election Court has jurisdiction to hear and determine pre-nomination and or pre-election issues and or disputes which the Petitioner did not raise and or have determined before election were held.
 - c. Whether the election was held in accordance with the *Constitution* and electoral law



- d. Whether there were election offences committed and irregularities and if so, whether such electoral offences and irregularities affected the outcome of the elections.
 - e. Whether the 3rd and 4th Respondents were validly elected
388. These issues are considered collectively. It was submitted on behalf of the 1st and 2nd respondents that the election of the Governor of Homa Bay County was conducted in a free, fair, credible, transparent, accurate and verifiable manner, that met the constitutional and statutory threshold and that the 3rd Respondent was validly and lawfully declared the winner on 12th August, 2022.
389. The 1st and 2nd respondents further submitted that the Petition was not founded on any reasonable ground and/or basis under the *Elections Act*, 2011 and that if at all there were any mishaps in the elections, the same were very minor human errors, that were permissive and did not, at all, affect the process or the outcome of the elections and the final results.
390. It was submitted that the Petitioners did not prove their case at all to the required standard considering that some of the allegations by the Petitioners, like, propagation of violence, undue influence and bribery, are criminal in nature and require proof beyond reasonable doubt, which burden the Petitioner did not discharge. Reliance was placed on the Supreme Court’s decision in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & another* [2017] eKLR where the apex Court set out the standard and burden of proof in an election petition as being above the balance of probabilities, though not as high as beyond-reasonable-doubt.
391. Further, the 1st and 2nd respondents submitted that it was very apparent that the Petitioners had not substantiated any of the allegations that they leveled against the 1st and 2nd Respondents as none of the witnesses paraded by the Petitioners proffered any evidence to back up the Petition.
392. Regarding the election court’s jurisdiction to hear and determine pre nomination and pre-election issues and or disputes as raised by the petitioners, it was submitted that the 1st Petitioner knew about these pre nomination disputes but choose not to seek legal redress and therefore as clearly set out by the Supreme Court in *Mohamed Abdi Mohamud v Ahmed vs Ahmed Abdullahi Mohamad & 3 others, Ahmed Ali Mukta (Interested party)* [2019] eKLR, the Petitioner was estopped from raising the said pre nomination disputes before the election court and likewise the Election Court had no jurisdiction to hear and determine the said pre nomination issues which the 1st Petitioner knew but chose not to seek legal redress.
393. The 1st and 2nd respondents further relied on Supreme Court’s decision in *Sammy Ndung’u Waity v Independent Electoral & Boundaries Commission & 3 others* [2019] eKLR where it affirmed that this court has no jurisdiction to entertain pre-election disputes before exhausting the established dispute resolution mechanisms.
394. The 1st and 2nd respondent further submitted that the Petitioners’ witness testimonies were not backed up by any evidence, but were riddled with hearsay evidence, suppositions, theories and an attempted choreographed account of events that neither added up nor proffered any viable evidence to impugn the election of the 3rd Respondent as conducted by the 1st and 2nd Respondents.
395. It was submitted that the Petitioners also relied on unhelpful evidence that related to pre-election disputes that had nothing to do with the elections of 9th August, 2022 and which disputes have their own channel of resolution, that the Petitioner never took up, as established under the *Political Parties Act*, the *Elections Act* and the *Independent Electoral and Boundaries Commission Act*.



396. Regarding the petitioners' allegations of violence and undue influence, it was submitted that such allegations were criminal in nature and required proof on a standard that is beyond reasonable doubt as was held by the Court of Appeal in the case of [*Julius Lekakeny ole Sunkuli v Gideon Sitelu Konchellah & 2 others*](#) [2018] eKLR.
397. The 1st and 2nd respondents further submitted that it appeared that few incidences of threats to violence that were minor, happened and were contained and did not affect the voting process, the voter turnout or the final results.
398. It was submitted that none of the petitioners' witnesses spoke to or tendered any evidence to ascertain the allegations of fraud or wrong doing against the 2nd Respondent but instead they spoke of the 2nd Respondent's timely intervention in averting escalation of some threats.
399. Regarding the issues of stamping of forms, it was submitted on behalf of the 1st and 2nd respondents that whether forms were stamped or not did not in any way affect the credibility of the process and the final results of the elections and further that in the very few instances where there appeared to be some alteration of the forms, the same was remedial and was well and satisfactorily explained as was held by the Court of Appeal in the case of [*Independent Electoral and Boundaries Commission & Another v Pauline Akai Lokuruka & Another*](#) (2018) eKLR.
400. It was submitted that the alterations were not to alter votes as cast for each candidate or the final results attained by each candidate and that they were also done in the presence of the Petitioners' agents who signed results declaration forms without objections and therefore the credibility of the elections was maintained.
401. Regarding the allegations that there was failure by some of the petitioners' agents to sign statutory forms, it was submitted that Regulations 79(6) and (7) of the [*Elections \(General\) Regulations*](#), 2012 provide that failure and/or refusal to sign a Declaration Form by an agent shall not by itself invalidate the results announced and that it was not a mandatory requirement for Form 37A and 37B to be signed by all the agents for them to be valid.
402. On the issue of issuance of extra ballot papers to a voter, the 1st and 2nd respondents submitted that the same was occasioned by clerical error taking into consideration the working conditions and that the same could not be misconstrued as having been done intentionally to favour any candidate.
403. It was further submitted that contrary to the allegations by the petitioners' witnesses of ballot stuffing and padding, no evidence was adduced to show the same. Related to this was the allegation that the number of votes cast exceeded the number of people recognized by the KIEMS kit and in this regard, the respondent faulted the petitioners' reliance on KIEMS kit data obtained from the presidential election petition and further relied on the Supreme Court of Kenya decision in [*Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others \(Amicus Curiae\)*](#) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 54 (KLR) where it was held that the technology employed by the IEBC in the 2022 general elections was impeccable and conformed with the constitutional and statutory requirements and that the said technology deployed by IEBC did not fail the standard of Article 86(a) of the [*Constitution*](#) on integrity, verifiability, security and transparency.
404. It was submitted that the Scrutiny report highlighted some polling stations as having more valid votes cast than voters cleared in the KIEMS kit however from a perusal of the PSD it was also found out that some voters were identified through the manual register were added to the numbers of voters who were cleared through KIEMS kit with the numbers being tallied together to get the valid votes cast and that this explained the difference.



405. The respondents further submitted that no evidence was led to prove that there was any irregular assisting of voters.
406. The 1st and 2nd respondents submitted that no evidence was tendered by the Petitioners to prove or substantiate that there was any bribing of voters but that to the contrary, it was the Petitioners' witnesses who testified under oath, that they were involved in bribery and unlawful expenditure contrary to Sections 9 and 16 of the Election Offences Act, respectively, as confirmed by PW5 that they enticed voters and bought them lunch and paid their fare from home to the polling station and back home on the voting day and by PW13 that they refunded fare and lunch to the voters and that the fare depended on the distance travelled.
407. It was submitted that no evidence was furnished linking the commission of the alleged electoral offences or malpractices to any of the Respondents. Further, the 1st and 2nd respondents submitted that none of the Petitioners' agents was denied access or entry into a polling station or ejected out of a polling station.
408. The 1st and 2nd respondents submitted that they furnished concrete evidence to counter and answer every issue raised by the Petitioner, leaving nothing unanswered thus discharging their evidentiary burden in proving that the elections and specifically the gubernatorial elections of Homabay County of 9th August, 2022 were held and conducted within the confines and tenets of the Constitution and the dictates of all electoral laws.
409. Regarding costs, it was submitted that costs follow the event and thus counsel for the 1st and 2nd respondents urged the court to dismiss the Petition with costs to the Respondents and that the said costs be certified for 3 advocates on behalf of the 1st and 2nd Respondents.

The 3rd & 4th respondents' written Submissions

410. On behalf of the 3rd and 4th Respondents, their counsel first and foremost contended that all witness affidavits properly filed in support of any party's case but whose deponents were not offered for cross examination were of no probative value and ought not be considered by the court as was held by Gikonyo J in the case of Moses Wanjala Lukoye v Bernard Wekesa Sambu & 3 Others Bungoma [2013] eKLR.
411. Counsel for the 3rd and 4th Respondents framed the following thirteen (13) issues for determination:
- i. Restatement of the law on burden and standard of proof in Election Petitions
 - ii. Whether the election court has jurisdiction over alleged nomination and/or pre-election grievances
 - iii. Whether the 5th Respondent and/or its party leader unduly influenced the gubernatorial elections to the Petitioners' detriment.
 - iv. Whether there were incidents of violence and whether the same, if any, affected the outcome of the election
 - v. Whether there was voter suppression
 - vi. Whether there were incidents of bribery by the 3rd Respondents or at all and whether the same, if any affected the outcome of the elections.
 - vii. Whether there was unlawful voter assistance



- viii. Whether there were incidents of vote padding and manipulation of
- ix. Whether the Petitioners' agents were denied entry into or forcefully ejected from polling stations by all the Respondents or at all.
- x. Whether the Petitioners were denied copies of forms 37A and whether any forms were unsigned by presiding officers or unstamped
- xi. Whether there were unlawful alterations of results declared at polling stations where the 5th Respondent had more agents than permitted by law
- xii. Whether the Deputy Registrar's scrutiny report corroborates the Petitioners' allegations as pleaded in the Petition
- xiii. Who should bear the costs of the Petition?

412. The above issues are considered cumulatively. According to the 3rd and 4th Respondents, the instant petition was founded on speculative and generalized allegations that were an afterthought and without cogent evidence as to affect the credibility and/or validity of the Homabay Gubernatorial election and further that where evidence was adduced to substantiate any allegation in the Petition, the same was either inadmissible, irrelevant or materially insignificant as to satisfy the 'cogency' test required of evidence in election petitions, whether taken individually or together as a whole.

413. The 3rd and 4th respondents further submitted that the burden and standard of proof in election petitions was settled in the case of *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR as the burden being on the petitioner to adduce cogent and credible evidence to prove those allegations claimed to the satisfaction of the court and the standard of proof being higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt.

414. It was submitted that none of the irregularities complained of was made out or demonstrated to have been substantial so as to affect the result of the election or to have so pervasively violated the *Constitution* or the applicable electoral laws as to affect the results or the integrity, credibility or validity of the Homabay gubernatorial elections and further that none of the testimonies of the 8 direct witnesses was corroborated by an independent/other witness who saw or heard the allegations made in the petition.

415. The respondents submitted that PW6's testimony was full of inconsistencies that cast doubt on his credibility and objectivity and that his cross examination revealed that his true gripe with the 3rd Respondent centred on management of party affairs and had nothing to do with the conduct of the 9th August 2022 elections.

416. It was submitted that the 1st Petitioner though aggrieved by the ODM Party's decision to nominate the 3rd and 4th Respondents as its preferred gubernatorial candidate, voluntarily chose not to appeal the same on grounds that he would not get any justice from the ODM Appeals Tribunal. Accordingly, it was submitted that the issues raised in the petition touching on or relating to the ODM gubernatorial primaries/nomination were not within the jurisdiction of an election court to determine. Reliance was placed on the Supreme Court case of *Mohamed Abdi Mahamud v Ahmed Abdullabi Mohamad & 3 others Ahmed Ali Mukhtar (Interested Party)* (2019) eKLR where the Supreme court held that pre-election disputes were a reserve of the IEBC or the court acting in judicial review or exercising its supervisory jurisdiction.



417. The 3rd and 4th respondents submitted that the 5th Respondent and/or its party leader did not unduly influence the gubernatorial elections to the Petitioners' detriment as they were exercising their political rights guaranteed under Article 38 of the Constitution and further enshrined in the 5th respondent's constitution.
418. Further, it was submitted that the videos produced in evidence of past events were of little or no probative value to these proceedings as the same had no rational connection to the 2022 Gubernatorial elections in Homabay County or were renditions of the subjective opinion of journalists on general political activities and none of whom testified in the instant proceedings.
419. It was submitted that the purported evidence adduced by the petitioners in support of the allegations of voter intimidation, violence and undue influence failed to demonstrate that the 3rd and 4th Respondents' campaigns went beyond canvassing for votes and involved acts of undue influence. Reliance was placed on the case of Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR where the supreme court set out the test of undue influence as an electoral offence as whether the 3rd respondent's conduct, if satisfactorily proved, created an impression in the mind of a voter that adverse consequences would follow as a result of their exercise of their political choices.
420. Reliance was further placed on the case of Julius Makau Malombe v Charity Kaluki Ngilu & 2 others [2018] eKLR, where it was held that proof of violence per se cannot vitiate the results of an election unless the same was, inter alia, widespread, in terms of extending over a wide area, to a large extent or to a great extent and that that widespread violence would lead to nullification or voidance of an election where the winner or returned candidate is directly or indirectly responsible for the violence, and, therefore, it ought to be demonstrated that the perpetrators of the violence were agents of the candidate, and that they engaged in the aged acts with the candidates' consent.
421. Regarding intimidation, it was submitted that it was not enough to conjure abstract scenarios and transpose unidentified voters and thereby reach conclusions of intimidation but rather, that there must be sufficient evidence adduced to directly link any of the Respondents, particularly the 3rd Respondent to the acts of intimidation as was held by the Supreme Court in the case of Hassan Mohamed Hassan & another v Independent Electoral & Boundaries Commission & 2 others [2013] eKLR.
422. The 3rd and 4th respondents further submitted that entertaining the Petitioners' wild and unfounded allegations against the 5th respondent's party leader would do more to occasion disharmony within the Constitution rather than promote its harmonious interpretation and application.
423. Regarding the allegations of violence, it was submitted that the allegations of violence at Akala, Shauri Yako and Ligisa primary schools taken together or individually could not be characterized as systemic, planned or widespread as to have disrupted voting or affected the outcome of the elections as a whole in 1228 polling stations and that the disturbances noted in the three (3) stations were by the common testimony of all witnesses random occurrences elicited by varied factors but which were swiftly contained by security agencies after which voting, counting and declaration of results resumed without further hitches.
424. In addition, the 3rd and 4th respondents submitted that on the death of Kepher Ouma at Okok primary school, not a single witness testified to establish the cause and motive of the said person's death nor to relate his death with the 3rd or 5th Respondents as alleged and further, that no empirical evidence was adduced to demonstrate that the death of the said person in any way affected the outcome of the elections in Kanyamwa Kologi Ward or the county as a whole. It was their submission that as a matter of fact, voter turnout in the said ward was quite high relative to the national average. The 3rd and



- 4th respondents relied on the case of *Lenno Mwambura Mbaga & another v Independent Electoral & Boundaries Commission & another* [2013] eKLR where the court held that high turnout of voters is incompatible with allegations of violence and disruptions.
425. It was submitted that the purported video evidence of violence during pre-election primaries did not draw any plausible nexus between the allegations made therein and the gubernatorial elections and thus that the same were at best hearsay evidence as the makers of the said videos had neither been called as witnesses nor justification provided for their absence.
426. Accordingly, it was submitted that the evidence adduced by the petitioners to support the allegations of violence in the Homabay gubernatorial election were of little or no probative value and could not be said to establish, beyond reasonable doubt, the three elements of violence in an election as the alleged violence was not of such magnitude or materiality as to affect the credibility or validity of the 2022 Homabay gubernatorial elections.
427. On allegations of voter suppression, it was submitted that the burden was upon the Petitioners to demonstrate, with credible evidence, a systematic, sustained and widespread effort by the Respondents to target a specific class of voters principally, because they were his supporters as was held in the case of *Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)* (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 56 (KLR) (Election Petitions) (26 September 2022). The respondents submitted that no empirical evidence of voter suppression in the said election was presented by the petitioners.
428. Regarding the alleged bribery, it was submitted that being a serious election offence, it must be proved beyond reasonable doubt. Reliance was placed on among others the cases of *Karanja Kabage v Joseph Kiuna Kariambegu Ng'ang'a & 2 others* [2014] eKLR and *Mary Wangari Mwangi v John Omondi Ogutu & 2 others* [2013] eKLR wherein it was held that bribery must be proven conclusively as to leave no room for presumptions. The giver and recipient(s) of the bribe and how much is involved are essential elements of the offence that must be proved. More importantly it must be established that the motive of the bribery was to influence voters to vote in a particular manner or to refrain from voting.
429. The respondents submitted that the Petitioners did not discharge their burden of proof to the required standard to prove that voters were bribed by the 3rd or 4th Respondents either directly or indirectly in order to influence their voting decisions.
430. On whether there was unlawful voter assistance, the respondents submitted that the allegations lacked in specificity and further that there was no direct evidence by any witness who witnessed the alleged incidents. They further submitted that the allegation that several agents were denied a chance to witness voters being assisted was not supported by the testimony of any of the affected agents and as such, the allegations as a whole were not proved by any cogent evidence so as to vitiate the elections in Homabay County.
431. On the alleged vote padding, it was submitted that save for the bare tabulation of data allegedly gathered from KIEMS kits, no other evidence was led by any of the Petitioners or their witnesses to substantiate the foregoing generalized allegations. The 3rd and 4th respondents submitted that data in KIEMS kits encapsulated voter identification in all six elective positions whereas the ballot box was representative of the votes cast by voters for a specific elective position only and is accordingly the true locus for the determination of the will of the people as was held in the case of *Edward Tale Nabangi v James Lusweti Mukwe & 2 others* [2018] eKLR.
432. The 3rd and 4th respondents further submitted that the scrutiny report affirmed the results of the election as returned by the people of Homabay county at the polling stations and debunked the



- grounds of the petition that the said results were manipulated or that there was vote padding in favor of the 3rd Respondent.
433. Regarding the admissibility of the electronic evidence adduced by the petitioners, it was submitted that the Petitioners though contending that the above information was derived from an electronic source did not produce the certificate as required under sections 78A and 106B of the Evidence Act to authenticate the said data and thus the said data was inadmissible.
434. They further submitted that without the benefit of accessing the logs from which the said data was allegedly derived for independent analysis and response, their presumption was that the said information was illegally/fraudulently obtained and would in the event be inadmissible as was held in the Presidential Election Petition No. 4 of 2017, Njonjo Mue & another v Chairperson of Independent Electoral and Boundaries Commission & 3 others [2017] eKLR.
435. It was submitted that the allegations that the petitioners' agents were denied access to the polling station was unsubstantiated and, in any event, the absence of agents at a polling station could not without more vitiate the results of the gubernatorial elections.
436. The 3rd and 4th Respondents further submitted that there was no evidence of unsigned or unstamped forms adduced by the petitioners and that the non-stamping of statutory forms by agents could not invalidate an election as was held in the case of Kalla Jackson Musyoka v Independent Electoral & Boundaries Commission (I.E.B.C) & another [2018] eKLR.
437. It was submitted that the Petitioners failed to demonstrate that there were any major, systematic or widespread errors or alterations which have not been countersigned by the presiding officer or the deputy presiding officer that were substantial enough to vitiate the election.
438. Regarding the scrutiny report carried out by the Deputy Registrar, it was submitted that the Petitioners' allegations were principally concocted in order to mislead the Court for scrutiny and recount and that the petitioners should be bound by their pleadings and evidence and where the Scrutiny exercise found contradicting facts, the Petitioners should not be allowed to change tune and now rely on the findings of the scrutiny exercise. Reliance on a party being bound by its pleadings was found in the case of Walter Enock Nyambati Osebe v Independent Electoral & Boundaries Commission & 2 others [2018] eKLR.
439. The 3rd and 4th respondents submitted that to set aside the election because of the flimsy and escapist allegations contained in the petition would be to deprive majority of the citizens who voted overwhelmingly for the 3rd Respondent in a majority of the 1223 polling stations where not a single agent impugned the result of the election. Reliance was placed on the case of Hassan Abdalla Albeity v Abu Mohamed Abu Chiaba & another [2013] eKLR where the court addressed itself to the primacy of the votes as cast in the ballot box and stated that the will of the people is expressed by the majority votes secured by the winning candidate and the primary duty of an election court is to sustain that will by giving it full effect.
440. As to who should bear costs of the petition, it was submitted that Section 84 of the Elections Act requires the election court to award costs to the winner of an election petition in accordance with the general principle that the successful party is entitled to costs of the litigation.
441. It was their submission that the hearing of the petition was quite laborious taking into account the number of issues pleaded and which the Respondents had to respond to, the voluminous record of documents filed by the Petitioners in support of the Petition, the number of witness affidavits to which the Respondents had to respond to, the number of hearing dates and man hours spent at the hearing of



the Petition, the extensive and laborious scrutiny and recount exercise involving more than 190 ballot boxes and more than 190 forms 37A and the several interlocutory applications argued in the course of the hearing and as such, they urged this court to cap the costs to the 3rd & 4th respondents at Kshs. 30,000,000.

The 5th Respondent's written Submissions

442. The 5th respondent framed the following five (5) issues for determination in this petition:
- i. Whether the elections held on the 9/8/2022 in Homa Bay County were conducted in accordance with the Constitution, the Elections Act and the Election Rules.
 - ii. Whether there was undue influence, bribery or violence by the 5th Respondent in the conduct of the elections?
 - iii. Whether there was substantive non-compliance with the Constitution, Elections Act and Applicable rules and if so what was the effect of Non-Compliance on the results.
 - iv. Is the Petitioner entitled to the prayers in the petition?
 - v. Was the 5th Respondent properly joined in the petition?
 - vi. Who should bear the costs of the suit
443. On behalf of the 5th Respondent, its counsel submitted that the burden of proof in election petitions lies with the petitioner because it is he who seeks to have the election declared null and void as was held in the case of Raila Odinga & 5 Others v Independent Electoral & Boundaries Commission & 3 Others (2013) eKLR as well as the case of John Kiarie Waweru vs Beth Wambui Mugo & 2 Others [2008] eKLR.
444. It was further submitted that the evidential burden of proof equally lies upon the petitioner and would only shift when a Petitioner is able to establish that there was no-compliance with the law and that such non-compliance affected the validity of the election.
445. The 5th Respondent submitted that bribery, undue influence and forgery are all electoral offences and thus any person who commits such an offence is liable on conviction to a fine or to imprisonment or to both and thus the standard of proof in such instances was beyond reasonable doubt. Further, it was submitted that the standard of proof in respect of electoral irregularities or acts that amount to non-compliance with any written law relating to an election is higher than on a balance of probability but lower than beyond any reasonable doubt as was held in the case of William Kabogo Gitau v George Thuo & 2 Others [2010] eKLR.
446. Regarding the allegations of bribery, it was submitted that no evidence was led to show that the alleged bribery was made with the consent and/or instructions of the 3rd, 4th or 5th Respondents. The 5th respondent further submitted that the bribery allegations by the petitioners were not substantiated and must be rejected for being scanty, based on speculation, suspicion or guesswork. Reliance was placed on the case of Simon Nyaundi Ogari & Another v Hon. Joel Omagwa Onyancha & 2 Others [2008] eKLR where the court held inter alia that when it is alleged that the bribery took place publicly and in the presence of many people, the court cannot be satisfied by anything less than the best evidence which is always direct evidence given first hand.



