



REPUBLIC OF KENYA



Kibathi v Independent Electoral & Boundaries Commission & 2 others (Election Petition E002 of 2022) [2023] KEHC 1697 (KLR) (6 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1697 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
ELECTION PETITION E002 OF 2022**

JN NJAGI, J

MARCH 6, 2023

BETWEEN

PETER KUNG'U KIBATHI PETITIONER

AND

**THE INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 1ST
RESPONDENT**

**THE RETURNING OFFICER, GATUNDU SOUTH CONSTITUENCY,
MAURICE OWINO LIGULU 2ND RESPONDENT**

GABRIEL GATHUKA KAGOMBE 3RD RESPONDENT

JUDGMENT

1. The Petitioner in this election petition was vying for the position of Member of National Assembly for Gatundu South Constituency in the August 9, 2022 General Elections as an independent candidate whereas the 3rd Respondent was contesting the same position on a United Democratic Alliance (UDA) Party. The 2nd Respondent was the Returning Officer for the constituency and returned the 3rd Respondent the winner after garnering 17,815 votes against those of the Appellant as the runner up at 15,417 votes.
2. The Petitioner was dissatisfied with the outcome of the election and filed the pertinent election petition. He contends that the election was marred with a myriad of malpractices, non-compliance with the law, commission of electoral offences and lapses in judgment by the electoral officials to the extent that the same did not meet the constitutional, statutory and regulatory thresholds required of a free, fair credible and transparent election.
3. The Petitioner seeks for orders that:



1. The election for the Member of National Assembly for Gatundu South Constituency was not conducted substantially in accordance with the Constitution and the relevant electoral laws and the results returned therefrom be declared invalid, null and void.
2. The returning of the 3rd Respondent as the elected Member of National Assembly for Gatundu South Constituency by the 2nd Respondent be declared null and void.
3. An order be issued directing the 1st Respondent to conduct a fresh election for the Member of National Assembly for Gatundu South Constituency in conformity with the Constitution and the Elections Act.
4. The costs hereof to be borne by the Respondents.

A. Grounds In Support Of The Petition –

4. The Petitioner accused the 3rd Respondent of being involved in the following malpractices during the election period:
 - a. Engaging in massive voter bribery both inside and outside various polling stations in flagrant violation of the provisions of the Elections Act, 2011 and the Election Offences Act, 2016
 - b. Campaigning outside the official gazetted campaign period on the 8th and August 9, 2022.
 - c. Misleading, coercing, intimidating, bullying and compelling voters to vote for him under the guise of ‘six-piece’ and ‘yellow’ voting in polling stations on the polling day.
 - d. Intimidating and/or unfairly influencing the Presiding Officers in the polling stations to allow six-piece voting and to mark all six-piece/yellow votes in favour of the 3rd Respondent without reading out the names of the candidates.
 - e. Harassing and insulting the Presiding Officers and the Returning Officer at the Tallying Centre to declare him the winner before tallying and verification process was complete.
5. The Petitioner further accused the 1st and 2nd Respondents of the following malpractices:
 1. Violating the constitutional, statutory and regulatory requirements relating to assisted voters in that they:
 - (a) Denied agents, particularly those of the Petitioner, the right to participate in the elections and to witness the assisted voters contrary to the statutory requirements.
 - (b) Alienated the agents of the Petitioner in witnessing the assisted voters in wanton disregard and violation of the law in a concerted bid to tilt the election in favour of the 3rd Respondent.
 - (c) Illegally and maliciously rotating agents in witnessing the assisted voters, well aware that the petitioner had one agent per polling station and thereby violating the express provisions of the Elections Act, 2011 and the Election (General) Regulations 2012 as amended by the Elections (General) (Amendment) Regulations 2017.
 - (d) Illegally and maliciously eliminating/excluding the Petitioner’s agents in some polling stations in witnessing the assisted voters contrary to the express provisions of the above stated provisions.



- (e) Through the Presiding Officers, marked 'six piece' and 'yellow' voting for assisted voters in favour of the 3rd Respondent without reading out the names of all those contesting the position of Member of National Assembly in contravention of the principles of transparency and fairness and in express provisions of the above stated provisions.
- (e) Through the Presiding Officers and contrary to the express provisions of the law, marked ballot papers in favour of the 3rd Respondent even after being told that a voter wanted six piece and the Petitioner.
2. Through the Presiding Officers and their deputies, violated the provisions of Article 81(e) of the [Constitution of Kenya, 2010](#) by openly campaigning for the 'six piece' and 'yellow' voting to the voters queuing to vote.
 3. Openly campaigning for the 3rd Respondent during voting by assisted voters in some polling stations by loudly and repeatedly reading out the name of the 3rd Respondent while faintly, inaudibly and with a sense of a hurry thumbing through the other names including that of the Petitioner, hence giving undue advantage to the 3rd Respondent.
 4. Violating the provisions of Article 81(e) of the [Constitution of Kenya, 2010](#) by printing the photograph of the 3rd Respondent with his party colours tilting the scale in favour of the 3rd Respondent and according him undue advantage over the other candidates, especially the Petitioner.
 5. Violating the provisions of Regulation 68 of the [Elections \(General\) Regulations 2012](#) as amended by the Elections (General) (Amendment) Regulations 2017 by allowing the photograph of the 3rd Respondent to be depicted in his party colours while denying the other candidates similar treatment.
 6. Conducting the election in a manner inconsistent with the provisions of the [Constitution of Kenya, 2010](#) by altering the total count of votes in the following polling stations in favour of the 3rd Respondent: Mavuria, Kirangi, Munyu-ini, Karinga, Kamutua, Ruburi, Mutomo, Kimunyu, Kahugu-ini, Gathuri, Githuya, Wamwangi, Nembu, Kiamoria, Gachika and Kiganjo Polytechnic.
 7. Conducting the election in a manner inconsistent with the [Constitution of Kenya, 2010](#) by adopting an opaque counting and tallying system where marks in the ballot papers were not shown to the Petitioner's agents who were kept a distance away from the counting table as a result of which the votes garnered by the 3rd Respondent were inflated while those of the Petitioner were reduced in flagrant violation of the principles of fairness, verifiability and transparency of elections.
 8. Conducting the election in a manner substantially inconsistent with the [Constitution](#) by denying agents of the Petitioner entry into the Tallying Centre at Gatundu Education Hall thereby denying the Petitioner through his agents the opportunity to verify whether the entries in Forms 35B and 35C tallied with those in Form 35A.
 9. Conducting the election in a manner substantially inconsistent with the [constitution of Kenya 2010](#) and the written laws relating thereto by mishandling election forms and other election materials, allowing access by 3rd parties to ballot papers, election forms, seals to ballot boxes and other crucial election materials thus incurably denting the credibility and integrity of



the elections and the purported results therefrom. This was done in Nganda Chief, Nganda Primary, Mutati Dispensary, Githioro Nursery, Nembu Primary, Kamutua Primary, Ituro Primary, Gathage Primary, Ndundu Secondary and Karinga primary.

6. As a consequence of the malpractices and violations complained of above, the Petitioner contended that the election of Gatundu South constituency Member of National Assembly was not free, fair nor transparent and should thus be declared invalid, null and void.

B. Response By The 1st And 2nd Respondents –

7. The 1st and 2nd Respondents contend that the election for Gatundu South constituency was conducted in strict compliance with the Constitution, the Elections Act , 2011 and the Elections (General) Regulations 2012 as amended by the Elections (General) (Amendment) Regulations, 2017 and all applicable laws. They further asserted that the elections were conducted in an impartial, neutral, efficient, accurate, open, transparent and accountable manner as prescribed in the Constitution and other applicable laws and regulations. They contended that the allegations made against them are untrue and unfounded.
8. The two Respondents said that they are not privy to any conduct attributable to the 3rd Respondent that impacted the election in such a manner that it failed the constitutional test. They said that they are strangers to acts and omissions alleged to have been committed by the 3rd Respondent such as voter bribery and campaigning outside the gazetted official period as none was brought to their attention. They denied all the allegations as set out in the petition and said that the petition lacks merit and should be dismissed with costs to them.

C. Response For The 3rd Respondent

9. The 3rd Respondent in his response stated that the election for Gatundu South Constituency was conducted in a manner that was free, fair, transparent, verifiable, impartial, neutral, accountable and free from violence, corruption, intimidation and in accordance with the general principles of the election system enshrined in the Constitution of Kenya and the election laws of the land. Therefore, that the election of the 3rd Respondent was valid.
10. In respect to the allegations of malpractices during the campaign, the 3rd Respondent stated that he fully complied with the code of conduct prescribed by the 1st Respondent in accordance to Article 84 of the Constitution of Kenya 2010, section 110 of the Elections Act 2011 and all Election Regulations as prescribed. Neither did he nor his agents commit any election offence as there is no complaint registered with the 1st Respondent or the respective authorities relating to any election offence with regard to the subject election. That he fully abided by the times set for the campaign and conducted his last campaign on the 5th August and on the 6th of August he participated in the presidential campaign and did not conduct further campaigns.
11. The 3rd Respondent denied that he received any kind of support from the 1st and 2nd Respondents in terms of campaign or otherwise. He denied that he or his supporters forced anyone to vote for him. He stated that all agents had opportunity to witness the assisted voters albeit interchangeably in most stations. That the affidavits of the Petitioner's witnesses confirm that some stations had as many as 20 agents and it would be unreasonable to have all those agents surrounding a voter at the voting booth.



D.The Evidence

The evidence for the Petitioner -

12. It was the evidence of the Petitioner that the election for Gatundu South Constituency was not conducted in accordance with the law. He stated that the election was marred with a myriad of election malpractices and irregularities that were committed during the campaign period, during the voting process, during the counting and tallying of votes. The Petitioner stated that there was mishandling of election materials by the officers of the 1st Respondent. That as a result of the malpractices, errors and mistakes, the election was not free and fair.
13. The Petitioner testified as PW1 in the case and called 11 witnesses. The chief agent for the Petitioner, Patrick Ng'ang'a Gitangu PW2, testified that his duties were to coordinate the election on behalf of the Petitioner. He and other agents were trained by IEBC on the Electoral Code of Conduct.
14. That on the polls day he voted at Mutomo Primary school polling station. When he was voting he realised that the photograph of the 3rd Respondent that was on the ballot paper was the branded shirt in his party colours that he was using during the campaign. This, in his view, gave him unfair advantage over the other candidates. He called the Petitioner and informed him.
15. The witness further said that when he was voting he witnessed one voter being assisted to vote. He observed that the Presiding Officer (PO) was only reading the first name on the ballot paper, which was that of the 3rd Respondent, which he would mention by name but would not read the names of the other candidates. In his view the PO should have read all the names.
16. That he also noted that the assisted voters were young. He came to learn that most of them were being given money and ask to be assisted so that the agents of the 3rd Respondent would witness how they voted.
17. The witness stated that on the evening of August 10, 2022 he was at the tallying centre. He left the place at 1.30 a.m to go and freshen up. He returned at 2.30 am and found the 3rd Respondent with a crowd of about 100 people outside the gate to the tallying hall. The 3rd Respondent was addressing the crowd and was telling them that he had won the election. The crowd started chanting. When they saw him they started to shout at him. They impeded him from entering into the tallying hall. He stayed there for about 10 minutes. He tried to call the RO but he did not pick the phone. He called the petitioner and informed him. He stayed within the town. The crowd remained there the whole of the day. He did not go back to the tallying centre. The results were announced on the August 11, 2022 at 10 am in his absence.
18. The witness said that he is the one who informed the Petitioner of the 3rd Respondent campaigning outside the official campaign period. He also informed him of the yellow and six-piece voting system which information he received from agents. That on the August 9, 2022 he witnessed campaigns at Mutomo polling station though he did not make a report of the same to the police officers who were on duty at the polling station. He however stated that he did not witness any voter being harassed or coerced to vote for the 3rd Respondent. Nor did he see IEBC officials inflating votes in favour of the 3rd Respondent.
19. The witness said that he first saw the election materials said to have been abandoned by IEBC at the lawyer's offices. He said that their agent was given the materials by a third party.



