



Karisa v Independent Electoral and Boundaries Commission & 2 others; Kingi (Interested Party) (Election Petition E001 of 2022) [2023] KEHC 1665 (KLR) (3 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1665 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
ELECTION PETITION E001 OF 2022**

A MABEYA, J

MARCH 3, 2023

BETWEEN

KENGA STANLEY KARISA PETITIONER

AND

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

**AISHA ABUBAKAR SENGE MAGARINI CONSTITUENCY RETURNING
OFFICER 2ND RESPONDENT**

KOMBE HARRISON GARAMA 3RD RESPONDENT

AND

MICHAEL THOYA KINGI INTERESTED PARTY

JUDGMENT

1. On 9/8/2022, the people of Magarini Constituency held elections for various positions including for Member of National Assembly (herein “MNA”). The petitioner, 3rd respondent and interested party were amongst the candidates vying for that seat under different political parties.
2. The 3rd respondent garnered the most votes being 11,946 and was declared as the duly elected MNA. The petitioner garnered 11,925 votes and lost to the 3rd respondent with a margin of 21 votes.
3. The petitioner rejected those results and moved this Court vide a petition dated 7/9/2022 which was amended on 12/10/2022 for the nullification of those elections. The grounds were that there were grave errors, flaws, fraud, illegalities and irregularities committed by the respondents which constituted fundamental contraventions of the letter, spirit and objects of *the Constitution* and the electoral laws. It was the petitioner’s case that the respondents failed to ensure or secure a free, fair and credible election and the will of the people of Magarini Constituency.



4. The petition was based on five grounds, to wit, denial of petitioners' agents to 3 polling stations; false or inaccurate Statutory Declaration Forms in 12 polling stations; differences in number of votes cast in the 6 elections in 2 polling stations; vote result padding or manipulation in 4 polling stations; and election offences due to the manner in which the 1st respondent through its officers conducted the elections.
5. The petitioner thus sought prayers for; a declaration invalidating the election of the 3rd respondent as the MNA, Magarini Constituency; a declaration that the petitioner was duly elected as having attained the majority vote in that election, or in alternative, an order for fresh MNA elections in Magarini Constituency. He further sought a declaration that the non-compliance, irregularities and improprieties in the impugned election were substantial and significant that they affected the integrity and quality of the election and the result thereof. An order for scrutiny and recount of the ballots cast in 19 polling stations and that such election offences by the 2nd respondent and 1st respondent's presiding officers be reported to the DPP for appropriate action plus costs of the petition.
6. The 1st and 2nd respondent responded to the petition vide a response dated 27/9/2022. The 3rd respondent opposed the petition vide the amended Response to Petition dated 28/10/2022. The respondents generally denied all the allegations and contended that the election was conducted in accordance with [the Constitution](#), specifically Articles 81 and 86, and Electoral Laws and Rules, and that there were no irregularities. That the 3rd respondent gathered most votes in the elections and the 2nd respondent validly declared him as the duly elected MNA.
7. It was contended that accredited agents were allowed in polling stations. That all agents signed Form 35As without any complaints or dissatisfaction with the processes and the same were ratified by chief agents who signed Form 35B without complaints. The differences in results were attributed to human error and it was contended that no candidate benefited from the errors. It was also contended that all errors were realized and corrected/rectified thus no candidate lost votes. That errors such as vote interchange did not affect the votes or results of any candidate. That ballots lacking IEBC stamp were rightly rejected to avoid ballot stuffing,
8. That no election offences nor irregularities were reported to the 1st respondent and that the errors in Forms 35A and 35B were honest mistakes of human error and were rectified in the presence of the agents and chief agents.
9. A total of 35 witnesses testified at the trial whose testimony pleadings and submissions I have carefully considered. At the pre-trial conference held on the 3/11/2022, the parties agreed on the following broad issues for determination: -
 - i. Whether the election of the MNA for Magarini Constituency was conducted in accordance with [the Constitution](#) and the law.
 - ii. Whether there was non-compliance with [the Constitution](#) and the law in the conduct of the elections of Magarini Constituency.
 - iii. Whether there were election offences committed as alleged.
 - iv. Whether the alleged irregularities affected the results of the election of the MNA for Magarini Constituency
 - v. What order as to costs.
10. It has been held before that an election petition is not an ordinary civil dispute that courts are often faced with. It involves the protection of the political rights of citizens as stipulated under Article 38 of [the Constitution](#). This right materializes when a citizen votes for a candidate of his choice. It then follows



that election petitions involve disputes between parties who represent the many citizens who voted in such an election on different sides. Election petitions are therefore within the domain of public interest and as such, courts apply a different standard of proof from the one applicable in ordinary civil suits.