447. Further reliance was placed on the Presidential Election No. 1 of 2001, *Rtd Col Dr Kizza Besigye v. Y. K. Museveni and Uganda Electoral Commission*, where the Supreme Court of Uganda held that the offence of electoral bribery is not committed unless the gift, money or other consideration is given or received by a person who is proved to be a registered voter as well as the case of *Hosea Mundui Kiplagat v Sammy Komen Mwaita and 2 Others* Election Petition Eldoret No 11 of 2013 where the court stated that where the election offence is allegedly committed by the agents of a candidate, the connection must be established. It is not enough to show kinship or proxies but go further to show that they perpetrators were agents of the candidate and engaged in the acts with the candidate's consent.
448. On the allegation of violence, it was submitted that the same were rebutted by testimony of DW3 whereas the allegations of alterations of statutory forms were rebutted by the testimony of DW6. Reliance was placed on the case of *Rishad Hamid Ahmed Amana v IEBC & 3 Others* H.C. at Malindi E.P No. 6 of 2013 where the court stated inter alia that If the mistake is innocent, human errors would not constitute a reason to nullify the election putting in mind the time and duration of the exercise and the fatigue that may ensue.
449. It was submitted that the allegations of denial of petitioner's agents to access into polling stations were baseless as no evidence was led by the petitioners to prove the same or to prove how absence of the agents at the polling station manifestly affected the end results.
450. On allegations that there was undue influence by the 5th respondent's party leader, it was submitted that the allegations were rebutted by DW15 and further that every voter had his individual vote and the party or party leader dynamics notwithstanding, at the end of the day, it was the individual voter who, in his unfettered right to vote, casts that ballot that helps to perpetuate the party. It was further submitted that the 5th Respondent and its party leader did not coerce the voters or threaten them in any particular way in a bid to ensure victory to its favoured candidate; nor did it impede or otherwise prevent a voter from voting for a candidate of his own choice and true to that 8 out of 40 Members of County Assembly in Homa-bay County were elected on independent platform.
451. It was submitted that the 5th Respondent party or its party leader dynamics in Homabay County and in Nyanza region at large does not amount to undue influence as contemplated by Section 63 of the *Elections Act*, 2011.
452. The 5th respondent submitted that the petitioners were obligated to show that the irregularities alleged were of such a nature or magnitude as to substantially affect the results or integrity of the election which the petitioner had not proved.
453. Regarding the pre-election issues raised by the petitioners, it was submitted that the same ought to be struck out as there were constitutional and statutory provisions providing challenges of ventilating the same. The 5th respondent submitted that if (as) the petitioners sought no relief against the 5th Respondent then the court had no jurisdiction as the court's jurisdiction flows from the reliefs sought by a party and thus it submitted that its participation be struck out of the petition and the petition be dismissed with costs.

Analysis And Determination

454. I have considered the election petition herein as pleaded, the affidavit evidence in support thereof and the responses to the petition as well as the affidavit evidence proffered by the respondents, the parties respective witnesses' viva voce evidence as well as their respective detailed written submissions and issues framed for determination, which I have consolidated into the issues herein for determination. I have also given serious consideration to the constitutional, statutory and judicial pronouncements



on the subject before me. I find the following 15 to be the main issues that are ripe for determination. There are also ancillary questions that I will endeavor to resolve.

1. What is the burden and standard of proof in election petitions?
2. Whether the electronic evidence adduced by the petitioners was admissible
3. Whether the 5th Respondent was properly joined to this election petition?
4. Whether the pre-election issues raised by the petitioners affected the result of the impugned election?
5. Whether there were instances of vote padding and ballot stuffing in the Homabay Gubernatorial elections?
6. Whether there were alterations and cancellations on the statutory electoral forms and whether the same affected the results of the impugned election?
7. Whether there was a failure to sign and stamp the statutory electoral forms and whether the same affected the results of the impugned election?
8. Whether there was unlawful ejection and denial of entry and access of the petitioners' agents to the polling stations and tallying centres and whether the failure of the petitioner's agents to sign Forms 37A and the presence of more agents of one candidate than the other affected the results of the impugned election?
9. Whether there was bribery and undue influence in the Homabay gubernatorial election and whether the same affected the result of the impugned election?
10. Whether there was violence, chaos and skirmishes during the Homabay gubernatorial election and whether the same affected the result of the election?
11. Whether the Homabay gubernatorial election was free, fair, credible, transparent and verifiable so as to meet the principles espoused in the *Constitution* and legislation?
12. What are the findings of the scrutiny and recount report and whether the findings negate the results of the Homabay gubernatorial election?
13. Were the 3rd and 4th respondents validly elected as governor and deputy governor for Homabay County in the 9th August 2022 general election?
14. What orders should this court make?
15. Who should bear the costs of the instant petition?
16. Conclusion

A. What is the burden and standard of proof in election petitions?

455. The law of evidence complements the existing civil and criminal substantive and procedural laws in Kenya. The merits of a case depend on the strength, accuracy, reliability and credibility of the evidence adduced. In an adversarial court system like in Kenya, the courts do not undertake investigations or gather evidence on behalf of the parties before them. The courts depend on and determine disputes from what parties present as admissible evidence. Consequently, cases are won or lost on the basis of the evidence placed before the Court. (see the case of Raila 2022).



456. Section 2 of the *Evidence Act* provides that the Act:

“(1) ...shall apply to all judicial proceedings in or before any court other than a Kadhi’s court, but not to proceedings before an arbitrator.” [emphasis added].

457. The common law concept of burden of proof (onus probandi) is a question of law which can be described as the duty which lies on one or the other of the parties either to establish a case or to establish the facts upon a particular issue. *Black’s Law Dictionary* defines the concept as: “[a] party’s duty to prove a disputed assertion or charge [and] includes both the burden of persuasion and the burden of production.”

458. With the above definition of what the burden of proof is, the next question is: who bears the burden of proof? On the burden of proof, Section 107 of the *Evidence Act* provides as follows:

- (1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

459. On proof of peculiar and particular facts, Section 109 of the *Evidence Act* stipulates that:

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

460. Section 110 of the same *Act* provides that:

“The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.”

461. The Supreme Court first pronounced itself on these twin concepts of burden and standard of proof in the Presidential Petition in *Raila Odinga & 5 Others v. Independent Electoral and Boundaries Commission & 3 Others*, SC Petition Nos. 5, 3 & 4 of 2013 (consolidated); [2013] eKLR (Raila 2013); and reiterated the same in the later decision between *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others*, SC Petition No. 1 of 2017 [2017] eKLR (Raila 2017) and *John Harun Mwau & 2 Others v. Independent Electoral and Boundaries Commission & 3 Others*, SC Petition Nos. 2 & 4 of 2017 (consolidated) [2017] eKLR (Harun Mwau Case).

462. In the *Raila 2017*(supra) case, the apex Court described the burden of proof as the duty which lies on one or the other of the parties either to establish a case or to establish the facts upon a particular issue. Thus, the Supreme Court has consistently held that a petitioner who seeks the nullification of elections for alleged non-conformity with the *Constitution* or the law or on the basis of irregularities and illegalities, has the duty to proffer cogent and credible evidence to prove those grounds to the satisfaction of the Court. Once the Court is persuaded that the petitioner has discharged that burden, then the evidentiary burden shifts to the respondent (who in most election-related cases is the IEBC), to present evidence by way of rebuttal of the assertion.

463. In *Raila 2013*(supra case), the Supreme Court expressed itself as follows:

“(196) Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but



that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common law approach in respect of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter esse acta*: all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law.

(197) While it is conceivable that the law of elections can be infringed, especially through incompetence, malpractices or fraud attributable to the responsible agency, it behoves the person who thus alleges, to produce the necessary evidence in the first place and thereafter, the evidential burden shifts, and keeps shifting.”

464. Thus, as stated above, a petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds “to the satisfaction of the court.” That position is fixed at the onset of the trial and unless circumstances change, it remains unchanged. In this case therefore, it is common ground that the petitioners bear the burden of proving to the required standard that, on account of non-conformity with the law or on the basis of commission of irregularities which affected the result of this election, the 3rd respondent’s election as Governor of Homabay County should be nullified.
465. However, albeit the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant throughout a trial with the petitioner, depending on the effectiveness with which a petitioner discharges this, the evidential burden keeps shifting” and “its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
466. It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that those irregularities did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, that burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law.
467. Turning to the issue of standard of proof, the Standard of proof refers to the extent a petitioner is required to go to succeed in his/her petition. The standard of proof in Electoral Disputes generally is an ‘intermediate standard’, one that is greater than a ‘balance of probabilities’ but lower than ‘beyond reasonable doubt’ (see [Raila Odinga, 2017](#)).
468. The Supreme Court in [Raila Amollo Odinga & 16 others v William Samoei Ruto & 10 others](#) [2022] KESC 56 (KLR) (Raila 2022) restated its earlier positions in the [Raila 2013](#), [Raila 2017](#) and the [Harun Mwau Cases](#) in which the apex Court adopted the intermediate standard, striking a middle ground between the threshold of proof on a balance of probability in civil cases and beyond reasonable doubt in criminal trials, save for two instances:- where allegations of criminal or quasi-criminal nature are made; and where there is data-specific electoral pre-condition and requirement for an outright win in the Presidential Election, such as those specified in Article 138(4) of the [Constitution](#). The court further stated that in those instances, the standard of proof must be beyond reasonable doubt.



469. In the *Raila 2017*(supra) case, the Supreme Court while acknowledging the criticism that it had received on its pronouncement on the issue of standard of proof stated inter alia that electoral disputes were not ordinary civil proceedings but sui generis and thus it must be ascertainable, based on the evidence on record, that the allegations made are more probable to have occurred than not.
470. Thus, in electoral disputes, unless the irregularities or malpractices pleaded and proved by a petitioner are such that they actually interfere with the free choice of the voters, the Court will not be quick to interfere with the existing voter's choice. See (*Raila 2017* supra). This position is also in tandem with Lord Denning's proposition in *Morgan v Simpson* [1974] 3 All ER (722) noted here in part, that:
- “If the Election was so conducted that it was substantially in accordance with the law as to Elections, it is not vitiated by a breach of the rules or a mistake at the polls-provided that it did not affect the result of the Election.”
471. However, the Supreme Court of Kenya has now authoritatively held that where the petition alleges corrupt practices, election offences or data-specific allegations, the petitioner must prove them beyond reasonable doubt. See (*Raila 2013*) supra. In the case of *Alfred Nganga Mutua & 2 Others v Wavinya Ndeti & Another*, Supreme Court Petitions 11 and 14 of 2018, the Supreme 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.”
472. The Supreme Court has also pronounced that in addition, a petitioner who alleges that the successful candidate did not garner a prescribed minimum number of votes must prove such an allegation beyond all reasonable doubt. (see *Raila 2013*).
473. I have spent a considerable length of time on this issue of the onus and standard of proof because in resolving the rest of the issues that I have framed in this petition, the question of the burden and standard of proof runs through the veins of those issues-whether the burden and standard of proof required in election petitions has been discharged in respect of each allegation levelled against the respondents herein and even where the burden shifts to the respondents, they are under the same duty to discharge that burden to the required standard as set out hereinabove.

B. Whether the electronic evidence adduced by the petitioners was admissible

474. The Petitioners adduced evidence through videos marked EOK4(a), EOK5(a), EOK5(d), EOK6(d), EOK7(a), EOK8(a), EOK10(a) and EOK11(a) to show the 5th's respondents' dalliance with violence and also the statement by the 5th respondent's party leader in which they alleged that he incited voters not to vote for the petitioners as this would be akin to being as stupid as their mother.
475. In response to the videos annexed to the 1st Petitioner's affidavit marked EOK4(a), EOK5(a), EOK5(d), EOK6(a), EOK7(a), EOK8(a), EOK10(a) and EOK11(a), the respondents submitted that the said videos were inadmissible in evidence.
476. The relevant law on the matter is as follows:

“78A. Admissibility of electronic and digital evidence



- 1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.
- 2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.
- 3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—
 - a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;
 - b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;
 - c) the manner in which the originator of the electronic and digital evidence was identified; and
 - d) any other relevant factor...

106B. Admissibility of electronic records

Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as “computer output”) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.....

Section 106 4 (a)- (d) *Evidence Act* Cap 80:

In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following ...identifying the electronic record, giving such particulars of any device involved in production of the electronic record... purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device... shall be provided.

477. From the above legal provisions, and cited authorities by the Respondent, the law requires that Section 78A and 106B of the Act are read conjunctively and complied with. Therefore, electronic evidence ought to be produced with a certificate as required under Section 106B of the *Evidence Act*, before fulfilling the requirements of authenticity and validity of the information and/or evidence contained in the said CD video recording. Further, the law envisions that the certificate shall contain information that complies with Section 78A (3) of the *Act*, that the certificate shall provide vital information as to the source, process and delivery of the electronic record or evidence to the Court and parties so as to enable admission of the electronic record as evidence. The content of the certificate would aid and



satisfy the court as to reliability of generation of the electronic record/evidence; the integrity of the process and the origin of the content.

478. In the instant petition, the video recordings relied on by the petitioners were produced with certificates sworn by one Paul Nyamwange Ombuna who provided details on how he downloaded the said videos and the specific devices he used and also the condition that the said devices were in.
479. Taking all the above into consideration, it is evident that all the video evidence relied on by the petitioners being EOK4(a), EOK5(a), EOK5(d), EOK6(a), EOK7(a), EOK8(a), EOK10(a) and EOK11(a), were properly before court and are thus meet the admissibility criteria.

C. Whether the 5th respondent was properly joined to this election petition

480. The petitioners herein instituted the instant petition against amongst others, the 5th respondent, the Orange Democratic Movement, a political party registered under the [Political Parties Act](#) and the sponsor of the 3rd Respondent and her running mate, the 4th respondent in the general elections that were held on the 9th August 2022.
481. The petitioners asserted that they enjoined the 5th respondent ODM Party to this petition owing to the acts of violence attributable to its supporters right from the time of nomination, against the candidacy of the 1st Petitioner, Dr. Evans Kidero. The petitioners also asserted that the 5th respondent's party leader Rt. Hon. Raila Amolo Odinga, the former Prime Minister of Kenya commanded a cultic kind of following in Nyanza and that he had such a big influence on the outcome of the said elections of the 3rd and 4th respondents thereby denying the people of Homabay their democratic right to choose the petitioners who were best suited to lead the people.
482. The 1st petitioner who testified as PW14 stated that had there been a free and fair nomination process undertaken by the 5th respondent, him and his running-mate the 2nd petitioner would have trounced their opponents and clinched the ODM Party ticket but that unfortunately, the 5th Respondent decided to unilaterally and conspiratorially issue a direct ticket to the 3rd Respondent Hon. Gladys Atieno Nyasuna Wanga, contrary to the democratic mode of nominating candidates, i.e. through universal suffrage.
483. The petitioners further pleaded that the 5th respondent and its party leader, the Right Honourable Raila Amolo Odinga, unduly influenced the gubernatorial elections to the petitioners' detriment by making a rallying call that the voters should elect only the ODM Party's candidates within Homabay County (voting of six piece) and further that the former Prime Minister made unbalanced, offensive and potentially inciteful remarks against anyone opposing the candidacy of Hon. Gladys Wanga, the 3rd Respondent herein.
484. The petitioners enjoined the 5th respondent and specifically sought the following prayers against the 5th respondent ODM Political Party:
- h) A Declaration be and is hereby made that the 5th Respondent violated the Petitioners' rights against equality and discrimination based on political affiliation contrary to Article 27(4) and (5) of the [Constitution](#) of Kenya, 2010;
 - i) A Declaration be and is hereby made that the 3rd and 5th Respondents violated the Petitioners' rights under Article 38(1)(c) of the [Constitution](#) to campaign for a political party or cause;



- k) A Declaration be and is hereby made that the 3rd and 5th Respondents may have committed electoral offences under Section 10(1)(a) & (b) of the [Election Offences Act](#), 2016 in the impugned Gubernatorial elections of Homa-Bay County that took place on 9th August 2022;
- l) A Declaration be and is hereby made that the 3rd and 5th Respondents may have committed electoral offences under Section 11(a) &(c) of the [Election Offences Act](#), 2016 in the impugned Gubernatorial elections of Homa-Bay County that took place on 9th August 2022.
485. The 1st & 2nd and 3rd & 4th respondents were silent on whether the 5th respondent was properly enjoined to this petition.
486. In their response dated 19th September 2022, the 5th respondent ODM Party stated in contention that the Petition lacked in specificity and comprised mere generalizations without evidence capable of meeting the materiality test to the requisite standard. Through the testimony of DW15, Mr. Anthony Matum Okechi, an advocate of the High Court of Kenya and the Director Legal and Parliamentary Liaison Affairs at the ODM National Secretariat, the 5th respondent adduced evidence urging this court to discharge it from these proceedings as the issues raised against it were not part of the petition and therefore they ought to have been canvassed elsewhere.
487. It was submitted on behalf of the 5th respondent that as the petitioners had not sought any relief against it then this Court had no jurisdiction, as the court's jurisdiction flows from the reliefs sought by a party. It was submitted that this court should strike out the 5th respondent's participation from the petition and that the petition against the 5th respondent be dismissed with costs.
488. I have considered the arguments by both the petitioners and the 5th respondent. Article 48 of the [Constitution](#) guarantees all persons the right to access justice. Further, Article 50(1) of the [Constitution](#) guarantees every person the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
489. Although the 5th respondent claims that no reliefs were sought against it by the petitioners, I have reproduced above the declarations which the petitioners sought against the 5th respondent and as well as the reasons why the 5th respondent was enjoined to this petition. The petitioners being dissatisfied with the declaration of the 3rd and 4th respondents' declaration as governor and deputy governor of Homabay County on an ODM party ticket, were well within their rights to institute the instant petition.
490. In addition, Section 2 of the [Elections \(Parliamentary and County Elections\) Petitions Rules](#), 2017 describes a respondent in relation to a petition as a:
- a. Person whose election is complained of
 - b. The returning officer
 - c. The Commission
 - d. Any other person whose conduct is complained of in regard to a petition.
491. An examination of the petition reveals that the petitioners herein levelled specific allegations against the 5th respondent as set out herein above where specific declarations are sought against the 5th respondent and DW15 testified on its behalf in a bid to debunk those allegations.



492. The petitioners raised issue with the 5th respondent's alleged conduct during the party primaries where the 1st petitioner alleges that he was never accorded fair play in the nomination exercise in that the 3rd respondent was handed a direct ODM ticket instead of the method of universal suffrage being applied as the interested ODM party candidates had been made to pay nomination fees as advertised, which fees had not even been refunded.
493. The 1st petitioner also complained that during campaigns, the 5th respondent and its party leader Rt. Honourable Raila Amolo Odinga and their supporters unduly influenced the citizens of Homabay to vote six piece. The petitioners attributed their loss and violence allegedly experienced prior and during the 9th August 2022 general elections in Homabay County to the 5th respondent working in concert with the 3rd respondent.
494. The petitioners specifically cited the 5th respondent's party leader as having made intemperate, vituperative and potentially inciteful remarks against anyone opposing the candidacy of the 3rd Respondent. The petitioners further sought specific declarations and orders against the 5th respondent specifically prayers (h), (i), (k) and (l).
495. It is therefore clear that the petitioners raised issues with the 5th respondent's conduct prior, during and after the election cycle in the gubernatorial elections in Homabay County. The allegations raised against the 5th respondent are up for determination in this petition and shall be considered in this judgement.
496. From the evidence laid forth above, I find that the 5th respondent has not demonstrated that it was wrongfully joined to this election petition.
497. In the circumstances, I find and hold that the 5th respondent is properly before this court and that it meets the definition of a respondent as defined in Section 2 of the *Elections (Parliamentary and County Elections) Petitions Rules*, 2017. Accordingly, the objection to joinder of the 5th respondent as a party to this election petition is hereby disallowed.

D. Whether this court as an election court has jurisdiction to hear and determine the pre-election- (party primary nomination related issues) raised by the 1st petitioner and if so, whether those pre-election issues affected the election results as impugned herein

498. The petitioners pleaded and the 1st petitioner testified that had there been a free and fair ODM party nomination process, he would have trounced his opponents and clinched the 5th Respondent's party ticket and that since he was denied a ticket to vie for governor through the ODM party, he resigned from the party and opted to vie as an independent candidate.
499. The petitioners further pleaded that the 3rd Respondent and the leadership of the 5th Respondent ODM Party, knowing how popular the Petitioner had become amongst the people of Homabay, were not happy with his decision to run as an Independent Candidate and that they therefore resorted to campaigns characterized by premeditated and widespread violence against him and his supporters and that they further enlisted the support and influence of the 5th Respondent's party leader, the former Prime Minister, the Rt. Hon. Raila Amolo Odinga, who campaigned for the 3rd respondent and made a rallying call that the Homabay County voters should only elect the 5th Respondent's ODM Party nominee candidates.
500. In his sworn testimony, the 1st petitioner who testified as PW14 stated that the 5th Respondent unilaterally and clandestinely issued a direct ticket to the 3rd Respondent despite the fact that the 1st



- petitioner had paid nomination fees and thus expected him to slug it out with the 3rd respondent and other candidates for the party ticket on a universal suffrage during the general election.
501. The 1st petitioner further testified that as a result of the botched nomination of the 3rd respondent as the 5th respondent's flagbearer for the governor's position, the 5th respondent in complicity with the 3rd respondent, engaged in a campaign of violence, voter intimidation, bribery and undue influence that led to the impugned results of the Homabay gubernatorial elections.
502. PW6 John Ogina Nyabola testified for the petitioner and stated that he was the chairman of the 5th respondent ODM party in Ndhiwa sub-county. He testified that the opaque activities of the ODM party led to the issuance of a direct party nomination ticket to the 3rd respondent Hon. Gladys Wanga. It was his testimony that after each candidate had paid the nomination fees, the ODM party came up with its own candidate through a direct ticket, which was not right and that the people of Ndhiwa felt that they had lost. He testified that the ODM party imposed on them a candidate whom they did not agree with and so they all left the party and that in protest, they did not vote for the 3rd respondent.
503. In their written submissions, the petitioners asserted that the acts and/or omissions during the 5th respondent's nomination process so affected the impugned elections to the extent that the said elections were rendered unconstitutional and invalid. It was their submission that the antecedent acts set the stage for a very toxic and violent atmosphere and that it therefore came as no surprise when violence broke out in a coordinated manner right across the County in the period leading to and on the voting day of 9th August 2022.
504. The petitioners further submitted that there was no nomination dispute between the Petitioners and the 5th Respondent and that they had simply provided context to the violence and intimidation that was eventually meted out on them and their supporters by the 3rd and 5th Respondents on the day of election, the 9th of August 2022.
505. In response to the above assertions by the petitioners, the 1st and 2nd respondents contended that the issues raised by the Petitioners in paragraphs 85 to 106 of the Petition were pre-election disputes and that the law provided for their resolution under the *Constitution*, the *Political Parties Act* and the *Elections Act*. The 1st and 2nd respondents further stated that the 1st respondent IEBC was also an arbiter of pre-election disputes but that the petitioner never lodged any complaint or a pre-election dispute with them. It was their contention that this court could therefore not entertain a dispute whose resolution channel was established in law as this would fly in the face of the doctrine of exhaustion.
506. The 1st and 2nd respondents called DW1, Fredrick Apopa, the County Returning Officer for Homabay gubernatorial elections 2022, who reiterated the pleading that this Court was not the appropriate avenue to address pre-election disputes and further that the Petitioners never lodged any complaint or pre-election dispute with the IEBC for resolution.
507. On their part, the 3rd and 4th respondents contended that neither the Petitioners nor members of the ODM party invoked the party dispute resolution mechanisms set out under the ODM Appeals Tribunal Rules or the *Political Parties Act*, to challenge the 3rd Respondents' nomination and that therefore this Court was devoid of jurisdiction to entertain matters relating to nomination disputes arising from the party primaries.
508. The 3rd respondent who testified as DW5 stated that despite efforts by leaders from the 5th respondent ODM party to reach out to the 1st petitioner, the 1st petitioner failed to attend the consensus meeting which was convened by the ODM party top leadership to determine the candidate to run for the governor's position in Homabay. It was also her testimony that the party leader of the 5th respondent