20. The witnesses who testified on the claims of bribery were Martin Kibunyi Ngengi PW3, Simon G. Muiruri PW4, Mary Muthoni Kimani PW7, Anthony Kamau Gitau PW8, Janiffer Wanjiku Ngugi PW10, John Gitonga Gikurumi PW11 and Caroline Wanjiku Magithi PW12.
21. It was the evidence of Martin Kibunyi Ngengi PW3 that he was a voter at Gatundu Primary School Polling Station. That on the voting day he cast his vote at around 7a.m. That when he was going away he saw a person called Isaac Kamau who was well known to him dishing out Kshs 200/= to voters while asking them to vote for the 3rd Respondent. Another person called Mwaura who was a campaigner for Murigi Geoffrey Njinji was dishing out Kshs 200/= to voters while asking them to vote for the said candidate. He reported the incidents of bribery to police officers who were on duty at the polling station who promised to take action. He went away.
22. Solomon Muiruri PW4 testified that he was an agent for the Petitioner at Githioro Nursery Polling station. That at one time he left for the toilet and saw the supporters of the 3rd Respondent giving out money to voters while asking them to vote for the 3rd Respondent.
23. The witness further testified that during voting of assisted voters they were only allowed to witness in groups of 3 at a time. That there were more than ten agents at his station and the number of assisted voters was between 20-30%.
24. It was the evidence of Margaret Muthoni Kabui PW5 that she was an agent for the Petitioner at Mururia Secondary School polling station. She arrived at the polling station at 5 am. She had documents identifying her as an agent for the petitioner. When the station opened at 6 a.m she entered into the classroom where voting was to take place and presented her documents to the Presiding Officer. Another woman also presented documents indicating that she was the agent for the Petitioner at that polling station. The PO. told them to go and resolve their issue outside. They went outside. The woman caused a fracas outside and went back into the room as agent for the Petitioner. PW5 called the chief agent who said he will check on it but never went to the polling centre. She remained at the polling centre throughout the day.
25. Lydia Wanjiru Gathemba PW6 testified that she was an agent for the Petitioner at Gathuri polling station 1 of 2. That before voting started she and other agents confirmed that the ballot boxes were empty. There were 10 agents in the room and there were others waiting outside. The PO gave instructions that those who were inside will witness for some time and give room to those who were outside. Later the PO instructed the agents who were inside to go out and be replaced by those who were outside. The agents refused. The agent for a candidate called Njinji was forced out by policemen. The PO. then allowed the agents who were outside to get in. Her instructions were for 2-3 agents to witness the voting of assisted voters at a time. There were more than 20 agents.
26. The witness said that counting of votes started at 8 pm after voting closed. The presidential votes were counted and it was found that the votes cast were more than those validated by the KIEMS kit. The agents protested while questioning why this was the case. They refused to have the rest of the votes counted. There was a stand off until the next morning when the Deputy Returning Officer went to the polling station and talked to the agents. He pleaded with them to allow counting to proceed. They agreed. The total votes cast for Member of National Assembly were found to 434 while those in the KIEMS KIT were 364. Ten voters were identified manually. The PO did not give them any explanation as to why there was a difference of 60 votes. There was no time that the PO told them that the KIEMS kit had a problem with identifying voters. Form 35A was prepared and she signed it. She said that the PO was very hostile to them.



27. Mary Muthoni Kimani PW7 stated that she was an agent for the Petitioner at Gatundu Polytechnic Polling station stream 3. That the former Member of Parliament for the area, Moses Kuria, went to the polling station and started to issue cash handouts to voters while telling them to vote for UDA Party.
28. She also testified that the Presiding Officer was the one assisting voters who needed assistance. That he would call the agents to witness the assisted voters but sometimes he would refuse the agents to witness and tell them that he will talk loudly for them to hear.
29. The witness further said that counting was smooth except that the Presiding Officer was not showing them the cast ballot and they could not tell whom the vote was in favour of.
30. Anthony Kamau Gitau PW8, told the court that he was a mobilizer for the 3rd Respondent. That he voted at Mutomo Primary school polling station after which he stayed within the polling station to cater for refreshments for the Petitioner's agents. That at 10 am the 3rd Respondent went to the polling centre in two cars. He was dressed in a shirt in UDA party colours. He went to the queue and started to shake hands with voters who were on the queue. PW8 and other people protested why the 3rd respondent was campaigning at a polling centre. There was a commotion and voting was disrupted for some time. The 3rd Respondent sent for a jacket from his car that he wore on top of the UDA shirt. Some VIPs went to the station. The 3rd Respondent took a photograph with them. The 3rd Respondent went away. However, his second car was left behind with some of his agents who started to dish out Kshs 500/ to each voter on condition that they showed photographs of their ballot papers indicating that they had voted in favour of the 3rd Respondent. The witness said in cross-examination that he was also given Kshs 500/= which he used to buy airtime to call the Petitioner's Chief Agent.
31. Teresia Nyambura Ndung'u PW9 testified that she was an agent for the Petitioner at Kigaa primary school polling station. That when voting started the PO excluded the agents from witnessing for assisted voters. The PO would also read the name of the 3rd Respondent and fail to read the names of the other candidates. He continued that way for some time and they protested. At 10 am the PO started to read the names of the other candidates but still excluded the agents from witnessing when he was marking the ballot paper. They complained. At midday is when he allowed them to witness how he was marking the ballot papers. The witness said that there was a big percentage of assisted voters of about 20-30 %.
32. It was further evidence of the witness that when the ballot papers were being sorted out they were not being displayed to the agents. She called her Chief Agent and informed him of what was going on. She did not sign Form 35A due to the failure to display the ballots to agents during sorting out.
33. The evidence of Janiffer Wanjiku Ngugi PW10 touched on assisted voters, bribery and counting. It was her evidence that she was an agent for the Petitioner at Mutati polling station stream 1. That when the voting exercise began the Presiding Officer told the agents that she had instructions from IEBC that it is only the PO. who would be allowed to assist those voters who needed assistance to vote. She did not allow agents to witness all the assisted voters. The agents protested.
34. The witness further testified that the PO. would read the name of the 3rd Respondent loudly but in a low tone when it came to the Petitioner's name.
35. It was also her evidence that while the voting exercise was going on there were some mobilizers for the aspirants who were giving out money to voters outside the polling station. That during counting of votes some marks that were perfectly within the boxes for the Petitioner would be rejected but otherwise the counting process was smooth.



36. John Gitonga Gikurumi PW11 testified that he was a voter at Mutomo primary school polling station and a mobilizer for the Petitioner. That voting went on well at the polling station except that there were two groups of people outside the polling station giving cash handouts to voters. The groups belonged to the 3rd Respondent and Njinji Murigi.
37. Caroline Wanjiku Magithi PW12 stated that she was an agent for the Petitioner at Mutati Dispensary polling station. She was also a mobilizer for the Petitioner. That at one time she left the polling station to buy a mask at a shop opposite the health centre. That on reaching the chief's camp, she met some women giving out Kshs 200/= to people while asking them to vote for the 3rd Respondent. When she was going back she met another woman giving out Kshs 300/= to people while asking them to vote for Njinji Murigi.
38. The witness further stated that counting went on smoothly but that votes for the Petitioner that slightly crossed the box were being rejected as spoilt votes while those of Njinji Murigi were being considered as valid.

1st and 2nd Respondent's Evidence –

39. The 1st and 2nd Respondents called two witnesses- the 2nd Respondent, who was the Gatundu South Returning Officer, Mr Maurice Owino Ligulu, DW1, and the Presiding Officer at Gathuri Primary School Polling Station 1 of 2, DW2.
40. It was the evidence of the Returning Officer, DW1, that the election for Gatundu South Constituency was conducted in compliance with the law and was fair, transparent and verifiable. That he had held a briefing with the candidate before the election and gave them a check list of what they were required to present to the Commission before the election. Among the items was a coloured passport size photograph to be used in printing the ballot paper. After the nominations were complete he invited the candidates to check whether the details in the sample ballot were correct. The Petitioner came and did not raise any concern on the 3rd Respondent's photo that was on the sample paper. He denied that he hid the 3rd Respondent's details from the Petitioner so as to facilitate yellow voting for the 3rd Respondent.
41. It was the evidence of the Returning Officer that the law does not specify the kind of photograph that a candidate should present to the commission for purposes of printing a ballot paper. That the check list does not indicate what one can wear or not. His instructions were for the candidates to present a photograph that could easily identify them to voters. He denied that the photograph of the 3rd Respondent on the ballot paper was geared towards facilitating the yellow and six-piece voting. He said that he did not know what the two terms meant.
42. The witness stated that agents are allowed to wear insignia of their parties. However, that campaign colours are outlawed in polling stations where they show open support for a particular candidate, if for example where a person is wearing a T-shirt with a message to vote for so and so. He said that he was not informed of anybody who went to a polling station wearing explicit campaign material.
43. The Returning Officer testified that he had trained the Presiding Officers and their deputies so as to deliver on the mandate of IEBC. That every candidate was required to present one agent per polling station. That where there was a dispute amongst agents for a particular candidate as to who among them was the authorised agent the PO. was required to leave them to sort out their own dispute.
44. He said that the POs were trained on voter assistance during voting. That in situations where a voter required assistance to vote, it was the duty of the Presiding Officer to assist the voter in the presence



of agents for the candidates. The PO. was required to mark the ballot in the presence of the agents as per the preference of the voter. That his instructions were that where there were more than 5 agents in the voting room, the agents were to witness for the assisted voters on rotational basis as it was not possible to accommodate all the agents in the voting booth due to the big number of candidates. That they had also to comply with the Ministry of Health guidelines on COVID-19. That he had agreed with the candidates to employ that method.

