



**Kerembu & another v Independent Electoral and Boundaries Commission & 4 others  
(Election Petition E001 of 2022) [2023] KEHC 1491 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1491 (KLR)

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

**JN MULWA, J**

**MARCH 2, 2023**

**BETWEEN**

**PAUL KIPAA KEREMBU ..... 1<sup>ST</sup> PETITIONER**

**HON. PERE JUDY NEIYEIYO ..... 2<sup>ND</sup> PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**MUREITHI MUCHEKE FESTUS, KAJIADO COUNTY RETURNING  
OFFICER ..... 2<sup>ND</sup> RESPONDENT**

**LENKU JOSEPH JAMA OLE ..... 3<sup>RD</sup> RESPONDENT**

**MOSHISHO MARTIN MARTINE ..... 4<sup>TH</sup> RESPONDENT**

**PATRICIA MBARIA ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Background and pleadings**

1. The third General Elections under *the Constitution* of Kenya, 2010 was conducted nationwide on the 9<sup>th</sup> of August 2022.
2. The Kajiado gubernatorial election attracted three candidates who were sponsored by their parties and one independent candidate; who upon conclusion of the election, garnered the following votes as declared by the County Returning Officer, one Mr. Mureithi Mucheke Festus as hereunder:



S/NO	NAME	PARTY	VOTES
1	H. E. Lenku Joseph Jama Ole	ODM	117,600
2	Hon. Katoo Metito Judah	UDA	111,725
3	Hon. Nkedianye David Kepue Ole	JUBILEE	75,337
4	Hon. Kago Peter Ambrose Ng'ang'a	INDEPENDENT	2,661

3. The initial Petitioners, Hon. Katoo Metito Judah and Hon. Pere Judy Pareno were dissatisfied with the results, upon which they mounted the Petition dated 8<sup>th</sup> September 2022, challenging both the process and the results on grounds stated therein and in the 1<sup>st</sup> Petitioner's supporting affidavit sworn on even date deponing to the particulars of his grievances.
4. The Petitioners main grounds for his dissatisfaction are stated as:
  - a. Denial of access of the Petitioner's Political Party Agents at Polling Stations.
  - b. Security of ballot materials at Kajiado East Constituency, Kajiado Central Constituency and Kajiado North Constituency at stated polling stations.
  - c. Appointment of County Government Employees to act as Presiding Officers, Clerks and Agents.
  - d. Irregular, unprocedural and unlawful assisted voting at the five constituencies stating the specific polling stations.
  - e. Variance in the number of votes cast in Kajiado County Gubernatorial Elections as against the Senatorial and Women Representative Elections and at Kajiado South and West Constituencies.
  - f. Vote result padding/manipulation/unlawful result declarations at numerous named polling stations.
  - g. Voter bribery at stated polling stations.
  - h. Election offences at stated polling stations, and tallying centres.
5. Based on the above grounds, the Petitioners sought for reliefs as follows:
  - a. Scrutiny and recount at 46 Polling Stations spread throughout the County as an interlocutory order.
  - b. A declaration invalidating the return of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents as the Kajiado County Governor and Deputy Governor respectively.
  - c. A declaration be, issued declaring the 1st Petitioner as the duly elected Governor of Kajiado County.



- d. In the alternative to (c) above, a declaration be issued that the results declared at Kajiado County Gubernatorial Election at the various stages of result declaration, were not verifiable, accurate, transparent and accountable.
- e. In the alternative to (c) above, a declaration be issued invalidating/annulling the Kajiado Gubernatorial Election conducted on 9<sup>th</sup> August 2022.
- f. Consequent to the grant of any/all of the alternative reliefs (d) or (e), an order be issued directing the 1<sup>st</sup> Respondent to organize and conduct a fresh Gubernatorial Election in strict conformity with *the Constitution*, the *Elections Act*, 2011 and Regulations.
- g. A declaration be issued that disclosed illegalities, irregularities and infractions substantially and significantly affected the integrity and quality of the election and the result thereof.
- h. An order be issued that the election offences committed by the Respondents as determined by this Honourable Court be reported to the Director of Public Prosecutions for appropriate action;
- i. Costs and incidentals to this Petitions be borne by the Respondents; and
- j. Any other order or determination that this Honourable Court may deem fit to grant.

### **Interlocutory Applications**

6. Two interlocutory applications were filed by the Petitioners:
  - i. By an application dated 26<sup>th</sup> October 2022, the 1<sup>st</sup> Petitioner sought leave to withdraw himself from the Petition and for substitution by his Chief County Agent, one Paul Kipaa Kerembu. The application was heard and allowed on the 3<sup>rd</sup> of November 2022. Paul Kipaa Karembo was substituted as the 1<sup>st</sup> Petitioner and the pleadings amended to reflect that. Paul Kipaa Karembo will hereinafter be referred to as the 1<sup>st</sup> Petitioner.
  - ii. The second application is dated 5<sup>th</sup> December 2022. The 1<sup>st</sup> Petitioner sought for an order of Scrutiny and Recount at 46 stated Polling Stations, after all evidence had been taken. In rulings dated 10<sup>th</sup> January 2023 and 18<sup>th</sup> January 2023 (Ruling Number 2 and 3), the court allowed scrutiny and recount in 16 polling stations out of the 46 as well as Re-tallying of forms 37 A, 37 B and 37 C in two constituencies.
7. The scrutiny and recount exercise was conducted under the supervision of the Deputy Registrar of the Court, Hon. Jane Kamau, who prepared a very detailed report dated 30<sup>th</sup> January 2023. The parties' Advocates were accorded the opportunity to make their comments on the report at the tail end of the hearing. The report will be addressed by the court later in this judgment.

### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents Response to the Petition**

8. In answer to the Petition, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their response dated 19<sup>th</sup> September 2022 together with witness affidavits sworn by: the Kajiado county Returning Officer, Mureithi Mucheke Festus, the 2<sup>nd</sup> Respondent herein; Evelyn Nyaboke Nyaata, the Returning Officer for Kajiado West Constituency; Elijah Mugo Ngunjiri, the Returning Officer Kajiado Central Constituency; the Returning Officer for Kajiado North Constituency, Bernard Musee; the Returning Officer for Kajiado South; and, the Returning Officer for Kajiado East Constitution.



9. In addition, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed annexures to the witness affidavits and documents among them the Kenya Integrated Election Management Systems (KIEM) which has the following components: -
- i. Biometric Voter Registration System (BVR).
  - ii. Electronic Voter Verification.
  - iii. Electronic Voter Identification.
  - iv. Candidate Registration Management System.
  - v. Results Transmission System - for presidential election results only.
10. Further to the above, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed several documents with a view to counter the allegations of irregularities and illegalities labelled against IEBC and its officers in regard to the conduct of the election on the 9<sup>th</sup> of August 2022. They are contained in several volumes, and at pages 50 to 257 of the Answer to the Petition. These are: -
- i. County Governor Election results at the Polling Station in all the 893 Polling Stations in the County.
  - ii. KIEMS authenticated voters per Polling Station as at 10<sup>th</sup> August 2022.
  - iii. Form 37 A's – declaration of the County Governor Election Result at the County Tallying Centre.
11. In addition to the above affidavits, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed other witness affidavits sworn by some Presiding Officers for: -
1. Ongata Rongai Open Air Market – 118
  2. Bulbul Primary School Polling Station -112
  3. Kerarapon Primary School Station – 2
  4. Lorngosua Primary School Polling Station – Kadjiado South Constituency.
  5. Kora Nursery Polling Station
  6. Oleserian Primary School in Kajiado Central Constituency
  7. Naserian GSU Camp Nursery Polling Station.
  8. Illasit Primary School Polling Stations.

### **The 3<sup>rd</sup> and 4<sup>th</sup> Joint Answer to the Petition**

12. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents denied all the allegations labelled against them by the Petitioners and stated that the 3<sup>rd</sup> Respondent was validly elected and declared as the Governor of Kajiado County; that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents conducted the election in accordance with [the constitution](#) and the Electoral Laws; that no grave errors flaws or fraud were committed by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents singularly or in consent as alleged by the Petitioner; and thereafter, and in detail, stated their positions in each of the specific allegations put forth by the Petitioners.



13. In addition, the 3<sup>rd</sup> Respondent, H. E. Lenku Joseph Jama Ole, swore and filed an affidavit in support of the answer/response on 19<sup>th</sup> September 2022. Several documents are annexed thereto as exhibits. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents witness Affidavits have also been filed, among them;
1. Affidavit of Chief Agent Kajiado County - Daniel Kanchori.
  2. Affidavit of Linnah C, Muchangi - Agent for Bulbul Primary School Polling Station.
  3. Affidavit of Millicent Muthoni Karari – Agent at PCEA Enchorro Emuny Primary School
  4. Affidavit of Dickson Yiaile Sitei – Chief Agent Kajiado West Constituency.
  5. Affidavit of Mokoi Sakata Ipitet - Agent at Kora Nursery School
  6. Affidavit of James Sankale Pareiyo -Chief Agent Kajiado North Constituency.

#### **The 5<sup>th</sup> Respondent's Answer to the Petition**

14. Apart from denying all the allegations labelled against her, the 5<sup>th</sup> Respondent filed a replying affidavit in answer to the allegations, and specifically, the one that she was involved in voter bribery in favour of the 3<sup>rd</sup> Respondent. The affidavit was sworn and filed on the 19<sup>th</sup> of September 2022, together with other witness affidavits sworn by the following;
1. Affidavit by Mbotor Ene Nkunina alias Anne Saita.
  2. Emoy Ali Hassan alias Cheupe.
  3. Sirote Uhuru

#### **Evidence**

##### **The Petitioners Case**

15. On the alleged irregularities, illegalities and violations of *the constitution* and the law during the Gubernatorial election; the 1<sup>st</sup> Petitioner presented to court 8 witnesses out of the 15 who had filed their affidavits in support of the Petition.
16. PW1 was the 1<sup>st</sup> Petitioner Paul Kipaa Kerembu. His lengthy affidavit was sworn on 4<sup>th</sup> November 2022. He averred that he was the County Chief Agent for UDA Gubernatorial Candidate, Hon. Katoo Ole Metito Judah; that his duties were coordinating and mobilizing all UDA Agents countywide and receiving hourly reports on the electoral process from the agents; that there were 893 Polling Stations in Kajiado County; and, that the win margin was 5,875 votes.
17. His testimony in respect of the specific allegations was as follows:
- On denial of access of UDA Agents in polling stations: that each agent was issued with an appointment letter and had access to all polling stations and centres; that on election day, he received several reports form Agents who claimed to have been denied access; that the denial was a well-orchestrated plan to subvert the sovereign will of Kajiado County electorate.
18. That in Kajiado South Constituency, he flagged 19 Polling Stations where agents were denied access and thus were unable to ascertain that ballot boxes were sealed before voting started and their serial numbers hence could not vouch for the credibility, transparency, fairness and verifiability of the electoral process; including witnessing of marking ballot papers for assisted voters