- noted after the 3rd respondent had been given a direct ticket that had the 1st petitioner been at the meeting and expressed his displeasure, then nomination would have been carried out vide universal suffrage.
509. The 5th respondent called DW15 who testified that the ODM party conducted its nomination of candidates in accordance with the law, the Party constitution and nomination Rules. DW15 further testified that despite the party having many mechanisms for settling disputes, no aspirant in the Homabay Gubernatorial nominations petitioned the party either orally or in writing for resolution of any dispute within the Party.
510. In their petition as alluded to hereinabove and in their written submissions, the petitioners asserted that there was no dispute between them and the 5th respondent and that they were simply creating a nexus between the botched nomination and the subsequent malpractices of violence, intimidation, undue influence and corruption that were experienced during the impugned Homabay gubernatorial elections.
511. The petitioners did not call any witness to testify and prove that indeed, as a result of the alleged bungled ODM nominations, the would-be voters were barred from voting in the gubernatorial elections or that they were exposed to violence that prevented them from voting. There was no evidence adduced by the petitioners to support their allegation that the aforementioned alleged malpractices resulted from what the petitioners' term as bungled nominations.
512. To the contrary, the 1st petitioner and PW6 John Ogina Nyabola testified that after the nomination of the 3rd respondent as the candidate for the 5th respondent in Homabay County, the 1st petitioner and PW6 together with their supporters decided to leave the membership of the 5th respondent ODM party and subsequently, the 1st petitioner vied as an independent candidate in the 9th August 2022 general elections.
513. This court's understanding of the instant petition is that the petitioners are attributing the alleged bungled nominations to violence, intimidation, undue influence and corruption allegedly perpetrated by the 5th respondent. I have no doubt in my mind that the petitioners know and believe that by this Court interrogating this alleged "nexus", the Court would be called upon to examine details of the alleged bungled nomination process.
514. My finding on this issue is that the petitioners having clearly pleaded, blaming the 5th Respondent for failure to conduct the nomination process in accordance with the law, cannot therefore turn around and adduce fresh evidence in their submissions that the nomination process as pleaded in their petition from paragraphs 85 – 105 was only meant to lay a foundation for the subsequent alleged malpractices and illegalities experienced during the election, which this Court shall, without a doubt, address.
515. I am satisfied that what the petitioners are calling upon this Court as an election Court to do is to determine the merits and demerits of the dispute arising from the ODM party primaries nomination process which the petitioners claim was bungled and that their loss in the party primaries is responsible for their loss in the main elections when they vied on an independent ticket.
516. The question as to whether an election court has jurisdiction to determine pre-election related disputes has been determined with recurring frequency by the Superior Courts.
517. Article 92(c) of the Constitution mandates Parliament to enact legislation to provide for the regulation of Political Parties. The Second Schedule to the Political Parties Act pursuant to Section 9 of the Political Parties Act contains the requirements for the contents of the Constitution of Rules of a political party without which a political party cannot be registered.



518. Section 23 of the Second Schedule provides that all Political Parties Constitutions must outline the internal political party dispute resolution mechanisms in accordance with Articles 47 and 50 of the *Constitution*. There are no express provisions as to what the content of the internal mechanism must be. However, under Articles 91 and 92 of the *Constitution*, there are standards that the political parties must meet for the Registrar of Political Parties to allow registration of a political party. These standards include: abides by the democratic principles of good governance, promotes and practices democracy through regular, fair and free elections within the party; respects the right of all persons to participate in the political process, including minorities and marginalized groups; respects and promotes human rights and fundamental freedoms, and gender equality and equity; and promotes the objects and principles of the *Constitution* and the rule of law. Indeed, this role is buttressed by the Electoral Code of conduct that, under section 6, requires, inter alia, all political parties to take reasonable steps to discipline and restrain their party office-bearers, employees, candidates, members and persons who support the political party in regard to contravention of the Code or electoral law.
519. Section 38 of the *Political Parties Act* establishes the Political Parties Liaison Committee whose principal function is to provide a platform for dialogue between the Registrar, Commission and political parties.
520. Prof Tom Ojienda SC and Lydia Mwalimu Adude in their writing on *Electoral Dispute Resolution Mechanisms in Kenya* (2022) Journal of cmsd Volume 8(3) underscore the importance of political parties having internal dispute resolution mechanisms. they state as follows:

“To promote democracy during and after party primaries, there is a constitutional and legal requirement that political parties in Kenya must have internal dispute resolution mechanisms. Each political party constitution is therefore expected to provide for such internal dispute resolution mechanism which must be resorted to as a first port of call before the dispute is escalated to the IEBC’s Political Parties Liaison Committee (section 38 of the *Political Parties Act*) or to the Political Parties Disputes Tribunal as established under section 39 the *Political Parties Act*.”

17. The two writers further emphasise that:

“Electoral dispute resolution (EDR) is the hallmark of any electoral system and process that is built to further democracy and the principle of free and fair elections. Electoral disputes can occur pre-election or post-election thus giving rise to the need for both pre-election EDR mechanisms and post- election EDR mechanisms. EDR mechanisms in Kenya are provided for under the *Constitution* of Kenya, 2010 (the *Constitution*), electoral statutes and regulations, and political party documents such as political party constitutions, nominations and primaries’ rules, and coalition agreements; and the electoral laws. EDR mechanisms are administrative and quasi-judicial, especially as pertains to intra-party pre-election disputes, as well as judicial, mostly as concerns post-election disputes.”

521. The above two writers acknowledge at paragraph 2.1.3 that:

- “2. First and foremost, section 38 of the *Political Parties Act*, 2011 recognizes
1.3 the role of a political party’s internal dispute resolution mechanisms in the resolution of pre-election disputes. The section requires political parties to



resolve any disputes arising from party nominations within thirty (30) days after the date of the party nominations. After exhausting a political party's internal dispute resolution mechanisms, an aggrieved party can seek recourse in the quasi-judicial EDR mechanisms.”

522. Section 40 of the [Political Parties Act](#) provides for the jurisdiction of Political Parties Disputes Tribunal as follows:

“Jurisdiction of the Tribunal

- (1) The Tribunal shall determine—
 - (a) disputes between the members of a political party;
 - (b) disputes between a member of a political party and a political party;
 - (c) disputes between political parties;
 - (d) disputes between an independent candidate and a political party;
 - (e) disputes between coalition partners; and
 - (f) appeals from decisions of the Registrar under this Act;
 - (fa) disputes arising out of party primaries.

523. However, there is a rider under section 40(2) of the [Political Parties Act](#) which stipulates that:

“4

- (2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.”[emphasis added]

524. Thus, the law as stated above mandates that each political party must have in its constitution, Internal dispute resolution mechanisms which must be resorted to before the Tribunal is approached with a dispute that falls within section 40(1) (a) to (fa) above. It is then only after such pre-election disputes have been attended to by the Parties Internal resolution mechanisms, or the IEBC or the Political Parties Disputes Tribunal that the High Court would have jurisdiction to hear appeals arising therefrom.

525. Section 41 of the Act provides for the resolution of political parties' disputes. In addition, Part VII (sections 74-87) of the [Elections Act](#), 2011 specifically dedicates provisions on election disputes resolution. The Act provides for settlement of pre-election and post-election disputes. First, section 74(1) of the [Elections Act](#) acknowledges the constitutional and statutory mandate of IEBC –under Article 88(4)(e) of the [Constitution](#) and section 4(e) of the [IEBC Act](#), 2011 – to settle pre-election disputes, including disputes relating to or arising from nominations. Still, the IEBC has no mandate to settle election petitions and disputes subsequent to the declaration of election results. Electoral disputes brought before the IEBC are to be determined within ten (10) days of being lodged with the Commission. However, where such a dispute relates to a prospective nomination or election, the dispute is to be determined before the date of the nomination or election as applicable. (See Prof Tom Ojienda SC and Lydia Mwalimu Adude) supra.

526. As regards post-election disputes otherwise legally known as election petitions, the [Elections Act](#), 2011 entails procedures for settlement of disputes in relation to the various elective posts in respect of



parliamentary and county elections. Section 75 of the *Elections Act*, 2011 is particular on county election petitions. A dispute as to the validity of an election of a county governor is to be heard and determined by the High Court within the county or nearest to the county. The High Court is to hear and determine the matter within six (6) months of the date of lodging the election petition. That is exactly what this court is now engaged in at this very hour, reading judgment in the petition filed on 9.9.2022 and which judgment must be delivered on or before 9th March 2023.

527. Article 88 (4) (e) of the *Constitution* mandates that the IEBC shall inter alia, be responsible for “the settlement of electoral disputes, relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.”
528. The Supreme Court has since clarified the law on the election court’s mandate over pre-election disputes in three cases that turned out on this issue.
529. In *Sammy Ndung’u Waity v IEBC & 3 Others*, Supreme Court Petition 33 of 2018, the Supreme Court established the following principles to guide the Courts:
- a. All pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT as the case may be in the first instance.
 - b. Where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of the *Constitution*, such dispute shall not be a ground in a petition to the election Court.
 - c. Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of the *Constitution*. The High Court shall hear and determine the dispute before the elections and in accordance with the Constitutional timelines.
 - d. Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court.
 - e. The action or inaction in (d) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of the *Constitution*, even after the determination of an election petition.
 - f. In determining the validity of an election under Article 105 of the *Constitution* or Section 75(1) of the *Elections Act*, an election court may look into a pre-election dispute if it determines that such dispute goes to the root of the election and that the petitioner was not aware or could not have been aware of the facts forming the basis of that dispute before the election.”
530. In *Silverse Lisamula Anami v IEBC & 2 Others*, Supreme Court Petition 30 of 2018, the Supreme Court stated as follows:

“How do we resolve the apparent conflicting positions taken by the Court of Appeal and election Courts? Our view is that Articles 88(4)(e) and 105(1) and (3) must be read holistically and that whereas the IEBC and PPDT are entitled, nay, empowered by the *Constitution* and Statute to resolve pre-election disputes including nominations, there are instances where the election Court in determining whether an election is valid, may look to



issues arising during the pre-election period only to the extent that they have previously not been conclusively determined, on merits, by the IEBC, PPDT or the High Court sitting as a judicial review Court, or in exercise of its supervisory jurisdiction under Article 165(3) and (6) of the *Constitution*. Where a matter or an issue has been so determined, then the election Court cannot assume jurisdiction as if it were an appellate entity since that jurisdiction is not conferred on it by the *Constitution*.”

531. The two decisions cited above were later applied in the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 Others; Ahmed Ali Muktar (Interested Party)* 2019 eKLR, where the Supreme Court held that pre-election disputes were a reserve of the IEBC or the court acting in judicial review or exercising its supervisory jurisdiction.
532. From the above judicial pronouncements by the apex Court whose decisions bind this Court, it is undeniable that disputes relating to nominations or eligibility to be nominated as candidates in elections go to the root of an election. However, as observed elsewhere, this fact does not confer jurisdiction on an Election Court as this Court, to hear and determine “nomination related” disputes, precisely because, “these disputes” are reserved for the IEBC by Article 88 (4) (e) of the *Constitution*, or the Political Parties Tribunal or the respective Party’s internal dispute resolution mechanisms. It follows that an Election Court ought not to trample upon the electoral process like a colossus, in the face of clear and unambiguous provisions of the law regarding its jurisdiction.
533. Where the *Constitution* or the law, consciously confers jurisdiction to resolve a dispute on an organ other than a court of law, it is imperative that such dispute resolution mechanism must be exhausted through those alternative means as acknowledged in Article 159(2) (c) of the *Constitution*, before approaching the Court. Were it not so, parties would overlook the recognized fora, and later spring a complaint at the courts. Such a scenario would be a clear recipe for forum shopping, an undertaking that must never be allowed to fester in the administration of justice.
534. The Supreme Court in the subsequent cases in addressing this question of the forum for resolving pre-election disputes relied on and accepted the persuasive holding by the Court of Appeal in *Geoffrey Muthinja Kabiru & 2 Others* [2015] eKLR wherein the Appellate Court observed that:
- “It is imperative that where a dispute resolution mechanism exists outside the Courts, the same be exhausted before the jurisdiction of the Courts be invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts.”
535. With all the above in mind, I find that in the instant petition, the petitioners did not adduce any evidence to prove that the pre-election issues detailed in the petition from paragraphs 85 – 105 affected the outcome of the gubernatorial elections in Homabay County. As earlier noted, none of the witnesses called by the petitioners testified that they were prevented from voting as a result of the alleged bungled nominations or that they were exposed to violence during nominations such that they were prevented from voting for the petitioners.
536. And as earlier stated, even if this Court were to find that there was a nexus between the alleged bungled nominations as pleaded by the petitioners and the violence, intimidation, undue influence and corruption that they pleaded occurred prior and during the election, the same would involve this court venturing into the bungled pre-election process to ascertain the said nexus. So far, I find no evidence presented by the petitioners to ascertain this nexus. Accordingly, the petitioners ought to have pursued



the available dispute resolution mechanisms to resolve the alleged bungled ODM nomination process as stipulated in law, instead of originating their grievances at the Election Court.

537. Furthermore, the 1st petitioner testified that he resigned from membership of the 5th respondent ODM Party and elected to vie as an independent candidate. He is thus estopped from using the 5th respondent's nomination process as a springboard upon which he can lay a foundation to bring his petition.
538. In the end, I find that this Court is constitutionally and legally speaking, deprived of jurisdiction to hear and determine pre-election nomination issues raised by the 1st petitioner and that the petitioners have not established a link and or proved that the pre-election issues which arose during the ODM party primaries nomination process affected and or had a direct effect on the Homabay gubernatorial election results of 9th August 2022.

E. Whether there were instances of vote padding and ballot stuffing in the Homabay gubernatorial elections

539. The petitioners pleaded in their petition that there was widespread vote-padding in polling centres in the constituencies of Kasipul Constituency, Rangwe Constituency, Suba South Constituency, Kabondo Kasipul Constituency, Ndhiwa Constituency, Suba North Constituency and Homa Bay Town Constituency.
540. Through the testimony of PW11, Lameck Oketch Odhiambo, the petitioners stated that in Rungu Polling Station, the results were changed on Form 37B with Rabudi's votes switched to Gladys Wanga's thus Gladys Wanga ended up with 258 votes and conversely, Rabudi ended up with 000 votes, quite contrary to the entries in form 37A as declared by the Presiding Officer at Rungu Polling Station.
541. The petitioners further averred that there was vote padding as was evidenced in the differences in the number of votes cast for different elective positions considering that every voter was handed six separate ballot papers in respect of the six elective positions.
542. The Petitioners further asserted that there were serious and glaring inconsistencies on the number of votes cast and that there were more votes cast than were identified by KIEMS kit implying that there was voter inflation and potential ballot stuffing.
543. In response to the petitioners' allegations and evidence tendered above, the 1st & 2nd respondents stated that the IEBC executed its mandate strictly in accordance with the Constitution and the law and further, that the counting and tallying of votes was done in a transparent manner as verified by the agents and that no candidate's votes were inflated, altered, manipulated or padded as alleged by the Petitioners.
544. The 1st and 2nd respondents further contended that the candidate's agents signed Form 37A's and 37B's which was a confirmation that they were satisfied with the counting and tallying of the election results at the various levels as envisaged in the electoral laws and that the results contained in Form 37A's and 37B's accurately reflected the count of the votes cast in favour of each candidate.
545. It was the case for the 1st and 2nd respondents that it was human to make some clerical errors taking into consideration the working conditions and environment coupled with political pressures, with a rider that, that in itself cannot be misconstrued to have been done intentionally so as to favour any candidate.
546. On their part, the 3rd & 4th respondents called DW6 Selphas Ouma, who was stationed as an agent for the 3rd respondent at Rungu Polling Station who testified that the declared votes at the Rungu polling station were; Wanga 258, Rabudi 00 and Kidero 48 but that during signing of Form 37A, he noticed that the Presiding Officer had entered the results for Wanga to be for Rabudi and vice versa so



- he intervened and the correction was done. It was the uncontroverted testimony of DW6 that no one complained against the correction including PW11 who agreed that there had indeed been an initial error in the entry of the gubernatorial results.
547. It was submitted on behalf of the 3rd & 4th respondents that the data allegedly gathered from KIEMS kits encapsulated voter identification in all six elective positions whereas the ballot box was representative of the votes cast by voters for a specific elective position only representing the expression of the people's will.
548. The burden of proof lay on the petitioners to prove the allegations of ballot stuffing and vote padding and serious glaring inconsistencies. The allegations by the petitioners were criminal in nature and as such, the standard of proof expected of the petitioners was that of beyond reasonable doubt. This position has already been explained in the first issue of this judgment.
549. From the evidence adduced, PW11 testified of the alleged vote stuffing in favour of the 3rd respondent at Rungu polling station. the Respondents called DW6 who testified that the declared votes at the polling station were; Wanga 258, Rabudi 00 and Kidero 48. DW6 further testified that during signing of Form 37A, he noticed that the Presiding Officer had interchanged the results for Wanga and Rabudi and he thus asked the Presiding Officer to correct the error, which correction was done and further that no one complained against the correction including PW11 who agreed that there had been an error. DW6 testified that the correction was done according to the declared results and that the results in Form 37C reflected the correct results for the 3rd respondent i.e. 258 votes.
550. I observe that in cross-examination, PW11 admitted that the correct results as declared were that the 3rd respondent had 258 votes, Rabudi 00 and Kidero 48. What that clearly means is that, the person whose votes had been wrongly exchanged and indicated to be 00 and who would have lost substantially, had the interventions and corrections not been done, was the 3rd respondent Hon Gladys Wanga and not the 1st petitioner herein.
551. It is therefore surprising that PW11 having agreed to the results at the polling station when the correction was being made, came to court and testified, citing the same as an incident of vote stuffing and ballot padding.
552. Following the scrutiny and recount ordered by this Court, the Deputy Registrar who supervised the process found that according to the petitioners and the 1st respondent, verified voters were persons biometrically identified while authorized voters were persons alphanumerically identified. Further, it was noted that both the petitioners and the 1st respondent stated that the total persons identified biometrically were the persons verified and that these included persons authorized by the Supervisor.
553. The Scrutiny report further revealed that in its explanation on the variance in the data, the IEBC team explained that the data captured by the KIEMS showed all persons who were eventually identified using the KIEMS either alphanumerically or biometrically but that all the parties agreed that the total number of persons identified by KIEMS did not include those identified manually. (see page 17 of the Scrutiny and recount report).
554. On the question of ballot papers, the scrutiny report also reveals that All ballot papers in 192 polling Stations were stamped at the back except in two polling stations, Rapedhi Primary School, where 14 ballot papers were unstamped and Dunga Primary School where four ballot boxes were unstamped but, had their corresponding counterfoils existing.
555. Further, that in two polling stations, Wayara Primary in Ndhiwa Constituency the ballot box had 11 unallocated/unclassified votes wrapped together and Rangwe Primary School in Rangwe



- Constituency had 4 ballot papers. The votes did not form part of the count in form 37A; and that the results in forms 37A matched the results from the recount in majority of the scrutinized polling stations. Further findings and observations were that in a majority of polling stations, the results as declared in forms 37A found inside the ballot box were consistent with the results of the recount of ballot papers. That in instances where there was a variance, the margin in a majority of them was between one and two votes and this affected both the Petitioners and the 3rd & 4th Respondents. see pages 16-17 of the scrutiny and recount report)
556. There is nothing from the scrutiny and recount exercise to show that there was ballot stuffing and or padding of ballots to favour the 3rd and 4th respondents to the detriment of the petitioners herein.’
557. This court now appreciates after reading the Scrutiny and recount report that some of the apparent discrepancies in the total numbers of votes as can be seen from the documents signed by all the parties’ representatives during the scrutiny and recount exercise, can be explained by the presence of manually verified voters and in addition, as explained by the 1st and 2nd respondents in the testimony of DW1, that the only situations where there would be a variance between KIEMS kit and the votes cast would be where a person spoilt their ballot and was issued with another ballot paper. Secondly, where one marks a ballot paper but placed it in the wrong ballot (stray ballot) and thirdly, where the ballot is marked wrongly so it is rejected (spoilt ballot).
558. The petitioners also pleaded that counting and tallying that was done by the 1st and 2nd Respondents was marred with illegalities and irregularities such as unlawful assisted voting. PW7, the petitioners’ agent at Akala Polling Station testified that at 2pm a voter came in and was given ballot papers, which she marked and after casting, the voter remained with 3 ballot papers. However, it was her testimony in cross-examination that the presiding officer took possession of the 3 extra ballot papers and went with them to consult with her fellow presiding officer.
559. In response, the 1st & 2nd respondents pleaded that in cases where the Presiding Officer was to assist a voter in the compartment, the agents must also have been present. He testified that none of the agents made any formal complaint of any irregular or unlawful assistance in voting, that there was no evidence that anybody was forced to vote for any particular candidate in the process of being assisted to vote and that in this case, the petitioners only cited two instances of the allegation of irregularly assisted voters at two Polling Stations at; Kojwach Primary School and Dudu Primary School, but did not state how many voters were involved to enable the court assess the magnitude and effect on the final results.
560. The 3rd & 4th respondents pleaded that the averments of assisted voters being assisted in favour of the 3rd respondent lacked in specificity and that in any case, any voters that were assisted were lawfully assisted in the presence of all available agents and none had been called as a witness to elucidate further on having been coerced to vote in a certain manner.
561. Regulation 72 of the *Elections (General) Regulations*, 2012 sets out the procedure for dealing with voters who require assistance to vote. A reading of the said Regulation shows that the preferred method for assisting an illiterate voter or one with a disability to vote is for the voter to go to the polling station with a person of their own choice. In such a situation, the voter marks and casts their vote with the assistance of a person the voter has selected and trusts. However, where the voter is not accompanied by a person who is qualified to assist the voter, the presiding officer shall assist such a voter, in the presence of the agents.
562. I have re-examined the evidence adduced by the petitioners. The evidence of PW7 Kachiawo Atieno Rachael regarding a voter who remained with 3 ballot papers after voting did not relate to unlawful assisted voting and in any case as testified by PW7 herself, the said extra ballots were taken away by the presiding officer and not cast in favour of any candidate. No evidence was laid before this court by the



petitioners of unlawful assisted voting which could have led to vote padding and ballot stuffing and which can be interpreted by this court to have been intended to favour the 3rd and 4th respondents.

