



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kwamboka v IEBC & 2 others (Election Petition E004 of 2022)
[2023] KEHC 1554 (KLR) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1554 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
ELECTION PETITION E004 OF 2022**

K KIMONDO, J

MARCH 2, 2023

BETWEEN

MATOKE EMILY KWAMBOKA PETITIONER

AND

IEBC 1ST RESPONDENT

NJOROGE ANTHONY DOUGLAS 2ND RESPONDENT

MONGINA MOMANYI JERUSHA 3RD RESPONDENT

JUDGMENT

Introduction

1. Matoke Emily Kwamboka was among 12 candidates who vied for the seat of County Woman Representative to the National Assembly for Nyamira County in the general elections held on 9th August 2022. She was a registered voter at Nyadoche Ibere Primary School Polling Station, Nyansiongo Ward in Borabu Constituency. I will refer to her variously as the petitioner or PW1.
2. The petitioner's bid was unsuccessful. On 12th August 2022, Njoroge Anthony Douglas, (hereafter referred to as the 1st respondent or DW1) declared that Mongina Emily Jerusha (hereafter the 3rd respondent) won the poll with 84,843 votes against the petitioner's (and who was the 1st runners up) 72,434 votes. The petitioner was aggrieved by that decision precipitating these proceedings.
3. The 2nd respondent was employed by the Independent Electoral and Boundaries Commission (hereafter the 2nd respondent or the IEBC) as its County Returning Officer in the impugned poll. The IEBC is a creature of Articles 88 and 248 (2) (c) of *the Constitution*; and, the *Independent Electoral and Boundaries Commission Act* (No. 9 of 2011). The Commission is mandated, inter alia, to conduct and supervise national elections and referenda.



4. I should add that the petitioner ran on the ticket of the Orange Democratic Movement Party (hereafter the ODM) while the 3rd respondent was the Jubilee Party (hereafter Jubilee) candidate. I therefore take judicial notice, as a matter of local notoriety, that the two political parties were affiliated to the Azimio La Umoja- One Kenya Coalition Party.

Pleadings.

5. The petition was filed electronically on 8th September 2022. A hard copy was delivered to the court on 9th September 2022. This was well within the time stipulated by section 76 (1)(a) of the *Elections Act* (hereafter the Act).
6. The petition was grounded upon the petitioner's deposition of even date and 21 witness affidavits. However, only the petitioner and 13 witnesses testified in the matter. One witness, Edwin Myamweya (PW12), was stood down for reasons on the record.
7. The petition was served personally and also by substituted service upon all the respondents within the time provided by the Elections (Parliamentary and County Elections) Petition Rules 2017 (hereafter the Rules).
8. The 1st and 2nd respondents Response is dated 22nd September 2022 and lodged formally on 28th September 2022. It was accompanied by five affidavits of the County Returning Officer (2nd respondent) and the four respective Constituency Returning Officers all sworn on 28th September 2022. Attached to the affidavits were copies of the results declaration forms 39As, 39B, and 39C.
9. The 3rd respondent on the other hand filed her response on 28th September 2022 together with a replying affidavit and a set of 34 witness affidavits. Of those, only the 3rd respondent and 19 witnesses took to the stand.
10. On 15th November 2022, the IEBC filed certified copies of the results declaratory forms 39A, 39B and 39C. I must point out at the earliest that some of the forms were missing, for instance form 39A for Embaro DOK Primary School Polling Station 1 of 2.

Petitioners Case

11. In a synopsis, the petitioner's case is that the elections for the County Woman Representative were not conducted in compliance with Articles 81 and 86 of *the Constitution*, the Act and the Regulations. In particular, she contended that the IEBC did not conduct a fair, transparent, efficient, accurate or verifiable poll.
12. The principal complaints were pleaded at paragraphs 10 to 53 of the petition as well as paragraphs 4 to 58 of the supporting affidavit. They can be grouped into seven broad thematic areas: Firstly, that there was a significant and inexplicable variance of 29,976 votes between the election of the County Woman Representative and that of the County Governor. There was another variance between the votes cast for the County Woman Representative and that for the Member of National Assembly, Kitutu Masaba. Under this rubric, the petitioner's case is that there was systematic fraud, ballot stuffing or vote-padding in favour of the 3rd respondent.
13. Secondly, that there was a variance in the number of registered voters in the election for the County Woman Representative compared to those in the governor's election. The former is indicated in Form 39C as 323,289 while the latter is 323,291.



14. Thirdly, that petitioner was the most popular candidate in Kitutu Masaba Constituency. She pleaded that she had “maintained a constant lead and it was then expected that the result in [her] home constituency of Kitutu Masaba would be close”. She was thus surprised and shocked that the 3rd respondent gained nearly three times the votes cast for the petitioner.
15. She attributed it to a “well-orchestrated underhanded [sic] campaign” led by the former Cabinet Secretary for Interior, Fred Matiang’i; the former Solicitor General, Ken Ogeto; complicit IEBC officials; and, unlawful use of public resources to tilt the balance in favour of the 3rd respondent. The petitioner also complained of padding up of the 3rd respondent’s votes or ballot stuffing at 13 polling stations specified in paragraph 41 of the petition.
16. Fourthly, that the results captured in Forms 39A in 14 polling stations in Kitutu Masaba contained multiple errors, anomalies, alterations and cancellations. In Borabu, ballot boxes were delivered after unexplained delay of almost 24 hours; and, the forms in three stations had multiple alterations which were not countersigned. The same obtained for 4 stations in North Mugirango. In West Mugirango, there were cancellations or alterations in forms 39A from 14 polling stations.
17. A related theme in all those cases was that some of the forms were not signed by agents or presiding officers in contravention of Regulation 79(4) & (5) of the Elections (General) Regulations 2012 (hereafter the Regulations). As a result, thousands of votes could not be verified. Other irregularities were at Kiamogiti Primary School 2 of 2 where the 3rd respondent garnered 238 votes exceeding the valid votes cast of 117; at Menyenya Primary School 2 of 5 where the form was signed by the presiding officer a day before the agents signed it; and, Etono Polling Station where there was unexplained delay in forwarding the results to the nearby county tallying centre.
18. The petitioner also alleged that her agents and those of ODM Party were intimidated or ejected from polling stations creating doubt on validity of 10,844 votes. Owing to all the glitches highlighted above, a further 14,740 votes were put into doubt. In a nutshell, the petitioner’s case is that the results could not be verified which called for a full scrutiny by the election court.
19. Fifthly, the petitioner alleged that there were “homogeneous results” particularly in Kitutu Masaba as per the table marked MEK-13. She complained that it affected 12,234 votes. She explains the term at paragraph 35 of her affidavit as a situation where she and the 3rd respondent garnered “a specific number of votes or numbers extremely close in each polling station in a polling centre, a phenomenon which was replicated numerous times in the county”. According to the petitioner, it fitted into “a sinister plan to rig the election in the 3rd respondent’s favour”.
20. Sixth, the petitioner alleged that there were transposition errors that illegally switched her results and credited them to the 3rd respondent. Examples are given at Makomoni Tea Buying Centre Polling Station 2 of 4, Nyakemincha DOK Primary School Polling Station 1 of 2 and Embaro DOK Primary School Polling Station 1 of 2.
21. Seventh, the petitioner alleged that the 3rd respondent or her agents engaged in acts of bribery or undue influence of voters. For example, Geoffrey Mosinga (PW14) testified that he witnessed bribery at Nyambaria Polling Station, Magambo Ward; Kiamogiti Polling Station in Gachuba Ward; and, Mosobeti DOK Polling Station in Gesima Ward. Duke Omwega (PW2) claimed that an agent of the 3rd respondent was distributing campaign materials or lessos at Muruga ACK Primary School Polling Station.
22. On her part, the petitioner deposed that former CS Matiang’i “offered bribes to voters, facilitated by state machinery, to convince the voters to vote for the 3rd respondent, thereby committing an election