19. That for Kajiado East Constituency, agents were denied entry in two Polling Stations, that is, G.K. Athi River Prisons Primary School – in all 17 Polling Stations and at Dr. Likimani Primary School in all 44 Polling Stations.
20. That at Kajiado West Constituency, in 6 Polling Stations his agents were denied access and named 7 agents at Kajiado Central Constituency; and three other Polling Stations namely Namanga Primary School Centre, Inaarok Lukuny Primary School Centre, two polling stations and Olmankeki Primary School.
21. At Kajiado North Constituency, his testimony was that access was denied at four polling stations being Ongata Rongai Open Air Market, Ongata Academy-New, Endomoto Chief's Camp and Scheme Six Chief's Camp and tendered 9 names of agents allegedly denied access.
22. On the matter of Security of Ballot Materials, PW1 testified that at Emakoko Primary School in Kajiado East ballot boxes were left open in a Land Cruiser registration number KAU 339G and the Presiding Officer was found illegally making ballot papers under supervision of an Administrative Police Officer, which illegality he testified was reported to the IEBC's Security Team, and later at the Isinya Police Station under OB number 21/10/8.
23. On the allegation of unreasonable delay in transporting ballot boxes to Constituency Tallying Centre, PW1 testified that despite the stations being less than 25 km away, the boxes were not delivered timeously which was a violation of Regulation 79(8) Elections Regulations.
24. PW1 further testified that at Kajiado Central Constituency, the gubernatorial ballot box was tampered with as the lid was exchanged with the one for County Women Member of national Assembly, which brought confusion, disenfranchised voters and compromised the integrity of the vote counts.
25. At Kajiado North Constituency, it was PW1's testimony that at some polling stations, the presiding Officers were found sleeping with the ballot boxes left open hence, in his view, the ballot papers were not secured.
26. On the allegation of appointment of County Government Employees as Presiding Officers and clerks, PW1 deposition and testimony was that the said officers were not independent and lacked credibility and openness. He named 9 persons who he believed were County Employees and were appointed as Presiding Officers and Clerks contrary to Section 12 of the *Political Parties Act* 2011 and Section 23(3) (2) of *Leadership and Integrity Act* 2012, that bars State and Public Officers from engaging in Political Party activities, including acting as Agents of a Political Party or Candidates in an election.
27. On the allegation of irregular, unprocedural and unlawful assisted voting; PW1 testified that most of his agents were denied chances to witness the manner the parties were being assisted; their complaints were ignored and the agents were ejected from the stations, and in particular in Kajiado Constituency he named 19 Stations where such irregularities happened. Further, he stated 6 polling stations at Kajiado East Constituency and 3 at Kajiado Central Constituency. At Kajiado North Constituency, four stations were cited.
28. On voter manipulation and unlawful result declaration, PW1 claimed that in about 80 polling stations, there was massive rigging, which in his own words, translated to 4800 total registered voters across 3 polling centres.
29. It was his further testimony that in Kajiado South Constituency upon county tallying, there was a variance of the votes tallied at the Constituency Centre at 51,518 yet at the County Tallying Centre, there was a difference of 176 unaccounted votes. He further testified that at Kajiado West Constituency, votes declared at the County Tallying Center were 57,274 while those declared at Constituency



- Tallying Centre 58,419 leaving 1,145 votes unaccounted for. As such, PW1's testimony was that the gubernatorial election was badly conducted and marred with so many irregularities that it did not matter who won or who was declared as the winner.
30. On alterations and non-signing and stamping on Form 37 A's, PW1 testified that some forms 37 A were altered and not countersigned, and some were not signed by agents with no reasons stated by the Presiding Officers. He named 46 polling Stations for which the Petitioner sought an order for scrutiny and recount.
  31. On bribery allegations, PW1 testified that there was voter bribery at Bulbul Primary School Polling Station, Kerarapon Primary School, Olepolos Nur Primary School, Lanet Chief's Camp Polling Station, Namanga Primary School and in all, his testimony was that he relied on his agents' affidavit in support of his allegations.
  32. On the matter of election offences, PW1 relied on his affidavit, stating stations where election offences were witnessed as Bulbul Primary Polling Station, Namelok Primary School Polling Centre. It was his testimony that the election offences – voter bribery, obstructing agents and denying them access to Polling Centres affected the integrity and credibility of the election and as a result, the election result must be invalidated.
  33. Finally, PW1 testified that for all the stated irregularities, illegalities and criminal enterprises, he would rely on his agents' affidavits filed alongside the petition, as he only received reports of the same from his agents across the county.
  34. At this stage, I find it necessary to state what the Petitioner had to say on cross examination by the Respondents Advocates. PW1 stated that he visited a few polling stations, about 6 out of the 893 but relied on reports by Chief agents for the rest of the county. He stated that if his agents were present, they were expected to sign the Station Diaries and Forms 37 A. Out of the randomly selected Polling Stations, he confirmed that his UDA Agents signed both the polling station Diaries and the Forms 37 A and that the Presiding Officers also signed and duly stamped the forms 37 A.
  35. On allegations of irregularities on assisted voters, he stated that he had no evidence of any voter who was irregularly assisted, nor any complaint from any voter. On unlawful declaration of results, PW1 stated that he had no evidence from a voter or any affidavit to that effect. On unstamped forms 37 A, PW1 also stated that he had no evidence. On alterations in Forms 37 A's upon being shown samples stated in the Petition, he stated that he could not see any that was altered and not countersigned by his agents and other candidates' agents. On unreasonable delay of transportation of ballot papers, PW1 stated that there was nothing wrong with the delay, save that it caused anxiety.
  36. On criminal tampering and manipulation of results, PW1 stated that there was nothing illegal as the purported alteration for Kajiado East constituency was an alignment but not alteration on the column for results which are duly signed and countersigned by the Presiding Officer. On voter bribery claim, PW1 testified that he received no complaint or evidence from his agents.
  37. On Form 37 C, PW1 stated that he did not sign it because he was dissatisfied with the election process and complaints he received, but confirmed that the returning officer signed and declared the result. Shown the Form 37 C, PW1 stated that the results from all the Polling Stations were indicated but that he expected his candidate to have garnered more votes. He could not produce any alternative results or Forms 37 A where results had been tampered with.
  38. On County employees, upon intense questioning, it was PW1's response that the employees would not be impartial if employed as IEBC officials within the county. Asked about his being a Chief Agent when he was a Civil Servant himself, his answer was that he had committed no offence by being an



agent of a political party, even though he was an employee of TSC, and a serving teacher in a secondary school within Kajiado County.

39. On bribery allegations against the 5<sup>th</sup> Respondent, PW1 said that he did not have evidence of the same and that no bribery incident was reported at the Police Station and the UDA agent at the station did not file a report of the allegation.
40. It was PW1's testimony that he only visited 6 Polling Stations and 2 Tallying Centres, meaning all the allegations in the Petition were based on reports received from his agents across the county.
41. On re-examination by his advocate Mr. Onderi, PW1 stated that his witnesses had filed affidavits on the allegations in the Petition, but stated that election is not about the processes but also the numbers, and that he wanted to be satisfied with the numbers and the results as announced.
42. PW2 was David Kibiru Kuria, Chief Agent for Kajiado North constituency. His Witness affidavit was sworn on 8<sup>th</sup> September 2022. His complaint was that at some stations, his agents were not allowed access into the stations before 6.00am but were later allowed and signed forms 37 A's, and he majority had no problem with the results. On the allegations of bribery, and other election offences, he stated that he had no evidence, nor any report of criminal activities at the Polling Stations.
43. PW3, PW4 PW5 adopted their witness affidavit but could not vouch for the allegations stated in the Petition. They all testified that they had no problem with the results of the election.
44. PW6 was the Chief Agent Kajiado Central Constituency. His testimony was that his agents were denied access in ten stations but he could not recall the stations nor the agents. For every allegation he made in his affidavit, his answer was that he had no evidence to prove any of the allegations.
45. PW7 was Chief Agent of UDA at Kajiado East Constituency. He relied on his affidavit sworn on the 8<sup>th</sup> of September 2022 and stated that he visited two centres; that he had no evidence of ballot stuffing at GK Athi River Prisons Primary School polling station 2 of 7 or Emakoko Primary School. He confirmed that most UDA agents signed the result Forms 37 A but again testified that those who signed were not his agents as he had told his agents not to sign, due to the allegation of ballot stuffing.
46. PW8 was a UDA Chief Agent for the Petitioner. His witness affidavit was also sworn on the 8<sup>th</sup> of September 2022 also on agents' denial of access. His evidence was that some agents were denied access but the denial did not affect the result. On the votes cast, he reiterated that they were more than the registered votes but had no evidence of the allegation, and stated that he relied on information from the agents across the Constituency. He testified that he was not aware of any voter who voted without the KIEMS Kit.

#### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents case (IEBC)**

47. These parties presented to court witnesses to testify on their witness affidavits all sworn on the 19<sup>th</sup> of September 2022. They are:
  1. Elijah Mugo Njunjiri, Returning Officer for Kajiado Central Constituency;
  2. Bernard Musee – Returning Officer for Kajiado West Constituency;
  3. Everlyne Nyaboke Nyaata, Returning Officer for Kajiado West Constituency;
  4. Samuel Chacha, Returning Officer for Kajiado East Constituency,



5. Festus Mucheke (the 2<sup>nd</sup> Respondent in the Petition) the County Elections Manager, and the County Returning Officer for Governor, Senator and Women Member of the National Assembly.
48. Collectively, these Returning Officers testified on their roles as Officers of IEBC; among them, receiving all Form 37 A's from the Polling Centres Presiding Officers, tallying and to declare the results of the Senator, County Women Member of National Assembly and Governor. Each of them deponed to have received the results by Form 37 A's from the Polling Stations within their assigned respective Counties, tallied them and declared the results, in this instance, for the county Governor.
49. On cross examination on various allegations of irregularities, their responses were as follows: That all Forms 37 A ought to be in the ballot box as per requirements; that once Form 37 A is filled and signed, it is final; that if there are errors on Forms 37 A, they should be countersigned by the Presiding Officer at the Polling Station but even if not countersigned the Form remains valid if the votes are tallied and the total votes are the same as long as the total figures add up.
50. Further that complaints during the voting exercise should be made to the Presiding Officer, that when parties agents are present, it is not mandatory for the Presiding Officer to write to indicate the fact; nor that when agents are absent, that comments must be made by the Presiding Officer; that once Forms 37 A are brought to the Returning Officers with errors, they cannot be corrected or amended.
51. They further testified that when an error on Forms 37 A is noted, they fill an Error Form as required, which errors are later rectified and that they are mostly human errors in tallying; that results announced at the polling Stations are the same ones declared at the Constituency Tallying Centre and County Tallying Centre.
52. That, if a mistake is made at the Constituency Level, the County Returning Officer rectifies the mistake using an Error Form. Results in Forms 37 A are used to fill Form 37 C while form 37 B is used for handing, and for filling Form 37 C, and that the results in the forms are valid; that results in Form 37 C is used to issue Form 37 D which is the Certificate of Declared Results.
53. On the alleged irregularities and illegalities, these witnesses testified in unison that complaints ought to have been reported to the Presiding Officers and that at the Tallying Centres they received no complaints and if there are errors on Form 37 C, they are transpositional errors which are rectified; and finally, that a transpositional error in Form 37 B cannot find itself in Form 37 C.