563. It was incumbent upon the petitioners to prove to the satisfaction of the court that there was vote padding and ballot stuffing that eventually affected the results of the gubernatorial elections. I find no evidence was adduced to prove these serious allegations. I therefore find no merit and substance in these serious allegations against the 1st & 2nd and 3rd & 4th respondents. No allegation was made against the 5th respondent concerning vote padding and ballot stuffing.

F. Whether there were alterations and cancellations on the statutory electoral forms and whether the cancellations and alterations if any, affected the results of the impugned election

564. The petitioners pleaded in their petition that there were a number of alterations in Form 37As contrary to the electoral laws and that the alterations were not countersigned by the various presiding officers of particular polling stations and finally that the alterations complained of were made in favor of the 3rd Respondent to give her an unfair advantage.

565. The petitioners cited the case of Rungu Primary School Polling Station No.2 where they alleged that all agents were asked to sign a blank form 37A before the recording of the respective valid votes cast in favour of each of the competing candidates as declared by the Presiding Officer was done and that the results were changed on Form 37B with Rabudi's votes being switched to the 3rd Respondent's and the 3rd Respondent ended up with 258 votes and conversely Rabudi ended up with 000 votes quite contrary to the entries in form 37A as declared by the Presiding Officer at Rungu Polling Station.

566. The petitioners in paragraph 177 of their petition also provided a list of 30 polling stations where they alleged that the Form 37As were altered. The 30 polling stations pleaded were as follows: Kome Primary School 1 of 1; Ndhiwa Primary School; Bwanda Primary School Ndhiwa Hospital Primary School; Sanoore Primary School 1 of 1; Koduugo Primary School 2 of 2; Akala Primary School 1 of 1; Akala Primary School 1 of 2; Akala Primary School 1 of 3; Ndhiwa Primary School 2 of 5; Ndhiwa Primary School 4 of 5; Ranen Mikumi Primary School; Ongaro Primary School 1 of 1; Poya Primary School 1 of 1; Ratanga Primary School 1 of 1; Nyamos Primary School 1 of 2; Got Kojowi Primary School 1 of 2; Osogo Primary School 1 of 2; Osogo Primary School 2 of 2; Ralang Primary School 2 of 2 ; Ralang Primary School 1 of 2 ; Nyakwadha Primary School 1 of 2; Ligisa Primary School 2 of 3; Anind Oko Primary School 1 of 1; Sango Gem Primary School 1 of 1; Randung Primary School 1 of 2; Anyona Primary School 2 of 2; Oriang Primary School 2 of 3; Othoro Primary School 1 of 3; and Kawiti Primary School 1 of 1.

567. In support of their allegations, the petitioners relied on the testimony of PW11 who was their agent at Rungu Primary School Polling Station and who testified that everything went on well on election day from morning till 11pm when they were told to sign an empty form 37A before the cast votes were indicated therein. PW11 testified that he later realized that there was an error on the form specifically that votes were wrongly placed, but that the votes assigned to the 1st petitioner were correct.

568. PW11 testified that Dr. Evans Kidero had 048 votes, Charles Rabudi had 000 and Hon. Gladys Wanga had 258 votes but that in Form 37A, it was indicated that Wanga had 000, Rabudi 258 and for Dr. Evans Kidero 048. PW12, the petitioners' chief agent for Kasipul Kabondo sub-county testified that he saw the discrepancy in the Form 37A from Rungu Polling Station as sent by his agent and what was being announced being different so he protested and the Returning officer placed the form aside and made some alterations. The petitioners pleaded that the number of votes cast were changed in several polling stations as stated above.



569. The petitioners further relied on the testimony of PW1, Andolo Dan Ojijo who was the presiding officer at Ongeti Primary School Polling Station and who testified that he was forced to fill in the wrong results in Form 37A in favour of the 3rd respondent at gunpoint. He however testified that when he managed to go to the tallying centre, he filled in another Form 37A with the correct results that showed that the 3rd respondent Hon Gladys Wanga had 235 votes while Dr. Evans Kidero had 115 votes.
570. In response to the above assertions, the 1st and 2nd respondents stated that counting and tallying of votes was done in a transparent manner as verified by the agents and that no candidate's votes were inflated, altered, manipulated, or padded as alleged by the Petitioners and that the candidates' agents signed Form 37A's and 37B's that confirmed that they were satisfied with the counting and tallying of the results.
571. The 1st and 2nd respondents further contended that the results contained in Form 37A's and 37B's accurately reflected the count of the votes cast in favour of each party. It was their further contention that it was human to make some clerical errors taking into consideration the working conditions and environment but that, that cannot be misconstrued to have been done intentionally so as to favour any candidate and that no agent was refused or denied an opportunity to verify and/or authenticate the alterations that were made and which were apparent.
572. DW1, Mr. Fredrick Apopa, the County Returning Officer testified that an examination of the alleged alterations to the forms at Rungu polling station reveals that the Form 37A on PW12's Affidavit and DW1's own Form 37A were the same only that Obonyo's – PW12's form 37A was incomplete. It was DW1's testimony that a presiding officer is allowed to make corrections to ensure completeness of the documentation for example, if certain entries are not correct or as agents bring to his attention or if the form is not duly stamped or not fully signed, the presiding officers ensure completeness of documents.
573. DW2, Lawrence Okumu Barasa the returning officer for Rangwe Constituency testified that he only received a Form 37A from PW1 while DW8, the chief agent for the 3rd respondent in Ndhiwa constituency testified that there were negligible instances of alterations on forms and that the alterations were not widespread or systemic and that they were mostly summations or entry errors that were countersigned by the presiding officers and also signed by the candidates' agents.
574. On behalf of the 3rd and 4th respondents, DW6 testified that the alteration to form 37A at Rungu polling station was done at the polling station after he noticed that there was an error in the votes awarded to the 3rd respondent Hon Gladys Wanga and Mr. Rabudi. He further testified that the alterations were done in the presence of PW11 and all other agents and that the said alterations reflected the true results as declared at the polling station and that no agent opposed the alterations.
575. The 3rd & 4th respondents submitted that the Petitioners failed to demonstrate that there were any major, systematic or widespread errors or alterations which had not been countersigned by the presiding officers or the deputy presiding officers and which errors or alterations were substantial enough to vitiate the results of the impugned election.
576. It is not in doubt that the Petitioners had the duty to, not only highlight cancellations and alterations in the forms 37A complained of, but also show that those cancellations and alterations when considered in the context of the specific cases had weight on the credibility of results contained therein.
577. I have examined Form 37A for Rungu Polling Station 2 of 2 and note that indeed there were alterations to the said form specifically on the votes assigned to the 3rd respondent Hon Gladys Wanga and those assigned to Mr. Mark Charles Rabudi. It is evident from the said Form 37A that the initial assigned votes were 000 for Gladys Wanga and 258 for Mark Rabudi. There is then the cancellation



and replacement with 000 votes for Mark Charles Rabudi and 258 votes for the 3rd respondent Hon Gladys Wanga. I also note that there is a signature next to the said alterations.

578. In Ongeti Primary School Polling Station, there is no evidence adduced to show any alterations to Form 37A. The witness stated that he handed over to the police the form 37A which he had been forced to record 00 votes for Kidero and 350 votes for Wanga and that when he reached the tallying centre, he got another form 37A and made the correct entries of Wanga-235 votes and Kidero-115 votes. If that be the case, then the question is, where are the alterations which can be said to have been made in favour of the 3rd respondent? In addition, the Form 37C for Ongeti Primary School as produced by the petitioners in evidence at page 113 of the petition shows that the tallied results are Dr. Evans Odhiambo Kidero had 115 votes, Mark Charles Rabudi 00 while Gladys Atieno Wanga had 235 votes. There were no rejected votes. There is no evidence that these are not the same results which were extracted from Form 37A for Ongeti Primary School polling station. Furthermore, no issue was raised in evidence concerning the total number of votes garnered by each candidate in that polling station.
579. At page 175 of the court proceedings-uncertified, on being cross examined by Mr. Awele counsel for the 3rd and 4th respondents, the 1st petitioner herein Dr. Evans Kidero stated as follows on his allegations that there were alterations to statutory forms at Ongeti Primary School:
- “...I heard what Ojijo said about Ongeti primary school. He presented the results that he believed were correct and not the ones he was forced to sign. The correct results were torn hence the results are not the real results. He said the results presented to the Returning Officer were correct results...”
580. I further note that the Rungu and Ongeti Primary Schools polling stations were not among the 30 polling stations wherein the petitioners claimed in their petition that there were alterations and cancellations of Form 37As without counter signing.
581. The petitioners called two witnesses to testify on the alterations of Form 37As, out of the 30 pleaded polling stations. In the scrutiny report ordered by this Court, the Deputy Registrar noted that none of the Form 37As as pleaded and disputed by the petitioners and subsequently scrutinised had any alterations, thus the question of there having been altered or cancelled and not having been countersigned Form 37As as contested by the petitioners does not arise.
582. The scrutiny ordered by this Court at the behest of the petitioners was designed to provide a picture of the quality of the electoral process. In respect of the alleged alterations and cancellations of Form 37As, the scrutiny report dutifully covered the 30 polling stations listed in paragraph 177 of the petition where it was alleged that the Form 37As were altered or cancelled without countersigning thereby affecting the credibility of the results of elections. These 30 polling stations were out of a total of the 1228 polling stations in Homabay County. The Deputy Registrar’s scrutiny report at page 42 gives a clean bill of health to all the Form 37As from all the 30 polling stations as listed hereinabove and pleaded by the petitioners and observes that none of them were found to have been altered or cancelled. The scrutiny report states as follows: “None of the Form 37As securitized, had alterations.
583. In the end, I find no evidence adduced by the petitioners to establish their claim that Form 37As in the pleaded 30 polling stations were altered or cancelled but not countersigned. Even in the two polling stations of Rungu and Ongeti where witnesses testified of alterations, in Rungu, the alteration which has been explained to the satisfaction of this court was countersigned while in Ongeti, there is no evidence of any alterations presented before this court.



584. This Court is not oblivious to the fact that the petitioners faulted the scrutiny report prepared by the Deputy Registrar and made submissions to the effect that the Deputy Registrar made a raft of “findings” and/or “observations” some of which findings were not borne out or supported by the primary documents, which are the scrutiny checklists/forms developed to guide the scrutiny exercise or what was observed and noted during the scrutiny. The petitioners made their own observations and findings and filed their separate parallel report as an appendix to their submissions.
585. The question that this Court must answer, in light of the petitioners’ own report is whether it is in order for there to be two perfectly different scrutiny and recount reports relating to one and the same vote-re-enumeration and scrutiny exercise. To what record or report, in such circumstances, ought the Court resort?
586. In my view, the court must resort to the official record emanating from the duly-authorized agency and certainly not the one from private sources. If, however, the data from the official source is suspect or has discrepancies, then a basis of ascertainment is to be resorted to, with the court analyzing and or evaluating that data against the primary data checklist forms signed by the parties as they engaged in the scrutiny exercise and making its own findings on the same.
587. How does this Court as the trial Court sort out this particular emerging issue? It is clear that as the trial Court, I was alive to the puzzle, and hence, I resorted to the judicious course, by ordering the conduct of a scrutiny, as a mode of unraveling any hidden mystery borne out of the pleadings by the petitioners. But the scrutiny exercise, as has been held time and again, is not meant to be a fishing expedition upon which the petitioner builds his case. Can this Court, then, properly resolve the question on the basis of the election data of private origin? In my view, that would be injudicious, and is not the lawful mode of resolution of an election dispute. This Court upon receipt of the scrutiny and recount report and its annexes adopted it as part of these proceedings and that is the reason I directed parties to submit on the same. I can therefore only rely on the report of a properly-conducted judicial scrutiny, which I directed to be undertaken and proceed to discuss it and if any part thereof makes no judicial sense, that part or parts can be discounted.
588. Judicial pronouncement on how a scrutiny report should be treated is that once a trial Court orders the conduct of scrutiny, the resulting findings are as good as the findings of the Court itself and that, on this account, the Court must take such findings into account by analyzing and evaluating the same. This position was appreciated by the Court of Appeal in Election Petition Appeal 5 of 2018, *Cyprian Awiti & another v Independent Electoral and Boundaries Commission & 3 others* [2018] eKLR and re-affirmed by the Supreme Court in *Cyprian Awiti & another v Independent Electoral and Boundaries Commission & 2 others* [2019] eKLR.
589. So important is the scrutiny process, as was stated by the Supreme Court in the case of *Abdirahman Ibrahim Mohamud v Mohamed Ahmed Kolosh & 2 Others*, Pet. No. 26 of 2018 (para. 66) that:
- “[I]t is clear that the process of scrutiny has not pointed to any contestant as a winner: the position is blurred and distinctly uncertain.”
590. The vital place of scrutiny in electoral dispute-settlement was reiterated yet again, in the case of *Clement Kungu Waibara v Hon. Annie Wanjiku Kibeh & 2 Others*, Sup. Ct. Pet. No. 24 of 2018, where the Court stated at paragraph 52 that:
- “In view of such considerations, we are in agreement with the Appellate Court’s standpoint that the trial Court ought to have ascertained whether the irregularities revealed by the



process of scrutiny, did affect the outcome of the election. It was clearly inapposite to settle the dispute on the basis of any conjecture, however logical.”

591. This Court is seized of the scrutiny and recount report and it will evaluate and analyse it. The Court cannot infer lack of credibility in results just because there are alterations in some of the electoral forms, although in the instant petition, the form 37As which the petitioners pleaded that they had been altered and cancelled without counter signings were found to have no such cancellations or alterations.
592. It is also not possible for the Court to prescribe a uniform finding with respect to the effect of cancellations or alterations in electoral forms, or to draw an inference out of the same. The Court can only reach a finding emanating from such cancellations and alterations after examining them in the light of the circumstances surrounding the impugned election results.
593. It was the duty of the Petitioners to show to this Court how the alterations referred to in Rungu and Ongeti Primary Schools polling stations and in the 30 pleaded polling stations affected the election results in the highlighted forms. I observe that in the instant case, the Petitioners did not garner the majority votes in the two polling stations that they claimed that alterations took place in favour of the 3rd respondent. To be specific, in Rungu Primary School Polling Station 2 of 2, the 1st petitioner garnered 48 votes, whereas the 3rd respondent garnered 258 votes.
594. In Ongeti Primary School Polling Station, the 3rd respondent garnered 235 votes while the petitioner garnered 115 votes. The Petitioners did not prove that there were other different votes for the 1st petitioner and the 3rd respondent in those two polling stations and or how the apparent cancellations or alterations on Form 37A for Rungu Polling station affected the election results at the said Rungu Primary School polling station.
595. From the evidence adduced, I find that at Rungu Primary School Polling Station, where the petitioners claimed that the 3rd respondent was awarded votes that she did not get, the cancellation/alteration which was explained to the satisfaction of this court, did not in any way point towards a compromise of the results in that form 37A which was countersigned and there was no proof that the 1st petitioner’s votes were exchanged with those of the 3rd respondent.
596. Furthermore, as a matter of principle, it is not enough to say that since there were cancellations in electoral forms, the results contained in those forms were by that fact invalid. There must be solid evidence to show that the integrity of those results has been substantially compromised as a result of the proven cancellations or alterations. No such evidence was supplied to this Court.
597. The Supreme Court in the case of [*Gatirau Peter Munya v. Dickson Mwenda Githinji and 2 Others*](#) (2014) eKLR was categorical that:

“It is clear to us that an election should be conducted substantially in accordance with the principles of the [*Constitution*](#), as set out in Article 81(e). Voting is to be conducted in accordance with the principles set out in Article 86. The [*Elections Act*](#), and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections... If it should be shown that an election was conducted substantially in accordance with the principles of the [*Constitution*](#) and the [*Elections Act*](#), then such election is not to be invalidated only on ground of irregularities. Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election...Where an election is conducted in such a manner as demonstrably



violates the principles of the Constitution and the law, such an election stands to be invalidated.” [Emphasis added.]

598. I have no reason to depart from the above holding that an election result will not be vitiated merely because of minor irregularities which did not go to the root of or substantially affect the outcome of the election.
599. On the evidence adduced in this petition, I find that, the alterations and or cancellations proved were administrative irregularities and errors occasioned by human imperfection which are not enough by and of themselves to vitiate the results of election which is impugned by this petition. I therefore find that the petitioners did not prove their allegations that there were cancellations and or alterations to statutory forms in 30 polling stations which affected the election results.

G. Whether there was a failure to sign and stamp statutory electoral forms and whether the alleged failure affected the results of the impugned election

600. The petitioners pleaded that there are various form 37As without stamps of the 1st Respondent, that some had not been signed by the presiding officers and that other forms had different signatures, an indication that it was the same presiding officer who purportedly signed which was suspicious and contrary to the electoral laws and the Constitution.
601. The petitioners provided a table in paragraph 174 of the petition, of the specific polling stations where the Form 37As were allegedly either not signed or stamped. In this Courts’ ruling for scrutiny and recount made on 18th November 2022 and reviewed on 26th November 2022, the Court allowed scrutiny and recount in 195 polling stations out of the 1228 polling stations. However, during the actual exercise of scrutiny and recount, only 192 polling stations were found to be available out of the 195 ordered as some polling stations had been repeated in the list provided by the Court.
602. In response to the above allegation, the 1st and 2nd respondents pleaded, testified on and subsequently submitted that whether the statutory form 37As were stamped or not, this did not, in any way affect the credibility of the election process and the final results of the elections now impugned. DW1 Mr. Fredrick Apopa, the IEBC Homabay County Returning Officer testified that a presiding officer is allowed to stamp a document to attain completeness of that document.
603. The 3rd and 4th respondents responded by stating that the allegations of non-signing or stamping of statutory Forms by presiding officers were fabricated as the evidence adduced in support of these allegations had been deliberately withheld or the said form 37As faintly printed by the petitioners to conceal the truth.
604. The 3rd & 4th respondents also submitted that there was no evidence adduced by the petitioners of unsigned or unstamped forms and that the non-stamping of statutory forms by agents could not invalidate an election.
605. I will first deal with the aspect of signing of statutory forms. The importance of signing electoral statutory forms by presiding or returning officers cannot be over emphasized and or understated. It is through signing such forms that the author or maker can authoritatively acquire authentic ownership. In the absence of that, the document shall be deemed to be worthless and ownerless hence not of any probative value for submission as evidence even in a court of law.



606. Recognizing the significant role that Forms such as 37A and 37B play in the electoral process, the Supreme Court in the [Raila 2017](#) supra case held at Paragraph 377 as follows:

“...why would a returning officer, or for that matter a presiding officer fail or neglect to append his signature to a document whose contents he/she has generated? Isn't the appending of signature to a form bearing the tabulated results the last solemn act of assurance to the voter by such officer, that he stands by the “numbers” on that form?”

607. It is therefore clear as pronounced by the Supreme Court that failure to sign the requisite statutory forms by a returning or presiding officer will render that form worthless, useless, null and void ab initio for want of authenticity and ownership of election results.

608. Yet again, the onus was on the petitioners to adduce evidence to demonstrate that the Form 37As were not signed or stamped by either the presiding officer or the deputy presiding officer of the respective polling stations.

609. At the time of pretrial directions, this Court observed that the petitioners had filed very faint copies of forms 37As and I did direct them to file clearer copies which they did. I further observe that the clearer copies of Form 37As filed by the petitioners as exhibits after this Court noted that the initial Forms filed were unclear, were all duly stamped and signed by either the presiding officer or the deputy presiding officer. In some instances, the forms had more than one IEBC stamps and the petitioners' counsel did examine and cross examine witnesses on the aspect of why some form 37As had one stamp while others had two stamps and I observed that in some instances where there were two stamps, one other stamp appeared to be slightly different from the other. See the evidence of PW4 Samuel Obunga Milama at page 67 of the typed proceedings where the Court recorded his evidence as follows:

“I can see 2 IEBC stamps on that 2 agents have signed. For independent and for ODM. The other form has two stamps Kiabuya Primary, 2 stamps and 1 agent signed. (Reads out each of the forms) some have 2 stamps, others have 1 stamp.”

610. The same witness PW4 claimed that some Form 37As were being received and stamped at the tallying centre and that he received 62 out of the 71 form 37As but that all the 62 forms that he received were duly stamped.

611. Throughout the hearing of this petition, the petitioners did not isolate any single Form 37A or 37B or 37C or any other essential electoral document from any polling station or the County tallying center which was not signed by the presiding or returning electoral officials or not stamped with the IEBC stamp.

612. DW14 who is the 1st petitioner herein acknowledged in his testimony that the legible form 37As which his advocates filed after the court directed that they be filed as the initial ones were illegible, had signatures of the presiding officers and duly stamped with IEBC stamps. This court too had the opportunity to see the said forms which had signatures and IEBC stamps. The 1st petitioner stated as follows on being cross examined by Mr. Awele counsel for the 3rd and 4th respondents at page 175 of the court proceedings:

“Based on paragraphs 97, 98 and 106 I have listed the polling stations EOK19 forms lacking signatures of presiding officers.

(Shown page 203 of the petition). I cannot see signatures. I can see page 28. I can see page 218-375 no stamps at page 218. Later we produced legible copies from IEBC. We took what



IEBC had filed in court as per the court orders. I have produced the copies of forms from IEBC as part of my evidence in this court. Page 203-217 of volume 1A of legible bundle. There are stamps on the forms by the presiding officers. Page 203-217 I stated that presiding officers did not sign. Page 218 –EOK 19 lacked stamps up to page 274.

I had my county chief agent say he was in the tallying center when the results were being declared. I am surprised that he never signed the results. I can see volume 2 of the 3rd and 4th respondents' affidavits. I can see F37C signed and stamped by county returning officer. ODM had no agents but it had candidates in elections. I have seen more than one agent for independent candidates. I can see annexure EOK 21. I have no recollection why I annexed those documents.

613. Even in the case of ballot papers, in the scrutiny report, the Deputy Registrar similarly found and observed that all ballot papers in the 192 polling Stations were stamped at the back except in two polling stations of Rapedhi Primary School, where 14 ballot papers were unstamped and Dunga Primary School where four ballot boxes were unstamped but, had their corresponding counterfoils existing. I observe that there is no requirement for stamping or even signing on ballot boxes and that the Deputy Registrar referring to four ballot boxes being unstamped must have, in my view been referring to 14 ballot papers and not boxes. I therefore take it that she referred to ballot papers and not ballot boxes and that reference to ballot boxes was a typo error.
614. Nonetheless, this Court observes that both these two polling stations of Rapedhi and Dunga Primary Schools were not among those pleaded by the petitioners to be among the polling stations that had unstamped or unsigned electoral materials or documents. Again, in the two cases of Rapedhi and Dunga, polling stations, it was not shown that the cumulative 18 unstamped ballot papers were in favour of the 3rd and 4th respondents herein. The scrutiny report shows that both the 1st petitioner and the 3rd respondent benefitted from the 18 unstamped cast ballot papers.
615. The scrutiny exercise report further reveals that all “originals” of Form 37As had IEBC stamps and further that they had signatures of either the presiding officer or the deputy presiding officer. The petitioners never contested the findings and observations by the Deputy Registrar that all the scrutinized Form 37As had signatures of either presiding officers or deputy presiding officers. Instead, their major disagreement with this aspect of the scrutiny report was that “all the forms scrutinised were either scanned or carbon copies and that no original Form 37A was availed for the exercise.”
616. I reiterate that what was being scrutinized were, inter alia, form 37As which were also annexed to the petitioners' application for scrutiny and at that stage, there was no allegation that those forms were either a forgery or fake.
617. In his testimony, DW1, the County Returning Officer testified that all original Form 37As were in the custody of their Chief Executive Officer. There was no protest from the petitioners at the time. The parties agreed and signed the checklist form and proceeded with the actual scrutiny and therefore there cannot be any basis for the petitioners to challenge reliance on scanned copies whose QR Codes were present and were authenticated to be genuine IEBC forms used in the 9th August 2022 elections for governor, Homabay County.
618. Regarding ballot papers, the form of a ballot paper for the various elections is as prescribed under Regulation 68 of the *Elections (General) Regulations*, 2012 which refers to the templates of ballot papers contained in the Schedule to the Regulations. I must clarify that clearly, Form 37A is not a ballot paper in respect of which the rubber stamp of IEBC is legally required to be affixed by an election officer, and this Court was not shown any written law or regulation or constitutional edict



that makes it mandatory and therefore unlawful or irregular for an election official not to stamp Form 37A. Nonetheless, there was no evidence that any of the form 37As were unstamped.