offence under Section 9 of the Elections Offences Act”. Analogous complaints were made by other witnesses including Kephah Gichana (PW3), Nemuel Okore PW5 and Edwin Nyamweya (PW14).

23. I will give a more detailed summary and analysis of the testimony of the petitioner and her 13 witnesses later.

Reliefs sought

24. The petitioner prayed for the following orders-
- a. An order securing the ballot boxes and their contents, the KIEMS kits, ballot counter foils and copies and all the electoral materials used on the 9th August 2022.
 - b. An order for scrutiny and recount of the votes cast in the polling stations: where there are cancellations and alterations on Forms 39A that are not countersigned: where Forms 39A are not signed by agents; where there are homogeneous results in a polling centre;
 - c. An order for scrutiny and recount of the votes cast in the polling stations complained of and more particularly Kitutu Masaba and North Mugirango to ascertain the true votes cast and declared by the 2nd respondent;
 - d. An order for scrutiny of the Polling Station Diaries kept by the Presiding Officers in the above-mentioned polling stations;
 - e. An order nullifying the instrument of declaration of the 3rd respondent as the duly elected County Woman Representative to the National Assembly for Nyamira County and the quashing and or cancellation of the consequent Kenya Gazette dated 22nd August 2022 in relation to the 3rd respondent's election;
 - f. An order for fresh elections for position of County Woman Representative to the National Assembly for Nyamira County;
 - g. The Honourable Court do find that the election offences complained of and perpetrated by the 2nd and 3rd respondents affected the election and be determined by this Honourable Court and be reported to the Director of Public Prosecutions for further appropriate action;
 - h. Costs of the petition.
25. On 13th December 2022, the Court ordered the IEBC to submit the original or certified copies of Forms 39As, 39Bs and Form 39C for the disputed election. The forms were presented to court on 15th November 2022 and used extensively at the trial. Following a successful motion for scrutiny, I directed that some other election materials including some ballot boxes be availed to the Deputy Registrar. It follows that the prayers in (a) to (d) are overtaken by events.

1st and 2nd Respondents' Case

26. The petition is vigorously opposed. The 1st and 2nd respondents' case can be summarized as follows: That the IEBC conducted the elections in accordance with *the Constitution*, the *Elections Act* and Regulations thereunder.
27. In the alternative, they argue that the malpractices or irregularities alleged by the petitioner did not substantially affect the results of the election. They thus prayed that the petition be dismissed with costs.



28. In reply to the specific allegations by the petitioner, the 2nd respondent (DW1) testified that there was no variance between the votes cast for Woman Representative and the Governor; and, that the petitioner was relying on an erroneous form 37C. According to him, the correct figure for the votes cast in the governor's race was 207,096 and not 176,929 as alleged by the petitioner.
29. Further, that the variances can be accounted for by the number of rejected ballots and stray ballots for example. They also denied the claims of switching of votes or ballot stuffing or any manipulation of data to deny the petitioner victory.
30. Regarding alterations to forms 39A, the IEBC conceded that there were some changes which were necessary to rectify certain errors. DW1 also admitted that form 39C had minor errors which occurred when transferring data from forms 39A or 39Bs. He also denied that there were "homogeneous results".
31. On claims of voter bribery, DW1, Ruto Wesley (DW2) and Benson Ambuko (DW5) all said they received no written complaints and were unaware of voter intimidation, acts of violence or campaigns by government officials.
32. The 1st and 2nd respondents also denied that the petitioner's or ODM's agents were unfairly kept out of polling stations. According to Sylvia Jepchumba (DW3), any presiding officer was entitled to deny entry to an agent with a letter stating "West Mugirango and without a name of polling station". She had however advised Presiding Officers to admit agents carrying a valid appointment letter, ID and oath of secrecy.
33. Citing Regulation 79(6), the IEBC also argued that failure or refusal by agents to sign the results declaratory forms, would not impeach the validity of the poll or the results.
34. I will deal in more detail with the evidence of the 5 witnesses called by the 1st and 2nd respondents later.

3rd Respondent's Case

35. The 3rd respondent testified as DW24 and called 19 witnesses. She denied all the allegations by the petitioner. In a nutshell, she testified that she won the contest fair and square and that the entire petition is ill-founded. In her view, the elections were conducted in a free, fair, accurate and verifiable manner.
36. She down played the claims by the petitioner that she (the petitioner) was the more popular candidate in Kitutu Masaba. The 3rd respondent was running as the incumbent and was born, raised, schooled, married in Kitutu Masaba. She was also a teacher and church for many years. Citing the margin between her votes and those obtained by the petitioner, she testified that the errors in the results declaratory forms admitted by IEBC were negligible with no significant effect on the election.
37. She also denied that there were electoral malpractices by Government Officials or IEBC officers pleaded in paragraph 13 of the petition. In particular, she contested the allegations of variances between the votes cast for various electoral offices in the general election. In her view, there was no requirement that such votes should tally. She also stated that there was no manipulation of the results in her favour.
38. Finally, the 3rd respondent denied that she was personally involved or responsible for any of the illegalities or irregularities alleged by the petitioner. She implored the court to dismiss the petition with costs.
39. I will revisit in greater detail her evidence and that of her 19 witnesses below.