### **The 3<sup>rd</sup> and 4<sup>th</sup> Respondents Case**

54. The 3<sup>rd</sup> Respondent, H. E. Lenku Joseph Jama Ole testified as RW3-7. He relied on the joint response to the Petition dated 19<sup>th</sup> September 2022 and his replying affidavit he swore on even date and annexures thereto. By the Response, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents denied all the allegations labelled against them in respect to the specific grounds for the Petition and put the Petitioners to strict proof of the allegations. They stated that they did not breach any of the provisions of [the Constitution](#) and the Elections Laws, or any other Statute; that they were validly elected as the Governor and Deputy Governor respectively for Kajiado County; and that the Petition lacks merit and should be dismissed with costs.
55. On the specific allegations stated by the Petitioner, upon cross examination by the Petitioner's Advocates, the 3<sup>rd</sup> Respondent testified that he only visited the Polling Station where he cast his vote, and the Constituency Tallying Centre at Kajiado Town. It was his evidence that he had Chief Agents in the entire County and agents in all the polling stations; that he never received any complaints of



the alleged malpractices, irregularities or illegalities put forth by the Petitioners from his chief agents or from anywhere else.

56. Additionally, he stated that he never influenced any of the IEBC Officers, the Kajiado Public Service Board employees and officials in any way as to favour him. On delay in transmission of election results, he confirmed that the Road Network within the stated area is good and that the delay was not unreasonable nor did it affect the declared result. On the allegation of voter bribery at some polling stations, he testified that no report was made to him from any of his agents of such events; nor were any records from the police tendered to him. Overall, the 3<sup>rd</sup> respondent denied any form of irregularities, illegalities or rigging during the electoral process at the county polling stations.
57. In support of the 3<sup>rd</sup> and 4<sup>th</sup> Respondent's case, five (5) witnesses were presented to court to testify in support of their witness statements.
58. RW3-1 Daniel Kanchory is an Advocate of the High Court of Kenya and was the Chief Agent for the 3<sup>rd</sup> Respondent. His witness statement is dated 19<sup>th</sup> September 2022. His role was coordinating all other agents in the 893 Polling stations, and was largely stationed at the County Tallying Centre. He signed the Form 37 C. His testimony was that no candidate showed alternative results for the entire county, but also stated that some Forms 37 A were not IEBC rubber stamped at the polling stations.
59. On voter bribery, his testimony was that no report was made of such occurrences from any of the polling stations by any of his agents. He could not confirm any result variances declared at the county and constituency levels, and that a Returning Officer cannot change any entry in Forms 37 A; that transpositional errors are not irregularities. He testified that it was not mandatory for all agents of candidates to sign the result form. He could also not confirm whether there were result variances or not, and if they were there, then result Form 37 A was final and cannot be altered or changed, even if it had mistaken.
60. RW3-2 Linnah Chillar Muchangi testified that she was not an Agent of any party, but was a voter at Bulbul Polling Station. Her testimony was that she saw nothing of interest at the Polling Station, and that as the lines were long, she slept in her car most of the time while waiting for her turn to vote. RW3- 3 Mokoi Sakata Ipitet was an Agent for the 3<sup>rd</sup> Respondent at Kora Nursery School at Kajiado West constituency while RW3-4 Millicent Muthoni Karani was an Agent at PCEA Ngong Hills for the 3<sup>rd</sup> Respondent. Their collective testimony was that nothing out of the ordinary happened during voting at their respective stations. RW3-5 and RW3-6 were both Chief Agents of the 3<sup>rd</sup> Respondent at Kajiado West Constituency and Kajiado North Constituency respectively. They both denied having witnessed anything suspicious or irregular at their respective polling stations and constituencies.

### **The 5<sup>th</sup> Respondent's Case**

61. The case for the 5<sup>th</sup> Respondent is stated in her answer to the Petition and her replying affidavit both dated 19<sup>th</sup> September 2022. She denied all the allegations labelled against her by the Petitioners. Additionally, her testimony was that she was not a candidate in any of the elections at Kajiado County or elsewhere.
62. On voter bribery stated at paragraph 117-121 of the Petition, she categorically denied such allegations and put the petitioner to strict proof. By her replying affidavit of even date, this respondent deposes that the affidavits sworn by James Saitoti Masikonde are fictitious, wild, malicious and couched in generalities and particularly that she was involved in bribery at Namanga Primary School Polling Station. She explained in detail the circumstances that led her to go to the said polling Station; being out of sympathy to take a disabled and amputated voter to the station to cast her vote, after she had



- voted at a neighbouring polling station. She denies in totality all the election offences under Section 9 of the *Elections Act*, and puts the petitioner to strict proof.
63. The 5<sup>th</sup> Respondent, Patricia Mbaria testified as RW5-3. She relied entirely upon her affidavit in reply. Her evidence was that she only went to vote with no other role in the elections, and that at no time she did attempt to bribe anybody at the Namanga Primary School.
64. Two witnesses testified in her support: -
- RW5 -1 Was Emoy Ali Hassan and RW5-2, Mbotor Ene Nkunina, alias Ann Saita. Both were voters at Namanga Primary School and both swore their witness affidavits on 19<sup>th</sup> September 2022. Their evidence was very similar, that they were at the Namanga primary school Polling Station, and both saw the 5<sup>th</sup> Respondent, but deny ever seeing her giving any form of bribe to anybody at the Polling Centre.
65. RW5-2's testimony was that she is disabled, and she knows the 5<sup>th</sup> Respondent. It was her testimony that on the voting day, as she was walking with crutches to go and vote, Patricia Mbaria passed by with her car and offered to help her by driving her to the Polling Station. However, Patricia never told her to vote for anybody nor did she give her a bribe to induce her to vote for a particular candidate. She further testified that she never recorded a report of bribery to the Police Station.
66. An application for Scrutiny, Recount and Re-tally was filed upon closure of the parties' cases and was allowed by the court's rulings dated 10<sup>th</sup> January 2023 and 18th January 2023 (Ruling no. 2 and 3).

### **Scrutiny And Recount**

67. The terms of reference for the exercise are well stated in the court's ruling number 2 and 3 dated 10<sup>th</sup> January 2023 and 18<sup>th</sup> January 2023 Respectively.
68. The Deputy Registrar's report on the exercise unearthed truths on the voting process, as well as the numbers each candidate garnered. The irregularities found in some of the Forms 37 A were found to be mere corrections and not alterations and in their totality cannot be held to have been so substantial as to void the election. In the case of Philip Mukwe Wasike v James Lusweti Neukwe & 2 others [2013] e KLR cited by the Petitioners, the court observed as follows:
- “In a few of the polling stations, no statutory cements, countersigning or explanations were provided for the alterations effected thereon or the absence of agents. In these polling stations, it is difficult for the court or any other person looking at the statutory forms provided to verify the results”
69. Unfortunately, in the instant Petition, the scrutiny exercise the Deputy Registrar's report established that all the polling station diaries for the 15 stations contained consistent information of the number of registered voters as per the KIEM'S Kit authenticated voters per polling station; the serial numbers seen in the used counterfoils of the used ballot papers were consistent with the range of serial numbers of the ballot papers as provided in each polling station and lastly, that re-tallying of results in Forms 37 A, 37 B and 37 C for Kajiado West Constituency and Kajiado South Constituency tallied and were similar in all aspects, and that the KIEM'S KIT authenticated logs were consistent with the number of registered voters as tabulated in Form 37 A and in the polling station diaries.
70. On the above observations, all the Respondents were in agreement that the few errors observed during the evidence by the Petitioner's witnesses could be explained, and as ably stated in the Wavinya Ndeti v IEBC & 4 others [2014] eKLR, such errors on their own cannot be sufficient to annul an election



petition. As held in the Gatirau Munya Case (Supra), the irregularities were not on their own, sufficient to negatively affect the election result. See also *Josiah & 4 Others v Ogutu & another* (2008) IKLR 73, when the court held that:

“By and large, the ballot papers which the court scrutinized, were free from irregularities and any discrepancies were minimal and could be accounted for by the unintentional human error and not by intentional design or any other sinister motive”

71. It is therefore clear in the court’s mind that the minimal errors unearthed by the scrutiny and recount exercise were unintentional without any sinister motive, and were well explained to the satisfaction of the court. These errors, in the court’s view, did not affect the result of the election in which the 3<sup>rd</sup> Respondent scored a substantial legitimate majority of the votes in Kajiado County over his three rivals; and in particular Hon. Katoo Metito Judah.

### **Applicable Constitutional And Legal Principles**

72. Article 38 (2) (a) (b) of *the Constitution* provides that 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 any elective public body or office established under this Constitution; or any office of any political party of which the citizen is a member.
73. Article 81 of *the Constitution* provides for the principles that apply to the electoral system. Among them is the principle of free and fair elections which should be conducted as follows:
- a. by secret ballot;
  - b. free from violence, intimidation, improper influence or corruption;
  - c. conducted by an independent body;
  - d. transparent; and
  - e. administered in an impartial, neutral, efficient, accurate and accountable manner.
74. Article 86 of *the Constitution* provides as follows regarding the voting process: -
- “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 malpractices are put in place, including the safekeeping of election materials.
75. Article 88 establishes the Independent Electoral and Boundaries Commission (IEBC). The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established under this constitution and any other elections as prescribed by an Act of Parliament; including and not limited to parliamentary and County Petitions.



## The Burden of Proof

76. A Petitioner, as the person seeking the nullification of an election, bears the legal burden of proving factors that would lead to annulment. The evidential burden on the other hand is not static. Once the Petitioner effectively discharges the legal and evidential burden, the evidential burden shifts to the Respondents to tender evidence to rebut the assertion and this evidential burden may shift back to the Petitioner depending on the weight of the evidence tendered. This is in line with the provisions of Section 107 and 108 of the Evidence Act, Cap 80 of the Laws of Kenya, which states that:

“ 107. Burden of proof.

- (1) 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.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

77. The Supreme Court of Kenya in *Raila Odinga & another versus Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR pronounced itself on the burden of proof in an election petition as follows:

“.. 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, ...

(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant throughout a trial<sup>[52]</sup> with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting”<sup>[53]</sup> and “its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”<sup>[54]</sup>

(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.”