11. In *Raila Odinga and Another v The Independent Electoral and Boundaries Commission and Others* [2017] Eklr, the Supreme Court held that: -

“In many other jurisdictions including ours, where no allegations of criminal or quasi-criminal nature are made in an election petition, an “intermediate standard of proof”, one beyond the ordinary civil litigation standard of proof on a “balance of probabilities”, but below the criminal standard of beyond reasonable doubt”, is applied. In such cases, this court stated in 2013 *Raila Odinga* case that the threshold of proof should in principle be above the balance of probability, though not as high as beyond reasonable doubt ...”.

12. From the foregoing, the applicable standard of proof is beyond the balance of probability but lower than beyond reasonable doubt that is applicable in criminal cases.

13. However, in situations where criminal or quasi-criminal allegations are raised, the applicable standard remains one beyond reasonable doubt. The same was held in *Khatib Abdalla Mwashetani v Gideon Mwangangi Wambua* [2014] eKLR, wherein the Court of Appeal delivered itself thus: -

“Purely from the consequences that flow from the finding that a person is guilty of improper influence is serious conduct that has attributes akin to those of an election offence. It is now settled beyond peradventure that the standard of proof where an election offence or such conduct is alleged, is proof beyond reasonable doubt.”

14. Accordingly, in an electoral dispute such as the one before me, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of a criminal or quasi-criminal nature are made, such as in this Petition, the proof of such allegations is beyond reasonable doubt.

15. The next question to answer is, who then bears the burden of proof? Under section 107 of the *Evidence Act*, Cap 80 of the Laws of Kenya, it is he who alleges that must prove. The burden is on the petitioner throughout to prove to the satisfaction of the Court that there was not only non-compliance with *the Constitution* and electoral law, but also that the said non-compliance affected the outcome of the election.

16. In *Ahmed Abdullahi Mohamad & another v Mohamed Abdi Mohamed & 2 others* [2018] Eklr, the court held that an Election Court will not easily upset an election by substituting its decision, conviction or will to that of the electorate, and that the Election Court has to be satisfied that the alleged irregularities affected the will of the electorate.

17. This position was derived from the finding in *Raila Amolo Odinga v. IEBC and 3 Others* [2013] eKLR, wherein the Supreme Court of Kenya held that: -

“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.”

18. It then follows that the petitioner not only bears the burden to establish that there were violations, omissions, malpractices, irregularities and illegalities in the conduct of the Magarini Constituency MNA election held on 9/8/2022, but must also illustrate to the satisfaction of the Court that those violations, omissions, malpractices, irregularities and illegalities affected the result of the election. That the result did not reflect the will of the people of Magarini Constituency. It is only then, that the evidentiary burden shall shift to the respondents to establish the contrary.
19. The nature of an election petition is that of an audit which is conducted by an Election Court on the basis of the complaints raised in a Petition, to confirm if the election was undertaken in accordance with *the Constitution* and the electoral law. The applicable Constitutional principles are to be found in Articles 38, 81, 83 and 86 of *the Constitution*. These provide that the elections should be free and fair which reflect the will of the electors; elections that are by secret ballot, free from violence, intimidation, improper influence or corruption, transparent; that are administered impartially, efficiently, accurately and in an accountable manner; that the voting method used is simple, accurate, verifiable, secure, accountable and transparent; that the votes are counted, tabulated and results announced promptly and that mechanisms are put in place to eliminate electoral malpractice including the safekeeping of electoral materials.
20. In the course of undertaking the audit, the Election Court ought to be cautious not to substitute its will for that of the voters. In the case of *John Fitch v. Tom Stephenson & 3 Others* [2008] EWHC 501 QB6, the Court held: -

“The decided cases, including those which Lord Denning considered in *Morgan –v- Simpson*, establish that the courts will strive to preserve an election as being in accordance with the law, even where there have been significant breaches of official duties and election rules, providing the results of the election was unaffected by those breaches. ... This is because where possible, the courts seek to give effect to the will of the electorate.”