45. It was the evidence of the RO. that a PO. was not obliged to read the names of the candidates to the voter but to ask the voter whom he/she wanted to vote for. However, the voter could request for the names to be read over. He said that on the day of the election he did not receive any complaints on assisted voters. He denied that the POs excluded agents when assisting those who needed to be assisted during voting.
46. On the claim of campaigning outside the official gazetted hours the witness said that they have no capacity to monitor that the rule is complied with. He said that it is for the candidates to ensure compliance with that rule. He said that he did not receive any complaint that any of the candidates had breached the rule.
47. The witness further stated that he did not receive any reports of bribery, alteration of votes or mishandling of election materials. Neither did he receive any report from any PO. of harassment.
48. It was the evidence of the RO. that there were 20 police officers who were keeping security at the tallying centre. That the Petitioner and his Chief Agent, Patrick Ng'ang'a were at the tallying centre and had free access to the place. He said that he was not aware that any agent was denied access to the tallying centre and no agent was denied an opportunity to sign Form 35B. He said that he announced the results on August 11, 2022 at 8 am. That nobody had pressured him to announce the results before tallying was complete.
49. The Presiding Officer at Gathuri Polling Station 1 of 2, Mary Muthoni Kimani, DW2 testified that the Presiding Officers and their deputies underwent a one-week training before the election date. That on opening on the polling day there were more than 10 agents in the voting room. There were others outside who wanted to enter but they did not have enough space to accommodate all of them. Later she suggested to the agents who were inside to go out and allow another group to replace them but the agents refused. There was a commotion. It was agreed that assisting of voters would be done on rotation basis. Even after that the agent for the Petitioner, Lydia Wanjiru, refused to take part in assisting voters who required assistance. The witness stated that three agents were assisting voters at each particular time.
50. It was further evidence of DW2 that they were required to transmit through the KIEMS kit the total number of people who had voted at intervals at 9 am, 11 am, 1 pm, 3 pm and 5 pm. That when she was doing the transmission at 1pm, she realised that the KIEMS KIT was not picking some of the voters who had voted. She called the Returning Officer and the ICT Officer. She was told to trouble shoot the gadget. She did so it started to function normally. However, that when they counted the presidential votes they realised that the votes cast were 434 while the number of voters validated by the KEMS kit was 374, thus showing a difference of 60 votes. The agents protested. She explained to them that the cause of the difference was that the KEMS kit had earlier in the day failed to capture some of the voters but they did not buy the idea. They boycotted the counting of the other positions, including that of the Member of National Assembly. The witness reported the matter to the Returning officer who on the following morning sent the Deputy Returning Officer and an ICT officer to attend to the issue. The two officers went and talked to the agents. Counting resumed. That the difference of the 60 votes was noticed on all the other boxes. Upon counting the those for Member of National Assembly, the



agent for the Petitioner signed form 35A. DW2 denied that the difference of 60 votes was occasioned by manipulation of the election or vote stuffing.

51. It was further evidence of DW2 that when they were sorting out the votes, she was displaying the ballot papers to the agents who would shout out to whom the vote was cast for. She said that the agents could see the mark on the ballot paper from where they were seated.

The evidence for the 3rd Respondent -

52. The 3rd Respondent testified that he contested the seat for Gatundu South Constituency on United Democratic Alliance, UDA, Party. That prior to the election he attended training by IEBC on the Code of Conduct and what was expected of candidates, agents and supporters. They were also trained on campaigns and documents to present to IEBC. The IEBC shared with them a check list of things required for clearance among them a passport size photograph. He thereafter attended a meeting with IEBC where candidates presented their documents to the Returning Officer after which the RO. prepared a sample ballot paper. The candidates then verified whether their details as captured in the sample ballot paper were correct after which they signed the sample ballot against their names. He said that the whole sample paper was visible to the candidates when they signed it. He saw the Petitioner sign it. He denied that part of the sample ballot was hidden from the Petitioner when he signed it.
53. The 3rd Respondent further said that the passport photograph he presented to IEBC had the insignia and logo of his sponsoring party, UDA. That each party had its party symbol beside the photograph of the candidate. That the photograph of one other candidate, Onesmus Gitau Mwihaki also had the insignia of his party. He said that his photograph did not contravene any law as it did not have any slogan or campaign message.
54. The 3rd Respondent admitted that he went to Mutomo Polling Station on the polling day. He denied that he shook hands with voters who were on the queue or that he caused a commotion at the polling station. He denied that he was dressed in an outfit in yellow colours. He said that he was in an orange shirt. He denied being involved with any acts of bribery at the said polling station as no such report was made to the police.
55. The 3rd Respondent denied that he campaigned outside the officially gazetted period. He said that he finished his campaigns on the August 5, 2022. That on the August 6, 2022 he attended the UDA presidential campaign at Nyayo Stadium and later at Kirigiti Stadium in Kiambu. On the 7th and 8th he was at his home with his campaign team where they were preparing his agents.
56. The 3rd Respondent said that he voted at Mutunguru primary school polling station. That at the place he saw a voter being assisted to vote. He noted that 2-3 agents were witnessing the PO. marking the ballot for a voter being assisted to vote. The agents were rotating to witness the voting. He had no problem with the rotation since there were many agents in the voting room.
57. The 3rd Respondent said that he visited a few polling stations during the counting of votes. He observed that the PO. was unfolding the ballot paper and displaying it to the agents who would then agree to whom the vote belonged.
58. He said that his agents were sending the results captured in Forms 35A to his command centre as they were being released at the polling stations. That he went to the tallying centre on the August 11, 2022 at 6 am. He stayed there until 8am when the results were announced. He said that he was not at the tallying centre on the August 10, 2022 at 2.30 am when the Petitioner's Chief Agent claims to have been blocked from assessing the tallying centre as he was sleeping at his home at the time. That in any



case the Chief Agent did not mention the issue in his witness statement. He denied that he declared himself winner before the results were announced by the RO.

59. The 3rd Respondent said that he did not force anybody to vote for him. That he was a stranger to what was being called yellow voting and six-piece voting. He said that the results were not challenged and thus was elected in a free, fair, transparent and verifiable election.

E. Submissions

60. Mr Kibe Mungai appeared for the Petitioner while Mr Mwangela appeared for the 1st and 2nd Respondents. Mr Njuguna Ng'ang'a appeared for the 3rd Respondent. The advocates made written submissions and submitted as follows.

Whether there were malpractices during the campaign period and whether there were campaigns in and outside the polling stations on voting day-

61. The Petitioner pleaded that the campaign period ended on the August 6, 2022 but that the 3rd Respondent continued to campaign on the 7th and August 8, 2022 and even on the election day on the August 9, 2022. He named 26 polling stations where this is said to have happened. Mr Kibe submitted that the 3rd Respondent was seen by Anthony Kamau Githaru PW8 campaigning at Mutomo Primary School Polling Centre on the election day where he lobbied for support from voters who had queued to vote. It was submitted that the 1st and 2nd Respondents did not call any witness to controvert the testimony of PW 8 about what transpired at Mutomo Primary School when the 3rd Respondent went there.
62. It was also the case for the Petitioner that 1st and 2nd Respondents violated the provisions of Article 81(e) of the [Constitution of Kenya 2010](#) and allowed the 3rd Respondent to campaign inside polling stations by printing the photograph of the 3rd Respondent with his party colours but required the rest of the candidates including the petitioner to wear neutral attire, tilting the scale in favour of the 3rd Respondent and according him undue advantage over the other candidates. That therefore, the 1st and 2nd Respondents violated the provisions of Regulation 68 of the [Election \(General\) Regulation 2012](#) as amended by the Elections (General) (Amendment) Regulations 2017. Mr Kibe submitted that the 3rd Respondent's photo on the ballot was not only inappropriate and wrongful but it amounted to unlawful and illegitimate campaign on the election date. Further that the 3rd Respondent actually admitted that it gave him an advantage to use it that way. Mr Kibe submitted that the unlawful campaign was condoned, aided and abetted by the 1st and 2nd Respondents.
63. On these malpractices, Mr Mwangela submitted that the Petitioner was informed of them by his chief agent PW2, who in turn said in his evidence that he was informed of the same by the Petitioner's agents whom he neither named nor called to testify in court. Further that both witnesses conceded in cross-examination that they did not report any violation of Electoral Code of Conduct to the 1st and 2nd Respondents. That the Returning Officer, DW1 testified that he did not receive any information regarding violation of Electoral Code of Conduct. The 3rd Respondent also testified that he did not violate the Electoral Code of Conduct and neither did his agents, supporters and campaigners. It was thus submitted that the claim that the 3rd Respondent was engaged in malpractice during the campaign period was based on hearsay and was not proved.
64. On allegations that the 1st and 2nd Respondents campaigned for the 3rd Respondent by printing the ballot papers with photographs that portrayed the 3rd Respondent's party colours, Mr Mwangela submitted that there was no breach of Regulation 68 (4) of the [Elections \(General\) Regulations, 2012](#)



which only requires a ballot paper to have the name of the candidate, his/her political party's symbol and photograph. Counsel thus submitted that the Petitioner's allegations concerning the form of the ballot paper are disingenuous and should be dismissed.

65. On the same issue Mr Njuguna submitted that the 3rd Respondent gave reasons for his decision to choose the photograph used in the ballot as being:
- a. It was in the public domain that UDA party was sponsoring his candidature in the election.
 - b. It was his political right under Article 38 of the Constitution to affiliate himself with a political party.
 - c. The political parties were also participants in the election and indeed those coming to vote were voting for one or the other or against. The photograph was for purposes of identification and as stated by the 2nd Respondent such photo ought to have been the best way the electorate would identify the candidate.
 - d. It was in line with the specifications issued by the 1st and 2nd Respondents vide the circular at page 34 of their bundle.
 - e. The same was not in violation of any law.
 - f. That the intention of the ballot paper was not to hide the political affiliation of the candidates as the party symbols and names were expressly listed in the ballot.
 - g. There were other candidates too in the ballot with party colours and insignia including Onesmus Gitau Mwihi of Tujibebe Party and Joyce Wanjiku Ngugi of Jubilee party.
66. Counsel referred to Regulation 68 of the Elections (General) Regulations 2012 as amended by the Elections (General) (Amendment) Regulations 2017 which makes provision for ballot papers as follows:
- (4) Every ballot paper for use at an election shall
- a. Contain the name and symbol of the candidate validly nominated.
 - b. Contain a photograph of the candidate where applicable;
 - c. Be capable of being folded up;
 - d. Have a serial number, or combination of letter and number, printed on the front; and
 - e. Have attached a counterfoil with the same number or combination printed thereon.
67. It was submitted that none of the above provisions is breached by the photograph. Further that the allegation by the petitioner that the photograph amounted to campaign material fell flat for the reason that campaign material includes slogans that call for voting or show support to a party or person.
68. It was also submitted that there was no proof on the allegation of campaigns at polling stations and neither was there proof that the 3rd Respondent went to Mutomo polling station wearing a UDA party T-shirt.

Whether there were malpractices during the voting process -

69. Mr Kibe categorised the malpractices pleaded by the Petitioner during the voting process into three: -
- a. Challenges relating to Assisted voters.