## The Standard of Proof

78. The standard of proof in an election petition where no allegations of a criminal or quasi-criminal nature are made is an ‘intermediate standard of proof’. This standard is higher ‘a balance of probabilities’



applicable to ordinary civil suits but lower than the criminal standard of ‘beyond reasonable doubt’. This was the holding in *Raila Odinga* [2017] supra where the Supreme Court rationalized the same as follows:

“ [150] The rationale for this higher standard of proof is based on the notion that an election petition is not an ordinary suit concerning the two or more parties to it but involves the entire electorate in a ward, constituency, county or, in the case of a presidential petition, the entire nation. As the Tanzanian High Court stated in the old case of *Madundo v. Mweshemi & A-G Mwanza*<sup>[71]</sup>:

“An election petition is a more serious matter and has wider implications than an ordinary civil suit. What is involved is not merely the right of the petitioner to a fair election but the right of the voters to non-interference with their already cast votes i.e. their decision without satisfactory reasons.”

### **What then is the threshold for annulment of an election?**

79. Under Section 83 of the *Elections Act*, an election cannot be annulled simply because the Petitioner has established that there was non-compliance with constitutional principles and electoral laws. A petitioner must show that such non-compliance materially compromised the integrity of the election. The said Section 83 states:

“ 83. Nullification of an election

(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.

(2) Pursuant to section 72 of the *Interpretation and General Provisions Act* (Cap. 2), a form prescribed by this Act or the regulations made thereunder shall not be void by reason of a deviation from the requirements of that form, as long as the deviation is not calculated to mislead.”

80. The above provision has received judicial backing in various decisions of the apex court which are binding on this court. For instance, in *Raila Odinga* [2017], the Supreme Court stated thus:

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



81. Further, the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR observed that:

“(217) If it should be shown that an election was conducted substantially in accordance with the principles of *the Constitution* and the Election Act, then such election is not to be invalidated only on ground of irregularities.

(218) Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election. In this regard, we stand on the same plane as the learned Judges in *Morgan, Opitz and Nana*.

(219) By way of example, if there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial Court would not be justified, merely on account of such shortfalls, to nullify such an election. However, a scrutiny and recount that reverses an election result against the candidate who had been declared a winner, would occasion the annulment of an election. Examples of irregularities of a magnitude such as to affect the result of an election, are not however, closed.

(220) Where an election is conducted in such a manner as demonstrably violates the principles of *the Constitution* and the law, such an election stands to be invalidated.”

### **Issues For Determination**

82. The parties’ final submissions are dated 10<sup>th</sup> February 2023, 15<sup>th</sup> February 2023 and 16<sup>th</sup> February 2023 respectively. The following are the issues that fall for determination in this Petition:

- a. Whether the Kajiado County gubernatorial election was conducted in accordance with the principles laid down in *the Constitution* and Electoral laws?
- b. Whether non-compliance with the constitutional, statutory and regulatory requirements, if any, substantially affected the validity of the gubernatorial results?
- c. Whether the court ought to grant reliefs prayed for by the parties?
- d. Who should bear the costs of the Petition?

### **Analysis And Determination**

83. Save for the issue of costs, it is noteworthy that issues (a), (b) and (c) are intertwined as the finding on one automatically answers the next. As such, the three have been analysed and determined together as shall be seen herein below. Each of the grounds raised in the Petition shall be determined separately

#### **A. Denial of access of the petitioners’ party agents at the polling stations:**

84. Three witnesses were presented to court to testify to the issue that UDA agents were denied access into 110 polling stations out of the 893 across the County.

85. The 1<sup>st</sup> Petitioner Paul Kipaa Kerembu being the Chief Agent for UDA, his party, upon cross examination recanted his witness affidavit averments and stated that three agents were allowed, but



- again, being the Chief Agent, only received reports of the allegation from his other agents who were not presented to court for cross examination.
86. PW4 Michael Mwathi also disowned his affidavit that he was denied access to Ongata Rongai Open Air Market Polling Station 08, yet on cross examination he stated that he was at the Polling Station at 5.45am, left at 3.00pm, and went back at 7.50am, to witness the counting of the votes.
  87. PW5 Michael Chacha too disowned his witness affidavit when on cross examination. He told the court that he was at the Polling Station from 5.00am and left at 6.00pm, confirming that he was not denied entry to the polling station. This witness too is not among agents stated to have been denied access and he confirmed upon further cross examination that he was a stranger to the Petition (Page 59 proceedings). Others; PW1, PW2, PW6, PW7 and PW8 all Chief Agents of UDA testified that their agents were denied access yet they were all stationed at the Constituency Tallying Centres, not at the polling stations.
  88. Upon cross examination, all they could tell the court is that they were informed by their other agents. In short, they were relying on hearsay evidence, which cannot be admitted in a court of law.
  89. Regulation 62 (2) and (3) of the Election General Regulation, 2012 grants the Presiding Officer authority not to admit more than one agent for each political party or candidate to a polling station and expressly provides that the absence of agents shall not invalidate the proceedings at a polling station. In addition, Regulation 74 (3) of the General Regulations grants the Presiding Officer authority not to admit more than one agent of any political party or candidate at the counting venue. Indeed, PW1 the 1<sup>st</sup> Petitioner confirmed that not all agents of other parties could be admitted as they were too many. It was not alleged that agents of the other parties were allowed in bigger numbers than UDA agents.
  90. These witnesses, asked under cross examination the effect if any of their not being allowed into the stations which was denied, could not state any; but only said that they were satisfied with the results of the election. The allegation by the 1<sup>st</sup> Petitioner that majority of his candidates' agents were denied entry was therefore total hearsay. Shown sample Forms 37 A, the witness confirmed that indeed in majority of the forms, UDA agents were present and signed the Forms.
  91. In the case *Walter Enock Nyambati Osebe v IEBC & 2 others* [2018] eKLR, the court had this to say; that non-signing of Forms 37 A by agents or lack of official stamps and signature does not invalidate the forms nor the results, but non-signature of the Presiding Officer or his Deputy prima facie makes the result invalid.
  92. Further, Regulation 79 does not require that Agents must sign the statutory Form. At sub-regulation (6) and (7), it is clearly stated that absence of candidates or agents or failure to sign the form by candidates or their agents does not invalidate the results declared in the forms. See *John Murumba Chikati v Returning Officer Tongaren Constituency & 2 others* [2013] eKLR. Same position was held in the case *Ahmed Abdullahi Mohamed v Mohamed Abdi Mohammed* [2018] e KLR.
  93. Further, upon scrutiny and recount exercise ordered by the court in 15 stations, it is instructive to note that in all the 15 polling stations, UDA (Petitioner's Party) agents signed all the 15 polling station diaries; a clear confirmation that indeed the Petitioner's agents were not denied access, and were signed in and out of the polling stations. The Petitioners' agents were present at the opening and closing of the polling stations.
  94. In his submissions, Advocate for the Petitioner stated that PW3, PW4, and PW5 were initially denied access to their polling stations; but upon intervention of the Chief Agent, they were granted access. The effect which was only stated in submissions was that they did not witness the opening of the ballot



boxes to confirm that they were empty. It was upon the Petitioner to call sufficient evidence to prove their allegations. So that when the 1<sup>st</sup> Petitioner submits that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents did not call their officers to answer to the allegation, he was shifting the burden of proof to the Respondent.

95. It is upon the Petitioner who alleges that the irregularity affected the election result to call enough evidence to prove the same. In *Raila Odinga* [2017], the supreme Court held that a petitioner who seeks nullification of an election on account of non-conformity with the law or on basis of irregularities must adduce cogent and credible evidence to prove these grounds to the satisfaction of the court. The same position was also held in *Raila Odinga 2013* and also *Bernard Shinali Masaka v Boni Khalwale & 2 others* [2008] e KLR.
96. In *IEBC v Maina Kiai & 5 others* [2017] e KLR, the Court of Appeal held that where irregularities do not affect the results as declared in the polling station, courts will be hesitant to nullify the election result. Ultimately, the court finds that the 1<sup>st</sup> Petitioner's Party Agents were in the majority allowed into the Polling Stations across Kajiado County, and that the Petitioners have fallen short of proving that they were not allowed; and, the effect such failure, if any, had on the results as announced by the Presiding Officers at the Polling Stations.
97. It is therefore not true that the Petitioners' party agents were denied access to the polling stations as they deponed on oath that they were indeed allowed into the polling stations and that they were satisfied with the result of the election. The court in *Gatirau Peter Munya v Dickson Kithinji Mwenda* held that errors and irregularities must demonstrably be shown to have reversed the result, and how the final vote outcome had been compromised by the irregularities. No such evidence was offered. The allegation falls for dismissal.

## **B. Security Of Ballot Boxes**

### **i. Ballot stuffing at Emakoko**

98. At Paragraphs 41, 42 and 43 of the Petition, the Petitioners alleged that a presiding officer was found illegally marking ballot papers and stuffing them in an open gubernatorial ballot box for Emakoko Primary School Polling Station 034185092302101 in a Land Cruiser registration number KAU 339G parked behind the lavatories at Moi Girls Isinya, the Kajiado East Constituency Tallying Centre.
99. To prove this allegation, the Petitioners relied on the evidence of PW7, Timothy Katoru Sayiore, the UDA Gubernatorial Candidate's Chief Agent for Kajiado East Constituency. PW7 stated in his witness affidavit adopted as his evidence in chief, that he is the one who discovered the alleged ballot stuffing and alerted the security officers. He averred that a woman by the name Deborah took pictures of the scene as well as a video of the conversation. It was also his testimony that despite the aforementioned, the 2<sup>nd</sup> Respondent herein advised them to resolve the issue locally and allowed the stuffed ballot boxes inside the tallying centre. He reported the matter to Isinya Police Station under OB. No. 21/10/8/22 as he was dissatisfied with the manner it was handled. PW7 adduced photographs of the alleged scene which were accompanied by a Certificate of electronic evidence. Also adduced is an occurrence book extract. During cross-examination, PW7 stated that he used his Samsung mobile phone to take the photographs he tendered in evidence in this regard. He conceded that it was impossible to tell when, where and with what device the photos were taken by simply looking at them. When shown form 37 A for the said polling station, PW7 confirmed that UDA agents as well as the Presiding Officer signed it on 9<sup>th</sup> August 2022, which is the day, when results were announced and declared and it bears an IEBC stamp.