21. The foregoing are the legal parameters and beacons within which this Court shall determine the allegations in this Petition.
22. I will now address the issues as agreed upon by the parties. Issues 1 and 2 are to the effect that, whether the elections were conducted in accordance with the law and *the Constitution*.
23. This issue revolves around the general conduct of the elections by the 1st and 2nd respondent. The official acts of the 1st respondent and its agents are normally presumed to be lawful, valid and in accordance with *the Constitution* and the law unless satisfactory evidence is tendered to prove the contrary. The petitioner made various allegations in an attempt to remove or discharge the said presumption. I will now interrogate those allegations as follows;

(i) Denial of access of the petitioner's agents in the polling stations

24. The petitioner alleged that his agents were denied access to Mjanaheri Primary School polling station, Mapimo Primary School Stream 3 and 4, and Mapimo Youth Polytechnic streams 2 and 5.
25. PW1 testified that in Mjanaheri Primary School polling station, his agent did not sign Form 35A though an agent of UDA, his party, had signed the form. That in Mapimo Primary School Streams 3 and 4, UDA agents signed but none of his agents signed Form 35A. That in Mapimo Youth



Polytechnic, UDA agents signed. It was also his testimony that in several other stations, the UDA agents who signed the forms were not his agents.

26. On the other hand, R1W2, the returning officer testified, that there was a pre-agreement with the candidates and their chief agents that the political parties would only be allowed to have one agent representing all candidates vying under the same party at any given point inside the polling stations due to space constraints. That though the agents were allowed entry on a rotational basis, only one agent at a time from each party, could be inside the polling station. The 3rd respondent corroborated this testimony. Further, the presiding officers (POs) who testified denied these allegations.
27. This Court has seen the various Form 35A's for the pleaded stations and notes that they were all signed by UDA agents. This is an indication that the petitioner, as a candidate vying under the UDA party ticket, was represented by the party agents who were present in the stations and signed the forms. I accept the explanation that space constraints could not allow each candidate in all the 6 elective posts to present their own individual agents in the polling stations. This could undoubtedly lead to overcrowding in already small spaces that are polling stations.
28. In any case, the petitioner called 6 other witnesses none of who alleged having been denied entry into their respective polling station.
29. From the foregoing, the allegation of denial of access to the pleaded polling stations fails.

(ii) Differences in number of votes cast in the 6 elections

30. It was the petitioner's case that the total number of votes cast and accounted for by the 1st and 2nd respondent differed by a big margin in the 6 elections. This was allegedly in Vuga Primary School polling station and Mapimo Central Primary School station 1 of 1.
31. There was no evidence before Court of other results from the other elective seats to enable this Court make a comparative analysis and audit whether indeed there was a substantial difference in the number of votes cast in the 6 elective posts as alleged. Accordingly, that allegation was not proved.

(iii) alleged false/inaccurate statutory declaration forms and vote result padding/manipulation

32. It was the petitioner's case that there were several Form 35A's whose results did not match the results posted on the 1st respondent's portal that were relied upon to declare the 3rd respondent's victory. He complained that the 1st respondent relied on results that had been altered and not countersigned, as well as results with wrong tabulations.
33. He complained that some of the Form 35A's were not signed by the agents and no explanation was given. That his agents disputed the rejected votes but such objections were never recorded. He also complained that some rejected votes were awarded to the 3rd respondent and that there were many instances where his results were being interchanged with those of the 3rd respondent. That corrections were only done after his agents complained. He further claimed that in some stations, his votes were either reduced, or altered and not countersigned. These allegations were denied by the respondents.
34. In the course of the trial, several anomalies in regard to the statutory forms and declaration forms arose.
35. PW3 was the petitioner's agent in Mapimo Youth Polytechnic stream 1. He testified that he was forced to sign a blank Form 35A before the Presiding Officer ("PO") entered the results and declined to issue him with a copy of that form. That when the form was pinned on the door of the polling station, he realized that the PO had interchanged the petitioner's votes with those of the 3rd respondent recording 78 votes for the 3rd respondent and 34 votes in favor of the petitioner. That the returning officer was



informed at the tallying centre and she ordered a recount of the votes. The interchange was admitted and the anomaly was corrected on 11/8/2022.