619. I am alive to the majority Supreme Court decision in the *Raila 2017* supra which overturned the Presidential election of August 2017, due to inter alia, the non-compliance with electoral law and because the election was marred by many irregularities, the cumulative effect of which fundamentally and negatively impacted the integrity of the said election. In the said *Raila 2017* supra case, some of the irregularities identified upon scrutiny included the following: Reliance on duplicated forms, photocopies of forms, forms not stamped (para 343; 377 of Opinion); Non-submission of original Form 34C amongst other documents despite a court order (para 357 of Opinion); Failure to fill in the hand-over and take-over sections of many Forms 34A thus throwing verification into doubt (para 367 of Opinion); deployment of prescribed forms that either lacked or had different security features (paras 375-376 of Opinion); Absence of watermark or serial number on Form 34C thus rendering it of dubious authenticity, and using a certified copy of Form 34C instead of the original (para 377 of Opinion);
620. Other findings or revelations in the *Raila 2017* supra case included: the returning officer compiling Form 34C when all results had not been received at the tallying center; declaring the results using form 34B rather than 34A as admitted by the IEBC (paras 250-257 of Opinion). Based on the cumulative effect of the irregularities seen by the Supreme Court, the apex Court concluded as follows:

“(378) Where do all these inexplicable irregularities, that go to the very heart of electoral integrity, leave this election? It is true that where the quantitative difference in numbers is negligible, the Court, as we were urged, should not disturb an election. But what if the numbers are themselves a product, not of the expression of the free and sovereign will of the people, but of the many unanswered questions with which we are faced? In such a critical process as the election of the President, isn’t quality just as important as quantity? In the face of all these troubling questions, would this Court, even in the absence of a finding of violations of the *Constitution* and the law, have confidence to lend legitimacy to this election? Would an election observer, having given a clean bill of health to this election on the basis of what he or she saw on the voting day, stand by his or her verdict when confronted with these imponderables? It is to the Kenyan voter, that man or woman who wakes up at 3 am on voting day, carrying with him or her the promise of the *Constitution*, to brave the vicissitudes of nature in order to cast his/her vote, that we must now leave Judgment.

(379) In concluding this aspect of the petition, it is our finding that the illegalities and irregularities committed by the 1st respondent were of such a substantial nature that no Court properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by IEBC can, in good conscience, declare that they do not matter, and that the will of the people was expressed nonetheless. We have shown in this judgment that our electoral law was amended to ensure that in substance and form, the electoral process and results are simple, yet accurate and verifiable. The presidential election of 8th August, 2017, did not meet that simple test and we are unable to validate it, the results notwithstanding.” (emphasis supplied).



621. In reaching the above conclusion, the Supreme Court reiterated three well-known principles in the determination of election petitions, and laid down two new ones. These principles are found in the following passages of the majority opinion of the Court:

“(211) In our respectful view, the two limbs of Section 83 of the *Elections Act* should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.

.....

(372) It is in this spirit, that one must read Article 38 of the *Constitution*, for it provides inter alia, that every citizen is free to make political choices, which include the right to “free, fair, and regular elections, based on universal suffrage and the free expression of the will of the electors...”. This “mother principle” must be read and applied together with Articles 81 and 86 of the *Constitution*, for to read Article 38 in a vacuum and disregard other enabling principles, laws and practices attendant to elections, is to nurture a mirage, an illusion of “free will”, hence a still-born democracy. Of such an enterprise, this Court must be wary.

(373) It is also against this background that we consider the impact of the irregularities that characterized the presidential election. At the outset, we must re-emphasize the fact that not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so, there would hardly be any election in this Country, if not the world, that would withstand judicial scrutiny. The correct approach therefore, is for a court of law, to not only determine whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it.

(374) In view of the interpretation of Section 83 of the *Elections Act* that we have rendered, this inquiry about the effect of electoral irregularities and other malpractices, becomes only necessary where an election court has concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in the *Constitution* or in that law. But even where a Court has concluded that the election was not conducted in accordance with the principles laid down in the *Constitution* and the applicable electoral laws, it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to



put the agencies charged with the responsibility of conducting elections on notice.”

622. The Supreme Court reiterated and enumerated the principles are as follows:

- a. Not every irregularity, not every infraction of the law is enough to nullify an election;
- b. The correct approach is for a court of law, to not only determine whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have seriously impacted the integrity of the election; and
- c. To overturn an election, the irregularities must be serious and so negatively impact the integrity of the election and the result thereof, that no reasonable tribunal would uphold it.”

623. The new principles enunciated by the Supreme Court are as follows:

- a. In determining whether free, fair, and regular elections, based on universal suffrage and the free expression of the will of the electors has occurred, Article 38 of the *Constitution* must be read and applied together with Articles 81 and 86 of the *Constitution*, for to read Article 38 in a vacuum and disregard other enabling principles, laws and practices attendant to elections is to nurture an illusion of free will;
- b. In light of section 83 of the *Elections Act*, an inquiry about the effect of electoral irregularities and other malpractices, becomes only necessary where an election court has concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in the *Constitution* or in that law;
- c. . Even where a Court has concluded that the election was not conducted in accordance with the principles laid down in the *Constitution* and the applicable electoral laws, it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election.

624. Applying the above principles to the present petition, it is my considered opinion that the irregularities identified through the evidence herein and following the scrutiny and recount exercise were not so cumulatively fundamental as to enable this court to make a finding that the free will of the people of Homabay County was subverted. I reiterate that scrutiny conducted showed that all Form 37As securitized were all stamped and further, that the said Forms had signatures of either the presiding officer or deputy presiding officer.

625. Indeed, as noted from the scrutiny exercise, in Rapedhi Primary School Polling Station, 14 ballot papers were unstamped and in Dunga Primary School, the Deputy Registrar noted that four ballot boxes were unstamped. However, there is no legal requirement that ballot boxes be stamped. As observed hereinabove, the two polling stations had not attracted any complaint from the petitioner. Nonetheless, it is a serious offence under Rule 69(4) of the *Elections (General) Regulations*, 2012, for an elections officer to deliberately refuse to stamp ballot papers. Strict proof of deliberate omission is therefore necessary. In this case, the onus was on the petitioners to demonstrate that the 1st respondent’s election officials deliberately failed to stamp the 18 ballot papers.

626. It is further noteworthy that Rule 62 (6) of the *Elections (General) Regulations*, 2012 forbids any person to be admitted into a polling station wearing a badge, dressing symbol or other indication of support for any political party or candidate. That being the case, and casting a vote being a secret affair, in my view, it was not possible for the presiding officers in the two polling stations identified –Rapedhi and



Dunga, to know in advance or even afterwards which party a voter supported. This in my view, absolves the 1st respondent's election officials from the allegation that they deliberately failed to stamp the 18 ballot papers for Rapedhi and Dunga as was discovered during the scrutiny exercise, which discovery showed that both the petitioners and the 3rd and 4th respondents benefitted from the unstamped ballot papers hence it cannot be said that the voters were the petitioners' supporters.

627. Considering that the 18 unstamped ballot papers were not shown to have been cast in favour of the 3rd and 4th respondents and even if they had been cast in their favour, a difference of 18 votes in the circumstances of this case could not have made a difference to the petitioners' votes which were 90,000 less than those garnered by the 3rd and 4th respondents.
628. In other words, I find that the failure to stamp the 18 ballot papers in Rapedhi and Dunga polling stations which was not part of the complaint raised by the petitioners, did not affect the results of elections which are impugned by this petition.
629. On the whole, I thus find and hold that whereas it is a requirement that ballot papers should be stamped and that it is an offence for an election official to deliberately refuse to stamp ballot papers, I find no evidence of deliberate refusal to stamp the 18 ballot papers and further that the failure to stamp the statutory forms cannot vitiate an election and in this case, did not affect the election results complained of. As regards other statutory forms, as was held in the case of *IEBC v Stephen Mutinda Mule & 3 Others* [2014] eKLR that there was no statutory requirement for stamping of Forms.
630. In the end, I find that as there is no evidence that none of the Form 37As lacked a signature of the presiding or deputy presiding officer or stamp, I am unable to find that the result of the Homabay County Gubernatorial Election was a nullity on that ground. Accordingly, I find no evidence that the alleged irregularities, non-compliance, improprieties, mistakes and omissions under this head, affected the conduct of the elections and validity of the result of the Homabay County Gubernatorial Election held on 9th August, 2022.

H. Whether there was unlawful ejection and denial of entry and access of the Petitioners' agents to polling stations and tallying centres, and whether the failure of the petitioners' agents to sign form 37A and the presence of more agents for one candidate than the other affected the results of the impugned election

631. The petitioners pleaded that their agents were unlawfully ejected from polling stations/tallying centers by both presiding officers and agents of the 3rd respondent as well as the 5th respondent and thus they did not have the opportunity to oversee the whole electoral process and access/approve the declared results and were unable to sign Form 37As and thus there was a doubt as to the credibility of the results therein.
632. The petitioners specified that their agents in the following 14 polling stations were denied access to the said polling stations: Wira Primary School, Ngeri Primary School, Ringa Primary School, Atemo Primary School, Dudu Primary School, Osuri Primary School, Kogonda Primary School, Nyasore Primary School, Kirindo Primary School, Wakondo Primary School, Kakrigu Primary School, Wasaria Primary School, Nyagina Fish Banda Polling Station and Mbita Fish Banda.
633. The petitioners further pleaded that the chasing away of their agents was to accord the fraudulent IEBC officers acting in complicity with the 3rd Respondent's agents time and opportunity to stuff the ballot boxes and/or change the results in favour of the 3rd Respondent.
634. To this end, the petitioners called a number of the 1st petitioner's agents as witnesses who testified that they were denied access to the polling stations in the early morning hours due to lack of accreditation



- badges but they admitted that they were subsequently allowed into the polling stations after presenting their letters of authorization and oaths of secrecy.
635. PW4, Samuel Obunga Milama, the petitioners' chief agent in Gwassi North Ward testified that he was unable to perform his duties effectively because he was denied access to the polling station right from the 1st polling station and that he received calls from his agents from the other polling stations to the effect that they had been denied access because they had no tags as agents.
636. PW10 John Okambo Kisiara an agent for the petitioners at Sindo-1 Polytechnic polling station testified that voting started at 7am but he was not allowed in because he did not have a tag. PW12 David Obonyo Mireri the petitioners' chief agent for Kabondo Kasipul sub county testified that on voting day at 5:30am, agents called him saying that they had been disallowed into the polling stations and that he subsequently managed to communicate with the Returning officer at 8:30 am and their agents were allowed to enter the polling stations. PW13, the chief county agent for the petitioners testified that on 9/8/2022 at around 5am, he began receiving calls from constituency chief agents and Polling Station agents that they had been denied access to the Polling Stations because they had no badges and that albeit the Polling stations opened at 6am, his agents were kept waiting for three hours and as a result, the agents were unable to execute their duties including ensuring their presence when ballot boxes were being opened.
637. In response, the 1st & 2nd respondents pleaded that pursuant to Regulation 62(1)(c) of the *Elections (General) Regulations*, 2012, an authorized agent could not be excluded from a polling station and further that pursuant to Regulation 62(2) of the *Elections (General) Regulations*, 2012 only one agent for each candidate or each political party that takes part in that election, is allowed in a polling station.
638. The 1st & 2nd respondents adduced evidence by producing Polling Station Diaries (PSDs) showing that the petitioners' agents were admitted into the polling stations albeit slightly later than the agents for the 3rd & 4th respondents.
639. DW1 testified that contrary to the allegations by the petitioners that their agents were denied access to the polling stations or admitted late, DW1 produced Polling Station Diaries as exhibits showing the time that the agents were allowed into the Polling Stations. DW1 further testified that as IEBC officials, they facilitated the process of agents' access to the polling stations despite the fact that the 1st respondent found that some of the petitioners' agents had no Oaths of secrecy or official appointment letters from their candidates.
640. There was no agent called by the petitioners from the pleaded polling stations who testified to their alleged denial to enter the polling station. There is also no evidence to the effect that in the pleaded polling stations, there was ballot stuffing in favour of the 3rd and 4th respondents simply because the petitioners' agents had been kept away intentionally. Indeed, the agents who testified on behalf of the petitioners, including PW13, Mr. Bolo, the petitioners' chief county agent admitted in their testimonies that the petitioners' agents were eventually let into the polling stations after communication from the County Returning Officer to the individual presiding officers.
641. The attendance of agents in a polling station is regulated by Regulation 74 of the *Elections (General) Regulations*, 2012 which provides that:
- “74. Attendance at counting of votes
- (1) No agent shall be deemed to be an agent for the purposes of counting unless, at least forty-eight hours before the close of the



poll in that election, the candidate or political party, as the case may be, has submitted to the presiding officer—

- (a) the name and address of the agent; and
- (b) a letter of the appointment of the agent.

- (2)) A presiding officer shall not allow a person whose name, address and authorization has not been so submitted to attend at a counting of votes notwithstanding that the appointment of that person is otherwise in order.
- (3). The presiding officer shall not be obliged to admit more than one agent of any political party, candidate or referendum committee, as the case may be to the counting venue. [emphasis added]

642. This provision gives discretion to the presiding officer to keep order and control of the polling station to facilitate an environment conducive to sound polling electoral business. The Regulation empowers the presiding officer to allow only an agent who has been so authorized and, on the numbers, to be permitted, only one agent from a party or candidate to avoid overcrowding in the polling station.
643. From the evidence adduced, it is apparent that there was a failure of communication from the 2nd respondent to his presiding officers regarding the admission of the petitioners' agents into the polling stations, as the IEBC did not issue badges to all polling agents, on account that the badges were not enough but that he directed that the agents could nonetheless be admitted into the respective polling stations on their production of the Oaths of Secrecy and the appointment letters from their candidates or party.
644. That notwithstanding, it is clear from the evidence of the petitioners' witnesses specifically PW4, PW10 and PW13 that the petitioners' agents were eventually allowed into the polling stations as is evident from the Polling Station Diaries (PSDs) produced by DW1, the second respondent herein who was the IEBC's Homabay County Returning Officer.
645. Regarding the polling stations pleaded, no agent testified to say that they went to those polling stations with appointment letters and the oaths of secrecy but that they were turned away and that as a result, the 1st respondent's officials took advantage to stuff ballot boxes with ballot papers marked in favour of the 3rd respondent.
646. It would therefore be incorrect to assign blame to the 1st and 2nd respondents regarding the failure to admit the petitioners' agents into the polling stations because from the evidence on record, in some cases, the petitioners' agents were allowed into the polling station even before the said Polling stations were opened and voting begun in their presence. PW3, PW7, PW8 and PW11 all testified that they reported to their respective polling stations early in the morning and were admitted therein as soon as the polling stations were opened.
647. I reiterate that the petitioners' claims that the failure to admit their agents in the complained of polling stations afforded the fraudulent IEBC officers' opportunity, acting in complicity with the 3rd Respondent's agents, time and opportunity to stuff the ballot boxes and/or change the results in favour of the 3rd Respondent was not proved by any scintilla of evidence. It was also not shown to the satisfaction of this court that the admission of ore agents for the 3rd respondents into the polling stations worked in her favour to the detriment of the petitioners as many PSDs clearly show that there was more than one agent who signed in for the petitioners too. Not even the scrutiny and recount exercise revealed the alleged massive malpractices or irregularities pleaded.



648. As earlier stated, and it is worth repeating here that even in the cases of the 18 ballot papers which were found not to have been stamped in the two polling stations of Rapedhi and Dunga, the unstamped ballot papers were cast in favour of both the petitioners and the 3rd respondent herein hence both were beneficiaries of the omission to stamp the 18 ballot papers, which ballot papers were not found to have been stuffed.
649. In addition, there was no contest in the final results emanating from the specified polling stations tabled before this Court. It follows therefore that the petitioners have not proved that the failure to allow their agents into the respective polling stations as early as had been anticipated and for the reasons given above was so material as to affect the election results in the said polling stations.
650. The petitioners also complained that their agents were denied the opportunity to sign the form 37As in the respective polling stations. Again, in the absence of agents from the listed and pleaded polling stations to say how they were denied to sign Form 37As the pleading remains just an allegation and no more. It is however important to state the law as it is. The legal requirement for a candidate or party agents to sign result declaration forms is provided for in Regulation 79(1) of the *Elections (General) Regulations*, 2012 which stipulates that:
- “(1) The presiding officer, the candidates or agents shall sign the declaration in respect of the elections.
651. On the other hand, Regulation 79(6) of the same *Elections (General) Regulations* provides that the refusal or failure of a candidate to sign Form 37A shall not by itself invalidate the results announced. However, the existence of this provision should not lead to total disregard of the role of agents in an election by the 1st and 2nd respondents and the presiding officers of the respective polling stations.
652. In the persuasive case of *Manson Oyongo Nyamweya v James Omingo Magara & 2 Others*, Election Petition no.3 of 2008 High Court of Kenya at Kisii it was held that whereas the court may not nullify an election for failure of a candidate or agent to sign the result declaration form, the failure by a presiding officer to comply with the other requirements constituted a serious breach which requires appropriate explanation by the officer concerned.
653. In the case of *John Murumba Chikati v R.O. Tongaren Constituency & 2 others* (2013) eKLR, the court found that, although signing of statutory forms by agents or candidates is crucial, failure to do so cannot alone vitiate an election unless there are other reasons or factors.
654. Understood in light of the provisions of Regulations 62, 79 and 97, of the *Elections (General) Regulations*, 2012, it cannot be said that the mere failure by an agent to be present at a polling station or to sign the statutory forms negates or invalidates the results of an election. Regulation 62 provides that:
- “(2) Notwithstanding sub-regulation (1), the presiding officer shall admit to the polling station not more than one agent for each candidate or political party.
- (3) The absence of agents shall not invalidate the proceedings at a polling station.”
655. Similarly, Regulation 79 provides that:
- “(3) Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.



- (4) Where a candidate or an agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the presiding officer shall record the fact of their refusal or failure to sign the declaration form.
- (5) Where any candidate or agent of a candidate is absent, the presiding officer shall record the fact of their absence.
- (6) The refusal or failure of a candidate or an agent to sign a declaration form under sub-regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub-regulation (2)(a).
- (7) The absence of a candidate or an agent at the signing of a declaration form or the announcement of results under sub-regulation (2) shall not by itself invalidate the results announced.” [emphasis added]

656. Under Regulation 97, non-attendance of an agent at any proceeding or act which requires their attendance or attention shall not invalidate the act or proceedings, unless the act is unlawfully done. The Regulation provides that:

“ 97

- (1) Where in these Regulations expression is used requiring, authorizing, or implying that, any act is to be done in the presence of the candidates or agents, that expression shall be regarded as reference to the presence of such candidates or agents as may be required or authorized to attend.
- (2) The mere non-attendance of any candidate or agents at the time and place as contemplated under sub-regulation (1) shall not, if any act is otherwise lawfully done, invalidate that act.” [emphasis added]

657. The law is therefore clear that, in the absence of proof of an unlawful act, the mere absence or failure by an agent to sign the results declaration forms, without more, cannot invalidate the act or proceedings in or at which the agent was required to participate.

658. My own observation and from the scrutiny carried out by the Deputy Registrar of Form 37As, she found that all these forms were signed by at least one agent and further that several forms were signed by more than one Agent for a single candidate and in several other instances, by three or more Agents for all the candidates. There were only three candidates in the Homabay County Gubernatorial elections

659. Regarding the issue raised by the petitioners that in some cases, the 3rd and 4th respondents had more than one agent in the polling stations, both the 1st & 2nd respondents as well as the 3rd & 4th respondents pleaded and called evidence that the 5th respondent ODM Party had candidates vying for all the six electoral positions and that since the 5th respondent ODM party had indicated that it would not be employing agents in all polling stations, each of the candidates vying on the ODM ticket was at liberty to appoint their own agents. This complaint has also been addressed by the scrutiny report as stated herein. In addition, I observed that although some agents signed for ODM and not the 3rd respondent as a candidate, from the description of Form 37A, an agent could either sign for the name of the candidate or the party that sponsored the candidate that is why in some instances, the agents signed for



the Independent candidate while in others they stated Kidero just like in some other cases they signed for Wanga or for ODM.

660. From the foregoing, it is evident that indeed, some of the petitioners' agents were granted access later on into the polling stations and further that some of the petitioners' agents failed to sign Form 37A although in none of the pleaded polling stations there was failure to sign form 37As by the agents for the Petitioners. The question is whether these irregularities were material enough to invalidate the results of the elections.
661. As earlier observed, there was no contest raised in the actual votes-results emanating from the polling stations specified by the petitioner as having had their agents ejected or admitted late and also allegedly denied the opportunity to sign Form 37A. There is also no evidence adduced to the satisfaction of this court that the petitioners' agents were singled out and unlawfully ejected from the respective polling stations or that those who were present in those polling stations were denied the opportunity to sign the form 37As.
662. On the allegation that where the agents for the petitioners did not sign, the presiding officers signed for the agents, I find no evidence of any handwriting expert showing that the presiding officers forged the signatures of the respective agents. There was evidence by DW1 the 2nd respondent herein that a presiding officer could ask the polling clerks to write the names of the agents but not to sign for the said agents. see page 195 of the proceedings where he stated as follows in cross examination:
- “...Writing of names at the Ps is an administrative function. The P.O can task the clerk to write names but cannot sign on behalf of the agent. I can see PSD for Duch 02 at pages 10 & 15. I can see names listed and even if written by the same hand, it is not irregular. Tasks are assigned by the P.O. I can see the name of David Ochieng on both page 10 and 15. I can tell if the signature for Daniel Ochieng on both pages is different....
663. In the end, I find that the allegations by the petitioners on this issue as pleaded and as discussed have not been proved to the required standard and are therefore dismissed.