- b. Promotion of “six piece” and “yellow voting”.
 - c. Harassment, blockage and interference with the Petitioner’s Agents.
70. On challenges relating to assisted voters, counsel referred to Regulation 72 of the *Elections (General) Regulations, 2012* which provides the procedure for assisted voters as follows: -
- 72.
- (1) On the application of a voter who is, by reason of a disability or being unable to read or write, and therefore unable to vote in the manner prescribed in these Regulations, the presiding officer shall permit the voter to be assisted or supported by a person of the voter’s own free choice, and who shall not be a candidate or an agent.
 - (2) Where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such voter, in the presence of the agents.
 - (3) The presiding officer may make such necessary and respectful inquiry in order to establish that the voter and the person the voter has chosen to assist him or her satisfies the provisions of this regulation.
 - (4) The person chosen by the voter is not required to be qualified to vote but is required to have attained the age of eighteen years.
 - (5) The following shall apply with respect to a person who assists a voter under this regulation—
 - a. The person shall, before assisting or supporting the voter, make a declaration of secrecy before the presiding officer in Form 32 set out in the Schedule;
 - b. A person who breaches his or her declaration commits an offence under the Act; (c) the person shall assist or support only one voter at that election and have a mark as proof of assisting or supporting a voter.
 - (6) Where a presiding officer grants the request of a voter under this regulation, the presiding officer shall record in the polling station register against the name of the voter the fact that the voter was assisted and the reason for the assistance.
 - (7) No person other than a person acting under this regulation shall be present in a compartment of a polling station while a voter is in the compartment for the purpose of marking his or her ballot paper and any person who contravenes this subregulation commits an offence.
71. Mr Kibe submitted that there was an unusually high number of persons who requested to be assisted in voting. That the law required the Presiding Officers to keep a record on the number of voters who required assistance. However, that the Returning Officer, DW1, in his testimony indicated that that legal requirement was not complied with in the 2022 general election as they did not use a manual register in that election and the KIEMS Kit could not tell or identify how many voters were assisted. He could therefore not confirm the 30% of assisted voters alluded by the petitioner. During cross examination DW1 stated that transparency and accountability was not fully realized with regard to agents who could not witness all assisted voters because of practical reasons such as COVID-19 and the high number of agents. He however added that the number of assisted voters were not so high as to abuse the procedure with an ulterior motive.



72. The Petitioner submitted that the procedure for assisted voters was undertaken in a manner prejudicial to the Petitioner in that the Presiding Officers were not reading out the names of all the candidates in order to give a chance for the voter to decide and say their preferred candidate and for the Presiding Officer to mark the ballot paper for the assisted voter accordingly.
73. It was submitted that implementation of Regulation 72 by Presiding Officers and other electoral officers at the polling stations was one of the most contentious issues in this election petition, yet the 1st and 2nd Respondents did not call any witness to testify on how the regulation was implemented. The Petitioner in the premises submitted that the testimonies of the Petitioner and his witnesses that Regulation 72 was not complied with stands uncontroverted. Mr Kibe urged the court to find that the Petitioner's testimony that the high number of assisted voters compromised the integrity of the election has not been controverted.
74. On promotion of 'six piece' and 'yellow voting' it was submitted that the 1st and 2nd respondents through the Presiding Officers promoted six piece voting by not reading out the name of all those contesting the position of the Member of National Assembly.
75. On harassment, blockage and interference with the Petitioner's agents, the Petitioner submitted that they called several witnesses who testified that the Petitioner's agents were blocked in the morning from accessing polling stations and were thus denied an opportunity to witness the protocols of commencing voting. It was submitted that the Presiding Officers used excuses of COVID 19 and high number of agents to deny the petitioner's agents fair opportunity to witness the procedure for assisted voters. Moreso, that the presiding Officers illegally and maliciously rotated agents witnessing the assisted voter thereby prejudicing the Petitioner.
76. Regarding these allegations, Mr Mwangela submitted that there were no agents called from most of the polling stations complained of in prove of the allegations. Consequently, that the allegations with regard to those Polling Stations fall flat on their face because they are based on hearsay evidence.
77. Mr Mwangela submitted that the evidence of the witnesses for the Petitioner who testified on the alleged malpractices from PW3 to PW12 was unbelievable for various reasons. That those who claimed to have witnessed the giving of bribes did not make formal complaints to the police or to the POs nor did they give out the names of voters who were given the bribes. No voter turned up to testify that he/she was offered a bribe. That those who raised complaints about voter assistance did not note the complaints in the polling station diaries. More over that their allegations were unsubstantiated based on admission that agents agreed on the rotation of agents while noting that the voting booth could not accommodate many agents. That though PW5 said that she was denied access to a polling station she confirmed that a substitute agent was already in the Polling Station and they agreed without being coerced by the Presiding Officer to have the substitute agent replace her.
78. Mr Njuguna on his part submitted that the Petitioner listed very many polling stations but there were no affidavits/witnesses with regard to most of the alleged stations. He submitted that there is no empirical data presented before court by way of research reports or otherwise to support the allegation that the assisted voters were more than 30%.
79. Counsel referred to Regulation 72 of the [*Elections \(General\) Regulations 2012*](#) which gives guideline on the issue of assisted voters and submitted that the allegations by the Petitioner have not proven a breach of these provisions of the law and thus cannot stand. That though the provision does not expressly require the presence of all agents when a voter is being assisted, the 2nd Respondent gave a logical explanation as to why it would not have been possible to accommodate all the agents at the



booth. Equally no assisted voter came to court to state that they went home without knowing who they voted for as alleged by the Petitioner and those allegations thus remain as hearsay.

80. It was submitted that the agents that testified before court confirmed that they did not make any such complaints in the polling station diaries and they actually all proceeded to sign the form 35As of their respective stations without any refusal whatsoever.

Whether there were election offences committed -

81. Mr Kibe submitted that there was wide spread bribery by the 3rd respondent and his agents which was acquiesced by the 1st and 2nd respondents. He submitted that the Petitioner's witnesses stated that the bribery incidents were reported to security officers at the concerned polling stations yet the 1st and 2nd Respondents did not call the Presiding Officers or security officers at the polling centres where the incidents of bribery occurred to controvert the testimony of the Petitioner's witnesses. Nor did the 3rd Respondent call any of his agents in the affected polling centres to controvert the testimony of the Petitioner and his witnesses.

82. Counsel cited the case of *Simon Nyaundi Ogari & Another Versus Hon. Joel Onyancha & 2 Others* [2008] eKLR where the court rendered itself thus on the subject of bribery:

“Clear and unequivocal proof is required to prove an allegation of bribery. Mere suspicion is not sufficient. It is true that it is not easy to prove bribery allegations especially if it is done in secrecy. In such cases perhaps bribery may be inferred from particular aspects of a case but when it is alleged that it 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”.

83. Counsel made reliance on the Court of Appeal decision in *Moses Masika Wetang'ula v Musikari Nazi Kombo & 2 Others* Civil Appeal No 43 of 2013 [2014] eKLR where it was held that proof of a single act of bribery by or with the knowledge and consent or approval of the successful candidate or the successful candidates' agents is sufficient to nullify the election.

84. Mr Kibe submitted that the direct evidence of the Petitioner and his witnesses shows that indeed bribery did occur and accordingly the said acts justify the nullification of the 3rd Respondent's election.

85. Mr Nganga submitted that the Petitioner failed to explain how acts of coercion and intimidation were possible in a station manned by police officers and with public presence. That these allegations amount to election offences which are criminal in nature and thus the threshold to prove them is that of beyond reasonable doubt. Counsel cited the case of *John Kiarie Waweru v Beth wambui Mugo & 2 others* [2008] eKLR where the High Court quoted with approval the case of *Joseph W. Khaoya vs. Eliakim Ludeki & another* EP No12 of 1993 (unreported) where the court held that:

“Election offences are serious matters with grave penalties. They amount to criminal charges which should be proved. The proof should be to a very high degree for the charges to be sustained before a court of law”.

86. Counsel submitted that there was no credible evidence tendered to prove the allegations touching on election offences.



Whether there were irregularities relating to the counting, tallying and handling of votes and election materials.

87. Mr Kibe submitted that they called witnesses to show that there were malpractices in counting and tallying. That a case in point is that of Gathuri Polling Station 1 of 2 where the Presiding Officer Mary Muthoni Kimani (DW2) could not account for 60 votes. Counsel submitted that they adduced evidence to show that the chief agent of the Petitioner was denied access to the tallying centre. He submitted that though the Returning Officer Maurice Owino Ligulu (DW1) told the Court that he was unaware of what was happening outside the hall where tallying was taking place, the security officers who were outside were not called to testify on what was happening in the vicinity of the tallying hall. He submitted that cumulatively they have demonstrated that the counting and tallying exercise were not conducted in accordance with the applicable laws and regulations and consequently urged the Court to find that the Petitioner has proved this issue.
88. On his part Mr Mwongela submitted that the Petitioner's chief agent conceded that he entered and exited the Constituency Tallying Centre several times. That despite being barred from accessing the Constituency Tallying Center by the persons that he claimed were the 3rd Respondent's supporters, he did not report the same when the tallying centre was within the Office of the Deputy County Commissioner and a few kilometers away from Gatundu Police Station.
89. Further that, even if the Petitioner were to be given benefit of doubt, the counting process cannot be said to be impugned by the fact that PW2 was barred from accessing the Constituency Tallying Center, as Regulation 69 (7) of the *Elections (General) Regulations, 2012* states:
- 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.
90. Mr Mwongela submitted that the Petitioner alleged that his agents were ejected from Polling Stations and did not witness counting and tallying yet the signed Forms 35A and the results in the Forms 35A which they shared with him were similar to the ones the 1st and 2nd Respondents supplied to court. That the witnesses signed Forms 35A without compulsion having participated in counting and tallying.
91. Counsel submitted that the results contained in Form 35A for Gathuri polling station were based on physical counting and tallying of ballot papers after the KIEMS Kit failed to validate 60 voters thereby failing to reflect them in the voters' turnout.
92. Moreover, that Forms 35A and Form 35B that were submitted to court did not contain any alterations.
93. He submitted that the evidence relied on by the Petitioner to prove mishandling of election materials was information from unnamed agents who did not testify. That the court was treated to evidence of election materials that were not linked to any Polling Station. That DW1 stated that they were not genuine election materials which position was unchallenged.
94. Mr Njuguna on this issue submitted that despite the Petitioner listing a total of 27 polling stations where he alleged there was alteration and inflation of votes, there was no single polling station where there was a dispute in the results declared in Form 35As. The only evidence the witnesses of the petitioner attempted to present was with regard to issue of votes from Gathuri polling station 1 of 2 where the difference in the total votes cast and the Kiems Kit count of voters was well explained by DW2 to be attributable to the failure of the kit to update the number of voters as it progressed. This difference was same across all the electoral seats and thus not unique to the parliamentary election.



The Petitioner did not prove any alteration whatsoever and all his agents present in the various stations signed the results forms without any complaint whatsoever.