100. The allegation of ballot stuffing was denied by the 2<sup>nd</sup> Respondent herein who testified as IEBC's 5<sup>th</sup> Witness. He stated in his cross-examination that he was stationed at the County Tallying Centre at Masai Technical Centre and therefore did not witness the alleged ballot stuffing at Moi Girls Isinya as alleged.
101. In their submissions, the Respondents argued that the photographs and the certificate of electronic evidence adduced by PW7 are inadmissible, as they did not meet the requirements under Section 106B of the *Evidence Act* Chapter 80 Laws of Kenya. It was also their submission that the allegation was disproved by the findings of the Scrutiny and Recount.
102. The court has carefully analysed the evidence tendered by the Petitioners on this allegation as well as the findings on the Scrutiny and Recount exercise concerning this particular polling station. From the Scrutiny and Recount, it was established that the number of used counterfoils (427) matched the number of ballot papers (427); the KIEMS Kit data revealed that there were 426 voters; a total of seventeen party agents, UDA Agents included, were present at opening and closing of the Polling station; and, all seals and ballot box were intact and consistent with the serial numbers in the Polling Station Diary. In addition, it was captured in the polling station diary that the incident alleged by the Petitioners related to the County Women Representative and not the Governor as alleged. To that end alone, it goes without saying that this allegation cannot stand.
103. Be that as it may, the court agrees with the Respondents submissions that the photographs and the Certificate of Electronic record adduced by PW7 does not meet the conditions set out under Section 106B of the *Evidence Act* for admissibility of electronic record. Sub-Section 4 thereof provides that:
- “(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following -
- a. identifying the electronic record containing the statement and describing the manner in which it was produced;
  - b. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
  - c. dealing with any matters to which conditions mentioned in subsection (2) relate; and
  - d. purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.”
104. In the instant case, the Certificate of Electronic Record tendered by PW7 does not meet the above test as it does not indicate the exact particulars of and the working condition of PW7's Samsung mobile phone that was allegedly used to take the photographs. There is also no evidence that the said Samsung mobile phone was at the time of taking pictures owned, operated and managed by the PW7. Further and in any event, there is nothing on the photographs to show that the open ballot box in the motor vehicle related to the election for Governor for Kajiado County and/or that the person on the photographs was the presiding officer for Emakoko Primary School Polling Station 034185092302101 committing the alleged offence.



105. In the premise, this court finds that the Petitioners did not prove the allegations of ballot stuffing to the required standard of proof. This ground must also fail.

## **ii. Delay in delivery of ballot boxes**

106. At paragraphs 44, 45, 46, and 47 of the Petition, the Petitioners claimed that there was unreasonable and unexplained delay in the transportation of ballot boxes from three polling centres in Kajiado East Constituency namely GK Athi River Prisons Primary School, Dr. Likimani Primary School and Noonkopir Secondary School to the Constituency Tallying Centre. They claimed that despite their close proximity and accessibility by a good road network, the results from the said polling centres arrived at the Constituency Tallying Center on 10<sup>th</sup> August 2022 at 4.00pm, a day after voting and long after tallying had been completed.

107. The Petitioners submitted that the unexplained delay violated the provisions of Article 86 of *the Constitution* and Regulation 79(8) of the Elections (General) Regulations. The Respondents on the other hand submitted that the Petitioners have not demonstrated how the alleged delay affected the declaration of results at the subject polling stations.

108. Regulation 79(8) of the Elections (General) Regulations, 2012 requires presiding officers to deliver ballot boxes and tamper proof envelopes containing other elections materials to the returning officer as soon as practicable. The phrase ‘as soon as practicable’ means that the delivery ought to be done as soon as both possible and practical as determined by the facts and circumstances of each case. In the instant case, PW7, the Kajiado East Constituency Chief Agent for the Petitioner’s candidate confirmed that there was no list of the agents who were present at the affected polling stations and none was produced in court to speak to this. Indeed, and as submitted by the Respondents, the Agents would have been better placed to inform the court when vote counting and result announcement ended so as to determine what was practicable in the circumstances. Moreover, PW1 confirmed during his cross examination that the alleged delay had no effect on the declared results and that no complaint was made or lodged regarding the delay. The court therefore finds that the Petitioners did not prove that there was unreasonable delay in transportation of ballot boxes from the three polling centres to the Constituency Tallying Centre. The result is that the allegation is dismissed.

## **iii. Interference with a gubernatorial ballot box at Lorngosua Primary School Polling Station 2**

109. At paragraphs 48, 49, 50, 51, 53, 54 and 55 of the Petition, the Petitioners alleged that a ballot box for the position of governor from Lorngosua Primary School Polling Station 2 was vandalised or interfered with. In this regard, they claimed that the ballot box lids for the positions of Governor and County Woman Representative to the National Assembly were swapped thus casting doubt on the credibility of the election results from the said station.

110. The 1<sup>st</sup> Petitioner submitted that they cogently and credibly substantiated this claim through the evidence of PW1 and PW6 to the point of shifting the evidential burden to the Respondents but the Respondents failed to lead any evidence to disprove that evidence. In their view therefore, this violation was proven accordingly in the circumstances. The Respondents on their part asserted that save for the oral testimony of PW6, the Petitioners did not tender any tangible evidence to prove this allegation and thus cannot purport to shift the evidential burden to them. Further, they argued that no evidence was led as to the effect of the alleged swapping of ballot box lids on the results of the election, which had already been announced and recorded at the Polling Station by the time the ballot boxes were taken to the Constituency Tallying Centre.



111. Both PW1 and PW6 testified and maintained during cross-examination that they witnessed this together at the Kajiado Central Constituency Tallying Centre. PW6 in his Witness Affidavit avers that he raised the concern with the Returning Officer who acknowledged that there was a mistake on the part of the Presiding Officer but stated that he was only mandated to declare the results and any contestation was to be sought through the court process. PW6 averred that he recorded his conversation with the Returning Officer and took photographs but admitted on cross examination that he had no evidence of the same as the recording was not part of the court's record. Further, upon being shown the Certificate of closure of polling station, PW7 confirmed that it was duly signed by a UDA Agent and that the Agents were present during sealing of packets at the station. The 2<sup>nd</sup> Respondent denied having been informed of any swapping of ballot boxes lids for women representative and Governor during his cross examination.
112. The burden of proof lay on the Petitioners to establish this allegation to the required standard and to show that there was a nexus between the alleged anomaly and the declared results for their candidate and/or their candidate's loss of votes. Upon analysis of the evidence, this court finds that save for the bare depositions by PW1 and PW7, no cogent evidence was tendered by the Petitioners to prove this allegation. Further, the Petitioners have not demonstrated how the alleged swapping of ballot box lids impacted the gubernatorial results from the subject station, which admittedly, had already been counted and announced at the polling station prior to being transported to the Constituency Tallying Centre as required under Article 86(b) of *the Constitution*. The totality of the foregoing is that this allegation must fail.

#### **iv. Presiding Officers allegedly found sleeping at PCEA Enchorro Emuny Primary School Polling Centre Code 034183091503313**

113. At paragraphs 56 and 57 of the Petition, the Petitioners contend that the Presiding Officers at PCEA Enchorro Emuny Primary School Polling Centre Code 034183091503313 were found sleeping after vote counting had commenced while they left the ballot boxes open thus jeopardising the security and integrity of the ballot papers.
114. Both PW1 and PW2 who deposed on this allegation admitted during cross-examination that they did not witness the incident, as they were not present at the polling station. It was the testimony of PW2 that he was informed about this by the Petitioners' agent assigned to the station. He stated that one Bakari, the UDA Chief Presidential Agent Coordinator, called to inform the Returning officer about what was going on at the said station and the Deputy Returning Officer, one Wilson, called the presiding officer and reprimanded him. Notably however, none of the persons referred to by PW2 as having witnessed or taken action regarding the allegation was called to testify in support of the allegation. From the court's analysis of the evidence on record therefore, it is clear that PW1 and PW2's evidence were not based on their personal knowledge of the alleged incident meaning the allegation was not proved and is hereby rejected.

#### **v. Power outage at Bulbul Primary School Polling Centre**

115. At paragraph 58 of the Petition, the Petitioners allege that power mysteriously went off at Bulbul Primary Polling Station 2 of 13 thus raising grave reservations as to the fairness, accuracy, integrity, transparency and credibility of the results declared by the presiding officer at the station.
116. During trial, both PW1 and PW2, who deposed on the incident in their respective affidavits, confirmed that none of them was present at the said polling station when it allegedly occurred. When shown the form 37 A for the station, PW1 conceded that the power outage did not have any adverse effect on the



results as their agent at the station authenticated the results by signing the form. From this evidence, the court agrees with the Respondents' submissions that the allegation is unsubstantiated and must therefore fail.

### **C. Appointment Of County Government Employees As Presiding Officers, Clerks, And Agents:**

117. The petitioners alleged that the appointment of the County Government Employees to oversee and conduct the election compromised the election in favour of the Governor, the 3<sup>rd</sup> Respondent. It is a joint submission by all the Respondents that there is no law that bars Public Officers from being appointed as election officers.

118. The Supreme court in Alfred Nganga Mutua & 2 others Vs Wavinya Ndeti & another [2018] eKLR had the following to say:

“upon further consideration of the issue, save for involvement in partisan politics, we concur with the Court of Appeal that in the absence of any law prohibiting public officers from being engaged as election officials and more particularly in the absence of anything the employees of the County Government engaged in this election did or omitted to do that compromised their impartiality, IEBC’s conduct of the election was not compromised.”

119. The 1<sup>st</sup> Petitioner’s (PW1) evidence at page 33 of the typed proceedings, and upon intense cross examination on what effect County Government employees had on the election could only state, without elaboration or evidence that they could be compromised. He admitted that he himself was a public servant, a secondary school teacher employed by the Teachers Service Commission, currently teaching at a Secondary School within Kajiado County. He at the end testified that he had no evidence to support the allegation that the participation of the County Government employees compromised the election.

120. Section 23(3) (a) of the *Leadership and integrity Act* 2012 prohibits state and public officers from engaging in the activities of political parties including acting as agents of a political party or candidate. Further, Section 12 of the *political parties Act* 2011 and Section 16 of the *Leadership and Integrity Act* 2012 as read together with Article 76(2) (b) of *the Constitution* requires a public officer to remain politically neutral. In addition, Section 15 of the *Election Offences Act* criminalizes the engagement by public officers in the activities of any political party or candidate whether as an agent or otherwise.

121. Without a doubt, the 1<sup>st</sup> Petitioner, Paul Kipaa Kerembu admittedly violated the very law that he accuses the 3<sup>rd</sup> Respondent to have violated by acting as the Chief Agent of the UDA Party, and now as the 1<sup>st</sup> Petitioner in this Petition. The consequences are dire, but I shall leave it at that. The allegation has no substance, and is hereby dismissed.

### **D. Irregular, Unprocedural And Unlawful Assisted Voting**

122. The law recognizes that there are people who for one reason or another may need to be assisted to vote for their preferred candidate. Regulation 72 of the Election (General) Regulation, 2012 provides as follows regarding assisted voting: -

“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.”

123. At paragraphs 73 to 84 of the Petition, the Petitioners contended that there were several instances where IEBC presiding officers conducted assisted voting contrary to Regulation 72 of the Election (General) Regulation, 2012. They claimed that UDA agents were unfairly denied the opportunity to witness the exercise and those who complained of impropriety were unjustifiably thrown out from their assigned polling stations. They contended that the presiding officers marked the ballot papers for assisted voters in favour of the 3<sup>rd</sup> Respondent against their will. Further, it was alleged that the Petitioners' agents at the affected polling stations did not see any Form 32 being filled out and signed by the presiding officers after assisting the assisted voters.