Detailed Oral and Documentary Evidence

40. Like I stated, the petitioner called 13 witnesses. I should add that the evidence of one of the witnesses, Edwin Nyamweya (PW12), was objected to as he was an employee of the IEBC during the disputed elections. The objection was upheld for considered reasons on the record.
41. PW1 testified that she won in three of the four constituencies in Nyamira, namely: West Mugirango Constituency where she hails from, North Mugirango Constituency and Borabu Constituency. But she lost in Kitutu Masaba constituency, a battleground that determined the race in the 3rd respondent's favour. The 3rd respondent got 39,784 votes there against the petitioner's 14,312.
42. A key plank of the petitioner's case is that she was more popular than the 3rd respondent and expected to carry Kitutu Masaba (which she said was her home); or, that in the worst-case scenario, the election would be closely fought. She based her views on the voting patterns in the other three constituencies where she had maintained a consistent lead.
43. The petitioner averred at paragraph 13 that she was thus surprised and shocked that the 3rd respondent obtained nearly three times of the votes than her in Kitutu Masaba constituency. She blamed the loss on the former Cabinet Secretary for Interior and National Co-ordination, Fred Matiang'i:

A well-orchestrated underhanded campaign led by the CS for Interior and National Co-ordination, Fred Matiang'i, a public officer, who openly campaigned for the 3rd respondent and marshalled state resources in her favour, together with unscrupulous election officials who ensured that the will of the voters in Kitutu Masaba constituency was subverted by their actions and omissions.

44. She also cast doubt on the overall results because the election of the Woman Representative attracted an extra 29,976 votes than those cast for the Governor. In paragraph 15, she has drawn a table detailing the results in both elections across the four constituencies. In Kitutu Masaba alone, the valid votes cast for governor were 47,459 against those of the Woman Representative of 69,386.
45. She testified that the difference between the two elections in Kitutu Masaba alone of 21,927 votes was inexplicable considering that each voter receives six ballots for all the six elections. She testified that it was a strong pointer to manipulation of the results. She also noted that "323,289 people were registered to vote in Form 39C while 321,291 people were registered to vote in Form 37C". On this point, she averred that the voter register used in all polling stations should be identical for all six elections, and it thus beats logic.
46. I should point out at the earliest that the IEBC claimed that the petitioner's analysis was not based on the official form 37C used to declare the winner in the governor's race.
47. The petitioner was also at a loss how the Member of National Assembly elect for Kitutu Masaba Constituency who "was a very popular candidate" could only garner 31,815 votes yet the 3rd Respondent obtained 39,751 there.
48. The petitioner took issue with cancellations, alterations and other anomalies in forms 39A. In her view, the results in those forms amounting to 11,480 votes were unverifiable. In Kitutu Masaba she isolated 14 stations whose forms contained cancellations which were not countersigned by either the Presiding Officer or agents as follows-
 - (i) Rigoma D.E.B Primary School 2 of 2
 - (ii) Bonyunyu D.O.K Primary School 1 of 2



- (iii) Nyabigege D.O.K. Primary School 1 of 2
 - (iv) Nyabigege D.O.K. Primary School 2 of 2
 - (v) Nyachichì D.O.K Primary School 2 of 2
 - (vi) Kenyerere P.A.G Primary School 1 of 1
 - (vii) Nyamangu Tea Buying Centre 2 of 2
 - (viii) Riegechure D.E.B. Primary School 1 of 1
 - (ix) Chitago Tea Buying Centre 1 of 1
 - (x) Tombe S.D.A Primary School 3 of 3
 - (xi) Sengera D.E.B. Primary School 1 of 2
 - (xii) Iranya P.A.G. Primary School 2 of 2
 - (xiii) Machururiati Primary School 1 of 2
 - (xiv) Matutu P.A.G. Primary School 1 of 1
49. Those in Borabu were three: Manga Girls Primary School Polling Station 1 of 3; Menyanya Primary School Polling Station 1 of 5; and stream 3 of 5. In North Mugirango, she identified four polling stations where alterations were not countersigned at Morembe Primary School 1 of 1, Ikonge Primary School 1 of 6, 6 of 6 and Kebariga Primary School PS 2 of 2.
50. In West Mugirango, she listed another 14 polling stations with similar deficiencies at-
- i. Embonga D.O.K. Primary School 2 of 2
 - ii. Nyakeore D.E.B. Primary School 1 of 3
 - iii. Nyamwutureko D.O.K. Primary School 1 of 3
 - iv. Nyakemincha D.O.K. Primary School 1 of 2
 - v. Nyagachi D.E.B. Primary School 2 of 2
 - vi. Girigiri D.E.B. Primary School 1 of 2
 - vii. Kuura D.E.B. Primary School 2 of 2
 - viii. Gucha S.D.A. Primary School 2 of 2
 - ix. Nyakoria D.E.B. Primary School 2 of 2
 - x. Bundo D.O.K. Primary School 1 of 2
 - xi. Bomondo C.O.G. Primary School 1 of 2
 - xii. Nyamira D.E.B. Primary School 2 of 8
 - xiii. Nyamira D.E.B. Primary School 4 of 8
 - xiv. Ikonge D.E.B. Primary School 1 of 1
51. At paragraphs 27 to 32 of the petition, contain complaints where the results declaration forms were not signed at all by agents or any reasons proffered by the presiding officers. The petitioner contends