95. It was submitted that the allegation by the Petitioner that his Chief Agent was denied entry to the tallying centre was not stated in the affidavit of the Chief Agent, Mr Patrick Ng'ang'a.
96. During his evidence before court, Ng'ang'a informed the court that he was denied entry by the 3rd Respondent and his supporters although in the Petitioner's affidavit the allegation was against the 1st and 2nd Respondents. The witness again informed the court that there was no human shield made to deny him entry but he was afraid of what the supporters would do to him and thus just turned away and left.
97. The 3rd Respondent submitted that the Petitioner informed the court during the hearing that they were together with the chief agent when he was denied entry but the chief agent stated that he was alone. Counsel submitted that there was heavy presence of police officers at the tallying centre and therefore that the allegation that the chief agent of the Petitioner was denied access is not believable.
98. The 3rd Respondent submitted that the allegation that there were election materials that were mishandled has not been proven at all. The Petitioner and his witnesses were not able to give an account of where the materials were collected from. The alleged witnesses who collected them as well as the one who handed them to the petitioner did not depose to any such evidence in their affidavits. Their statements that the same were collected after the affidavits were sworn was also untrue as they confirmed to have handled the same before swearing the affidavits.

Whether there was harrassment and intimidation of the presiding officers and returning officers -

99. The petitioner relied on the evidence and testimony of his witnesses and urged this court to find in his favour.
100. Mr Mwangela submitted that it was not possible to intimidate Presiding Officers within Polling Stations. That the Returning Officer, DW1 testified that none of the Presiding Officers reported to him that they were harassed and or intimidated by the 3rd Respondent, his agents and supporters.
101. Mr Njuguna submitted that there is no documentary evidence to the allegations by way of a report to the respective authorities and therefore that the same should be dismissed.

Implications of the malpractices on voting and final results -

102. The petitioner submitted that the malpractices in the impugned election were not only widespread but seriously impacted upon the voting process and in the end affected the results of the election.
103. The Respondents on the other hand submitted that the Petitioner has failed to substantiate and prove any malpractice with regards to the elections and as such the issue is moot and an afterthought.

Whether the elections were conducted in compliance with the *Constitution of Kenya 2010* , the *Elections Act , 2011* and the Regulations -

104. Mr Mwangela submitted that it has been demonstrated in the affirmative that the election was conducted substantially in accordance with the law and the *Constitution of Kenya 2010* , the *Elections Act , 2011* and the Regulations made thereto.
105. Mr Njuguna on his part submitted that the Petitioner had failed to prove that there was non-compliance with the law. That in the premises the acts by the 1st and 2nd Respondents are presumed to have been done rightly and the 3rd Respondent correctly declared as duly elected.



F. The Law On Elections

106. Elections are governed under the [Constitution of Kenya](#) . Article 38 provides for the political rights of every Kenyan and states that: -

- (1) Every citizen is free to make political choices, which includes the right—
 - (a) to form, or participate in forming, a political party;
 - (b) to participate in the activities of, or recruit members for, a political party; or
 - (c) to campaign for a political party or cause.
- (2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—
 - (a) any elective public body or office established under this Constitution; or
 - (b) any office of any political party of which the citizen is a member.
- (3) Every adult citizen has the right, without unreasonable restrictions—
 - (a) to be registered as a voter;
 - (b) to vote by secret ballot in any election or referendum; and
 - (c) to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office.

107. Article 81 provides for the general principles of the electoral process as:

The electoral system shall comply with the following principles—

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

108. Article 86 of the [Constitution](#) governs voting and provides as follows:

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.
109. Elections are further governed by legislation contemplated under Article 82 of the Constitution and includes the Elections Act and the rules and regulations therein, and the Election Offences Act. Relevant to the instant petition, section 83 (1) of the Elections Act No 24 of 2011 that makes provision for the nullification of an election and states that:
- (1) A Court shall not declare an election void for non-compliance with any written law relating to that election if it appears that-
 - (a) the election was conducted in accordance with the principles laid down in the Constitution and in that written law; and
 - (b) the non-compliance did not substantially affect the result of the election.
110. The Supreme Court in Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR) (Election Petitions) (20 September 2017) (Judgment) (also known as Raila II) enunciated the importance of the elections conforming to the principles laid out in the law and stated:
- “(212) Having analyzed the wording of Section 83 of the Elections Act, bearing in mind its legislative history in Kenya and genesis from the Ballot Act and also in light of the need to keep in tune with Kenya’s transformative Constitution, it is clear to us that the correct interpretation of the Section is one that ensures that elections are a true reflection of the will of the Kenyan people. Such an election must be one that meets the constitutional standards. An election such as the one at hand, has to be one that is both quantitatively and qualitatively in accordance with the Constitution.... In addition, the election which gives rise to this result must be held in accordance with the principles of a free and fair elections, which are by secret ballot; free from intimidation; improper influence, or corruption; and administered by an independent body in an impartial, neutral, efficient, accurate and accountable manner as stipulated in Article 81. Besides the principles in the Constitution which we have enumerated that govern elections, Section 83 of the Elections Act requires that elections be “conducted in accordance with the principles laid down in that written law.” The most important written law on elections is of course the Elections Act itself.”
111. Further, section 83 of the Elections Act has been examined by the courts where it has been held that where elections have been conducted in accordance to the principles set out in Statute, and where non-



compliance was minimal, an election will not be voided. The Supreme Court in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR stated thus: -

- “(216) It is clear to us that an election should be conducted substantially in accordance with the principles of the Constitution, as set out in Article 81 (e). Voting is to be conducted in accordance with the principles set out in Article 86. The Elections Act, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.
- (217) If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities.
- (218) Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election. In this regard, we stand on the same plane as the learned Judges in Morgan, Opitz and Nana.”

112. It is generally agreed that conduct of an election may not be perfect as held by the Supreme Court in Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (*supra*):

“[209] Therefore, while we agree with the two Lord Justices in the Morgan v. Simpson case that the two limbs should be applied disjunctively, we would, on our part, not take Lord Stephenson’s route that even trivial breaches of the law should void an election. That is not realistic. It is a global truism that no conduct of any election can be perfect. We will also go a step further and add that even though the word “substantially” is not in our section, we would infer it in the words “if it appears” in that section. That expression in our view requires that, before vitiating it, the court should, looking at the conduct of the whole election, be satisfied that it substantially breached the principles in the Constitution, the Elections Act and other electoral law.”

113. Similarly, the Supreme Court in Mohammed Mahamud Ali v Independent Electoral and Boundaries Commission [2019] eKLR stated:

“

“(55) In this present matter, what the Appellant has successfully proved are minimal irregularities in the conduct of the election for Member of National Assembly for Changamwe Constituency. As observed by this court in a number of cases, elections as a matter of course cannot be perfect and errors, so long as they are minimal, should not affect the will of people.

(56) We note that this Court has in the recent election cycle also determined the place of minimal irregularities in an election. We thus stated in Supreme Court Petition 21 of 2018, Gideon Sitelu Konchellah vs Julius Lekakeny Ole Sunkuli and 2 Others (unreported):

“[63] We also agree with the trial Court’s appreciation of the evidence presented before it that the election, despite the isolated cases of irregularities which did not affect the result



of the election, was essentially free and fair. We therefore find that in view of the fact that the election went on smoothly in all 165 polling stations, save one, the alleged violation of Article 86(a) of the Constitution did not substantially affect the outcome of the election....”

- (57) We are accordingly satisfied that the Superior Courts correctly analyzed the effect of the illegalities and irregularities on the election and cannot fault their finding that they were not of such magnitude as to justify the invalidation of the disputed elections. We are also of the view that the will of the people of Changanwe Constituency was duly expressed and in keeping with our pronouncements in the above outlined cases of *Munya 2b*, *Raila 2013* and *Raila 2017*, while there may have been imperfections in the conduct of the elections, they did not impeach or affect the overall outcome of the results.”

Burden of Proof -

114. It is now an elementary principle that the burden of proof in an election petition lies with the petitioners, as is well stated in various judicial decisions. It is only when the petitioner has discharged his burden of proof, that it shifts to the respondents to rebut the allegations levied against them. In *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* (supra), the Supreme Court stated that: -

“ [130] The law places the common law principle of onus probandi on the person who asserts a fact to prove it. Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya, legislates this principle in the words: “Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” In election disputes, as was stated by the Canadian Supreme Court in the case of *Opitz v. Wrzesnewskyj*[48], an Applicant who seeks to annul an election bears the legal burden of proof throughout. This Court reiterated that position in the 2013 *Raila Odinga* case, thus:

“[195] There is, apparently, a common thread in...comparative jurisprudence on burden of proof in election cases...that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner....”

- (196) 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.”
- (131) Thus 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[49] “to the satisfaction of the court.”[50] That is fixed at the onset of the trial and unless circumstances change, it remains unchanged.[51] In this case therefore, it is common ground that it is the petitioners who 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 President of Kenya should be nullified.”



115. Further, the Court stated that once the petitioners discharge their burden, it shifts to the respondents to rebut the allegations laid and held that: -

“(133) 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 they 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, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law. We shall revert to the issue of the shifting of the burden of proof later in this judgment.”

116. 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 56 (KLR) (Election Petitions) (26 September 2022) (Judgment), the Apex court reiterated this position in its recent decision and held that: -

“

“32. Suffice to stress that the Court has been consistent 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 convinced that the petitioner has discharged that burden, then the evidentiary burden shifts to the respondent (who in most election-related cases is IEBC), to present evidence by way of rebuttal of the assertion.

33. In this context, we reiterate the words of this Court as stated in *Raila 2013* 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.”



Standard of proof:

117. The standard of proof in election petitions is well settled that it lies in-between beyond reasonable doubt and a balance of probability, except where there are criminal charges. In *Odinga & 5 others v Independent Electoral and Boundaries Commission & 3 others* (Petition 5, 3 & 4 of 2013 (Consolidated)) [2013] KESC 6 (KLR) (16 April 2013) (Judgment) (famously known as Raila 1) the Supreme Court considered the standard of proof from various jurisdictions and pronounced itself thus: -

“203. The lesson to be drawn from the several authorities is, in our opinion, that this court should freely determine its standard of proof, on the basis of the principles of the Constitution, and of its concern to give fulfilment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the “national values and principles of governance” declared in the Constitution [article 10], judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in article 138(4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.”

118. Further, in *Odinga & another v Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae)* (*supra*) (Raila II)) the Court affirmed its earlier position 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. Consequently, we dismiss the petitioners’ submissions that the Court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities.

(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.”

119. Also in its more recent decision in *Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae)* (Raila III) (*supra*), the Court affirmed its earlier decision on the standard of proof as: -

“34. As to the standard of proof, the Court’s position rests with its decisions in Raila 2013, Raila 2017 and the Harun Mwau Case in which it 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 precondition 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 must be beyond reasonable doubt. We are alive to the fact that different standards have been adopted in other jurisdictions across the globe, as demonstrated in the amici briefs in this Petition on behalf of LSK and ICJ-Kenya Chapter but we find no justification and we are not prepared at this point in time to depart from the test now firmly laid and applied in this jurisdiction.”