. Whether there was bribery and undue influence in the Homabay gubernatorial elections and whether the same negated the election results as impugned herein

664. The petitioners pleaded that there was Voter Bribery in the following nine (9) polling Stations: Kisui Primary School; Nyakango Primary School; Bolo Polling Station; Ragogo Primary School; Kogonda; Osuri Primary School; Omiro Polytechnic; Umai primary School; and Kojwach Primary School.
665. The petitioners also alleged that there was Bribery and vote buying by the area Chief Mr. Mboga and Mr. Kaoto at Wakondo Primary School Polling Centre as evidenced in the testimony of PW2, Maurice Odhiambo Gambi. In cross-examination, PW2 was not able to name anyone who received the money from the said chiefs and further stated that he only knew the chief.
666. PW8, George Ochieng Okech, the petitioners' agent at Nyakango Primary School Polling Station testified that he was offered a Kshs. 10,000 bribe by a candidate of the 5th respondent vying for the position of MCA by the name Onger John, but that PW8 refused and that he was informed that other agents had taken a similar bribe.
667. The petitioners further pleaded that the 3rd Respondent and her agents, especially her husband moved all around the County in a motor vehicle with goons unleashing violence on the Petitioner's supporters and out- rightly giving out bribes to induce voters to vote for the 3rd Respondent. This was in the evidence adduced by PW3, Dickson Ouma Ayuo.



668. Regarding the alleged undue influence, the petitioners pleaded that voters were unduly influenced to vote for the 5th Respondent's Candidates in Oseri Primary School and Adongo Primary School polling stations.
669. In response to the above allegations, the 3rd & 4th respondents called DW9 Roselyne Agengo, an agent for the 3rd respondent for Adongo polling station who testified that she never saw or heard the supporters of the 3rd respondent campaign at her polling station nor did she hear the presiding officer telling voters to vote six piece. It was her testimony that she never saw anyone being bribed to vote and that no complaints of bribery were raised.
670. Article 81(e) of the Constitution contemplates free and fair elections, which are:
- (i) by secret ballot.
 - (ii) free from violence, intimidations improper influence or corruption.
 - (iii) Conducted by an independent body.
 - (iv) transparent, and
 - (v) administered in an impartial neutral, efficient, accurate and accountable manner.
671. Bribery is one of the election offences provided for in the Election Offences Act No. 37 of 2016. Section 9 of the said Act creates the offence as follows:
- 1) A person who during an election period-
 - a) Directly or indirectly offers a bribe to influence a voter to
 - i. Vote or refrain from voting for a particular candidate or political party.
 - ii. Attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending support to or for a political party or candidate.
 - b) In any manner unlawfully influences the result of an election.
 - c) Directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates.
 - 2) A person who, during an election period, accepts or agrees to accept a bribe that is offered in the circumstances described in subsection (1) commits an offence.
 - 3) A person who commits an offence under this section shall be liable, on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both.”
672. Bribery is therefore a criminal offence as well as an election offence. The burden of proof lies on that who alleges bribery and the standard of proof required is beyond reasonable doubt. Further, the witnesses who testify in such cases also matter and the superior courts give greater weight to non-partisan witnesses than partisan witnesses. The case in mind is that of Fredrick Otieno Outa v Jared Odoyo Okelo [2014] eKLR where the Court of Appeal pronounced itself as follows on this issue:
- “...the offence of bribery ought to have been pleaded clearly with specificity. The 3rd respondent ought to have adduced sufficient evidence to prove that the purpose for



distributing the CDF cheques was to influence voters to vote for the appellant, directly or indirectly. As evidence of the appellant's presence during the distribution was controverted, the 3rd respondents ought to have provided evidence, not emanating from his own agents or even the supporters. The record reveals that most of those who testified were politically inclined to support either of the candidates."

673. The superior courts have also made a distinction between corrupt acts committed by agents of a candidate and those committed by the candidate personally. In *Moses Masika Wetangula v Musikari Nazi Kombo* [2014] eKLR, the Court of Appeal pronounced that:

"...in determining the effect of commission of an election offence, a distinction should be drawn between corrupt acts committed by agents of a candidate and those committed by the candidate himself....the corrupt acts of an agent have to be shown to have had the implied sanction or blessing of the candidate which would establish a consistent pattern from which a reasonable inference can be drawn that the candidate concerned must have sanctioned the acts."

674. The Petitioners were under a duty to prove the allegations of bribery and undue influence beyond reasonable doubt. The testimony of PW2 was not conclusive as it failed to confirm the person who allegedly received the money alleged to have been paid by the two chiefs or that the purpose of the money was to influence the voters to vote in favour of the 3rd and 4th respondent, since the possibility that the said chiefs could have bribed the voters to vote in favour of the petitioners has not been ruled out.

675. The Petitioners are required to prove by clear and unequivocal evidence allegations of bribery. In the cases of *Wilson Mbithi Munguti Kabiti and 5 others v Patrick Makau King'ola and Another* High Court Machakos, Election Petition Number 9 of 2013) and *Twahir Abdulkarim v Mwathethe Adamson Kadenge and 2 others* HC Malindi EP Appeal No 1 of 2014, the Court stated as follows:

"Due Proof of a single act of bribery by or with the knowledge and consent of the candidate or by its agents, however insignificant that act may be, is sufficient to invalidate the election, the judges are not at liberty to weight its importance, nor can they allow any excuse...such as they can allow in certain conditions in cases of treating or undue influence by agents. For this reason, clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient, and the confession of a person alleged to have been bribed is not conclusive. Bribery may be implied by the circumstances of the case and the court is not bound by strict practice applicable to criminal cases, but may act on uncorroborated evidence of an accomplice.... a corrupt practice must in all cases be strictly proved. A corrupt motive in the mind of the person bribed is not enough..."

676. The allegations of bribery and undue influence require clear supportive evidence. The court will reject the allegations where those allegations are scanty, or where they are based on speculation, suspicion and guesswork see *Muliro v Musonye and another* [2008] 2 KLR (EP) 52 at 65.

677. The 3rd respondent testified and denied ever offering and bribes of deploying any of her agents to give bribes to voters or to the two named chiefs. I find no evidence adduced to prove the allegation that the 3rd respondent or her agents moved around bribing voters to vote in her favour. The evidence by PW8 that he was offered Kshs 10,000 bribe by an MCA candidate vying on the ODM party ticket which offer he declined and that he was told that other agents had also been offered bribes is not sufficient evidence to link the 3rd and 5th respondents to the alleged bribery. There was also no evidence to show



that the 1st and second respondents or the 5th respondent were complicit in the alleged bribery or that the MCA candidate who allegedly offered PW8 a bribe was acting on behalf of any of the respondents herein. Further, the other agents whom PW8 stated that he was told they had also been offered bribes were never called as witnesses to say who offered them those bribes.

678. This Court is not persuaded that the allegations of bribery were proved to the required standard of beyond reasonable doubt.
679. The fact that the witnesses called by the petitioners were also their agents does not help in terms of the weight their testimony on bribery should be given in light of the Court of Appeal's finding in the above cited Fred Outa Case.
680. On the whole, I find that the Petitioners and their witnesses only made allegations without providing any cogent evidence to prove that there was bribery at the polling stations and therefore I find that the allegations and ingredients of the offence of bribery under section 9 of the *Election Offences Act* were not proved to the required standard of beyond reasonable doubt.
681. Regarding allegations of undue influence, the petitioners pleaded that the 5th respondent ODM party, through its leader, Hon. Raila Amolo Odinga, used undue influence to compel the voters in Homabay County to vote for the 3rd respondent. The petitioners cited the case where, during the funeral service of the late Paddy Ahenda, the 5th respondent's party leader allegedly made remarks to the effect that anyone who did not vote for the 3rd respondent was as stupid as their mother. A video clip EOK5(a) was played in Court on what transpired at the said funeral service, with a translated version thereof.
682. The petitioners also faulted the 5th respondent's party leader, the Rt. Honourable Raila Amolo Odinga for campaigning for the 3rd respondent as an incident of him using undue influence considering the cult-like following that the ODM Party leader enjoyed in the County.
683. In response, the 5th respondent pleaded that pursuant to Article 16 as read with Article 7(1)(d) and 11 of the ODM Constitution, it was the duty of the Party Leader and all members and leaders of the ODM Party to campaign for all ODM candidates and any other candidate affiliated to the Azimio La Umoja One Kenya Coalition Party, without prevarication.
684. Undue influence is an election offence created under Section 10 of the *Election Offences Act*. The section provides that:
- (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, damage or loss, or any fraudulent device, trick or deception for the purpose of or an account of
- (a) Inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election.
 - (b) Inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate or
 - (c) Impeding or preventing a person from being nominated as a candidate or from being registered as a voter commits the offence of undue influence.
- (2) A person who induces, influences or procures any other person to vote in an election knowing that the person is not entitled to vote in that election commits an offence".



685. In addition, Section 63 of the *Elections Act* prohibits and criminalizes undue influence and provides as follows:

63.

- (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, damage 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;
 - (b) impeding or preventing the free exercise of the franchise of a voter;
 - (c) inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate; or
 - (d) impeding or preventing a person from being nominated as a candidate or from being registered as a voter, commits the offence of undue influence.
- (2) A person who induces, influences or procures any other person to vote in an election knowing that the person is not entitled to vote in that election commits an offence.
- (3) A person who directly or indirectly by duress or intimidation—
 - (a) impedes, prevents or threatens to impede or prevent a voter from voting; or
 - (b) in any manner influences the result of an election, commits an offence.
- (4) A person who directly or indirectly by duress, intimidation or otherwise compels or induces any voter who has already voted at an election—
 - (a) to inform that person or any other person of the name of the candidate or political party for which the voter has voted; or
 - (b) to display the ballot paper on which the voter has marked his vote, commits an offence.

686. Section 63 of the *Elections Act* addresses situations where a candidate or his agents resort to specified conduct to induce or impede the free exercise of franchise by a voter. The petitioners' witness PW5, Maurice Onyango Osodo who was based at Shauri Yako Primary School Polling Station testified that the petitioners' agents enticed voters and bought them lunch and paid their fare from home to the polling station and back home on the voting day, a point that was re-emphasized by PW13 who testified that they refunded fare and lunch to the voters on the voting day and that the fare depended on the distance travelled by the voters.

687. PW13, Enosh Ongweya Bolo the 1st petitioner's chief agent for the county stated as follows in cross examination at page 154 of the proceedings:

“On voter bribery, I did not communicate to IEBC about it. I did not report any incident of bribery to the police. We were not mobilizing during the campaigns. We had a program. We never distributed cash. We only refunded fare and lunch. Fare depended on the distance



travelled. Maximum was 500 shillings but a few from far off would be given 4000 shillings. We gave lunch.”

688. PW5 on the other hand stated as follows in his testimony in cross examination at page 71 of the proceedings:

“I am a voter. I was to entice voters to vote for Mr. Evans Kidero. I was mobilizing before the voting started but not within the polling stations. I understood fully the rules that after I have voted, I was supposed to leave the polling station. I was appointed as security in Shauri Moyo. I was to raise alarm to our Chief agent in case I see something illegal taking place...”

689. At page 70 of the proceedings, PW5 in introducing his testimony contained in his affidavit stated as follows:

“I have come to give evidence on the elections that took place on 9/8/2022. I was one of the mobilizers and security agents for Dr. Evans Kidero.”

690. From the above evidence adduced by the petitioners own chief agent and mobilizer, it is apparent as conceded that the petitioners indeed influenced voters by enticing them with fare and lunch on the voting day.

691. Even the testimony of PW10 John Okambo Kisiara of Sindo Youth Polytechnic polling station that he saw voting taking place on 8/8/2022 at Gindo Secondary School, a day before the scheduled election and that those who were voting were being given Kshs 2000 was not substantiated.

692. From the evidence adduced, I find no credible and believable evidence adduced before this court of any reports made to any presiding officer or to the police of instances of undue influence on the part of any of the respondents.

693. The influence of Hon. Raila Amolo Odinga over Kenyan politics is undeniable. However, this cannot be the basis to claim that his campaigning for his party’s candidate amounts or amounted to undue influence. Hon. Raila Amolo Odinga is entitled under Article 38 of the Constitution to exercise his constitutional right to campaign for a political party, candidate or cause of his choice. The former Prime Minister, Raila Amolo Odinga, as the party leader of ODM, the 5th respondent, had the right to campaign for the candidate of his choice. Furthermore, he was obligated to campaign for his party’s candidates. In my mind, I find no offence or misdemeanor on the part of a party or party leader of a party that sponsors a candidate campaigning for that candidate. In political campaigns, people sell their agenda and they use various ways of persuading the voters. This country is yet to see a situation where a candidate wakes up from nowhere and goes to the polls to win elections without campaigns unless the candidate as nominated is unopposed

694. The petitioners, specifically the 1st petitioner testified that after the nomination of the 3rd respondent as the candidate for the governor position, he decided to resign his membership from the 5th respondent ODM Party and vie as an independent candidate. Having done so, the 1st petitioner could not have expected the 5th respondent ODM or its party leader, the Rt. Hon Raila Amolo Odinga to campaign for him. In other words, he could not have his cake and eat it too, even if he used the ODM party leader’s banner as his preferred presidential candidate.

695. In addition, it was not enough as was in this case for the petitioners to claim that there was an electoral irregularity or malpractice in the form of undue influence, but it was incumbent upon the petitioners to demonstrate how the alleged irregularity or malpractice affected the electoral process to the extent that it can be said that the will of the electorate of Homabay County had been impeded.



696. Again, just like in the case of bribery, I find that none of the allegations and ingredients of the offence of undue influence as provided for under section 10 of the [Election Offences Act](#) were proved to the required standard that is beyond reasonable doubt as against the respondents herein.

J. Whether there was violence, chaos, skirmishes during the Homabay gubernatorial elections and whether these affected the result of the impugned election

697. The petitioners pleaded that there were widespread instances of violence in the Homabay county before, during and after the elections. They pleaded that the violence was systematic and coordinated in a way as to benefit the 5th respondent ODM party with as many elective positions in the region while frustrating other candidates not vying under the 5th respondent ODM Party banner.

698. The petitioners further pleaded that the violence began as early as during the party nominations executed by an organized criminal outfit code-named ‘men in black’ that terrorized citizens during the party primaries. They also pleaded that the said outfit is at the disposal of shadowy figures within the 5th respondent ODM party to execute nefarious(wicked) assignments on behalf of the 5th respondent thus violating the 1st petitioner’s rights under Article 91(2)(c) of the [Constitution](#).

699. The petitioners further pleaded that during the elections, the same gang unleashed violence on the voters before, during and after elections to benefit the 3rd respondent. At paragraph 110 of the petition, the petitioners claimed that the violence affected the results of the election herein impugned in the following manner:

“...it led to serious voter suppression, but allowed time for the goons to blatantly conduct a coup on certain polling stations, meting violence on certain officials of the 1st Respondent, holding others at gun-point as they entered results, flagrantly hijacking and commandeering vehicles of the 1st Respondent to unknown destinations while transporting election materials from the polling stations to the tallying centres and in a major way intimidating and/or working in collusion with certain officials of the 1st Respondent to either deny access to my agents to the polling stations or ejecting them in other instances.”

700. The petitioners further pleaded that such incidences of violence were reported to the police and more particularly, to the OCS, Homa Bay Town and OB numbers given but that there had been little progress on the investigations. The specific instances of violence were stated to have led to the death of one Kepha Ouma on 8/8/2022 leading to fear in: Kologi Kanyamwa Ward; Nyakango Primary School in Karachuonyo Constituency; Akala Primary School in Ndhiwa Constituency; and Ligisa Primary School in Rangwe Constituency.

701. The petitioners attributed the violence to the 3rd respondent and or her supporters. The 1st Petitioner also testified that he produced the videos on violence to demonstrate that “I picked videos which were relevant that violence is the genetic make-up of the ODM.”

702. PW-1, Andolo Dan Ojjo, the Presiding Officer at Ongeti primary School testified for the petitioners that he was attacked at gunpoint and forced to change the actual result on the declaration form 37A.

703. PW-3, Dickson Ouma Ayuo, a voter and who also stated that he was the 1st petitioners’ agent testified that he was physically assaulted by one of the goons who went there in the company of George Wanga, the 3rd respondent’s husband and others whom he could not identify at Ligisa Primary School Polling Station 01. That the assailants hit him with metal rods and threatened him brandishing a pistol and that he escaped after the incident to seek treatment and later reported to the police.



704. On cross examination, PW3 confirmed that his name was missing from the list of agents who signed in at the Ligisa 1 of 2 polling station. He also stated that the PSD showed that Brian Adams was the agent for the 1st petitioner Dr. Kidero and that the said Brian Adams had signed in the PSD both at the commencement and affirmation of closing of voting at page 19 of the PSD. He stated that he was attacked at about 6.30 p.m. He stated that he was the only one assaulted.
705. PW-5, Maurice Onyango Osodo testified that there was violence at Shauri Yako Primary School following the entry of a motor vehicle carrying election materials. He stated that the rowdy voters forced open the vehicle and destroyed the materials. His testimony was that the situation was calmed and the process of voting continued. His evidence was corroborated by DW-4, Aloyo Joseph Odira who confirmed that the incident took place and that the situation was calmed.
706. PW-6 John Ogina Nyabola testified that he was attacked and property destroyed on 1/8/2022 and again on 8/8/2022 leading to the death of Joseph Mwai who was killed by people advocating for 6-piece voting patterns in Kolodhi, Ndhiwa constituency. He stated that his employee one, Kepha Ouma was hacked during the invasion of his business on 8/8/2022.
707. Violence was also reported at Akala Primary School by the petitioners' agent Kandiwao Rachael who testified as PW-7 and who was stationed at the Akala polling station when she saw youths carrying pangas and rungas chasing one youth towards the school latrine. She testified that the violence occurred outside the polling centre in the nearby trading centre at about 3 pm. She stated that as a result of the violence, voting stopped because voters ran away and all ballot materials were carried away to the tallying centre. She testified that she could identify some of the youths as ODM supporters.
708. PW-10, John Okambo Kisiara testified of violence at Sindo Youth Polytechnic polling station at around 4.00 p.m., perpetrated by a group of rowdy youths armed with crude weapons who invaded the Polling Station forcing the closure of the polling station. He stated that the group was chanting the 3rd respondent's name. He stated that as a result of the chaos, voters, election officials and agents ran away from the polling station leaving the presiding officers. He further stated that the situation was contained by the area chief and police officers.
709. PW-13, Enosh Ongweya Bolo, the petitioners' county chief agent testified of having been attacked at Malela Polling Station but that he opted not to report to the police because they had had many instances of unacted-on reports made to the police.
710. The 1st petitioner played in court video clips EOK 6(a) showing men in a gathering violently dispersing a meeting and causing chaos by kicking tables and turning them upside-down. In this video, he stated that the men were to scuttle elections against those who were threatening to win the elections contrary to the ODM party wishes.
711. The Video marked EOK 8(a) played in court related to party primaries reporting by the media house (KTN) of a lady being interviewed who complains of violence at Ratanga while video EOK 9(a) showed a lady being interviewed by KTN news journalists appearing injured on her face and right hand.
712. Video EOK 5(c) was also played in court showing a man speaking in Dholuo which when translated he was saying that nobody will get the seat of Governor if it is not on the ODM party.
713. The 1st petitioner explained the contents of the videos that the footages go to demonstrate that supporters of another candidate who was not the 5th respondent ODM party's favourite was hacked and the candidate would not clinch the governor's seat.



714. Responding to the allegations and testimony by PW-1, Lawrence Okumu Barasa the Constituency Returning Officer for Rangwe Constituency and who testified as DW2 stated that he received the complaint of violence in the polling station and immediately dispatched a vehicle to rescue and ferry PW1 to the Constituency Tallying Centre. From there, he received the declaration of results and advised the particular presiding officer to report the incident to the police.
715. DW-3, Risper Oloo who was the presiding officer for Akala Primary School, 3 of 3, narrated to court the incidences of the day as well as what was recorded in the PSD. In her testimony in court and more specifically in cross examination by the Ms Julie Soweto counsel for the petitioners, she stated as follows:
- “Skirmishes broke out at about 4:45 P.M. At page 30 of the PSD, I recorded the time to be 1400 hours which is the same as 2.00 PM. After securing the materials, amidst confusion, I could not record as everybody was lying on the floor so I recorded later. The goons were throwing stones through the window from outside. I called the Returning Officers who came with Police Officers, then calm was restored. Calm was restored after about 10 minutes, or so.”
716. The Polling Station Diary (PSD) for Akala Primary School shows that voting closed at 1700 hours which is 5pm, in the presence of four agents and the voter turnout at the time was 62.6 percent. The Presiding Officer noted that: ‘Attacked by rowdy goons at 1400 hrs. action taken; called RO after securing all election materials.’
717. At Ligisa Primary School 001, the PSD indicates an incident recorded as having occurred at 1745 hours and that the violence was calculated to altering the order of counting of votes and use of manual register. It is recorded that some valuable items were stolen from there. The Presiding Officer noted that he talked to the agents to calm down the crowd. On this particular incident, page 19 of the PSD of the polling station indicates that the polling station closed at 1700 hours and polling ended at 1740 hrs.
718. Having listened to the witnesses’ testimonies, both for the petitioners and the testimony by the 2nd respondent Mr. Fredrick Apopa DW-1, I am satisfied that there were incidences of violence in the various polling centres reported. The OB extracts produced by the petitioners’ witnesses lend credence that these incidences indeed took place.
719. On her part, the 3rd respondent on being shown the video EOK 6(a) stated that the activities in that video related to the 5th respondent’s National delegates Conference in 2014 and had no bearing on the just concluded elections. That the video was recorded at Kasarani Stadium. Mr. Anthony Matum Okechi the 5th respondent’s ODM party Parliamentary Counsel and who testified as DW-15 in relation to the video stated that the alleged video related to the 2014 National Delegates Conference (NDC) in Kasarani and that it had no bearing whatsoever to the 9th August 2022 Homabay elections herein. She denied sponsoring any violence. She produced a video (Ciii) played live into court shows the 3rd Respondent during her campaign trail calling on the peaceful process and excluding confidence of a win. She stated that since her supporters were mostly women, if there was violence, then she would be the loser as women would not turn out to vote where there was violence. She stated that she heard of violence at Akala and condemned it.
720. It was contended by the 1st and 2nd respondents’ witnesses that the most important document is the Polling Station Diary (PSD) which captures all the incidences reported and or taking place at the polling station. In this case, the PSD’s captured these incidents. Therefore, there cannot be any doubt that there were incidences of violence and skirmishes witnessed in the specific polling stations.