- that as a result 2,113 votes and a further 1,147 votes were unaccounted for. The total number of votes affected by the anomalies in forms 39A are 14,740. Granted the magnitude, she argued that it was a scheme to increase the margin between her and the 3rd respondent; and, that the election was thus not transparent or verifiable. Hence her prayers for scrutiny that is now past.
52. At paragraph 19 of this judgment, I highlighted the petitioner’s complaints of the petitioner alleged that there were “homogeneous results” particularly in Kitutu Masaba as per the table marked MEK-13. She said over 40 polling stations were affected. An example is at Embaro DOK Primary School. The results are identical for all candidates in both streams 1 and 2. As I will discuss shortly, IEBC was unable to provide the results for stream 1.
 53. The petitioner testified that in all those stations, the 3rd respondent suspiciously obtained a higher number of votes which cast a long shadow of doubt on the integrity of the poll. In her analysis, the homogeneous results affected 12,234 votes. She opined that there was complicity between the 3rd respondent, certain government officials and IEBC personnel in contravention of section 6 of the *Election Offences Act*.
 54. The petitioner that her results were switched and credited to the 3rd respondent. She gave examples of Makomoni Tea Buying Centre Polling Station 2 of 4, Nyakemincha DOK Primary School Polling Station 1 of 2 and Embaro DOK Primary School Polling Station 1 of 2.
 55. Regarding padding up of votes, the petitioner cited 8 instances at-
 - i. Masosa AIC Primary School where the 3rd respondent was added 102 votes;
 - ii. Bondeka ELCK Primary School — the petitioner's votes were reduced by 100 and the 3rd respondent's increased by 100;
 - iii. Moruga ELCK Primary School —where the 3rd respondent’s votes were padded with 126 votes. Surprisingly the Presiding Officer signed the form as an agent for UDA party;
 - iv. Kuura D.E.B Primary School PS 1 of 1 where the Presiding Officer altered votes to award..... [I noted that this sentence was left hanging in both the petition and the supporting affidavit and its essence is lost].
 - v. Girigiri D.E.B. Primary School PS 1 of 2 — the Petitioner's votes were reduced by 100 while those of the 3rd respondent rose from 19 to 70;
 - vi. Nyamira D.E.B Primary School PS 2 of 8 — the 3rd respondent's votes were increased from 109 to 110 and in the absence of any agents;
 - vii. Nyamira D.E.B Primary School PS 4 of 8 — the Petitioner's votes were reduced from 232 to 199; and
 - viii. Bomondo C.O.G Primary School PS 1 of 2 — the Respondent's votes were increased from 30 to 139.
 56. I dealt at paragraph 15 and 43 of this judgment with the complaints by the petitioner of unlawful campaigns by the former Cabinet Secretary for Interior, Fred Matiang’i; the former Solicitor General, Ken Ogeto; and, complicit IEBC officials. The petitioner averred that the conduct contravened sections 9 and 15 of the *Election Offences Act*.
 57. She and one of her witnesses (PW14) claimed the former CS “chided her dressing and asked the voters not to vote for her”. She accused him of publicly campaigning for the 3rd respondent and misusing “government machinery in the campaigns to unduly influence the voters”. She also accused Matiang’i



and his officers of intimidating her agents and those of the ODM Party or ejecting them from polling stations. At paragraph 49 of her affidavit, she deposes that-

On the day of the election, the Cabinet Secretary for Interior, for the benefit of the 3rd respondent, marshalled national security organs, the police, to intimidate and evict the Petitioner's agents (appointed by the ODM party) from polling stations in a scheme calculated to deny the Petitioner and other candidates in the election an opportunity to monitor and verify the voting exercise in the following polling centers in Kitutu Masaba Constituency: Eronge D.O.K. Primary School; Kegogi P.A.G Primary School; Nyasore S.D.A, Primary School; Mobamba Tea Buying Centre; Biticha Primary School; Nyankoba Primary School; Nvanchonori D.O.K. Primary School; Nyagancha DEB Primary School; Bonyunyu D.O.K Primary School, Kegogi D.E.B. Primary School, Riamisi Tea Buying Centre; Nyaibasa Primary School; Nyaisa S.D.A. Primary School; Nyaikuro Primary School; Rionguti D.O.K. Primary School; Sirate D.O.K. Primary Nyamwanga Primary School; Bogwendo P.A.G. Primary School and Nyambogo S.D.A. Primary School

58. The petitioner made a written complaint to the 2nd respondent regarding a missing Form 39A for Menyenya Primary School 5 of 5 which was later "located at Kebirigo under the supervision of security officers". She said the 2nd respondent ignored her and went ahead to declare he impugned results.
59. The petitioner's case is that the blocking of her agents during voting, counting, sealing of ballot boxes or tallying affected 10,844 votes which cannot now be verified. Her parting shot was that contrasting the margin between her and the 3rd respondent of 12,409 votes against the sheer number of votes affected by the malpractices and illegalities she highlighted, the obvious inference is that the poll was not conducted in compliance with Articles 81 and 86 of *the Constitution*, the Act and the Regulations. She concluded that it did not also reflect the will of the people of Nyamira.
60. PW2 was Duke Ombogi Omwega, an ODM agent at Muruga ELCK Primary School Polling Station. He testified that on election day at about 10:00 a.m., he saw two men inside a Toyota Probox registration number KCY 273P distributing the 3rd respondent's campaign merchandise. They were apprehended and handed over to the area chief, Justus Momanyi Okenye (DW6) who was also outside the polling station. He claimed that they were later handed to the police.
61. The witness produced a black and white photograph at page 47 of the bundle but which is unclear. There are also pictures of the vehicle and the two suspects in the hands of a chief and a police officer. However according to DW6, upon interrogating the two suspects and searching them and the car, he found no evidence of the merchandise or money.
62. PW3 was Kepha Gichana Osoro. He said he was an ODM super-agent for Kitutu Masaba. His key evidence was that the petitioner's agents were intimidated by "too many" security agents or that they were denied access into polling stations. But under cross examination, he clarified that his stream had approximately two police officers. He testified that the 3rd respondent's agents were distributing money to voters and that the polling clerks were taking too many breaks during the counting causing unnecessary delays. I must observe that paragraphs 3 to 8 of his affidavit do not specify the polling station but in his oral evidence, he stated that it was at Moitunya.
63. He also complained of homogeneous results at the unnamed stream as well as in the table at paragraph 9 of his affidavit including Borabu DEB Primary, Metamaywa Primary School, Nyachichi Primary School, Moitunya Primary School, Motembe Primary School, Nyamwanga Primary School and Kiogutwa Primary.