120. The court has to bear in mind the law and the principles set above in determining the petition.

G. Analysis And Determination

Issues for Determination -

121. The issues for determination were agreed upon during the pre-trial conference as being:
- a. Whether there were malpractices during the campaign period.
 - b. Whether there were malpractices during the voting process.
 - c. Whether there were campaigns in and outside the polling stations on voting day.
 - d. Whether there were any election offenses committed.
 - e. Whether there were irregularities relating to counting, tallying and handling of votes and election materials.
 - f. Whether there was harassment and intimidation of the presiding officers and returning officers.
 - g. If so, what are the implications of the malpractices on the voting and final results.
 - h. Whether the election was conducted in compliance with the Constitution of Kenya 2010, the Elections Act, 2011 and the Regulations thereto.
 - i. What orders should issue.
 - j. Who should bear costs.

Whether there was malpractice during the campaign period

122. The Petitioner pleaded that the 3rd Respondent and his campaigners, agents, supporters and party officials campaigned outside the official and gazetted campaign period including 8th and August 9, 2022 with the aim of unfairly and illegally tilting the outcome of the election in favour of the 3rd Respondent. The Petitioner in his witness affidavit named 26 polling stations where this is said to have happened. However, among all those stations the Petitioner only called one witness, Anthony Kamau Gitau PW8 who testified that on the polling day he was at Mutomo polling station when at 10 am the 3rd Respondent went there while dressed in a shirt in UDA party colours with his name and logo of his party printed on it. He started to shake hands with voters who were on the queue. PW8 and other people complained on why the 3rd Respondent was campaigning on a polling day. There was a



- commotion and voting was disrupted for some time. The 3rd Respondent sent someone to his car who brought him a sweater that he wore on top of the UDA shirt.
123. Though the 3rd Respondent admitted that he went to Mutomo polling centre on the polling day he denied that he was dressed in a shirt in UDA party colours. He said he was in an orange shirt.
124. The witness, PW8, however stated in his witness statement that the 3rd Respondent only “talked to some people”. He said in cross-examination that he did not hear what he was telling the people. He did not mention in his witness statement that the Respondent shook hands with people who were in the queue. He also admitted in cross-examination that the issue of 3rd Respondent being dressed in a UDA shirt was not captured in his statement. The question then is why the witness failed to mention in his witness statement that the 3rd Respondent was dressed in a UDA shirt if the issue was that important to him? What made him conclude that the 3rd Respondent was campaigning when he did not hear what he was telling the people? Would it amount to campaigning if, for example, he only exchanged pleasantries with the people? I do not believe that PW8 was a credible witness. I find no evidence that the 3rd Respondent campaigned at Mutomo Polling station on the August 9, 2022. The fact that the Petitioner mentioned so many polling stations where the 3rd Respondent was alleged to have campaigned on the 8th and 9th and called no witnesses to back it up can only mean that nothing of the sort happened.
125. The Petitioner argued that the printing of the Photograph of the 3rd Respondent in the ballot paper with his party colours gave him undue advantage over other candidates. Mr Kibe argued that it amounted to campaigning on the ballot paper on the polling day.
126. Regulation 68 (4) of the [Elections \(General\) Regulations, 2012](#) only requires a ballot paper to contain the name of the candidate, his party’s symbol and the photograph of the candidate. The Regulation does not specify the kind of photograph that should appear on the ballot paper. The Returning Officer DW1 stated that his instructions to the candidates was for them to present a photograph that can easily identify them to voters. He said that there was no breach of the said Regulation in printing the photograph of the 3rd Respondent in his party colours.
127. In my considered view, the essence of printing a photograph on the ballot paper is only for purposes of identification. The ballot paper also contains the party symbols of candidates which is meant for identification of the party. If then the party has its symbol and logo on the ballot, why should it matter if the photograph of its candidate is in the same party colours? In the case of [Omar & Another v Mbuzi & Another](#) (2006) 2 KLR 190 the Court of Appeal considered the importance of party symbols during voting and held as follows:
- “It is to us obvious, and need not be emphasized, that a party symbol is an integral part of the parliamentary elections where more than one candidate presents himself/herself for election. It is, in our view, a way of identifying the candidate with the party that has sponsored him. We take judicial notice of the fact that during the campaigns, in such elections, the parties do campaign for the candidates using the symbol and some of those who would wish to vote for a particular party would vote for it being guided by the symbol even where they may not have known the actual name of the candidate.”
128. Since the printing of a photo in party colours is not outrightly banned by the law I do not think there was anything wrong in printing the photograph of the 3rd Respondent in the colours and logo of his sponsoring party. After all it was no secret that he was the UDA candidate and during the campaign people were used to seeing him dressed in his party colours. I do not think that the other candidates



were denied similar treatment as the 3rd Respondent was not the only candidate whose photograph was in his party colours. The photograph of one other candidate, Onesmus Gitau Mwihaki, who was running on Tujibebe Party was also in his party colours and insignia. The Petitioner must have seen the photograph of the 3rd Respondent when candidates were checking their details in the sample ballot and he did not raise any issue that time. There was no point in raising the issue after the election. I do not think, as submitted by Mr Kibe, that the printing of the photographs in party colours amounted to campaigning at the polling station.

Assisted Voting –

129. The Petitioner pleaded that the 1st and 2nd Respondents enforced the law and regulation regarding voter assistance in an arbitrary, opaque and confusing manner by:
- a. Denying, alienating and excluding his agents in witnessing assisted voters contrary to the express provisions of the law.
 - b. Maliciously rotating agents to witness assisted voting in violation of the law.
 - c. Harrassing his agents and conducting the election in a biased manner by misleading illiterate and incapacitated voters in favour of the 3rd Respondent.
130. The Respondent called several witnesses who raised complaints on assisted voting. These were Simon G. Muiruri PW4, Lydia Wanjiru Gathemba PW5, Mary Muthoni Kimani PW7, Teresia Nyambura Ndungu PW9 and Janiffer Wanjiku PW10. Their evidence raised various complaints of being made to witness the voting of assisted voters on rotational basis of 2-3 agents at a time; POs excluding them from witnessing of assisted voters; of an agent not being allowed into the voting room; PO attempting to throw agents out of the polling room when they protested instructions on witnessing the voting of assisted voters; of a PO only reading the name of the 3rd Respondent and say “and others” and of another PO reading the name of the 3rd Respondent loudly only to read the other names faintly.
131. There is no telling on whether some of these complaints are true or not as they were made after the Petitioner lost the election. No complaints were made in the polling station diaries neither were they reported to the Returning officer. The agents who made the complaints ended up signing for the results in form 35A. PW5 who claimed to have been blocked from witnessing the voting explained that there was another person who had documents showing that she was an agent for the Petitioner. It was therefore not the fault of the P. O. I do not think that there is much weight to be placed on the complaints.
132. Regulation 72 of the [Elections \(General\) Regulations, 2012](#) which offers guidance on the voting of assisted voters provides as follows:
- 72.
- (1) On the application of a voter who is, by reason of a disability or being unable to read or write, and therefore unable to vote in the manner prescribed in these Regulations, the presiding officer shall permit the voter to be assisted or supported by a person of the voter’s own free choice, and who shall not be a candidate or an agent.
 - (2) Where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such voter, in the presence of the agents.



- (3) The presiding officer may make such necessary and respectful inquiry in order to establish that the voter and the person the voter has chosen to assist him or her satisfies the provisions of this regulation.
- (4) The person chosen by the voter is not required to be qualified to vote but is required to have attained the age of eighteen years.
- (5) The following shall apply with respect to a person who assists a voter under this regulation—
 - (a) the person shall, before assisting or supporting the voter, make a declaration of secrecy before the presiding officer in Form 32 set out in the Schedule;
 - (b) A person who breaches his or her declaration commits an offence under the Act;
 - (c) the person shall assist or support only one voter at that election and have a mark as proof of assisting or supporting a voter.
- (6) Where a presiding officer grants the request of a voter under this regulation, the presiding officer shall record in the polling station register against the name of the voter the fact that the voter was assisted and the reason for the assistance.
- (7) No person other than a person acting under this regulation shall be present in a compartment of a polling station while a voter is in the compartment for the purpose of marking his or her ballot paper and any person who contravenes this sub-regulation commits an offence.

133. It is clear from the provisions of Regulation 72 that the Presiding officer is required to assist a voter in the presence of agents and the same has to be noted in the polling station register. The person assisting is required to make a declaration of secrecy in Form 32.

134. It was the evidence of the Returning Officer that the provisions of the said Regulation were not complied with because they were not using the manual register in the 2022 elections. As such Form 32 were not filled by those who were assisting the voters nor was the fact of assistance noted in the polling station register since the registers were not in use. Therefore, the number of those who were assisted to vote is not known as no record of the same was kept.

135. It was also the evidence of the Returning Officer DW1 that it was not possible to implement the said rule due to the high number of agents as a result of high number of candidates. That he had agreed with candidates that witnessing of assisted voting would be done on rotational basis of 2-3 agents at a time.

136. The law is that Form 32 must be filled when a voter is assisted and the same is required to be noted in the polling station register. In *Mohamed Abdul Omar v Kiponda Joseph Josephe Ngumbao & 3 others* [2018] eKLR, where Form 32 were not completed, Thande J. held as follows:

Regulation 72 is designed to facilitate voters who by reason of disability or illiteracy are unable to vote in the manner prescribed in the Regulations, to be assisted to vote by a person of their choice. This ensures that in spite of their limitations, such people are able to exercise their right to vote as guaranteed by Article 38(3)(b) of the *Constitution*. The Regulation requires the person assisting such a person to make a declaration of secrecy in Form 32. Form 32 forms part of the electoral materials as defined in Section 2 of the Election Act which under Article 86 of the *Constitution* are to be kept by the returning officer in



safe custody.....It is manifest that in the absence of Form 32, the 3rd and 4th Respondents failed to comply with the constitutional requirement that an election should be transparent, accountable, verifiable and credible and that election materials are kept in safe custody. Faced with a similar scenario, Mabeya, J in *Ahmed Abdullahi Mohamad & another v Mohamed Abdi Mohamed & 2 others* [2018] eKLR stated:

It is a fact that there were two registers in the August 8, 2017 elections, electronic and a hard copy. The requirement in Regulation 72 that Form 32 be filled and that the Presiding Officer does mark the register in respect of an assisted voter whom he assists is for good reason. It is meant to comply with the constitutional requirement that an election should be transparent, accountable, verifiable and credible. In the absence of the Forms 32 and marked register, how is the 2nd and 3rd respondent to account for the assisted voters? In the absence of such evidence, this Court doubts if that election is verifiable?

137. The law further requires the Presiding officer to assist a voter in the presence of agents for the parties. The Returning Officer DW1 admitted that he gave instructions that the witnessing of an assisted voter would be done on rotational basis of 2-3 agents at a time. This was contrary to the clear provisions of the law that the Presiding officer was to assist a voter “in the presence of the agents”. In *David Ouma Ochieng v Independent Electoral & Boundaries Commission, Isaiah Nabwayo, (The Returning Officer Ugenya Constituency) & Christopher Odhiambo Karani* [2018] eKLR where the Respondent adopted a similar method of rotating agents as in this case, Cherere, J held as follows:

By randomly rotating agents to witness voting by assisted voters, the 1st and 2nd respondents breached Regulation 72 of the General Regulations, 2012 which requires that such voting be witnessed by all agents. The 2nd respondent’s contention that the rotation of the agents was a management tool is unacceptable since it denied the petitioner’s agents an equal chance with the ODM agents that included those of the 3rd respondent to witness the voting by assisted voters.