36. R1W2 admitted the testimony of PW3. She stated that upon realizing the mistake, she called all the agents and the PO of the polling station and broke the seals on the ballot boxes in their presence to retrieve the original Form 35A which had been locked in the ballot box. That the PO then corrected the anomaly.
37. A reading of Regulations 81, 83, 86, and 93 of the Regulations will show that, once ballot boxes are sealed at the polling station, there is no authority whatsoever to break open those ballot boxes without an order of the court.
38. In *Ahmed Abdullahi Mohamed & Anor Vs Hon Mohamed Abdi Mohamed & 2 Others Election Petition No 14 Of 2017 Eklr*, the Court held that any attempt by the returning officer to rely on internal manuals such as “the training manual and guide for returning officers’ or the guidelines in the PSD’s in order to break seals and open ballot boxes was irregular. The Court held thus: -

“The 3rd respondent cannot arrogate to itself power which it does not have under the law. It cannot amend the law through internal manuals. If that is its intention, it should lay those amendments before the people’s representatives in Parliament for enactment. By attempting to allow the Returning Officer to break open ballot boxes at the tallying centre after they had been properly sealed at the polling station, the 3rd respondent and its Returning Officer acted ultra vires. I hold that once ballot boxes have been sealed at the polling station, no amount of consensus by electoral officers and agents/candidates can validly lead to their opening without a court order.
39. The position remains the same. The voting process is an expression of the will of the people and once finalized, no one is allowed to tamper with the material used to express that sovereign will unless authorized by court or by law.
40. R1W2 had testified extensively on the training done by the 1st respondent to presiding officers and their deputies, who then sit for an exam before becoming accredited presiding officers. It was expected that at the very least, the presiding officer would not lock the original Form 35A which is among the crucial documents to be handed over to the returning officer for entries in Form 35B.
41. R1W7, the PO for the polling station stated that he knew of the error at 2pm the day following the election. This Court notes that R1W7 did not enter any comments on the alterations made on Form 35A though he testified that it was his duty to comment on any alterations in the Form. He also testified that only some of the polling agents witnessed the recount and cancellation. However, there was no evidence to show which agents witnessed the recount and cancellation. The transparency of the entire process was already dimmed at this juncture.
42. Further, the returning officer did not stop at retrieving the original Form 35A from the ballot box. She went ahead and re-assembled 14 agents and the available chief agents, conducted a recount, and caused the presiding officer to alter the results in the tallying centre. This was contrary to all her other evidence where she repeatedly said that polling station results are final, and hers was only to tally the results. Why then was a recount conducted in the tallying center? Moreover, why were the results altered in the tallying center? Weren’t the polling station results final? What she did was contrary to the holding in the *IEBC VS Maina Kiai & 5 others Civil Appeal 105 of 2017* case on the finality of the results at the polling station.