64. Lucas Omangi Otiso (PW4) said he was an ODM agent at Borabu DOK polling station. He testified that at Rigoma Polling Station the presiding officer denied ODM Party agents access to all the streams at the polling stations. He intervened in the matter but they were only allowed in after 16:00 hours.
65. PW5 was Nemuel Kiage Okore. He testified that on election day, while queueing at Kipkembe Primary School Polling Station, the 3rd respondent's agents offered him a bribe of Kshs. 100 but he turned it down. On cross examination he said he never reported the matter.
66. Justus Nyakwara (PW6) said he was an agent at Makomoni TBC Polling Station. However, his appointment letter stated Kiabonyoru Polling Station. He testified that four policemen were handing out Kshs 100 to voters and "whispering to them" to vote for the 3rd respondent; and, when he protested they were thrown out of the polling station.
67. PW6 averred that during the count, police officers harassed and threw him out of the station but the other people present protested. He claimed that a police officer referred the matter to Matutu Police Station instead of the nearby Ekerenyo Police Station. When the OCPD arrived, he accused them of being problematic and causing trouble to his officers.
68. He testified that during tallying, the petitioner's 190 votes were switched to the 3rd respondent who had 105. Following his protests, the presiding officer corrected the figures. However, he did not sign against the altered figure. The count and recording ended at 3.00a.m. on 10th August 2022, they signed the forms and the ballot boxes were sealed.
69. He claimed that at Mokomoni TBC Polling Station 2 of 4 the ODM agent had been forced out of the station. He said that at first, the Presiding officer switched the petitioner's 241 to the 3rd respondent who only had 71. He protested and the error was corrected. He claimed that Denis Omwansa, a close relative of the 3rd respondent was brought in to sign in place of ODM agent.
70. PW6 also claimed that the presiding officer did not give sufficient time to voters who required assistance but marked their ballots in favour of the 3rd respondent. A similar allegation was made by another witness, Jane Moraa Momanyi (PW9) who voted at Enkinda Primary School and also by PW10 Edward Getange (PW10) at Ekerenyo EDN Polling Station. The latter averred that Presiding Officers were assisting aged voters in the absence of agents of the candidates.
71. PW10 also claimed that there was voter bribery near the polling station. He made other allegations that at Ikonge Polling Station stream 3, the petitioner's agents were locked out; and, that the results for Nyagonge Polling Center were delayed.
72. Jones Arasa (PW7) testified that he was denied entry into Nyankoba Primary School Polling Station despite presenting his credentials. He averred that he remained in the compound until 18:00 hours.
73. Bernard Matura (PW8) testified that he voted at Kierira Polling Station. He was then escorted out of the polling station by the Presiding Officer and a police officer notwithstanding his appointment letter and other credentials as an agent. He did not annex a copy of his appointment letter to his affidavit.
74. PW11 was Robinson Masita, a super-agent for ODM. He was tasked to supervise three polling stations in Kitutu Masaba. He testified of bribery as follows. Firstly, he was informed that Dr. Matiang'i's brother John Matiang'i was bribing voters at Embaro. He went there and saw John bribing voters but upon noticing that the petitioner's agents were around, he took off. It raised a commotion. Stuningly, he claimed he was also offered Kshs 200 but he declined. He said he reported it to police officers there but they took no action. He informed the petitioner.



75. At Metamaywa, he said that agents of the 3rd respondent were bribing voters. The police did not arrest anyone. He also informed petitioner about the matter. He said he never made a formal report to the Chief or the Police Station because Dr. Matiang'i was in power. The witness was referred to the affidavit of Nyambane (DW17) at page 109 of 3rd respondent's bundle. He admitted that he was not a voter there and that his appointment letter refers to "Kitutu Masaba". He also said he entered Metamaywa but not inside the polling station. In re-examination, he said that he was not prevented by any Presiding Officer from doing his work.
76. PW13 was Steward Oyugi was a reporter for Standard Digital in North Mugirango. His material evidence was that at Kebabe Polling Center he witnessed a protest by the petitioners' agents against the results announced for Ekerenyo Polling Station. He added that the results for Gekendo Polling Station arrived late on 10th August 2022 at 15:00 hours leading to a protest. It took the intervention of media teams such as Minto FM and Radio Jambo to restore calm.
77. Geoffrey Mosinga was PW14. He said he was a super-agent for the entire county. I dealt with aspects of his evidence earlier. He witnessed bribery at Nyambaria Polling Station by agents of the 3rd respondent but he was asked to leave. At Kiamogiti Polling Station in Gachuba Ward there was bribery of Kshs 50 per vote for "Matogoro" which referred to the 3rd respondent. He "formed the impression the persons bribing were from her camp".
78. He raised the matter with policemen and notified petitioner. He claimed that at Mosobeti DOK Polling Station, he "discovered the 3rd respondent's agent holding cash meant to bribe voters". He testified that he met a woman who said "I am happy to have received my flour today." He concluded that the beneficiary could only have been the 3rd respondent.
79. He stated that at Gekano, "there was a big meeting attended by Raila Odinga and CS Matiang'i. I recorded his speech which suggested the contest was already over". At Igoma, former Solicitor General, Ken Ogeto said he was sent by Matiang'i and said: "kama ningekuwa nyinyi, ningechagua Jerusha". The witness said he recorded those events on his phone and retrieved others from social groups and YouTube. He clarified that regarding Ken Ogeto, it was obtained from Watchtower.
80. He sought to produce a flash drive containing video clips of some of those incidents. By a considered ruling delivered on 15th November 2022, the introduction of that evidence was disallowed. In cross examination, he admitted that he did not report the bribery formally to the police because he feared for his safety and had no faith in the objectivity of the police. He did not also report it to IEBC or Presiding Officers because the police blocked him from entering the polling stations.
81. Rebecca Mora Ombuki (PW15) was the petitioner's last witness. She was tasked with overseeing elections at Nyambaria Primary Polling Center and Magombo Ward. She saw a white Probox vehicle distributing money to voters or mobilizing them to vote for the 3rd respondent. She said the vehicle was spotted in Nyambaria, Gekano, Rionguti, Sirate and Nyamwanga.
82. She also stated that the petitioner's agents were harassed and ejected from polling stations by presiding officers and police officers at Nyamwanga D.O.K Polling Station stream 1 of 2, Rionguti Polling Station, Serate Polling station, Bogwendo Polling Station stream 2 of 2, Nyambogo SDA Primary Station stream 1 of 2, Kenyerere Polling Station and Nyamanagu TBC Station stream 2 of 2.
83. That marked the close of the petitioner's case.
84. The first witness for the respondents was Njoroge Anthony Douglas (DW1). He relied on the response and replying affidavit sworn on 28th September 2022. He testified that Forms 39A contained the