138. From the above it clear that the provisions of Regulation 72 of the *Elections (General) Regulations, 2012* were not complied with in the election for Member of National Assembly for Gatundu South Constituency in that the POs, did not assist voters in the presence of all agents, no declarations of secrecy were made in form 32 and the same was not recorded in the polling station register.

Six-piece and yellow voting –

139. The Petitioner alleged that the 3rd Respondent and his supporters, agents and campaigners openly campaigned for six piece and yellow voting for the 3rd Respondent in the polling stations on the polling day in contravention of the law. The Petitioner named 26 polling stations where this is said to have happened but none of his 10 witnesses who testified from the field stated that the 3rd Respondent promoted something called by those names.
140. The Petitioner also in his witness affidavit accused the 1st and 2nd Respondents through the Presiding Officers of marking ‘six-piece’ and ‘yellow’ voting for assisted voters in favour of the 3rd Respondent without reading out the names of all those contesting in contravention of the principles of transparency and fairness. The only witness for the Petitioner who in her witness statement raised such complaint was Janiffer Wanjiku PW 10 who stated in her statement that the Presiding Officer “would read out the full names of all the contestants especially the 3rd Respondent out loud but when it came to the Petitioner’s name he would read it in a low tone.” This is contrary to what is stated by the petitioner



that the PO was not reading out the names of all those contesting. The problem that PW10 had with the PO was that he was not reading out the name of the Petitioner loudly like was the case for the others but not that he was not reading out the names. It is then not known where the Petitioner got the allegations that the PO was not reading out the names of all the contestants. Besides this, PW10 never referred in her evidence to anything called ‘six-piece’ and ‘yellow voting’. The witness stated in cross-examination that she never made any allegations to the effect that the PO was telling voters to vote for ‘wheelbarrow’ from top to bottom. There is then no evidence where the terms ‘six-piece and ‘yellow’ voting were coined from.

Harassment of Presiding officers –

141. The Petitioner alleged that the 3rd Respondent and his supporters, agents and campaigners intimidated and or influenced the Presiding Officers in the polling stations to allow six piece/yellow voting in favour of the 3rd Respondent.
142. The Petitioner never produced a single witness to prove that the Petitioner harassed and intimidated Presiding Officers at the polling stations. The Presiding officer who testified in court, DW2 denied that she was harassed by the 3rd Respondent and his supporters. The allegation has therefore not been substantiated.

Commission of Election Offences-

143. It was the case for the Petitioner that the 3rd Respondent and his agents were involved in massive acts of bribery on voters. He called witnesses who testified on the acts of bribery. These were Martin Ngengi PW3 who saw an agent of the petitioner giving out money to voters at Gatundu primary school polling station; Simon Muiruri PW4 who said he saw supporters of the 3rd Respondent giving out money to voters at Githioro Nursery polling station; Mary Muthoni Kimani PW7 who saw Moses Kuria dishing out money at the gate while telling the voters to vote for UDA candidate; Anthony Kamau Gitau PW8 who was given Kshs 500/= by agents of the 3rd Respondent at Mutomo polling station; John Gikurumi PW11 who saw groups of agents belonging to the 3rd Respondent and Njinji Murigi giving out cash handouts outside the polling station and Caroline Wanjiku Magithi PW12 who said that she saw a woman near the Chief's camp giving out Kshs 200/= to voters while telling them to vote for the 3rd Respondent.
144. Voter bribery is an offence under Section 9 of the [Election Offences Act, 2016](#) that attracts a penalty of up to 2 years imprisonment. It is now settled law that the standard of proof of election offences in an election petition is that of beyond reasonable doubt - see [John Kiarie Waweru v Beth wambui Mugo & 2 others](#) [2008] eKLR and [Onalo v Ludeki & Others](#) (2008) 3KLR 614. In [Mohamed Ali Mursal –vs- Saudia Mohamed & others](#) Petition No 1 of 2013 Garissa cited in [Ebenyo Ekuwam Lynus v Ekomwa Lomenen James & 2 others](#) [2018] eKLR, Mutuku J. held that:

“Bribery is an electoral offence. It is also a criminal offence in ordinary life. Being such proof of the same must be by credible evidence and in my view, nothing short proving this offence beyond reasonable doubt will suffice”.
145. On examination of the evidence on bribery I am not satisfied that there was sufficient evidence to prove the same. In the first place, the witnesses did not make formal complaints of the incidents of bribery to the police. Ngengi PW3 who claims to have reported to a police officer who was on duty at the polling station never followed up the issue to make a formal report to the police or the Presiding officer/ Returning Officer. The witnesses themselves did not clearly connect the agents they claim to have been dishing out money to be agents of the 3rd Respondent. To simply say that the money givers were agents



of the 3rd Respondent without anything more to prove that the people were acting under the direction of the 3rd Respondent fails the test of proving acts of bribery. In this respect, I take guidance in the case of *M'nkiria Petkay Shem Miriti v Ragwa Samuel Mbae & 2 others* [2014] eKLR, where the Court of Appeal observed that:

“We concur with the learned Judge that the offence of bribery and communication with voters was not proved to the required standard. Why do we say so? This is because there was no evidence connecting the 1st respondent to the alleged offences. The appellant on cross-examination admitted that neither he nor any of his witnesses saw the 1st respondent personally bribing voters. He contended that it was the 1st respondent's agents who bribed voters. We find that there was need for the appellant to connect the alleged agents with the 1st respondent and that they had acted under the direction of the 1st respondent.”

146. In addition, the witnesses did not name any of the voters who were influenced and none was called in the case. More so the Petitioner's agents who claimed to have witnessed the acts of bribery did not ask the Presiding Officers to note the acts of bribery in the polling station diaries. Most of the agents proceeded to sign Forms 35As of their respective polling stations thereby signifying that they were satisfied with the manner the election was conducted. I therefore find that the Petitioner did not adduce credible and sufficient evidence to prove the alleged acts of bribery.

Counting and Tallying –

147. The Petitioner alleged that the 1st and 2nd Respondent illegally altered the total vote count in some named 16 polling stations in favour of the 3rd Respondent. However, the Petitioner did not produce any witness to prove these allegations. Among the named polling stations, the Petitioner called witnesses from only two of them, being Gathuri and Kiganjo Polytechnic polling stations. The agent at Gathuri PW6 never made any allegations of alteration of votes at her polling station. The agent at Kiganjo Polytechnic PW7 told the court that counting was smoothly done at that station except that the PO was not displaying the ballot papers to the agents. The total sum of the evidence is that the Petitioner never called evidence to substantiate this very serious allegation of alteration of vote count in favour of the 3rd Respondent.

148. The Petitioner further alleged that the 1st and 2nd Respondents inflated votes garnered by the 3rd Respondent while reducing those of the Petitioner. That this was done through the POs adopting an opaque counting and tallying system where marks in the ballot papers were not being shown to the agents and in some cases agents were kept a distance away from the counting table.

149. The only witness who in her witness statement raised the issue that the votes were not being displayed to them during counting was the agent at Kiganjo Polytechnic polling station, PW7. It is the Petitioner who won the contest at that polling station. The witness proceeded to sign form 35A without making any remarks of protest. This in itself meant that she was satisfied with the way the counting was conducted. I do not believe her evidence that the votes were not being displayed to them.

150. During the hearing, Teresia Ndung'u PW9 made claims that the votes were not being shown to them as they were being sorted out. However, this was not contained in her witness statement. She did not explain why such crucial evidence was left out in her statement. I therefore do not find that aspect of her evidence to be credible.

In the premises, the allegation that there was inflation of votes in favour of the 3rd Respondent by failure to display ballot papers to the agents during counting has not been substantiated.



151. It is not in dispute that when the presidential votes were counted at Gathuri polling station the cast votes were found to be more than those registered in the KIEMS kit by 60 votes. The Presiding Officer DW2 explained that the difference was occasioned by malfunctioning of the KEMS kit. That difference was noted in all the six electoral seats that were being contested and therefore this was an isolated case. In my view, the explanation was reasonable. If it was a mischief, it cannot have occurred in all the electoral seats.

Harassment at the tallying centre and denial of entry into the tallying centre –

152. The Petitioner alleged that the 3rd Respondent, his campaigners and supporters harassed and insulted the Presiding Officers and the Returning Officer at the tallying centre to declare the 3rd Respondent the winner before tallying and verification of results was complete.

153. The Petitioner's chief agent PW2 testified that he left the tallying centre to go for refreshment at 1 am and returned to the place at 2.30 am. That he found the 3rd Respondent and his supporters blocking the way to the tallying centre. The 3rd Respondent was addressing the crowd of about 100 people and was telling them that he had won the election and that the Returning Officer should declare him the winner. PW2 said that the group was about 35 meters from the gate of the counting hall. The 3rd Respondent however denied this allegation and said that he was at the time sleeping at his house.

154. The Returning Officer in his evidence denied that he was harassed by the 3rd Respondent and his supporters. He stated that they had set up a waiting bay tent outside the gate to the tallying hall where Presiding Officers were waiting with their ballot boxes before they were let in to be attended to by the RO. He said that there was heavy presence of security officers and it was not true that a rowdy crowd could have gathered at that place.

155. Evidence was adduced in court that the Gatundu Education Hall where tallying was taking place is accommodated inside the Sub-County Commissioner's compound where there are several government departments. There is a main gate to the Sub-County Commissioner's compound. The Gatundu Education Hall has its own fenced compound with a gate inside the Sub-County Commissioner's compound. The Returning officer said that the distance from the gate to the Education Hall to the main gate is about 100 metres. He said that there were police officers guarding both gates.

156. There is no reason for me to doubt the evidence of the Returning Officer that they had set up a tent outside the gate to Gatundu Education Hall where Presiding Officers were being accommodated before being let in to be attended to by the Returning Officer. I do not think that security officers would have allowed a rowdy crowd so close to where ballot boxes were being kept in an open tent. I do not believe the evidence that there was a crowd outside the gate to the tallying centre. If at all there was a crowd as claimed by PW2, which is most likely, it was outside the main gate to the Sub-County Commissioner's compound and not at the gate to the Education Hall. The crowd was thus far from the tallying hall. I find no evidence that the 3rd Respondent and his supporters harassed and intimidated the Returning Officer to declare the 3rd Respondent the winner before results were announced by the Returning officer.

157. The Petitioner further pleaded in the petition that the 1st and 2nd Respondents denied his chief agent, Mr Patrick Ng'ang'a, PW2, access and entry into the tallying centre at Gatundu Education Hall.