124. The Petitioners did not offer any submissions on this allegation while the Respondents were all in unison in their submissions that the Petitioners did not tender any evidence on this allegation hence it remains unproven.



125. PW1 reiterated the allegations above in his Affidavit adopted as his evidence in chief. On cross-examination, PW1 confirmed that he was not present in any of the 122 pleaded polling stations in which unlawful assisted voting allegedly took place. He stated that he relied on reports from agents and that about 9 of their agents swore affidavits in support of this allegation. He also confirmed that he did not provide particulars of any assisted voter who was improperly assisted and admitted that none had sworn an Affidavit to that effect.
126. PW8, Elijah Kesei Metian, the chief agent for the UDA Gubernatorial Candidate in Kajiado West Constituency stated in his Witness Affidavit that the Presiding officers were hostile and prohibited the Petitioners' agents from witnessing the marking of the ballot papers of assisted voters in the following Polling Centres: Olkiramatian Boarding Primary code no. 071, Oloserian Nursery Code No. 074, Oloika Primary School Code No. 060, Lenko Bay Nursery Code No. 059, Entaamo Nursery Code No. 058, Enchorro Ee Senteu Primary Code No. 036, Edonyo-Oolasho Primary Code No. 057, Kora Nursery Code No. 031, Entasopia Primary Code No. 068 and Oloibortoto Primary Code No. 073.
127. It was his testimony that at Kora Nursery Polling Station Code No. 034186092703101, the Presiding Officer unlawfully appointed two 'Azimio La Umoja One Kenya' Agents namely Robert Sakaya and Mokoi Ipitet to mark ballots cast by assisted voters. Further, he stated that the Presiding officers failed to sign the Form 32 on declaration of secrecy made by a person assisting a voter at the following polling centres: Olkiramatian Boarding Primary Code No. 071, Oloserian Nursery Code No. 074, Oloika Primary School Code No. 060, Lenko Bay Nursery Code No. 059, Entaamo Nursery Code No. 276058, Enchorro Ee Senteu Primary Code No. 036 and Edonyo-Oolasho Primary Code No. 057.
128. Upon cross examination, PW8 stated that he relied on information from their polling station agents. As regards the incident at Kora Nursery in particular, he told the court that he was informed by an agent called Emmanuel but admitted that the said agent had neither sworn any affidavit nor filed a complaint in that respect.
129. Notably, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents called Mokoi Ipitet as their third witness and his testimony that polling agents were allowed to witness assisted voting by the Presiding Officers remained uncontroverted.
130. From the analysis of the above evidence, it is clear that the Petitioners did not adduce any evidence to support this serious allegation. Both PW1 and PW8 have expressly admitted that they merely relied on information from agents who were not called to testify in court. The court therefore finds that the allegation of improper assisted voting was not only unfounded but also unsubstantiated and must also fail.

#### **E. Variation In Number Of Votes Tallied At The Constituency And County Level**

131. PW1 testified to these allegations but midway, abandoned the allegations. At page 26 of the typed proceedings, the Petitioner told the court that he no longer wished to pursue the complaints – also at page 25-26 of the Petition. To that extent then, the court will not belabour interrogating the complaints in respect of the alleged variations in the votes cast in respect of the Gubernatorial, senatorial and Women Representative numbers cast at all levels of the election. However, the 3<sup>rd</sup> and 4<sup>th</sup> Respondents submitted that as no evidence was adduced in support, the allegations stood for dismissal.
132. In furtherance to the above, the court ordered for re-tallying of the votes cast in Kajiado West and Kajiado South Constituencies. What the re-tallying exercise revealed was that the results contained in Forms 37 A, 37 B and 37 C in regard to Kajiado South was caused by a clear and explainable human arithmetical error of an administrative nature which cannot go the crust of overturning the will of the



people of Kajiado County. The Court is guided by the case of Raila Odinga & 16 others Vs Ruto & 10 others [2022] e KLR, where the Supreme Court observed that;

“The reasons for the irregularity was plausible. It had not been established that those minor infraction errors were of a magnitude that would lead to a different result from that declared by IEBC.”

133. Indeed, the Deputy Registrar’s report on the re-tallying of votes in the two constituencies was that Forms 37 A, 37 B and 37 C tally and are similar in all aspects. See also the cited decision of Gitarau Peter Munya (Supra) that there must be evidentiary justification and demonstration of how the final result had been compromised by the alleged irregularities.
134. In any event, no such irregularities were unveiled during the scrutiny and recount exercise conducted by an order of the court. In any event, errors and irregularities which can be attributed to innocent mistake or human error cannot constitute a reason for voiding an election result – Wavinya Ndeti v IEBC & others [2013] eKLR; Ole Lempaka v Koimen & another (2008) 2 KLR 83 to the same effect. The same holding was that if no evidence is offered, the Petitions shall be dismissed. This allegation must therefore be put to rest, as unsubstantiated, and therefore without merit.

#### **F. Vote Result Padding/manipulation**

135. The Petitioners claimed in paragraph 103 of the Petition that a Presiding Officer was found marking ballot papers for two voters at Olmankeki Primary School Polling Station No. 03418092010601 contrary to Section 5 of the *Election Offences Act* 2016.
136. PW6 stated in his witness affidavit, which was adopted as his evidence in chief, that the above irregularity was witnessed by two of their agents by the name Ole Masariet and Maison Koitalel who raised complaints. He averred that a commotion ensued as a consequence and the Presiding Officer ejected Ole Masariet from the polling station. It was also his testimony that the said Presiding Officer openly declared that the 3rd and 4th Respondents would win the gubernatorial elections in that station and that came to pass. During cross-examination, both PW1 and PW6 testified that they did not witness the alleged incident, as they were not present at the polling station and that none of the two polling agents swore Affidavits in support of the allegation. Further, when shown the Form 37 A for that polling station, PW6 confirmed that he was fully satisfied with the results as they were authenticated by the KIEMS kit data.
137. From the foregoing, it is evident that what was presented before this court was hearsay evidence which does not hold any water. The two presiding officers who allegedly witnessed the incident were not called to testify on this allegation. The upshot is that this allegation remained unsubstantiated and therefore it stands dismissed.

#### **G. Non-signing Of Forms 37 A By Party Agents**

138. The Petitioners in their Petition paragraphs 102 to 116 and 104 to 111 alleged that numerous Forms 37 A were unsigned by IEBC Officers and the party agents at various polling stations.
139. It was a further complaint that at the forms that the agents did not sign, the Presiding and/or his Deputy failed to state the reasons for non-signature; and therefore, the result Form 37 A could not be verified. The alleged polling stations where the said forms 37 A were neither stamped by IEBC nor signed are among the polling stations ordered for scrutiny.



140. It is however instructive that during the hearing, PW1 and his 7 witnesses, were taken through most of the forms, sampled from various polling stations. Sampling showed that some Form 37 A's were not signed by UDA agents as well as agents of other candidates/parties. Even for the polling stations where UDA agents had not signed, no reasons were stated by the Presiding Officers, but upon cross examination, witnesses testified that non-signing of the result form had no effect on the results stated at the Forms 37 A, and that they were all satisfied with the result. The Petitioner despite enumerating very many polling stations; and his witnesses shown most of them, none was produced where IEBC's Presiding Officers or their Deputies had not signed and stamped the Form 37 A's

141. The Petitioners in their submissions stated that failure to sign the result form or state reasons for the failure was contrary to Regulation 79 of the Elections (General) Regulations, 2012. Regulation 79 (b) States:

“The refusal or failure of a candidate of an agent to sign a declaration form under sub-regulation (4) or to record the reasons for their refusal to sign as required under the regulation shall not by itself invalidate the results announced under sub-regulation (2) (a)”

142. It is the Respondent's submissions that this is a post declaration irregularity and had no effect on the voting, collation, tallying and declaration of the results at the polling stations. In Raila Odinga 2017, the Supreme Court pronounced itself thus:

“...We must re-emphasize that the fact that not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so, there would hardly be any election in this country, if not the world that would withstand judicial scrutiny. The correct approach therefore, is for a court of law to not only determine whether, the election was characterized by irregularities but whether, those irregularities were of such a nature, or such magnitude, as to have either affected the result of the election or to have negatively impacted the integrity of the election, that no reasonable tribunal would uphold it.”

143. The above observations were followed in the case Mark Nkonang Supeyo v IEBC and others [2018] e KLR wherein the court further observed that:

“... However, in the absence of proof of any prejudice suffered by failure to stamp the requisite form and therefore the fundamental negative effect on the results delivered, the omission cannot per se stand on the way of the electorate to frustrate the will of the people especially when the result including the votes garnered by each candidate is not in question and the party agents have signed”

144. A Makau J in Walter Enock Nyambati v IEBC & 2 others [2018] e KLR further rendered that: -

“I therefore find that the lack of official stamp and signature on statutory forms by the Agents does not invalidate the forms nor the results therein..... that failure of form 37As to bear Signatures of Presiding Officers and Deputy Presiding Officers prima facie makes them invalid and unacceptable (emphasis added)

145. Further, F Gikonyo J in John Murumba Chikati Vs Returning Officer (Supra); while addressing the same issue held that: -

“In the same vein, Regulation 79 does not require that the Statutory Form must be signed by Agents. It states clearly in Regulation (6) and (7) that the absence of Candidates or Agents



or failure to sign the Form by candidates or agents does not invalidate the results declared in the Form.”

146. It is this court’s considered view that the result form is valid if signed by the Presiding Officer, the Deputy Presiding Officer or either of them. In this instant petition, the Petitioner did not produce to the court any Form 37 A out of the 893 polling stations across Kajiado County where the Presiding Officer or the Deputy failed to Sign. Indeed, from the scrutiny exercise of 15 polling stations, among the many produced in court, it was shown that all the Forms 37 A from all the polling stations were duly signed by the Presiding Officer and/or the Deputy Presiding Officers.
147. Signing of the result forms by IEBC officials prima facie give credence to the result stated, and makes the voting exercise accountable and verifiable. For the few forms that were not signed, PW7 Timothy Katoro Sayiore – Chief Agent for UDA, Kajiado East Constituency, testified that he had instructed his agents not to sign the result Forms 37 A, while confirming that all the agents participated in the voting exercise though initially some had been denied access. However, none was called to testify to the denial, and that some UDA agents signed.
148. For Emakoko polling station, PW7 confirmed that his UDA Agents signed the result forms and that they were duly stamped by IEBC Officials. Of all the randomly sampled Forms 37 A, PW7 confirmed that UDA Agents signed the forms. The Deputy Registrar’s Report on scrutiny also confirmed that at all the 15 polling stations, UDA agents were present at the polling stations at the time of opening and closing of the stations.
149. For those that were not signed under instructions of the UDA Chief Agent, including PW1 – the 1<sup>st</sup> Petitioner; who testified that despite being present at the Tallying Centre throughout the tallying process, he declined to sign. He cannot therefore be allowed to attempt to impeach the election results on the same basis, that his UDA agents failed to sign the result form – hence the legal maxim that one cannot benefit from his own wrong.
150. This was ably addressed by the Supreme Court in 2013 in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] e KLR as follows:
- “.....A candidate or her agent cannot abscond her duty from a polling station, and then ask the court to overturn the election because of her failure to sign a statutory form....”
151. On the matter of some mistakes made by IEBC Officials on the Forms 37 A, suffice to state that, no election has ever been perfect world over; and wish to cite what Justice Majanja J stated in *Wavinya Ndeti v IEBC* (Supra), that:
- “ An election is a human endeavor and is not carried out by programmed machines. Perfection is an inspiration, but allowance must be made for human error”
152. The scrutiny exercise indeed confirmed the Respondents very spirited cross examination of the 1<sup>st</sup> Petitioner and his witnesses for confirmation that the Kajiado Gubernatorial election was conducted in accordance with [the constitution](#) and the law, and that the minor flaws and errors or irregularities exposed were not substantial and sufficient to nullify the result.