- names and signatures of presiding officers or their deputies and any agents present. The results and ballot boxes were then forwarded to the respective Constituency Tallying Centres. After the four Constituency Returning Officers tallied the results into forms 39B, they handed them over to him. He said he generated Form 39C from those two tiers.
85. The final tally revealed that the petitioner had garnered 72,434 votes while the 3rd respondent obtained 84,843. In his opinion the elections were free, fair, transparent and credible. He owned up to some errors, but he said they were not premeditated and did not substantially affect the outcome. He averred that the voting method was simple, accurate and verifiable, and the elections results transmission system worked efficiently.
86. He denied that there was variance between the votes cast for Woman Representative and the Governor. He claimed that the petitioner was relying on an erroneous form 37C. According to him, the correct figure for the votes cast in the governor's race was 207,096 and not 176,929 as alleged by the petitioner.
87. He added that the differences between the votes in the two county-wide elections could be explained by the number of rejected ballots and stray ballots as captured in the Polling Station Diary. He testified that there were no discrepancies between the votes cast for each of the 12 candidates for the position of the County Woman Representative in form 39C and those in Form 39A. The total number of registered voters could also be ascertained from the register of voters and whose data was captured in Form 39 C.
88. He denied the allegations of homogenous results. He averred that counting of votes was done in the open and verified by party agents. He was emphatic that the presiding officers could not change the results which were submitted both electronically and physically. He denied the allegation on transposition of votes and said that Forms 39A showed the results of the count and therefore a true reflection of the will of the people of Nyamira County.
89. Regarding the claims of vote padding or ballot stuffing, DW1 responded at paragraph 25 of his deposition as follows:
- That the 3rd respondent was not added votes in Masosa AIC Primary School or in any polling station; that the petitioner's votes were not reduced in Bondeka ELCK Primary School or in any polling station neither were those of the 3rd respondent increased; that at no given point did the presiding officer pad the votes at Moruga ELCK Primary School or in any polling station; that there was no alteration of votes in Kuura D.E.B Primary School; that the petitioner's votes were not reduced in Girigiri D.E.B Primary School PS 1 of 2 or those of the 3rd Respondent added; that the votes of the 3rd respondent in Nyamira D.E.B Primary School PS 2 of 8 were not increased in the absence of agents; that the Petitioner's votes were not reduced in Nyamira D.E.B Primary School PS 4 of 8; that the 3rd respondent's votes were not increased in Bomondo C.O.G Primary School; and, that any changes of votes were done publicly for the purpose of recording the accurate count of votes.
90. He denied that the petitioner's agents were locked out or ejected from polling centres in Kitutu Masaba Constituency by the Officials of the IEBC or the national security agencies. He averred that so long as an agent carried identification, a letter of authority and oath of secrecy he or she would be admitted unless they became disorderly or "caused a fracas". He said the PSD could confirm that the agents who were present at all the polling stations. In his view, they were afforded reasonable opportunity to scrutinize the results and ventilate any disputes.
91. On signing of forms by the agents, he opined that Regulation 62 and 79(2) provide that the absence of the agents at a polling station or tallying centre shall not invalidate proceedings or results at the polling stations or tallying centre.



92. On examination by Mr. Nyaundi, he denied claims by PW14 that voting materials were delayed. He also denied claims by PW10 and PW9 that there was improper assistance of illiterate voters. He stated that he did not get such complaints from the petitioner or those witnesses.
93. Regarding anomalies, alterations and cancellations in forms 39A, he stated that the changes were made openly and were meant to rectify mathematical errors and were countersigned by the presiding officers. He was questioned at length on the issue by learned counsel for the petitioner, Mr. Ondieki. Regarding the form at page 59, he admitted it contained errors but stated that it was an error of tabulation. On the letter at page 148 by the petitioner, he stated that the IEBC stamp on the letter is a forgery because each Constituency Returning Officer has his own rubber stamp.
94. He also said that that elections in the majority of cases were held in primary school classrooms. While he was unaware of any complaints of congestion, he opined that the IEBC could not be blamed for limited space. He generally conceded that a number of the results declaration forms contained errors but in his view, they were minor and did not affect the outcome of the election considering the margin was 12,409 votes.
95. The other four witnesses for the 1st and 2nd respondents were the respective Constituency Returning Officers for Kitutu Masaba, North Mugirango, West Mugirango and Borabu. Their affidavits were largely identical. Their general line of defence was that there were no irregularities, malpractices or violence during the poll; and, that the election was conducted in a free and fair manner.
96. Ruttoh Wesley (DW2) was in charge of North Mugirango. He averred that the Presiding Officers delivered 135 forms 39A to the Constituency Tallying Centre. He verified them and collated the data into form 39B (annexture RKW1) and announced the results. He then delivered form 39B together with the results to DW1. He claimed that from the verification and tallying, there were no discrepancies between the votes cast for each candidate and the results recorded in Form 39A.
97. He testified that the changes, alterations and cancellations in Form 39A in were necessary to rectify mathematical errors and were countersigned by the Presiding Officers. In paragraphs 16 to 18 of his affidavit, he averred that there was a cancellation in the form for Kebariga Primary School 2 of 2 but the same was countersigned. There were however no such alterations at Morembe Primary School 1 of 1, Ikonge Primary School 1 of 6 and 6 of 6. He admitted however that the last three forms at Morembe and Ikonge had “overwritings” but were signed by agents.
98. In cross examination he conceded to some errors in form 39B. For instance, the results for Ekerenyo EDN Centre streams 1 and 2 are identical for all candidates.
99. DW3 was Sylvia Jepchumba, the Constituency Returning Officer for West Mugirango. She collated the results and prepared form 39B which she handed over to DW1 together with the original forms 39A.
100. She averred that the alterations or cancellations in Form 39A, for instance at Embonga D.O.K Primary School PS 2 of 2 were “made to correct mathematical errors” while those to Form 39A for Nyakemincha D.O.K Primary PS 1 of 2 were countersigned by the Presiding Officer. She said there were no alterations or cancellations to Form 39A for Nyakeore D.E.B Primary School PS 1 of 3; Nyamwitureko D.O.K primary School PS 1 of 3.
101. She denied that there were alterations or cancellations as pleaded by the petitioner to Forms 39As for Nyagachi D.E.B Primary School PS 1 of 2; Girigiri D.E.B Primary School PS 1 of 2; Kuura D.E.B primary School PS 2 of 2; Gucha S.D.A Primary School PS 2 of 2; and, Nyakoria D.E.B Primary School PS 2 of 2.