43. It is this Court's finding that the opening of the ballot box was a serious irregularity. This was coupled with the established error of transferring the results of the petitioner to the 3rd respondent.
44. PW5 testified that in Kinyaule polling station, the votes for Chad Karisa Hamadi were increased by 7 votes and Form 35A indicated a total of 81 votes while Form 35B showed 88 votes. This Court has seen both forms and finds that the results therein are different and are as stated by PW5. There were discrepancies and inaccurate results in those statutory forms.
45. PW7 testified that in Kaembeni Primary School, there was a total of 16 rejected votes and 3 out of them ought to have been valid and awarded to the petitioner. That he raised an objection which was met with threats of eviction from the station by police officers. That he only signed the Form 35A to signify that he was present and not to validate the results. The scrutiny would later bear this witness to have said the truth.
46. PW6 testified that in Kayadagamra Primary School, the presiding officer had entered 224 votes in favor of the petitioner instead of 244 thus denying him 20 votes. That even after raising alarm, the presiding officer declined to rectify the anomaly until PW6 called the petitioner himself. This was yet another incident whereby the 1st respondent's officers declined to rectify an anomaly until further measures were taken against him.
47. R1W1 testified that he was the PO at Mjanaheri Primary School station 1 of 4. He admitted that the tabulation of the total votes was not correct as he indicated 357 instead of 358 in Form 35A. He also admitted that not all agents appearing at page 20 of the PSD signed Form 35A and he did not indicate any reasons for refusal. That agents were not allowed to write anywhere in Form 35A but for their names and signatures.
48. He further testified that he indicated that the declared results were for Majenjani instead of Mjanaheri. That the same was out of fatigue and human error and the same did not affect the results. The petitioner in its submissions vehemently opposed that position and submitted that Form 35 A is a statutory document and the declarations made therein are to be guided by the *Oaths and statutory declarations Act* chapter 15. That the faulty declaration and its pronouncements therein could not be taken to be a representation for the will of the people in Mjanaheri.
49. From the foregoing, there is evidence to show that the results indicated in that Form 35A were false and consequently, Form 35B was inaccurate. There is also evidence that the results therein cannot be credible having been for another station, Majenjani, and not Mjanaheri Primary School station 1 of 4. The acts of a presiding officer gives credibility to the results and information contained in the statutory forms.
50. The declaration part of Form 35A reads thus: -
- “ We, the undersigned, being present when the results of the count were announced, do hereby declare that the results shown above are true and accurate count of the ballots in..... polling station....Constituency.”
51. The foregoing is self-explanatory. The presiding officer affixes his signature to signify that the results in Form 35A to be true and accurate in the polling station where he was present when the results of the count were announced. When the presiding officer proceeds to indicate a different polling station other than the one he was present in, the statutory form loses its value and credibility.



52. In *Manson Oyongo Nyamweya v James Omingo Magara & 2 Others* [2009] Eklr the Court held that: -

“It is the signature of the Presiding Officer (and not any other person) that validates and authenticates the results announced in a polling station. Where a Returning Officer is given a form 16A that is not signed by a Presiding Officer it would be against the law for the Returning Officer to accept such a declaration and include it in tallying results. Acceptance of such a form by a Returning Officer is tantamount to validating results which the Returning Officer has no idea as to how they were arrived at. Where the law requires a document to be signed by a particular person, if it is not so signed or not signed at all such a document is worthless and ought to be rejected.”

53. In the circumstances, the results for Mjanaheri Primary School polling station remained not credible. In other words, the presiding officer did not sign the declaration form for Mjanaheri Primary School, making it an election offence under Regulation 79.
54. Though failure to sign a statutory form by a candidate or his agent is excused under Regulation 79(6), such failure will only be excused if the presiding officer records that fact in the declaration form itself. (See Regulation 79(4)). Such recording is for the purposes of accountability, credibility and verifiability of the results in the declaration form. In the circumstances of this case, the question of credibility of the results in Mjanaheri 1 of 4 could not be said to have been credible.
55. From the foregoing, the Court finds that all the Form 35A's that were unsigned by the candidates or their agents and no reason was indicated by the presiding officer for the failure to sign were questionable. The results therein cannot be said to be credible and verifiable.
56. The 1st and 2nd respondent also made several admissions including that there were discrepancies between Forms 35A and 35B in several stations such as Kinyaule Nursery School polling station 1 of 1, St. Peter's Primary School, Malindi GK prison polling station 1 of 1 and 2 of 2, Chakama Primary School polling station 1 of 1 and Mekatilili Primary School wherein the two forms had a discrepancy of 100 votes. That agents were not allowed to write objections in Form 35A despite having raised objections. For instance, there was challenge on the declared rejected votes in Kadzuhoni Primary School station 2 of 2, Shomela Primary School station 1 of 1 and Kaembeni Primary School. No explanations by POs was given.
57. Another admitted inaccuracy in statutory forms was Form 35B for Malindi GK prison station 1 of 1 and 2 of 2. R1W1 admitted that there were errors and result interchanges during the transfer of results from Form 35A to 35B in these two polling stations. However, she insisted that the parties' votes remained the same and the results were not affected.
58. Regulation 83 of the Elections (General) (Amendment) Regulations 2017 provides for tallying and announcement of election results. The responsibility of ensuring the correctness of the entries in Form 35B lay squarely upon the returning officer. The mistake she committed in these Polling Stations of Malindi GK Prison was telling.
59. There was also the very strange situation in Vuga polling station which caused the petitioner to cry foul as to the accuracy and credibility of the results from Vuga. It was not in dispute that no single agent signed Form 35A in that station yet they signed the polling station diaries after counting the votes. According to the evidence of R1W8, counting ended at 21:45 hours on