## **H. Alterations On Forms 37 A**

153. At Paragraph 115 of the Petition, the Petitioners pleaded several polling stations whose Forms 37 A contain alterations that in their view were unlawfully made to manipulate the gubernatorial election results in favour of the 3<sup>rd</sup> Respondents as they were not countersigned. The Petitioners submitted



that the alterations point to tampering of election materials in custody of the 1<sup>st</sup> Respondent. They contended that not a single Presiding Officer from the cited stations took to the stand to explain the circumstances under which the alterations were made so as to disprove the allegation. Reliance was placed on the case of Ahmed Abdullahi Mohamad & another v Mohamed Abdi Mohamed & 2 others [2018] eKLR, to support the submission that failure to call presiding officers of impugned stations as witnesses' may be construed to mean that the evidence of the petitioner remains rebutted. Further reliance was placed on the case of William Kabogo Gitau v George Thuo & 2 Others [2010] eKLR to support the contention that alterations must be countersigned to validate the results on the forms.

154. The Respondents contend that this allegation is baseless as there were no alterations. It was their assertion that the Petitioners are simply referring to corrections made by presiding officers on the forms which can be attributed to reasonable human error. To support their position, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents relied on the case of Wavinya Ndeti v Independent Electoral and Boundaries Commission & 4 Others [2014] eKLR for the position that an election is a human endeavor hence allowance must be made for human error.
155. Before proceeding to analyze the evidence tendered on this allegation, it is important to highlight the jurisprudence that has been laid down by the superior courts regarding alterations on statutory election forms. In the case of William Kabogo Gitau v George Thuo & 2 Others (supra), Kimaru J. applied a very strict approach while addressing the issue of alterations on the then Forms 16A. He stated that:

“There are other complaints which were raised by the petitioner that are in the genre addressed by the court. They relate to Form 16As where specific results of specific candidates were either cancelled or altered without the presiding officer countersigning the cancellation or alteration. The 3<sup>rd</sup> respondent explained away the cancellations and alterations to be on account of, once again, human error which, according to him, was to be expected in the circumstances. Having evaluated the questioned Form 16As, it was clear to the court that whereas the regulations did not specify what ought to be done where there are cancellations and alterations, common sense dictates that where there is a cancellation or alteration in a statutory form, the same should be countersigned by the concerned official. In the case of electoral documents, it is important that the statutory forms which contain results that will invariably be required to be verified by other parties, including the members of the public, should be written without any alterations or cancellations. The cancellations and alterations in the Form 16As produced in this court raised question regarding the veracity and authenticity of the said results. The said Form 16As cannot in the circumstances be said to contain valid results of the polling stations in question.”

156. However, courts have subsequently adopted a different approach which in this court's view which this court associates with. For instance, in Paul Gitenyi Mochorwa v Timothy Mosei Bosire & 2 Others [2013] eKLR Muriithi J. stated: -

“There is no requirement that the entries on form 35 or any other form be without alteration. The constitutional requirement for accuracy in an election system cannot be construed to mean that the statutory forms for the recording of the results of an election must never have errors, corrections or alterations. Accuracy does not mean free from error which has been corrected, an impossibility in all human endeavour; accuracy will be served, if there exists a means of verification of the entries to test for their accuracy and it necessarily imports corrections by alterations, whether countersigned or not.” (Emphasis added)



157. In *Wavinya Ndeti v IEBC & 4 Others* (supra), Majanja J. also stated: -

“An election is a process where mistakes will be made and malpractices may occur but in order to succeed in annulling the election, the petitioner must establish either that there was non-compliance with *the Constitution* and the law governing the election or that the election malpractices and irregularities that took place were of such magnitude that they substantially and materially affected the election.”

158. See also *William Odhiambo Oduol v Independent Electoral and Boundaries Commission & 2 others* [2013] eKLR and *Lenno Mwambura Mbaga & another v Independent Electoral & Boundaries Commission & another* [2013] eKLR

159. From the above authorities, it can be deduced that the mere fact that alterations are not countersigned by the concerned presiding officers cannot invalidate the results on the forms. It must be shown that the changes were made deliberately or maliciously and, were not the consequence of normal human flaws. It must also be shown that the changes had a significant impact on the election.

160. In this case, there is no doubt that a small number of Forms 37 A contained some corrections on the vote counts that were not countersigned by the relevant presiding officers. However, the Scrutiny and Recount conducted in the sampled stations disproved the Petitioners’ allegations of vote manipulation in favour of the 3<sup>rd</sup> Respondent. The Report revealed that the corrections on the Forms 37 A resulted from normal human errors. They were made in good faith for purposes of indicating the correct number of votes garnered by each gubernatorial candidate and the total valid votes, in accordance with IEBC’s constitutional mandate under Article 86(c) of *the Constitution* to ensure accuracy in collation of results.

161. For instance, the Form 37 A for Open Air Market Polling Station 14 of 26 contains a correction of the number of votes garnered by Ambrose Kago and the recount affirmed the entries made for all four candidates. As for Open Air Market Polling Station 20 of 26, the Form 37 A contains a correction of the votes garnered by the Petitioners’ candidate Katoo Metito Judah as 140 and this as well as the entries made for the other three candidates was confirmed to be accurate upon recount. For GK Athi River Prisons Primary School Polling station 2 of 17, it was confirmed that the vote entries on the Form 37 A were initially made on the wrong rows and corrected for purposes of realigning the votes garnered by each candidate to his name. The realigned entries correspond with the initial ones and recount confirmed the votes indicated as garnered by each candidate to be accurate.

162. Similarly, it was confirmed that the form 37 A for GK Athi River Prisons Primary School Polling Station 4 of 17 was changed to indicate the correct number of votes garnered by Katoo Metito and the total votes cast. On recount, it was discovered that Katoo had been added one vote belonging to Nkediye but the total votes cast was not affected. Finally, the Form 37 A for Isinet Primary School Polling Station 2 indicates that the entries were initially not aligned to the correct candidates. Changes were made to correct the anomaly and upon recount, a slight irregularity was discovered in the number of votes garnered by the Petitioners’ candidate and the 3<sup>rd</sup> Respondent. Three votes belonging to Katoo were retrieved from the 3<sup>rd</sup> Respondent’s bundle of votes.

163. Further and in any event, the court notes that the Petitioners did not tender any evidence of ill motive on the part of the concerned presiding officers. The failure to call the concerned presiding officers to answer to this allegation cannot therefore lead to a finding that the Petitioners evidence was unrebutted as suggested in their submissions. The upshot is that the allegation that non-countersigned alterations



were intended to manipulate the results in favour of the 3<sup>rd</sup> Respondent was not proved to the required standard and therefore fails as well.

## **I. Voter Bribery**

### **a. Bribery in Kajiado North Constituency**

164. At paragraph 117 of the Petition, the Petitioners alleged voter bribery at Bulbul Primary School Polling Station, Kerarapon Primary School Polling Centre, Ole Polos Nursery Polling Centre and Laiser Chief's Camp Polling Station.
165. On this, the Petitioners submitted that three of the persons that PW2 mentioned were involved in the bribery, that is, Kibe, Ali Abdulrahman Wadi aka Boi and Linet Muchangi, swore witness affidavits in support of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents' case but were not called to disprove the allegations. Relying on the Court of Appeal decision in *Cyprian Awiti & another v Independent Electoral and Boundaries Commission & 3 others* [2018] eKLR, they urged the Court to draw an adverse inference against the 3<sup>rd</sup> & 4<sup>th</sup> Respondents in the circumstances.
166. The Petitioners' evidence on this allegation was tendered by PW2. In his Witness Affidavit, he stated that he received information from Peter Lempapa, a UDA presidential agent who witnessed a Ward Administrator by the name Ali Abdulrahman Wadhi aka Boi at giving Kshs. 500/- to three voters namely Fatuma, Bakari and Ali at Bulbul Primary School Stream 2. Further, he averred that a UDA gubernatorial position mobiliser called Jane Murage saw one Linet Muchangi, a supporter of the 3<sup>rd</sup> Respondent herein, calling voters to her vehicle which she had parked strategically along the main road leading to the polling centre and issuing them money. As regards Kerarapon Primary School Code No. 025, PW2 stated that Eric Sekento and Malik Mureu had parked their vehicles in the polling centre but forced out of the station by the people for attempting to bribe voters. As for Olepolos Nursery School Centre No. 026, PW2 contended that Eli Gor, the ODM MCA candidate was chased away for giving money to voters and asking them to vote for the 3<sup>rd</sup> Respondent.
167. On cross examination, PW2 testified that Peter Lempapa, Fatuma Bakeri, Ali and Jane Murage did not swear any affidavits in this regard. He also stated that Mutangiri, Linet Muchangi and Jane Murage were not polling agents. It was also his testimony that he saw the MCA giving money to voters but did not report the incident.

### **b. Bribery at Namanga Primary School Polling Centre**

168. At paragraph 119 of the Petition, the Petitioners alleged that Patricia Mbaria, the 5<sup>th</sup> Respondent herein, was found bribing voters at Namanga Primary School Polling Centre in the company of one Mr. Cheupe. They claimed that she parked her car inside the school compound and was interacting with voters while handing out money to them and asking them to vote for the 3<sup>rd</sup> Respondent herein. Particularly, that one Keria Ole Mantina saw Patricia giving money to a voter by the name Ms. Anne Saita. It was their contention that the acts of bribery were witnessed by Keria Ole Mantina, Mr. Karisa and Mr. Sirote Uhuru who called alerted the security officers and Patricia was later ejected from the polling station after intervention from the Petitioner's agents.
169. The Petitioners submitted that under Section 87 (1) of the *Elections Act*, the standard of proving that an electoral malpractice of a criminal nature has occurred is that of balance of probability as the use of the word "may" connotes probability. In this regard, it was their contention that R5W1, R5W2 & R5W3 having testified that they were present at Namanga Primary Polling station and that they had



some interactions, the Petitioners have proven, on a balance of probabilities, that an election offence of bribery may have been committed.