102. Similarly, she said in chief that there were no alterations or cancellations made to Forms 39A for Bundo D.O.K Primary School PS 1 of 2; Bomondo C.O.G primary School PS 1 of 2; Nyamira D.E.B Primary School PS 2 of 8; Nyamira D.E.B Primary School PS 4 of 8; and, Ikonge D.E.B primary School PS 1 of 1.
103. In these stations, any changes were to correct a mathematical errors and were countersigned by the Presiding Officers and signed by the agents. The latter were also allowed to take pictures of the forms after being signed by the Presiding Officer and Deputy Presiding Officer.
104. On examination by Mr. Ayuka, she said that “if an agent comes with an appointment letter indicating “West Mugirango” and without a name of the polling station, I would deny them entry”. In further cross examination by Mr. Anyegah for the petitioner, she said she never heard of any bribery allegations at Moruga.
105. The witness admitted to some errors in form 39B where results for some streams were similar for some candidates. She agreed with counsel that at Nyakemincha 1 of 2, the votes cast are 267. The entry in Form 39B is different. The petitioner’s votes are 161 but Form 39B captures them as 016. She attributed it to a typing error. She was of the view that the errors were minimal and did not affect the final results.
106. When pressed about complaints by agents, she said that-
- In the 6 races, you could have 6 agents for parties but representing one candidate. In the senatorial race I received a complaint about ejected agents and I went there. The complaint on agents was for senate race. The petitioner here was vying for Woman Representative. I didn’t get a complaint on agents for that race. I was not required to keep a list of agents. The letters of appointment should contain the polling station
107. DW4 was Julius Meja Okeyo, the Constituency Returning Officer for Borabu. He averred that he received all the forms 39A, verified and collated them into Form 39B (annexture JMO1) and announced the results in public. He then delivered Form 39B together with the collated results to DW1.
108. Regarding the alterations to forms 39A, he stated that the cancellations at Manga Girls Primary School Polling station 1 of 3 and Menyenya Primary School PS 1 of 5 were all countersigned by the respective presiding officers. He denied that there were any alterations or cancellations in Form 39A for Menyenya Primary School Polling Station 1 of 3.
109. Upon cross-examination he said he was unaware of ejection of the petitioner’s agents from polling stations or claims of switched results. When he was shown the form 39A for Makomoni TBC station 3 of 4, he insisted there were no changes and that an agent for ODM, Justus Nyonga, had signed it.
110. But I noted there were apparent changes which had been countersigned and that the witness was stalling and being argumentative. He said he was at the Tallying Centre at Menyenya and did not receive any report over the letter at page 147 or 148. He said the stamp on the letter reads Constituency Returning Officer but it is actually addressed to the County Returning Officer. Regarding form 39A for Manga Girls Primary School Polling station 1 of 3, he agreed there were “overwritings” but in his view, the Presiding Officer just put the same figures on another side and countersigned them.
111. Benson Ambuko was DW5. He was the Constituency Returning Officer for Kitutu Masaba. However, parts of his affidavit, for instance paragraph 12 and 14, made erroneous references to Borabu. During the hearing, he sought to amend those paragraphs but the same was rejected by court for reasons on the record. Those offending paragraphs are for striking out.



112. He averred that there were no anomalies in the election and that any alterations or cancellations in Forms 39A were done in public to rectify “mathematical errors and were countersigned by the presiding officers”. After the verification and collation of the results, he prepared Form 39B and announced the results which are detailed at paragraph 11 of his affidavit. The petitioner garnered 14,268 votes while the 3rd respondent received 39,751 votes in the constituency.
113. He claimed that no agents bearing proper credentials were locked out. He said the incident mentioned at paragraphs 6, 7 and 8 of the affidavit of PW11 was not brought to his attention. He opined that the absence of agents at a polling station or tallying centre did not invalidate proceedings or results.
114. He also denied the claims of bribery, obstruction, violence or campaigns by government officials; and, that no such report was made to IEBC or any investigative agency by the Petitioner.
115. He conceded that the form for Kegogi PAG Primary School 1 of 1 and 1 of 2; Nyachichi DOK Primary School 1 of 2; and, Rionguti Primary School 1 of 2 were all not signed by agents. He agreed that the presiding officer is supposed to indicate the reasons for refusal to sign or absence of agents which was not done.
116. Regarding Embaro DOK Primary School Polling Station, he conceded that the two certified forms 39A from IEBC are for stream 2 only. He also admitted that he never got the results for stream 1. The results in Form 39B are thus for stream 2 but have been replicated for stream 1.
117. The witness also admitted that the form for Rigoma DEB Primary School 2 of 2 had overwriting in the results for candidate Asanyo but which did not alter the votes. the witness was put to task on the number of valid votes cast at Kiamogiti Primary school 2 of 2. The 3rd respondent got 238 votes there. However, form 39A indicates 117 valid votes were cast. The witness said that it was a mathematical error for the total votes garnered by all candidates. In his view, all the combined errors are minor and do not affect the outcome of the poll.
118. That marked the close of the 1st and 2nd respondents’ case.
119. Like I stated, the 3rd respondent lined up 19 witnesses. The first was Justus Okenye Momanyi (DW6), the Chief for Bosamaro Chache Location in Nyamira County. At the material time, he was at the Moruga ELCK Primary School monitoring the electoral process. His material evidence was in reply to the allegations by PW2 that I dealt with earlier. Upon interrogating the two suspects (one of whom was DW7) and conducting a search, he found no evidence of the campaign merchandise or money.
120. Like I said, DW7 was Jackson Nyamweya and one of the above suspects. He was the ward agent coordinator for the 3rd respondent in charge of Bosamaro Ward. He testified that the allegations by PW2 are misleading and false. While at Moruga ELCK Primary School Polling Station, DW7 was accused of bribing voters and distributing branded campaign merchandise. He was arrested by the public and handed over to DW6. Upon confirmation that he was not in possession of any campaign merchandise or money, he was released.
121. Fred Karamu Mwakania (DW8) was a Jubilee Party Chief Agent in Nyamira. He questioned the allegations made in the affidavits of various witnesses of the petitioner. In particular, he opined that the affidavit of Kepha Gichana (PW3) did not particularize the polling stations where alleged malpractices occurred; the same case with the affidavit by George Bosire Nyakundi (who never testified) as well as that of Rebecca Moraa Ombuki (PW9).
122. Joash Ogweno Momanyi (DW9) was essentially responding to the claims by PW9. He said that he was a registered voter at Enkinda Primary School in Itibo Ward, North Mugirango Constituency. He