9/8/2022, and the last agent left at 22:02 hrs which was after counting had ended. However, not a single agent signed Form 35A.

60. The reason given by R1W8, the PO was that the agents left for fear of attacks by elephants. That explanation was not satisfactory. Many agents left way past 21.45hrs after the counting of votes. No reason was indicated by the PO in the Form 35A. The explanation was an afterthought.
61. There were also various instances whereby the petitioner's votes were reduced, altered or interchanged. Corrections thereon were only done after the agents interjected in such stations as Kayadagamra Primary School where votes had been reduced by 20 before intervention.
62. There were also statutory documents that had alterations that were not countersigned and the same were admitted by the Returning Officer. The affected stations included Adimaye Primary School polling station 1 of 1, Kinyaule Nursery School Polling station 1 of 1, Mapimo Primary School polling station 4 of 4, and Mapimo Youth Polytechnic station 1 of 6.
63. It was established to the satisfaction of the Court that in many instances, it was the petitioner's votes that were either interchanged or altered without countersigning.
64. From the foregoing, there is evidence and the Court is satisfied that the petitioner established that there were various false and/or inaccurate statutory forms that were relied upon to declare results in the MNA election. There were also irregularities and non-compliances with the Constitution and the law.
65. It is therefore this Court's finding that under this head, the petitioner has met the standard of proof and proved that the MNA elections in Magarini Constituency were not conducted substantially in accordance with the Constitution and the law.
66. The next issue is whether there were election offences. It was the petitioner's case that the manner in which the election was conducted was fraudulent. That various presiding officers committed grievous electoral fraud by altering and stamping Forms 35A inflating voter turnouts and transmitting manipulated results. The petitioner particularly identified Mapimo Youth Polytechnic 1 of 6 and claimed that the agents were forced to sign a blank Form 35A, and thereafter the presiding officer altered the results and the agents raised the concern with the returning officer who then corrected the anomaly.
67. This claim is criminal or quasi criminal in nature, and the applicable standard of proof for it is one beyond reasonable doubt. Though the petitioner's agent testified that he was given a blank form to sign, the respondents agents from that station testified that none of them was given a blank form to sign.
68. Further, there was no evidence that the presiding officer in that station had fraudulent intent while entering the vote interchange. In the circumstances, this Court is not convinced of that allegation. Admittedly, there were many instances where results were altered but not countersigned and many instances where statutory forms had inaccurate results. However, it was for the petitioner to prove that this was done with a fraudulent intent.
69. To this Court's mind, the petitioner did not establish to the required standard that there was fraud on the part of the 1st respondent and its officials.
70. As regards violence, IPW1 was Joseph Kahindi Karisa. He testified that on 8/8/2022, he was attacked and physically assaulted by 8 ODM supporters in his home together with his family.



That the people were well known to him and they indicated that they did not want PAA supporters to vote the following morning. That they also attacked and damaged his car. He reported the matter to the police and was given OB Number 03/09/08/2022. That the Nissan they used was towed to the police station along with his car. That the driver of that Nissan said that he had been hired by the ODM team. It was his testimony that IEBC ought to have sanctioned ODM.