721. On the incidences at Akala primary School and Ligisa Primary school polling stations, I find that the violence was witnessed during counting of the votes. The presiding officer in her testimony confirmed that after the skirmishes, only one agent returned to the polling station where there was only one voter casting his vote.
722. The next question that must be answered therefore is did the violence affect the election and the results? In other words, did the violence and chaos witnessed in the above-named polling stations affect the gubernatorial results of the election as alleged by the petitioners?
723. Article 81 (e) of the *Constitution* provides that:
The electoral system shall comply with the following principles--
- (e) free and fair elections, which are—
 - (i);
 - (ii) free from violence, intimidation, improper influence or corruption;
 - (iii)
 - (iv); and
 - (v)
724. The legal position as provided for under Sections 107, 108 and 109 of the *Evidence Act* is that he who alleges bears the burden of proof in the sense that the petitioners alleged that the violence witnessed in the various pleaded polling stations stated above and in other places other than the polling stations affected the results of the election impugned in this petition.
725. The petitioners also urged this court to draw an adverse inference against the respondents for failing to call witnesses to rebut the petitioners' assertions and evidence on the issue of violence stated above.
726. Section 112 of the *Evidence Act* relates to instances where the court can draw such an inference. The Section provides that: In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.
727. Adverse inference is a legal situation in which someone making a judgment concludes that evidence was not adduced because it would be unfavourable to the party being asked to adduce that evidence. The court is therefore invited in the circumstances herein to find that the respondents failed to call witnesses to rebut the violence witnessed.
728. In this petition, the 1st and 2nd respondents through the testimonies of DW-1, DW-2 and DW-3 admitted that indeed, there were incidences of violence as can be seen from their affidavits, oral testimonies and the PSD's which were produced in court relating to Akala Primary School and Ligisa primary School polling stations. From these polling stations, it was evident that there were sporadic incidences of violence which were ultimately contained.
729. I therefore find that the respondents did not withhold any information relating to the incidents of violence warranting the court to draw an adverse inference that had they tendered that evidence then it would have been adverse to them.
730. Under Regulation 64(1) of the *Elections (General) Regulations*, 2017, the Presiding Officer has discretion to adjourn proceedings and even transfer them elsewhere in the event of riot, violence etc,



and to extend the voting hours in consultation with the Returning Officer. The Regulation provides thus:

- (1) Notwithstanding the terms of any notice issued under the Act or these Regulations, a presiding officer may, after consultation with the returning officer, adjourn the proceedings at his or her polling station where they are interrupted by a riot, violence, natural disaster or other occurrence, shortage of equipment or other materials or other administrative difficulty, but where the presiding officer does so, the presiding officer shall re-start the proceedings at the earliest practicable moment.

731. This means that the law is not blind to the fact that in election contests, violence or riots can occur and when they do take place, then the presiding officer is given discretion on a way out.

732. In the instant case, my finding is that although there were incidences of violence and skirmishes, had the violence been of an extended magnitude so that the same could not be contained by deploying the security measures already put in place by the 1st respondent IEBC, the presiding officer of that particular polling station had the discretion in consultation with his/her superiors to adjourn such voting.

733. From the evidence adduced, there is no evidence that such a step of adjourning of the voting was taken due to the violence witnessed in the stated polling stations.

734. Having found that there were various incidences of violence before, during and after the elections, the petitioners were obligated to tender such evidence to persuade this Court that as a result of the said violence, the magnitude thereof affecting the voting and therefore the results of the election were affected or that the said violence or skirmishes tilted the results of the election in favour of the 3rd and 4th respondents to the petitioners' detriment.

735. The petitioners bore the duty of placing before the court sufficient evidence that as a result of the violence or skirmishes as recorded in the PSDs and alluded to above, voters did not turn up to vote for him or that those who turned up to vote were forced to return home or that those who turned up to vote, voted for the 3rd respondent instead of the petitioner.

736. Section 11 of the *Election Offences Act*, 2016 prohibits violence. The section provides that:

“A person who, directly or indirectly in person or by any other person on his behalf, inflicts or threatens to inflict injury, damage, harm or loss on or against a person—

- (a) so as to induce or compel that person to support a particular candidate or political party;
- (b) on account of such person having voted or refrained from voting; or
- (c) in order to induce or compel that person to vote in a particular way or refrain from voting, commits an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both.

737. Given that the Act specifically makes violence an election offence, the question is whether the violence in Ongeti Primary School, Ligisa Primary School, Shauri Yako Primary School and Akala Primary School was instigated by any of the respondents herein either by themselves, or by other persons on their behalf so as to unfairly edge out the petitioners in the election in favour of the 3rd and 4th respondents.



738. Analysing the video evidence played out by the petitioners, the first video relates to incidences that happened way back in the year 2014 during a National Delegates Conference (NDC) and during the ODM Party nomination exercise. That evidence does not, in any way, proof, let alone sufficiently proof, that the 9th August 2022 election at Homabay was marred by violence thereby affecting the result of the impugned election. I find the incidences complained of as played out in the videos to be too remote to affect the outcome of the 9th August, 2022 gubernatorial elections in the Homabay County.
739. My further finding on this video evidence played out to court is that it is of little help to the petitioners. The violence in that video does not in any way link the respondents with the violence as alleged by the petitioners. There is no evidence that the ODM party harbours ‘men in black’ goons or that its supporters’ DNA is violence and that the men in black were transported from place to place to unleash terror upon the supporters of other parties or candidates who are not affiliated to the ODM party. There is no evidence that these ‘men in black’ goons were the same people who unleashed violence in Homabay in the named polling stations.
740. I reiterate that even if the petitioners wanted this court to believe and find that ODM party is comprised of violent goons, it was not shown that those goons of the 2014 NDC were imported into the 9th August 2022 elections at Homabay by the respondents herein to cause havoc to the impugned elections to the advantage of the 3rd respondent Hon. Gladys Wanga and to the detriment of the petitioners herein. Further, as earlier stated, it was not established that the violence in the videos produced and played to court was in any way directly or indirectly attributed to the acts or omissions of the respondents herein.
741. Relating to the violence at Ongeti Primary School, Ligisa Primary School, Shauri Yako Primary School and Akala Primary School polling stations, my finding is that the said incidents of violence were sporadic and isolated and that there was no sufficient evidence linking either of the respondents to the said incidents. Further, there was no evidence that the violence witnessed affected the election results which are impugned herein. I say so because the allegation of violence being linked to ballot stuffing was not proved.
742. This Court notes that in the scrutiny and recount report, the Deputy Registrar observed that in some instances, the KIEMS Kit identified more or less voters compared to the number of votes cast. In its analysis of the Kiems Kit data as brought out in the scrutiny report, this court noted that there were 1,898 positive variances where the number of people identified were more than the votes cast and 258 negative variances where the number of people identified were less than the votes cast.
743. The petitioners pleaded that there was vote padding and ballot stuffing to the advantage of the 3rd respondent and that this would be evident following the scrutiny and recount undertaken by the court. Even if this court was to take into consideration the positive variances in the number of voters identified biometrically in relation to the votes cast, as emanating from the scrutiny, and add the same to the votes garnered by the petitioners, the same would still not be sufficient to close the margin of victory garnered by the 3rd respondent which was 244,559 against the petitioners’ 154,182 votes, a difference of 90,377 votes.
744. I therefore find that the infractions brought out by the scrutiny and recount report were minor and immaterial and that the report further affirmed that the gubernatorial elections carried out in Homabay County on the 9/8/2022 by the 1st respondent were conducted substantially, in accordance with the prescriptions of the *Constitution*, the *Elections Act* and Regulations made thereunder.
745. Further, albeit the scrutiny and recount report filed in this court revealed some infractions such as some SD cards and Form 37As were missing from the ballot boxes as they were expected to have been attached



thereto and although the report does not give explanations in all the inconsistencies, the scrutiny report was clear that the counterfoils of those Form 37As were present and matched the results tallied for the respective polling stations.

746. This is what the scrutiny report reveals in part:

“The results on the printed scanned original copies matched with the results on the Carbon copies.

- vi. Some carbon copies serials did not match the original forms; however, the results were the same.
- vii. In one polling station, Ongeti Primary School in Rangwe constituency the results on the Carbon copy did not match the results on the Original Form used in the final tally. Notably, the results in the Original matched the results after the recount.

747. From the above report, it is clear that even in polling stations where violence was reported, it did not affect the final result of the elections under challenge. On the allegation that the violence led to voter suppression, it was not demonstrated by way of evidence from any intended voter that the violence experienced in the named polling stations prevented them from voting and more importantly, that they had intended to vote for the petitioners herein.

748. On the allegations that Hon Wanga’s husband assaulted or unleashed violence at Ligisa Primary School, George Wanga, the petitioner’s husband who testified DW 14 and stated that he voted at Alara Primary School between 10.am and 11.00am in the company of his wife and children then he returned to his home. He stated that he was never present at Ligisa Primary School Polling Station because he was at his home at that time that he is alleged to have been unleashing violence on the petitioner’s agents. In cross examination, he denied being summoned by the police or being charged with any criminal offence in respect of the incident at Ligisa Primary School polling station and that he was not aware of any other person charged of the said offence. In re-examination, he stated that had he walked into Ligisa Polling station and caused violence, the same could have been noted in the PSD.

749. The testimony of DW14 Was corroborated by DW6 the 3rd respondent herein who testified that on the material election day, she went and voted at Alara Kokayo Polling station in the company of her husband DW14 and that her husband had not been summoned in connection with the alleged violence at Ligisa Polling station.

750. I note that before DW14 testified, there were objections by the petitioners’ counsel on account that he had been sighted in court while the third respondent was testifying. This court rendered a ruling on the objection and allowed him to testify and the Court stated that it would consider the fact of his being present in court when DW6 was giving her testimony and assess the weight to be attached to such evidence.

751. In assessing the weight to be given to the testimony of DW14, I am alive to the fact that he was a husband to the 3rd respondent and that he had also filed into court his witness affidavit which he adopted as his evidence in chief. I find no evidence that he came to court to listen to what DW6 would say so that he could adopt the same testimony verbatim. I find that his testimony was independent to the extent that he swore his affidavit after perusing the affidavit of Dickson Ouma Ayuo, denying ever being at Ligisa Polling station on the material voting day or causing violence as alleged. He also denied in cross examination, knowing what was in the third respondent’s statement and that neither did he consult her when he was recording his witness statement.



752. Further, the witness did not testify about the conduct of elections and only acknowledged that the 3rd respondent was his wife. He did not delve into her testimony. A similar issue arose in *Lily Gathoni Karathi v Lincoln Karathi Willys* [2016] eKLR. Mativo J had this to say:

“On the issue of the two defence witnesses who sat in court, I have analysed their evidence and I find no prejudice on the part of the applicant. The second witness’s report was filed long before the application was heard and his evidence dealt on it. The applicants counsel was served with the same and was aware of the contents. There was no objection to the production of the said report. Nothing new was introduced in the oral evidence and the witness confined himself to its contents. I find that no prejudice was occasioned to the applicant by the fact that the said witness sat in court.

The first defence witness testimony was brief and did not dwell of the plaintiff’s testimony. I also find that though he sat in court, there is nothing to show that affected his version of evidence to the prejudice of the applicant.”

753. Accordingly, I find that the presence of DW14 in court while his spouse the 3rd respondent was testifying did not in any way prejudice the petitioners.

754. Back to the standard and burden of proof in instances of election offences such as one of violence reported in this petition, in *Raila 2017* (supra) it was held that:

(152) We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt...

(153) We recognize that some have criticized this higher standard of proof as unreasonable, however, as we have stated, electoral disputes are not ordinary civil proceedings hence reference to them as sui generis. It must be ascertainable, based on the evidence on record, that the allegations made are more probable to have occurred than not.

755. The burden of proving that these incidences of violence affected the election was on the petitioners and the standard of proof required of them is that of beyond reasonable doubt. Once the petitioners satisfactorily discharge this burden, the respondents are then called upon to rebut the same. From the evidence on record and having carefully perused the pleadings, considered the oral testimony and the submissions, I find that the petitioners have failed to discharge this burden.

756. Consequently, after reviewing the evidence on record, I find that the violence witnessed in the few polling stations did not affect the results of the election subject of this petition.

K. Whether the elections held in Homabay County were free, fair, credible, transparent and verifiable and conducted in accordance with the principles espoused in Articles 81 and 86 of the *Constitution* and Section 83 of the *Elections Act*

757. The petitioners in their petition urged this court to find that the Homabay gubernatorial election was conducted in blatant breach of the various Articles spelt out in the *Constitution*, various Sections of the *Elections Act*, 2011, *Election offences Act*, 2016, *Elections (General) Regulations*, 2012 and *Elections (Technology) Regulations*, 2017. The specific manner in which the said laws were breached is outlined in the petition at length. I will restate some of the allegations here. In support of this, the petitioners led evidence as illustrated earlier in this judgement and their submissions also analysed earlier.



758. This position by the petitioners was contested by the respondents who asserted that they followed the law to the letter in the conduct of the impugned elections, as illustrated earlier in this judgement.
759. The guiding principles in determining whether the elections were free, fair, credible, transparent and verifiable is to be found in the Constitution, the Statutes and the Regulations made thereunder and the case law as variously interpreted and pronounced by the courts.
760. Articles 81 and 86 of the Constitution afford the yardstick to be applied in every election. The Articles provide 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) ...;
 - (c) ...;
 - (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. At every election, the Independent Electoral and Boundaries Commission shall ensure that—
- (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
 - (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
 - (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.
761. On the other hand, Section 83 of the Elections Act which is the enabling legislation in electoral matters provides that:
- “No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.”



762. In determining whether an election was conducted in conformity with the principles laid out in the Constitution and the statutes as reproduced above, the Supreme Court in the Raila 2022 case (supra) held as follows:

“A petitioner who sought the nullification of elections for alleged non-conformity with the Constitution or the law or on the basis of irregularities and illegalities, had the duty to proffer cogent and credible evidence to prove those grounds to the satisfaction of the court. Once the court was convinced that the petitioner had discharged that burden, then the evidentiary burden shifted to the respondent (who in most election-related cases was IEBC), to present evidence by way of rebuttal of the assertion.”

763. The same Supreme Court while considering the standard of proof in a petition for nullification of elections stated that:

“The intermediate standard of proof in election petitions lay in a middle ground between the threshold of proof on a balance of probability in civil cases and beyond reasonable doubt in criminal trials, save for two instances; where allegations of criminal or quasi-criminal nature were made; and where there was data-specific electoral pre-condition and requirement for an outright win in the presidential election, such as those specified in Article 138(4) of the Constitution. In those instances, the standard of proof was beyond reasonable doubt. Despite there being different standards of proof in other jurisdictions across the globe, there was no justification to depart from the test applied in the Kenyan jurisdiction. There were therefore only two categories of proof in relation to election-related petitions in Kenya: the application of the criminal standard of proof of beyond reasonable doubt and the intermediate standard of proof.”

764. The question then is; which irregularity or malpractice was proved in this petition, and whether the irregularity or malpractice was substantial in nature, as to affect the results of the Homabay Gubernatorial elections of 9th August 2022. The Supreme Court in the Raila 2017 on the issue of what amounts to substantial irregularity and how it affects an election observed inter alia, that:

“....In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.”

765. At paragraphs 373 and 374, of the Raila 2017 case, the Supreme Court observed as follows in relation to the irregularities in light of Section 83 of the Elections Act:

“(373) It is also against this background that we consider the impact of the irregularities that characterized the presidential election. At the outset, we must re-emphasize the fact that not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so, there would hardly be any election in this Country, if not the world, that would withstand judicial scrutiny. The correct approach therefore, is for a court of law, to not



only determine whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it.

(374) In view of the interpretation of Section 83 of the *Elections Act* that we have rendered, this inquiry about the effect of electoral irregularities and other malpractices, becomes only necessary where an election court has concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in the *Constitution* or in that law. But even where a Court has concluded that the election was not conducted in accordance with the principles laid down in the *Constitution* and the applicable electoral laws, it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice.”

766. These constitutional underpinnings were applied by Mwongo J in the case of *Elizabeth Ongoro Amolo v Francis Kajwang Tom Joseph & 2 others* (2018) eKLR and reduced the principles flowing from Raila 2017 supra to the following three:

- a. Not every irregularity, not every infraction of the law is enough to nullify an election.
- b. The correct approach is for a court of law, to not only determine whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have seriously impacted the integrity of the election,
- c. To overturn an election, the irregularities must be serious and so negatively impact the integrity of the election and the result thereof, that no reasonable tribunal would uphold it.

767. In the instant petition, following the petitioners’ allegations of irregularities and malpractices and in a bid to determine whether the *Constitution* and statutory provisions were breached in the conduct of the 9th August 2022 Homabay Gubernatorial elections, this Court heard several witnesses on alleged violations of the law. The court also allowed the petitioners’ application for scrutiny and recount of votes in the 192 polling stations alluded to earlier. This was to assist this Court appreciate, first hand, the level of the alleged irregularities and malpractices complained of by the petitioners and whether those malpractices and irregularities complained of affected the election results as impugned in this petition. Thus, scrutiny and recount would be one of the methods by which this Court would get a first-hand account of how the impugned election was conducted and whether there were substantial breaches of the *Constitution* and the law as to affect the results impugned herein.

768. As stated earlier in this judgment, elections are not just an event but a process and therefore for elections to be found to have been validly held in conformity with the law and the constitutional dictates, it must meet the threshold set in the law as prescribed.

769. The scrutiny and recount exercise was carried out under the supervision of the Deputy Registrar of this Court as stipulated in the law and the report was filed in this Court and all parties were supplied with the said report and annexes and as earlier directed by the court, they were to file written submissions on the same.



770. I have perused and considered the scrutiny and recount report in light of the pleadings and the oral testimonies and the documentary evidence tendered in this Court as well as the submissions by the respective parties' counsel.
771. On the issue of recount of ballot papers, the Deputy Registrar found that:
- “On the recount of votes garnered by each candidate, it was found that in some instances the correctly marked ballot papers with clear intention of the voters were counted as rejected. Both the Petitioners and the 3rd and 4th Respondents appear to have been affected.”
772. The Deputy Registrar also found that “the results in forms 37A matched the results from the recount in majority of the scrutinized polling stations.”
773. From the scrutiny report findings, a table is provided at pages 18 to 39 showing what was unearthed during the scrutiny and recount as far as voters who were identified biometrically and manually were concerned. As earlier stated, there are both negative and positive variances and so were some 18 ballot papers not stamped among other minor omissions including absence of SD cards and form 37A not being found affixed on the ballot boxes but the that counterfoils were available and the results in the scrutinised form 37A matched the numbers of votes found in those ballot boxes.
774. I have, in my evaluation of the assertions and evidence adduced by the respective parties on each of the issues framed herein applied myself to the burden and standard of proof required in each allegation alongside the findings of the scrutiny and recount report, after perusing the primary documents annexed. I am unable to find instances where the Homabay Gubernatorial elections of 9th August 2022 was conducted short of the constitutional and legal threshold set out herein.
775. It is acknowledged that there were some infractions such as the one noted in instances of violence alluded to earlier in the few polling stations, which I have found to have been sporadic and did not therefore affect the result of the election as impugned herein.
776. There were allegations of the 1st respondent's election officials allowing into the polling stations multiple agents for the 3rd and 4th respondents yet the law only allows one agent per candidate or party. However, there was more than sufficient evidence that the petitioners too had in most polling stations, more than one agent who signed in the PSD. There were allegations that voting was marred with vote padding and ballot stuffing, transmission of false results, exaggeration of voter turnout, irregular and unlawfully assisted voting in favour of the 3rd respondent and unlawful ejection of the petitioners' agents from polling stations.
777. I have found that there was no evidence adduced to prove these allegations to the required standard. there was allegation of voter bribery in various polling stations, that more votes were cast than what was identified in the KIEMS kit, voter inflation and potential ballot stuffing, voter suppression and voter apathy, alterations of statutory forms without countersigning by election officials and that such alterations were done to give the 3rd respondent an unfair advantage, and that in polling stations where the petitioners garnered more votes, the same were swapped with impunity by fraudulent presiding officers and their deputies. It was alleged that the 3rd respondent, her husband and agents moved around the county inducing voters to vote for her and that her said husband also moved with goons who terrorised agents of the petitioners and even assaulted them and demanded that counting of votes be hastened. There were serious allegations of failure by the electoral officials to sign and stamp electoral forms such as form 37As, 37Bs and 37Cs; that agents for the petitioners were prevented from signing form 37As and that ballot papers were not stamped. All these allegations, among others, I have found, were not proved to the required standard.



778. Back to the earlier position stated on the burden and standard of proof in instances of anomalies that can lead to the nullification of an election, I am unable to find evidence of infractions that could lead to this Court reach a finding that the 9th August 2022 Homabay Gubernatorial election was conducted in a manner that violated the Constitution and the electoral law.
779. In the circumstances, I find that the impugned election was conducted in substantial conformity with the constitutional dictates and the electoral law.

L. What are the findings of the scrutiny report and whether the findings negate the election results of the Homabay Gubernatorial election

780. I must now dedicate some paragraphs exclusively to the scrutiny and recount exercise and report although I have already considered it in the issues discussed above.
781. The order for scrutiny and recount follows the petitioners' application dated 29th September, 2022 and allowed by this Court on 18th November, 2022 and later amended by the ruling delivered on 26th November, 2022 clarifying on the polling stations to be subjected to scrutiny and recount. The scrutiny was to cover 195 polling stations spread across the eight constituencies in Homabay County. However, it turned during the scrutiny exercise that 3 polling stations had been repeated and 2 polling stations were non-existent reducing the number of such polling stations to 192. The exercise was supervised by the Deputy Registrar of this Court assisted by judicial staff in the presence of the parties' advocates and agents.
782. The prayer for the scrutiny and recount as stated by the petitioners was that the declaration form for the results for the gubernatorial election (form 37C) was neither signed nor stamped by the 2nd respondent thus raising serious questions as to the entire verification and tallying process. The petitioners further faulted the alleged serious and glaring inconsistencies between the number of votes cast for governor per polling station recorded under form 37A and the number of people identified by the KIEMS kits. At the end of the scrutiny and recount exercise which took a much longer period than the earlier ten days allocated, the Deputy Registrar filed her Report dated 4th January 2023.
783. From the said report, following the Order for scrutiny and recount, the parties agreed that the exercise covers the following nine broad areas:
- i. Scrutiny of ballot boxes which entailed checking integrity of ballot boxes and seals,
 - ii. Recount of votes garnered by each candidate and compare the recount results with that in Form 37As.
 - iii. Confirmation that the serial numbers on each ballot paper matched the used counterfoil,
 - iv. Scrutinize the number of counterfoils used on the polling day,
 - v. Scrutiny of forms 37As to confirm that each vote had the visible security features,
 - vi. Comparison of the Original form 37As and the certified result (carbon copy) of the form 37A found in the Ballot Box for the polling stations which required scrutiny of forms 37As,
 - vii. Serial number of the form 37A booklet used if any and matching them with Polling Station Diary (PSD),
 - viii. Scrutiny of the SD cards to ascertain the number of voters identified by the KIEMS kits on the voting day; and,



- ix. General observations from the exercise.
784. I observe that the parties never raised any issue of non- signing of Form 37C by the 2nd respondent as had been alleged by the petitioner hence I will say no more on that.
785. In the scrutiny and recount report, the Deputy Registrar observed as follows:
- a. On the scrutiny of ballot boxes, she found that out of the 192 ballot boxes, 190 were intact and two ballot boxes had a breakage on the side.
 - b. On the recount of votes garnered by each candidate, it was found that in some instances the correctly marked ballot papers with clear intention of the voters were counted as rejected. Both the Petitioners and the 3rd and 4th Respondents appear to have been affected. She also found that the results in forms 37A matched the results from the recount in majority of the scrutinized polling stations.
 - c. On scrutinizing the SD cards, the Deputy Registrar found instances where the persons identified by the KIEMS matched with the total votes cast as per form 37A and as per the counterfoils used and, in some cases, KIEMS identified more or less voters compared to the number of votes cast.
 - d. As regards verification of recounted ballot papers vis –a- vis the number of Counterfoils used, the Deputy Registrar noted that all the ballot papers’ serial numbers in all the respective ballot boxes had their corresponding counterfoils matched and, in few instances, the counterfoils lacked their corresponding ballot papers found in the ballot box for gubernatorial election, and that this was averagely three counterfoils without corresponding ballot papers thus, $3 \times 192 = 576$.
 3. According to the scrutiny and recount report, counterfoils from the following eight polling stations were missing: 1. Takawiri Primary 1; God Joje Primary School; Kamayoge 2/2; Wanga Primary 1/1; Nyasanja Primary 1/1; Rinya Primary 1/1; Kianyumba Primary 1/1; and Ongeti primary 1.
 - e. On the scrutiny of form 37A, the report indicates that all the forms’ Security features of the printed scanned original copies revealed that they were authentic forms and that all of them were signed by either the presiding officer or the deputy presiding officer or both.
786. The foundation of a scrutiny report is found in section 82(1) of the [Elections Act](#) which provides that:
- “An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.”
787. The same is also provided for under Rules 30 and 31(1) of the [Elections \(Parliamentary and County Elections\) Petition Rules, 2017](#) which provides that:
30. A petitioner may apply to the court for An order to recount the votes or examine the tallying. Scrutiny.
 31.
 - (1) The parties to the proceedings may, at any stage, apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.