158. In his evidence in court Mr Ng'ang'a testified that it is the 3rd Respondent and his supporters who blocked him from accessing the tallying centre when he returned to the place at 2.30 am. If the allegations are true, the question is: who denied Mr Ng'ang'a entry into the tallying centre? Is it the 1st



and 2nd Respondents as pleaded in the petition or the 3rd Respondent and his supporters as testified by Mr Ng'ang'a in court? If it is the Returning Officer who did so, how did he do it when he was not near where the crowd was and was most likely not aware as to what was happening at the main gate?

159. Mr Ng'ang'a admitted that he did not report the incident to the police. The question is why he or even the Petitioner himself never took any action for over a period of 24 hours, such as reporting the matter at Gatundu Police station which was a few kilometres away? It would seem that both Mr Ng'ang'a and the Petitioner were content to accept the situation after being denied entry by a mob. The story is not convincing in any way. With the interest attendant to elections they cannot have taken the matter so casually. The Petitioner has not proved that his chief agent was denied entry into the tallying centre.

Mishandling of election materials–

160. The Petitioner pleaded that the 1st and 2nd Respondents mishandled election materials by allowing access by third parties to ballot papers, election forms, seals to ballot boxes and other crucial election materials thus, denting the credibility and integrity of the election. That this was done at the following polling stations: Ngenda Chief, Ngenda primary, Mutati dispensary, Githioro nursery, Nembu primary, Kamutua primary, Ituro primary, Gathage primary, Ndundu secondary and Karinga primary.
161. The evidence that was adduced in court in regard to mishandling of election materials as stated by Mary Muthoni Kimani PW7 was that on the August 11, 2022, a person that she knew by name Njoro who was a boda boda rider took to her a copy of a ballot paper and some seals of ballot boxes. Njoro told her that the items were given to him by one Joseph Kibunyi who asked him to take them to her (PW7) for her to take them to an honourable member. That on the following day, she took the items to the Petitioner. She later recorded her statement over this matter on the August 24, 2022 but she forgot to mention the items in her statement.
162. The Petitioner's chief agent PW2 testified that he came to see the materials at the lawyer's office. The materials were however not produced in court. Instead it is a photograph of the materials that was presented. There was no explanation as to why the items were not produced in court.
163. PW7 in her evidence said that the person called Joseph Kibunyi was a witness in this case. The Kibunyi who testified in court was Martin Kibunyi Ngegi, PW3 never mentioned the items in his witness statement. The person called Njoro who is said to have been given the material by Joseph Kibunyi did not testify in the case. The materials themselves, if ever they are in existence, were not produced in court. The 1st and 2nd Respondents cannot be accused of mishandling election materials when the same have not been produced before court and authenticated as genuine election materials and proof tendered as to where they came from.
164. The Petitioner alleged that the 1st and 2nd Respondents mishandled election materials in 10 polling stations as mentioned above. No evidence was tendered that there were election materials mishandled in any of those polling stations. The allegation was thus not substantiated.

The implications of the malpractices on the voting and final results –

165. Having considered all the alleged malpractices that were raised in the petition, the only irregularity that the court finds to be proved is non-compliance with the provisions of Regulation 72 of the Elections (General) Regulations, 2012. I will therefore proceed to consider whether the election was conducted in compliance with the law in view of the finding that there was non-compliance with the stated regulation.



Whether the election was conducted in compliance with the law -

166. An election is an expression of the will of the people in exercise of their political rights under Article 38 of the [Constitution of Kenya, 2010](#). A petitioner who therefore challenges the will of the people in an election petition has to adduce cogent evidence for that will to be overturned. The burden of proof is on the petitioner to show that the election was not conducted in accordance with the [Constitution](#), the [Elections Act, 2011](#) and the regulations made thereunder.
167. The criteria for nullification of an election is laid out in Section 83 of the [Elections Act, 2011](#) that provides that:
- (1) A court shall not declare an election void for non-compliance with any written law relating to that election if it appears that:
 - a. The election was conducted in accordance with the principles laid down in the [Constitution](#) and in that written law; and
 - b. The non-compliance did not substantially affect the result of the election.
168. That position was emphasized by the Supreme Court in [Raila Odinga vs Independent Electoral & Boundaries Commission & Others](#), Supreme Court Election Petition No 5 of 2013 where it held:
- “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.”
169. The Supreme Court also discussed the section in [Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 Others](#) [2014] eKLR where it stated;
- “216. It is clear to us that an election should be conducted substantially with the principles of the [Constitution](#), as set out in Article 81(e). Voting is to be conducted in accordance with the principles set out in Article 86. The [Elections Act](#), and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.
 217. If it should be shown that an election was conducted in accordance with the principles of the [Constitution](#) and the [Elections Act](#), then such election is not to be invalidated only on grounds of irregularities.
 218. Where, however, it is shown that the irregularities were of such magnitude that they affected the election results, 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...”



170. The same court in *Raila Amollo Odinga & Another v. IEBC & 2 Others* (2017) eKLR rendered an interpretation of the provisions of Section 83 of the *Elections Act* as thus: -

“(192) There are clearly two limbs to all the above quoted provisions: compliance with the law on elections, and irregularities that may affect the result of the election. The issue in the interpretation of the provisions is whether or not the two limbs are conjunctive or disjunctive...

(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.”

171. In this petition it was incumbent upon the Petitioner to prove to the satisfaction of the court either that the conduct of the election substantially violated the principles laid down in the *Constitution* as well as other written law on elections or that though the election was conducted substantially in accordance with the *Constitution* as well as other written law on elections it was fraught with irregularities and illegalities that affected the result of the election.

172. I have examined the petition in its entirety and find that the election for Gatundu South constituency was conducted substantially in accordance with the *Constitution*, the *Elections Act, 2011* and the regulations made thereunder, save that there was no compliance with Regulation 72 of Elections (General) Regulations, 2012. Apart from that non-compliance, there was no evidence of any malpractice during the campaign period or on the voting day. Counting of ballot papers and tallying was conducted in accordance with the law. There was no harassment of Presiding Officers or agents as alleged.

173. The provisions of Regulation 72 of *Elections (General) Regulations, 2012* that were breached are that:

1. The Presiding officers did not assist assisted voters in the presence of all the agents as required by Reg. 72 (2).
2. The persons assisting the voter did not make declarations of secrecy before the Presiding Officers in form 32 as required by Reg. 72 (5)(a).
3. The Presiding Officers did not record such assistance in the polling station register as required by Reg. 72 (6).

174. The question then is whether failure to comply with the provisions of the said regulation was an irregularity that substantially affected the result of the election to warrant the election of the 3rd Respondent being nullified.

175. The Petitioner and his Chief agent PW2 told the court that they were not disputing the results that were declared in Form 35As. In fact, all the Petitioner’s agents who testified in court except Teresia Ndung’u PW9 signed their respective Form 35As without any reservations. Even for PW9 the explanation she



gave for not signing the form was that the Presiding Officer told her that the three agents who had signed before her were sufficient. The inference to be made of the fact that the agents signed the forms is that they were satisfied with the manner the election was conducted.

176. The Petitioner alleged that the percentage of assisted voters was 30% of the voters who turned up to vote. There was no empirical basis on which this conclusion was arrived at and is most likely an exaggeration.
177. In my consideration, it has not been shown that failure to comply with Regulation 72 of *Elections (General) Regulations, 2012* was an irregularity of such a magnitude that it substantially effected the final result of the election in Gatundu South Constituency. According to the Returning officer DW2, the manual register was not in use across the country. That would mean that it is not Gatundu South constituency alone where Regulation 72 of *Elections (General) Regulations, 2012* was not complied with.
178. In the final end, I find that the Petitioner has not discharged his burden of proving that the election for the Member of National Assembly for Gatundu South Constituency was not conducted substantially in accordance with the *Constitution* and the relevant electoral laws as to warrant the election of the 3rd Respondent being declared null and void. Instead, I do make a finding that the election of the 3rd Respondent as Member of National Assembly for Gatundu South Constituency was conducted in conformity with the *Constitution of Kenya, 2010* and the electoral laws of the land.
179. In view of the above finding, the upshot is that the election petition herein lacks merit and is hereby dismissed. I consequently order that:
1. The election held on August 9, 2022 for Member of National Assembly for Gatundu South Constituency was conducted in accordance with the principles laid down in the *Constitution* and written law and any non-compliance observed thereof did not substantially affect the result of the election.
 2. The 3rd respondent Mr Gabriel Gathuka Kagombe was validly elected as the Member of National Assembly for Gatundu South Constituency.
 3. A Certificate of this determination is to issue to the Commission and the Speaker of the National Assembly under Section 86 of the *Elections Act, 2011*.
 4. The Petitioner is to bear the costs of the petition to the Respondents.

H. Costs-

180. Rule 30 of the *Elections (Parliamentary & County Elections) Petition Rules, 2017* provides: -
- 30.
- (1) The election court may, at the conclusion of an election petition, make an order specifying –
 - (a) the total amount of costs payable; and
 - (b) the maximum amount of costs payable;
 - (c) the person who shall pay the costs under paragraph (a) and (b); and
 - (d) the person to whom the costs payable under paragraph (a) and (b) shall be paid.



181. The rule thereby grants the court discretion to decide on the costs payable and the party to pay the costs.
182. Mr Mwongela asked the court to award the 1st and 2nd Respondents a sum of Kshs 10,000,000/= and cited the case of *Owino Paul Ongili Babu v Francis Wambugu Mureithi & 2 Others* [2018] eKLR, where an award of Kshs 5,000,000/= made by the High Court was reduced to Kshs 3,000,000/= by the Court of Appeal. He also cited the case of *David Ouma Ochieng v Independent Electoral & Boundaries Commission, Isaiah Nabwayo, (The Returning Officer Ugenya Constituency) & Christopher Odhiambo Karani* [2018] eKLR where an award of Kshs 7,000, 000/= was made in costs.
183. Mr Njuguna similarly asked for a sum of Kshs 10,000,000/=. He cited the case of *Dickson Daniel Karaba v Kibiru Charles Reubenson & 2 others* [2018] eKLR where the High court upon allowing an application for withdrawal of the petition allowed costs to each of the Respondents at a cap of Kshs 5,000,000/=. [This was however reduced and capped by the Court of Appeal at Kshs 2,500/= for the 1st Respondent and Kshs 2,500,000/= for the 2nd and 3rd Respondents].
184. In *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition No 4 of 2012 [2014], the Supreme Court settled the law on costs by finding that they follow the event and further that a Judge has the discretion in awarding same. The learned Judges of 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.”

“[22] Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases. The relevant question in this particular matter must be, whether or not the circumstances merit an award of costs to the applicant.”

185. I have considered that there was a lot of time and energy spent in defending the petition. I cap the costs for the 1st and 2nd Respondents at Kshs 1,000,000/= and those of the 3rd Respondent at Kshs 2,000,000/=.
186. Lastly, I would like to thank and appreciate the advocates for the respective parties for their professionalism and commitment to duty shown during the course of the hearing of the petition.

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

J. N. NJAGI

JUDGE



In the presence of:

Mr Kibe for Petitioner

Mr Mwangela for the 1st and 2nd Respondents

Mr Njuguna Ng'ang'a for 3rd Respondent

Petitioner - present

Court Assistant - Simon