71. There was no evidence that IPW1 informed the 1st respondent of the attack to enable it take any action. In any event the attack took place far from the election area where the IEBC has jurisdiction.
72. The other allegation was that of bribery and campaigns at polling stations. IPW3 testified that one of the IEBC's officials, John Fondo campaigned within a polling station. However, R1W2 testified that the said official was assisting voters and was allowed to talk to them. This is permissible under the regulations. None of the witnesses told the Court what the said official was telling the voters for the Court to hold that he was campaigning.
73. As regards bribery, IPW3 testified that he witnessed ODM and UDA supporters soliciting for votes and offering Kshs. 500/= to anyone who agreed to vote 'six-piece'. That he was personally offered the same amount but declined, and he saw several voters accepting the money. He testified that he informed the PAA agent of the malpractices. On this allegation, there was no evidence to show that the same was reported to the 1st respondent.
74. The other issues relates to unstamped ballots. During the trial PW2 testified that he was the petitioner's agent at Shomela Primary School. That during counting and tallying of ballot papers, three ballot papers were rejected, and two of the rejected ballots were cast in favor of the petitioner but lacked IEBC's official stamp thus treated as rejected.
75. R1W2 testified that it was the duty of the IEBC clerks to stamp ballot papers and it was an offence for them not to stamp. She also testified that each ballot paper had a counterfoil which had a serial number and the PO's had adequate training to confirm whether unstamped ballots were from IEBC or from outside. That Francis Sirya Masha had not offered that explanation in his affidavit nor indicated whether he counterchecked the foils to confirm that the unstamped ballots were IEBC's.
76. That there was no report of voters coming in with ballot papers from outside. He further testified that they did not confirm whether the 2 rejected papers were from the station or outside though he was required to find out and neither did he write a statement to explain why the ballots were rejected.
77. No doubt that it is for IEBC's officials to stamp ballots. In a situation where the clerks fail to stamp ballots and even their counterfoils as is the case in this petition, it is the 1st respondent to be held responsible. The scrutiny would later reveal unstamped ballot papers as well as counterfoils.
78. From the foregoing, the only offence established was that of failing to stamp ballot papers and counterfoils. Further the Breach of Regulation 79. However, there was no particular official that was identified for reference to DPP.
79. The last issue is whether the irregularities complained of affected the results of the election. Upon application for scrutiny and recount this Court ordered for the same on 13/1/2023. The same was undertaken and the Deputy Registrar filed her report on 20/1/2023.



80. The report revealed that there were numerous unstamped counterfoils of the ballots used in 7 stations. The purpose of counterfoils is to relate the votes found in a ballot box to any particular polling station. In IEBC and another v. Stephen Mutinda Mule and 3 others [2014] eKLR the Court of Appeal emphasized the importance of the requirement for stamping as provided for in Regulation 69. That regulation provides:-

“ Before issuing a ballot paper to a voter, an Election official shall;

- a. “Stamp the counterfoil of the ballot paper on the face with the official mark of the commission, and
- b. Stamp the ballot paper at the back with an official mark of the commission.”

81. The counterfoils and ballot papers are the only two documents that require stamping under the regulations. Regulation 77(e) allows a returning officer not to count any ballot paper which cannot be verified from the counterfoil of ballot papers used at that polling station.

82. From the above, it is clear that counterfoils serve an important role in verifying the ballots used to cast votes. Without counterfoils, it is not possible to relate the votes found in a ballot box to any particular polling station or the votes cast.

83. The scrutiny revealed a total of 37 unstamped counterfoils from 7 out of the 24 stations. There were also several ballots that were unstamped

84. In Mjanaheri Primary School, the total valid votes in Form 35A was indicated as 357 while Form 33A indicated 358. The total ballots used were 350, but it was indicated as 360. Since the total ballots used were 350, the additional 8 votes in Form 35A cannot be accounted for. This was an indication of ballot stuffing.

85. Further, in Kinyaule Nursery School stream 1 of 1, there was no counterfoil of Form 35A in the ballot box. That raises questions about the Form 35A that was used and relied on to transfer the results to Form 35B.

86. Despite the numerous discrepancies in the rejected votes, this Court notes that Form 42A's for rejected votes were missing in about 15 out of the 24 polling stations. In other instances, counterfoils for Form 35A were missing, as well as tallying sheets. These are vital documents which are required under the election regulations to be put in the ballot box together with the cast ballots at the close of an election. It is those documents which are used to verify the results of an election. Without those vital documents, the ballots in a box are unverifiable.