170. The Petitioners relied on the evidence of PW6 in this regard. PW6 stated in his witness affidavit that on the election day, John Keria, their polling station agent at Namanga Primary School Centre Code 073, called him and informed him that the 5<sup>th</sup> Respondent herein had parked her car inside the school's compound and was handing out money to the voters while asking them to vote for the 3<sup>rd</sup> and 4<sup>th</sup> Respondents. He stated that one Keria Ole Mantina witnessed the above happenings and particularly saw the 5<sup>th</sup> Respondent giving money to a voter known as Ms. Anne Saita and asking her to vote for the 3<sup>rd</sup> Respondent. He alleged that the bribery was also witnessed by Mr. Karisa and Mr. Sirote Uhuru who alerted the security officers. Further, that their agents complained to the Presiding Officer and the Police officers at the Namanga Polling Station who forced the 5<sup>th</sup> Respondent to vacate the Polling station and she went to a nearby hotel where she continued with the bribery.
171. On cross examination, PW6 stated that he was relying on information given to him by John Keria as he did not witness the above. He also confirmed that neither John Keria, Sirote Uhuru nor Karisa had sworn affidavits as regards the above. Further, PW7 confirmed that no UDA supporter had sworn an affidavit stating that he or she had been bribed by the 5<sup>th</sup> Respondent.
172. The 5<sup>th</sup> Respondent vehemently denied this allegation and stated that she was not an agent of the gubernatorial candidates in Kajiado County. It was her testimony that she has never been summoned to any police station to answer to any allegations of bribery at Namanga Primary School or elsewhere and no bribery charges have been preferred against her in any court. She admitted that she interacted with Ann Saita who is her neighbour on the said day but only by driving her to the station she was to vote as Anne is an amputee. The 5<sup>th</sup> Respondent called two witnesses, Emoy Ali Hassan alias Cheupe and Mbotor Ene Nkunina alias Anne Saita, both of whom corroborated her evidence that she did not engage in any acts of bribery.
173. The offence of voter bribery is provided for under Section 9 of the Elections Offences Act, Act No. 37 of 2016 Laws of Kenya as follows.

“9. Bribery

- (1) A person who, during an election period—
- a. directly or indirectly offers a bribe to influence a voter to—
    - i. vote or refrain from voting for a particular candidate or political party;
    - ii. attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending support to or for a political party or candidate;
  - b. in any manner unlawfully influences the result of an election;



- c. directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates, commits an offence.
- (2) A person who, during an election period, accepts or agrees to accept a bribe that is offered in the circumstances described in subsection (1) commits an offence.
- (3) A person who commits an offence under this section shall be liable, on conviction, to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both.”

174. Bribery being a criminal offence, must be proved to the standard required for such cases, which is beyond reasonable in doubt. See the case of Raila Odinga 2017 (supra) on the standard of proof of allegations of criminal or quasi-criminal nature. In the case of Fredrick Otieno Outa v Jared Odoyo Okello & 4 Others [2014] eKLR, it was held that evidence of bribery must be clear, cogent and credible. It should not leave or create doubt that the offence was committed and by who. In the instant case, the Petitioners have not discharged the burden of proving the bribery allegations to the required standard. The allegations were based on the hearsay evidence of PW2 and PW7, rather than the direct evidence of the persons who were mentioned to have allegedly witnessed the criminal acts. In addition, the Petitioners did not establish any nexus between the acts of voter bribery and the 3<sup>rd</sup> Respondent, his supporters or agents. It is also strange that none of the alleged incidents were reported. The upshot is that the allegation remains unsubstantiated and is for dismissal.
175. Indeed, there was absolutely no reason for the Petitioners to have joined the 5<sup>th</sup> Respondent as a party to this petition on account of bribery allegations. She was not a candidate in the Gubernatorial election race or in any of the other five elections. The allegations against her were farfetched, a witch hunt, actuated by ill will, malice and made in bad faith.

### Determination

176. The analysis undertaken for each specific complaint by way of interrogation of the parties’ pleadings, evidence and submissions, as well as the legal principles that underpin election petitions being: The burden of proof and the standard of proof; brings me to the question: Whether the Petitioners have discharged the burden of proof and the standard laid down by the Superior Court, the Supreme Court of Kenya in Raila Odinga [2013] and Raila Odinga [2017]; and whether the alleged irregularities and illegalities were of such magnitude as to effect the election result, as held by the Supreme Court in Gatirau Munya case (2014) (Supra).
177. Mwongo J. in Ferdinard Ndungu Waititu v IEBC and Evans Kidero & others (Election Petition No.1 of 2013) expressed himself as to what constitutes a void election on account of non-compliance with the election laws, the evidence of irregularities and discrepancies must be of such nature as to disclose through clear and weighty evidence, any one of the following: -
- a. An attempt to establish a winner otherwise than in compliance with *the Constitution*; and/or



- b. An attempt to suppress, alter or undermine the will of the voters exercising their rights under Article 38 in such a manner as to affect the overall outcome of an election; and/or
  - c. A failure by or of the electoral system, or in the process used therein, such as to constitute non-compliance with the general principles of the electoral system under Article 81 of *the Constitution*; and/or
  - d. Such clear and glaring flaws in the conduct of the elections as substantially render any of the aspirations of Article 86(a), (b), (c) or (d) to be meaningless, and or
  - e. That the non-compliance with the electoral law or regulations was substantial enough to and did in fact, affect the result of the election.
178. If the answer of the above is in the affirmative, then the cumulative effect would reverse a win and in that case, the court would be obligated to reverse the win. However, for the win to be reversed, there must be clear, evidentiary justification and demonstration of how the final vote outcome result, in this instance, in Forms 37 A has been compromised by the irregularities, being the quantitative approach which was spelt out in *Ole Lempaka v Komen & another* (2008) 2 KLR (EP) 83 that a petition which alleges breach of the law rule or regulation or malpractice must be proved by evidence and if no evidence is offered, the Petition must be dismissed. The above is very well captured by the Supreme Court thus:
- “The correct approach therefore, is for the court of law, to not only determine whether the election was characterized by irregularities, but whether those irregularities were of such a nature or such a magnitude as to have either affected the result of the election or to have so negatively impacted the integrity of the election that no reasonable tribunal would uphold it.”
179. The above propositions were also rendered and reiterated in *Raila Odinga [2022] Presidential election Petition*. Article 86 of *the Constitution* declares the minimum threshold in the different stages of the electoral process thus;
- a. Whether voting method 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.
180. If the election does not meet the above basic constitutional underpinnings, such election result is but for reversal and dismissal. On the matter of scrutiny, recounting and re-tallying, if there are errors that do not change the result of an election, then the court hearing an election petition cannot be justified, merely on account of such shortfalls, to nullify such an election – *Gatirau Munya Case* (Supra).
181. An election result cannot be affected by a one off irregularity or illegality; but may be affected, and nullified by accumulative irregularities and illegalities that despite a majority win in votes, they would go into the credibility, accuracy and verifiability of the election.



182. By the evidence tendered before the court in support of the pleadings, the Petitioners have failed to discharge the initial evidential burden of proof to the required standard before shifting it to the Respondents. The threshold of proof should be upon a balance of probability, though not as high as beyond reasonable doubt save that where criminal charges are linked to an election petition.
183. Ultimately, it is about the evidence tendered by the Petitioner who is under a duty to prefer cogent and credible evidence to prove the grounds stated for the Petition to the satisfaction of the court. It is only upon the above burden being discharged that the evidentiary burden shifts to the Respondents to present evidence by way of rebuttal of the allegations. Raila Odinga [2022]; [2017] and [2013].
184. For the foregoing, the court comes to the unenviable conclusion that the Petitioners have fallen short of discharging their legal and evidential burden of proof that the Kajiado Gubernatorial election held on the 9<sup>th</sup> of August 2022 was not conducted in accordance with the Constitution, the Election Laws and Regulations thereunder.
185. The upshot is that the reliefs sought in the Petition cannot be granted, and the Petition is hereby dismissed with costs.

### **Who should bear the costs of the Petition?**

186. Section 84 of the Elections Act 2011 empowers an Election Court to make orders on costs after conclusion of a Petition. It provides that an election court shall award the costs of and incidental to a petition and such costs shall follow the cause.
187. Rule 30(1) of the Election Petition (Parliamentary and County Elections) Petition Rules, 2017 further provides:

- “ 30 The election court may, at the conclusion of a petition, make an order  
(1) specifying –
- a. the total amount of costs payable;
  - b. the maximum amount of costs payable;”

188. Further, pursuant to Rule 31(3) of the Election Petition (Parliamentary and County Elections) Petition Rules, 2017, the Election Court may also direct that the whole or part of any money deposited as security be applied in the payment of taxed costs.
189. The court has considered the submissions tendered by the Petitioner as well as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submissions on costs. The court has considered the general conduct of the Petition, the length of time taken during the hearing of the Petition as well as the preparation of the pleadings, research and industry by Counsel. Also considered are relevant court decisions on the award of costs in Election Petitions. The court hereby takes the option of determining the total amount of costs payable to the Respondents pursuant to Rule 30(1) (a) above and awards the Respondents costs as stated here below.

### **Final Orders**

- a. Kajiado High Court Election Petition No. E 001 of 2022 is hereby dismissed with costs to the Respondents, payable by the Petitioners, jointly and severally.
- b. A declaration is hereby issued that the 3<sup>rd</sup> Respondent, H.E. Lenku Joseph Jama Ole, was validly elected and declared Governor of Kajiado County following the 9<sup>th</sup> August 2022 General Election.



- c. A certificate in terms of Section 86(1) of the *Elections Act*, 2011 shall issue to the Speaker of the County Government of Kajiado and the Independent Boundaries and Electoral Commission (IEBC).
- d. The Respondents are awarded a total sum of Kshs. 3,000,000/- in costs, payable as follows:
- i. To the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, Kshs. 1,200,000/-;
  - ii. To the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, Kshs. 1,200,000/-; and
  - iii. To the 5<sup>th</sup> Respondent, Kshs. 600,000/-.
- e. The sum of Kshs. 500,000/- deposited in court as security shall be applied as part payment of the above costs in equal proportions to the five Respondents;

Lastly, the court wishes to appreciate and commend all Counsel who tirelessly appeared before the court in strict compliance with the pre-trial directions. Their cooperation and decorum before the court, and to each other cannot be underrated.

I commend my very able Legal Researcher Ms. Verah Momanyi for her unwavering support and dedication. To the Support team at Kajiado High Court, thank you for making my short tour of duty at Kajiado pleasant.

**DELIVERED, DATED AND SIGNED AT KAJIADO THIS 2<sup>ND</sup> DAY OF MARCH 2023.**

**JANET MULWA**

**JUDGE**