788. The scope of the scrutiny and recount is provided for under Rule 31(4). The purpose to be achieved by conducting scrutiny and recount of votes has been the subject of litigation in our electoral system and there are a number of judicial pronouncements on the subject. In *Peter Gichuki King'ara v Independent Electoral and Boundaries Commission & 2 others* [2014] eKLR, the Court of Appeal; (Visram, Koome & Odek JJA), held that:

“As it was held in the case of; *Said v Hemed* (2008) eKLR (ED) 323. The aim of a recount is to assist the Court to establish the correctness or otherwise of the allegations by a petitioner. Also, a recount is meant to assist the Court in its duty to investigate the validity of alleged breaches of the law and the irregularities.”

789. The Supreme Court's position on the purpose and essence of scrutiny exercise in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 3 Others*, [2014] eKLR was that the scrutiny and recount report serve the following purposes:

- “(i) it enables the Court to ascertain whether the allegations, irregularities or breaches of the law complained of, are valid;
- (ii) it enables the Court to ascertain the valid votes cast in favour of each candidate;
- (iii) it is not meant to unearth new evidence to sustain a petition; its purpose is to enable the Court to verify the allegations made by the parties — allegations which must be founded on formal pleadings;
- (iv) it is one of the devices for enabling the Court to ascertain whether an election has been conducted in accordance with constitutional principles, and to establish that, indeed, the declared result was a reflection of the electorate's will at the time of voting;
- (v) it is a mechanism of proportionate design, for rectifying election results, and declaring the valid outcome — a process which obviates the necessity to annul the entire election outcome, or, alternatively, the validation of an erroneous electoral outcome.”

790. In the circumstances of this petition, I find that the scrutiny and recount exercise was meant to confirm the specific allegations raised by the petitioners regarding the conduct of the HomaBay gubernatorial election and more specifically as contained in the application dated 29th September, 2022 and the ruling delivered on 18th November, 2022 as reviewed on 26th November, 2022.

791. Having stated the purpose sought to be achieved by conducting the scrutiny and recount exercise, the next step is to determine whether the Court is bound to consider the scrutiny report and if it should, what probative value should this Court attach to the findings in the report, in view of the reservations made by the petitioners' counsel in their submissions on the said report.

792. On this question, I find the Supreme Court's decision in the case of *Cyprian Awiti & another v Independent electoral and boundaries commission & 2 others* [2019] eKLR to be instructive. In that



case, the Supreme Court faulted both the High Court and the Court of appeal for failing to consider the scrutiny report and stated as follows:

“(92) ...it is now well established that once a trial Court orders the conduct of scrutiny, the resulting findings are as good as the findings of the Court itself^{3/4} and that, on this account, the Court must take such findings into account.

[94A] Moreover, in the absence of the findings of the scrutiny report, the trial Court had no reference-point in judging the magnitude of the impact of any electoral irregularity such as may have prevailed, upon the electoral outcome.”

793. It was further held in *Clement Kungu Waibara v Hon. Annie Wanjiku Kibeh & 2 Others*, (2019) eKLR that:

“(52) In view of such considerations, we are in agreement with the Appellate Court’s standpoint that the trial Court ought to have ascertained whether the irregularities revealed by the process of scrutiny, did affect the outcome of the election. It was clearly inapposite to settle the dispute on the basis of any conjecture, however logical.”

794. In the instant case, the scrutiny and recount report was filed after all the witnesses had testified and I directed the parties to record their views on the report in their written closing submissions.

795. The petitioners disputed the scrutiny report as false for the following reasons, among others:

- a. All the forms scrutinised were either scanned or carbon copies and therefore it was not possible to verify all the security features as alleged in the Report. A case in point: It is impossible to verify a water mark on a scanned or carbon copy.
- b. No original Form 37A was availed and therefore the finding in relation to the fact of original form 37As bearing signatures and stamps is false as no original Form 37A’s were availed in the first place.

796. In light of this, the petitioners prepared and filed in court their own parallel report dated 11th January, 2023 and urged the court in reviewing the same to also look and confirm from the primary data documents signed by parties’ agents supplied to this court together with the Report.

797. According to the petitioners’ counsel, the primary documents which are the source materials are glaringly at variance with the conclusions and or findings arrived at in the report.

798. The scrutiny and recount report is queried in some other aspects for instance the findings on the SD cards. That whereas the report indicates that 192 cards were examined, the petitioners on their part assert that a total of 19 cards were missing thus the report is inaccurate. This is evident from the report and as stated in the preceding paragraphs.

799. The other limb of contest regards the counterfoils compared with the recounted ballot papers. That in the instant case, counterfoils from 21 polling stations were missing yet the report states that all the ballot papers serials in all the respective ballot boxes had their corresponding counterfoils matched.

800. The petitioners also cast doubt on the report’s findings on the issue of forms 37A. That in as much as the report indicates that all forms 37A had security features, none of the original forms were availed for scrutiny since all the forms scrutinized were either scanned or carbon copies.



801. Further challenge is that according to the report, for example in Kamwala Primary School Polling station, (Karachuonyo Constituency) 2 of 3, form 37A shows that there were 11 rejected ballot papers while the scrutiny report indicates that there were 10 rejected ballot papers and 1 stray ballot, 3 were marked in favour of Kidero and 7 in favour of Wanga. In Kisegi Primary School Polling Station, 1 of 1, form 37A has a note that there were 8 rejected ballot papers, 6 of them were not marked, one was not rightly marked and the other one had the portrait of a pot.
802. That in the scrutiny report, the Deputy Registrar further found that none of those rejected ballots papers was validly marked for Dr. Evans Kidero and that 1 in favour of Wanga and 7 were validly rejected. In Nyandiwa Primary School Polling Station 2 of 2 of Rangwe Constituency, the total number of rejected votes is indicated as 7, out of which 1 vote was validly marked in favour of Wanga and none for Kidero. The petitioners, maintained that the report by the Deputy Registrar was misleading and untrue.
803. The question is whether, the exercise having been sanctioned by the Court, and the parties having agreed to the process and how the exercise was being conducted until the report was filed, the petitioners are entitled to disassociate themselves with the findings therein?
804. As established by case law stated above, a scrutiny exercise is not one in futility. The trial Court is to consider the report as a matter of law and fact and the report cannot just be discarded because of one of the parties does not agree with all or some of the findings therein. To the contrary, the report should assist the Court in resolving the dispute raised by the party seeking scrutiny.
805. It is a principle law that a party is bound by his pleadings. In this case, the petitioners had pleaded a scrutiny and recount in specific polling stations, where they deemed malpractices had occurred. The petitioners cannot therefore turn back and seek to dispute the findings thereof which were not part of what they had pleaded as this was their plea to this Court. It is worth reiterating what I stated in the ruling for scrutiny and recount that a scrutiny or recount is not a fishing expedition for a party.
806. Further, I find that the scrutiny exercise was witnessed by the petitioner's advocates as well as agents who signed off on all the necessary documents at the commencement and close of the exercise. I get it that the purpose of appending their signatures is an indication that they agreed with the scope of scrutiny and the findings as recorded in the signed forms.
807. The scrutiny report is very instrumental in establishing the correctness of the allegations raised by the petitioners on the manner in which the elections were conducted. The scrutiny report is a very crucial document that goes to assist the litigants dispose of the dispute effectively once the points of contention have been identified and to this extent, it is worth consideration by the court to the extent that if there is no sufficient explanation tendered by the respondents for the anomalies, the report is sufficient to lead to the nullification of the elections.
808. As relates to the scrutiny of forms 37A, it is worth repeating here that the petitioners' contention was addressed by the testimony of DW-1, Fredrick Apopa who testified that all original forms 37A were with the Chief Executive Officer in Nairobi and therefore at the time of conducting such scrutiny, the original forms were not available. From the scrutiny report, the Deputy Registrar has indicated that they used original scanned copies and although she referred to the said Form 37As as 'original Form 37As', I agree that the said original forms were not available during scrutiny and recount exercise.
809. This information was within the petitioners' knowledge at the time of commencement and conclusion of the scrutiny exercise and no issue was raised with this court on the non-availability of original Form 37As at the commencement of the scrutiny exercise. This Court having ordered for availability of the original Form 37As, at the request of the 1st and 2nd respondents' counsel so that the said forms could



be released from Nairobi, it was expected that the petitioners would insist that the original Forms be availed before the scrutiny exercise begins and ends.

810. There was also no protest over the use of the scanned copies for scrutiny and neither did the petitioners approach this Court on the noncompliance with the order for production of original F37As as it was the 1st and 2nd respondents' counsel who urged the Court to make that order so that the Chief Executive officer of the Commission could avail them. Furthermore, it is not disputed that from the report of the Deputy Registrar, all the scrutinised forms were subjected to authenticity test and it was found that they were all signed and stamped and that the Security features (QR codes) of the printed scanned original copies revealed that they were authentic forms. see page 40 of the report.
811. On the missing SD Cards, the report primary documents and the table at pages 14 to 39 of the report by the Deputy Registrar is clear that indeed 19 SD Cards were missing. However, even in those 19 cases of missing SD Cards, there was no variance or discrepancy between the total number of valid votes cast in favour of the petitioners, Mr. Rabudi and the 3rd and 4th respondents and the valid votes cast in favour of each of the three candidates as per Form37A.
812. Further, although the petitioners claim that some 21 counterfoils were missing, I have established that in those cases where the counterfoils were missing, the variance was found to be three on average for the 192 polling stations securitized which is $3 \times 192 = 576$ which could not have affected the overall results of the impugned election. Only one polling station had some ballot papers lacking the corresponding counterfoils but that the ballot paper serials were correctly captured in the Polling Station Diary to be among the counterfoils used, while the available counterfoil were loosely attached and pieces scattered in the ballot box. Therefore, although some of the Deputy Registrar's comments on findings are inconsistent with the findings as per the Table 4 which also has some minor inconsistencies with difference in figures being negligible i.e 11 instead of 10, and the primary data in the signed documents, I have examined the Table 4 alongside the primary documents signed by parties hereto and their agents and I find no discrepancies in them. The Table 4 is a summary of what is in those bulky documents.
813. As earlier discussed, the allegation of voter inflation is discounted by the explanation given that where some voters could not be identified by KIEMS, they were authorized and allowed to vote manually. There is no evidence that those who voted manually did so in favour of the 3rd respondent. Again, on alleged voter suppression, there is no credible evidence that people who turned up to vote were not allowed to vote so as to disadvantage the petitioners.
814. From the petitioners' parallel report on scrutiny and recount, it is clear that the petitioners were on a fishing expedition for evidence to support their petition. That is not permissible. In the end, having examined the scrutiny and recount report and documents placed before this court on the exercise, I am unable to find that the findings negate the results of the impugned election. I am equally unable to find any evidence that there were deliberate irregularities or illegalities of such magnitude that would alter the final valid votes cast in favour of the 3rd and 4th respondents and the petitioners.

M. What orders should this court make

815. The petitioners sought the prayers contained in the petition alleging that the impugned elections were conducted in total contravention of the law. Notable among their grievances is the allegation that the 5th respondent's ODM party nominations unfairly edged the 1st petitioner out in favour of the 3rd and 4th respondents. The first petitioner alleged that the 1st and 2nd respondents conducted the election in total breach of the law and therefore the results failed to meet the Constitutional test, statutory provisions and the Rules and Regulations made thereunder.



816. The petitioners' sought a number of prayers contained in the petition stated earlier in this judgement which are:

- i. Prayers (a)-(f) relate to An order for preservation of election materials and scrutiny and recount thereof. These prayers were spent through the grant of orders for preservation of electoral materials and orders of scrutiny and recount in 192 polling stations.
- ii. Prayers (h) and (i) relates to declaration of violation of the petitioners' constitutional rights under Articles 27(4) and (5) and 38(1)(c) of the Constitution by the 3rd and 5th respondents. As stated in the preceding paragraphs, the allegations levelled against 5th respondent in this petition dates back to the party nominations and the alleged role that the ODM party played in the Homa Bay gubernatorial elections on 9th August, 2022. As discussed above, none of these allegations were satisfactorily proved against the 3rd and 5th respondents. In the circumstances, this prayer is declined and dismissed.
- iii. On prayers (j), (m) and (n), relating to the prayers for the declaration that the 3rd respondent was not validly elected and the 1st respondent to conduct fresh elections, my finding on the issue of whether the election was conducted in conformity with the law suffices. In the circumstances, these prayers are found to be devoid of merit and are fit for rejection. The prayers are therefore hereby declined and dismissed.
- iv. On the prayers for a finding of commission of electoral offences as sought in prayers (k), (l), (o), and (p), my finding is that the same has been dealt with sufficiently in the preceding paragraphs dealing specifically with the mentioned offences. The petitioners have not discharged the legal burden and standard of proof in proving the said offences. The prayers are found to be without merit and the same are hereby dismissed.
- v. Section 87(2) of the Elections Act provides that:

“Where the election court determines that an electoral malpractice of a criminal nature may have occurred, the court shall direct that the order be transmitted to the Director of Public Prosecutions.”

817. As already found, there were instances of violence at various polling stations stated above. Having found that these incidences were sporadic and isolated and attributable to none of the respondents and the cases having been reported to the police for investigations and action, I find no compelling reason to issue an order of investigations by the Director of Criminal Investigations as prayed. This prayer is thus rejected and dismissed.

N. Who should bear the costs of the instant petition?

818. On the issue of costs, the 1st and 2nd respondents submitted that costs follow the event and therefore urged the court to dismiss the Petition with costs to the Respondents and that the said costs be certified for 3 advocates on behalf of the 1st and 2nd Respondents.

819. On the part of the 3rd and 4th respondents, it was submitted that Section 84 of the Elections Act requires the election court to award costs to the winner of an election petition following the general principle that the successful party is entitled to costs of the litigation.

820. It was the respondents' submissions that the hearing of the petition was quite laborious taking into account the number of issues pleaded and which the Respondents had to respond to, the voluminous record of documents filed by the Petitioners in support of the Petition, the number of witness affidavits



to which the Respondents had to respond, the number of hearing days and man hours spent at the hearing of the Petition, the extensive and laborious scrutiny and recount exercise involving more than 190 ballot boxes and more than 190 forms 37A and the several interlocutory applications argued in the course of the hearing and as such they urged this court to cap the costs for the 3rd & 4th respondents at Kshs. 30,000,000/-

821. On the 5th respondent's part, it was submitted that as the petitioner sought no relief against the 5th Respondent, then the court had no jurisdiction as the court's jurisdiction flows from the reliefs sought by a party and thus it submitted that its participation be struck out of the petition and the petition be dismissed with costs.

822. The issue of costs is provided for under section 84 of the *Elections Act* which provides that:

“An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.”

823. A more elaborate illustration is provided by Rule 32 of the *Elections (Parliamentary and County Elections) Petition Rules*, 2017 which provides that:

(1) The court shall, at the conclusion of a petition, make an order specifying—

- (a) the total amount of costs payable; and
- (b) the persons by and to whom the costs shall be paid.

(2) When making an order under sub rule (1), the court may;

- (a) disallow any costs which may, in the opinion of the court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the petitioner or the respondent; and
- (b) impose the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not, in order to discourage any such expense.

824. A guide in awarding costs was stated by the Supreme court in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* [2014] eKLR where the court stated that:

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”

825. It is not in doubt that this petition was voluminous, running into thousands of pages, the responses too and the attention required by the [court] and counsel to peruse and make responses to the specific allegations raised by the petition. A lot of effort was put in by the parties and their respective counsel. Hearings were quite lengthy entailing a lot of attention. All the parties put up the much effort required



and are commended for that. This court must therefore make an order of costs and determine who to pay such costs and to who.

826. On how much costs to award and to who, jurisprudence on the issue of costs has come a long way, from the days when costs were excessively high to the era of capping as provided for under Rule 32.

827. The rationale for keeping costs at the minimum was discussed by the Court of Appeal in *Martha Wangare Karua v IEBC & 3 others* (2018) eKLR where the Court expressed itself thus:

“... In our understanding, the capping of costs provided under rule 30 of the Petition Rules, 2017 was to ensure that parties approach courts without fear of being subjected to excessive costs. Despite this rule, the current trend in the capping of costs at inordinately high amounts shows that we are going back to the era where costs in election petitions were very high. Capping of costs was intended to curb the practice of awarding large sums in costs. High costs are an impediment to the right of access to justice and are not meant to be punitive...It is up to the election court to determine whether a party would be awarded costs or not and in doing so the court must be guided by the principles of fairness, justice and access to justice. It is meant to compensate a successful litigant. It is not a punishment or a deterrent measure to scare away litigants from the doors of justice...”

828. The above position was affirmed by the same Court in the *Cyprian Awiti case* (supra) which formulated the criteria for award of costs. The court gave the following guidelines:

- (a) the general rule that “costs follow the event” is applicable in election matters in which no special circumstances are apparent;
- (b) however, an election Court holds discretion in reserve, for awarding costs as merited by the occasion;
- (c) a discretion vests in the election Court to prescribe a ceiling for the award of costs;
- (d) in setting a ceiling to the award of costs, the election Court stands to be guided by certain considerations, namely:
 - (i) costs are not to be prohibitive, debarring legitimate litigants from moving the judicial process;
 - (ii) inordinately high costs are likely to compromise the constitutional right of access to processes of justice;
 - (iii) costs are not to bear a punitive profile;
 - (iv) Courts, in awarding costs, are to be guided by principles of fairness, and ready access to motions of justice;
 - (v) costs are intended for decent and realistic compensation for the initiatives of the successful litigant;
 - (vi) costs are not an avenue to wealth, and are not for enriching the successful litigants;
 - (vii) the award of costs shall not defer to any makings of opulence or profligacy in the mode of conduct of the successful party’s cause.

829. On whether to certify costs for the 3 advocates appearing for the 1st and 2nd respondents, I am of the view that this petition was not that complex to require the services of 3 advocates, although the 1st and



- 2nd Respondents had the liberty of hiring more advocates for their own convenience but not at the expense of any other party to the petition.
830. The conduct of the hearings was coordinated in such a way that counsel would share amongst themselves in advance, the names of witnesses set to testify on a given day. Therefore, with adequate preparation, one advocate would comfortably handle the hearing. It was for this reason that even when one of the petitioner's counsel was said to have suddenly fallen ill, this court declined to adjourn the hearing as there were two advocates on standby who had participated in the proceedings from the onset and therefore the petitioners were in no way disadvantaged by the absence of one of their advocates.
831. In the circumstances I decline to certify costs for 3 advocates appearing for the 1st and 2nd respondents. Kenya shillings 30,000,000 as claimed by the 3rd and 4th respondents as costs is in my view unconscionable, prohibitive and impedes access to justice.
832. I will therefore determine what costs are payable based on the above established legal principles. From the cited legal provisions and the case law, the award of costs is a discretionary exercise which discretion ought to be exercised judiciously by considering the various principles enumerated above. Parties should not be dissuaded from approaching the court for fear of being subjected to unreasonable and unconscionable colossal sums of money in costs arising out of election petitions.
833. I have also examined the previous election disputes where costs were awarded. In Election Petition No. 3 of 2017-*Jackton Nyanungo Raguma v IEBC & 2 Others*, after the case was fully heard, the 1st and 2nd Respondents as well as the 3rd respondents were each awarded Kshs 2,500,000.
834. In Election Petition No. 1 of 2017- *Jeremiah Ngwara Matoke v IEBC & 2 Others*, after the Petition was fully heard, the costs were capped at Kshs 2,000,000/-for the 1st and 2nd Respondent and Kshs 3,000,000 for the 3rd Respondent.
835. Taking a cue from the above judicial pronouncements, and mindful of the hard global and domestic economic times, I hereby exercise discretion and order that the petitioners herein jointly and severally shall pay to the respondents herein costs of this election Petition capped at Kshs 3,500,000/- to be appropriated to the respondents such that the 1st and 2nd respondents are awarded costs not exceeding Kshs 1,000,000/- subject to taxation while the balance shall be shared out between the 3rd and 4th Respondents and the 5th respondent subject to a maximum of Kshs 1,500,000 in favour of the 3rd and 4th Respondents subject to taxation and the balance of Kshs 1,000,000 in favour of the 5th Respondent being the maximum payable subject to taxation by the taxing master.
836. Finally, having found that the Homabay Gubernatorial elections held on 9th August 2022 were conducted in accordance with the *Constitution* and the law, and now, pursuant to the provisions and dictates of section 86(1) of the *Elections Act*, I hereby declare and certify that the 3rd Respondent Gladys Atieno Nyasuna Wanga was on 12th August, 2022 validly elected as the Governor, HomaBay County following the 9th August 2022 elections.
837. Therefore, pursuant to the provisions of Section 86 (1) of the *Elections Act*, a Certificate as to the validity of the election of Gladys Atieno Nyasuna Wanga as the Governor for Homabay County shall forthwith be issued to the Independent Electoral and Boundaries Commission (I.E.B.C.), (the 1st Respondent), the Speaker of the Senate and to the Speaker of the County Assembly of Homabay.
838. As I pen off, I wish Godspeed healing of hearts and reconciliation to the parties hereto who are both leaders in their own right and who are hereby implored to extend their diplomatic hands towards each other as in every duel, there must be a winner and a loser, whichever way they look at it. For those aggrieved and wish to ventilate their grievances to higher levels, this court as a trial court having



said what it saw and heard first-hand, gives them blessings, for their right of appeal is constitutionally guaranteed.

839. My appreciation goes to all parties and counsel including my legal research team and court assistants, secretaries, security together with and under the supervision of the Deputy Registrar who accorded the court support, cooperation and industry and making it possible to reach and render this verdict within the constitutional and statutory timelines. I couldn't have had any better team than this.

DATED, SIGNED AND DELIVERED AT HOMABAY VIRTUALLY THIS 7TH DAY OF MARCH, 2023

HON. R.E ABURILI

JUDGE OF THE HIGH COURT