87. In Wabuge v Limo & Another [2008] 1 Klr (Ep), the court held that an election would be held to be void if it was conducted so badly that it was not substantially in accordance with the election laws. In that petition, scrutiny and recount revealed that 285 votes marked for the petitioner had been rejected by the Returning Officer. It was further observed that the ballot papers had been tampered with. The Court held: -

“ This court however cannot shut its eyes to such illegal acts which although the number of ballot papers it involved is small being only 285 cannot affect the result of this election, nevertheless it clearly revealed that the election, despite the assurances of the 1st respondent to the contrary was not conducted in accordance with the law as claimed... Taking the evidence available to us in this case as a whole and having



considered it with anxious minds we are satisfied that the mistakes have been revealed by scrutiny and recount, which were claimed to have been caused by tampering with election documents, affected the result of the election... For the above reasons we hold that the interest of the situation demands that free poll be conducted. We declare the election to be void.”

88. The general principle of free and fair election under Article 81 is given effect by the prescriptive provisions of Article 86 of *the Constitution*. The principle of substantial compliance must be read into the provisions of section 83 of the Election Act so that for an election to be held not to be according to *the Constitution* and statutory scheme of elections, there must be wanton and widespread non-compliance with such provisions as registration of voters, recruitment of polling officers, voting process, counting and tallying of the votes, among other important steps in an election process.

89. In *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 others*, the Court interpreted section 83 in the following terms: -

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

90. An election will be nullified if it is shown not to have been conducted substantially in accordance with electoral law. It will also be nullified, even though substantially conducted in accordance with the law but the errors, mistakes and irregularities committed in conducting the elections which, however trivial, are found to have affected the result of the election. See *Joho v Nyange* [2008] 3 KLR (EP).

91. In the present petition, considering all the glaring anomalies and taking into account all the incidents of non-compliance with mandatory and important provisions of the law as highlighted above, the Court finds that the election was not transparent, free and fair. There was substantial noncompliance with *the Constitution* and electoral law. Offences were committed by agents of the 1st and 2nd respondent which compromised the sanctity of the vote. There was use of false or irregular statutory forms. There was vote staffing. There were glaring



errors committed by the presiding officers and the returning officer herself which affected the verifiability of the election.

92. Considering the slim margin of 21 votes, the irregularities and illegalities revealed above, irresistibly point towards an election that was flawed and unverifiable. That those irregularities definitely affected the results of the election. It is not about the numbers, but the process on how those numbers are arrived at.
93. Accordingly, the Court finds that the MNA election for Magarini Constituency was not conducted in accordance with *the Constitution* and the law. Further, the massive errors, irregularities and illegalities committed by the 1st and 2nd respondent affected the validity and results of the election. That election is declared null and void. The 3rd respondent was not validly elected as the MNA for Magarini Constituency.
94. A certificate to that effect shall issue forthwith and be served upon the necessary parties. The 1st respondent should therefore proceed to conduct a by-election as required under the law.
95. The law on costs is set in Section 84 of the *Elections Act* which provides as follows:

“ An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.”
96. Further, the Elections Petitions Rules, 2017, provide:

“ Rule 30. (1) The election court may, at the conclusion of a petition, Costs, make an order specifying –

 - (a) the total amount of costs payable;
 - (b) the maximum amount of costs payable; (c) the person who shall pay the costs under paragraph (a) or (b); (d) the person to whom the costs payable under paragraphs (a) and (b)

(2) When making an order under sub-rule (1), the election court may –

 - (a) disallow any prayer for costs which may, in the opinion of the election court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the Petitioner or the respondent; and
 - (b) impose the burden of payment on the party who may have caused an unnecessary expense, whether that party is successful or not, in order to discourage any such expense...”
 97. In *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others* Petition No. 4 of 2012; [2014] eKLR the Supreme Court stated that: -

“ 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.”

98. I exercise my discretion and award costs to the petitioner. The costs shall be paid by the 1st respondent. The petitioner’s costs shall be capped at Kshs. 1 million. The interested party shall not be entitled to any costs as he failed to appear and lay a foundation for his case.

It is so decreed.

DATED and DELIVERED virtually this 3rd day of March, 2023.

A. MABEYA, FCI Arb

JUDGE