- averred that the election officials did not interfere with the voting process and all those who turned up to vote were given a chance to do so without undue influence.
123. In his oral testimony, he stated that he was in stream 3 and there were about 10 agents. Any voters requiring assistance were “given assistance through Presiding Officers with agents present. The Presiding Officer would call at least two witnesses or agents before marking the ballot. It is the person assisting the voter who would mark”.
 124. DW10 was Denish Omwansa, an ODM party agent stationed at Mokomoni Tea Buying Centre, Kiabonyoru Ward, Borabu Constituency. He testified that PW6 was not the ODM agent leader there but an agent at Kiabonyoru Polling Station. DW10 said he did not witness any incident of voter bribery. He also stated that the votes recorded in Form 39A were correct and there was no switching of results as alleged.
 125. But under cross examination by Mr. Ondieki, he conceded that he was an agent for a candidate for Member of Parliament. He had no clear explanation why he remained behind until the counting of votes for the Woman Representative. He admitted that he went into stream 1 at 6:15 a.m. and then returned to stream 2; and, that he could not tell what was going on outside the polling station. He did not also peruse the Polling Station Diary after the exercise.
 126. Jasper Mokaya (DW11) was a Jubilee agent at the same station but in stream 2 of 4. He also denied the allegations by PW6. He averred that there were ODM agents at the polling station and upon the conclusion of the counting of votes, all agents present were requested by the Presiding Officer to sign the Form 39A. He said that Denis Omwansa, an ODM agent, was present and executed the form.
 127. He was however at pains to explain why he signed Form 39A yet he was appointed to represent an MCA aspirant. He also conceded that at some point the OCPD was at the station but he left after about 10 minutes because all was peaceful. He denied that the visit was linked to the events alleged by PW6.
 128. Kefah Ondieki (DW12) was a United Progressive Alliance (UPA) polling agent at Nyambaria Primary Polling Station, Magombo Ward in Kitutu Masaba Constituency. He denied the claims of bribery at the station made by PW14 and PW15. In particular, he denied that the 3rd respondent's agents bribed any voters there. Under cross examination, he agreed that he could not tell for sure what was happening outside the polling station. He confirmed he knew PW15 but he never saw her. He did not however know PW14.
 129. DW13 was Dickson Ongori, a Jubilee Party agent at Gekendo Polling Station at Ekerenyo Ward, North Mugirango Constituency. He disputed the allegations by PW13 that the results for the station arrived late at the tallying centre leading to a protest. He also stated that no report of such an incident was reported to the police. But he admitted that he did not know PW13; did not go to the tallying centre at Kebabe; and, that the distance from Gekendo to Kebabe is only 30 minutes by car.
 130. Victor Okero (DW14) was a Jubilee Party agent at Kierira DOK Primary School Polling Station at Rigoma Ward, Kitutu Masaba Constituency. He testified that PW8 was not an agent at the polling station but rather an overall agent who would occasionally appear at the polling station. He said that agents were freely allowed into the station. In view of their high numbers, the Presiding Officer directed that only one party agent or candidate's agent would sign Form 39A. Wilfred Motika signed for Jubilee but the petitioner's agent could not be traced. In cross examination he confirmed that he knew PW8 and that the latter was at the station.
 131. DW15 was Jared Makworo, an ODM Party agent at Rigoma Primary School Polling Station in Gachuba Ward. He refuted the claims made by PW4 that agents were denied entry into the polling station. In cross examination, he conceded that he did not annex his appointment letter. He claimed



- it was taken away by IEBC officials. It also transpired that he was an agent for a candidate for MP. He said there were about 5 ODM agents at the polling station and other parties' and candidate's agents; about 18 agents in total. The witness said he knew PW4 but was not concerned about what he was doing at the station.
132. DW16 was Kepha Oyugi, an ODM party agent for the Member of National Assembly stationed at Nyankoba Primary Polling Station, Rigoma Ward, Kitutu Masaba. His material evidence was that he never saw any agent being ejected from the polling station. He thus disputed the version of evidence by PW7. Upon cross examination by Mr. Ondieki, he conceded that he was not an agent for the Woman Representative and that that the Presiding Officer only allowed one agent into the polling station due to constraints of space. However, they were informed that the others would be allowed in during the counting. He said all the agents were registered. When pressed further, he said he could not tell if PW7 was denied entry because he (DW16) was inside the polling station.
 133. David Nyambane (DW17) was a registered voter at Metamaywa Primary School Polling Station in Rigoma Ward, Kitutu Masaba. He denied the allegations made by PW11 on bribery. He stated that he did not witness the 3rd respondent's agents bribe any voters. He claimed that he was at the station at the time of the alleged incident. But upon cross examination, he conceded that he did not know PW11 and would not therefore recognize him. He also admitted that there were long queues that stretched outside the station.
 134. DW18 was Evans Momanyi Kasimiri, a Jubilee Party agent at Keroka Farmers Coop Society Polling Station stream 2 at Rigoma ward. He disputed the allegations by in PW11's affidavit that he (PW11) had "witnessed agents of the 3rd respondent known to [him] bribing voters". According to DW18, there was no such bribery at the station and no formal complaint was made. During cross examination, it transpired that this witness did not attach his appointment letter as an agent.
 135. That version was repeated by Paul Mosioma (DW19). He also voted at Keroka FCS Polling Station. He got there at 8:30 a.m. and left at 11:00 a.m. He did not witness any incident of bribery or hear other persons refer to it. In cross examination, he conceded that he could not speak about events that may have taken place outside the precincts of the polling station. He did not also know PW11 and could not then say whether he was there.
 136. Jackline Kemunto (DW20) was a UPA agent and voted at Ekerenyo EDN Polling Station. The thrust of her evidence was that every agent with proper credentials or a badge was allowed into the station. She also said that the Presiding Officer would assist old or illiterate voters in presence of agents. She did not witness any incident of bribery. She disputed the averments by PW1, PW10 and PW13 in that regard.
 137. Upon cross examination by Mr. Ondieki, she conceded that she was a UPA agent for an MCA candidate and she left the station early. When she was shown form 39A where both streams had identical results she stated that it was not expected and invited the court to interrogate the matter.
 138. Felix Osinde Obwoye (DW21) was a polling agent at Nyamwanga DOK Polling Station. He said that no agent was ejected from the polling station; and, that he never heard of such an incident. He also denied the allegations of voter bribery at the station made by PW15. It turned out that he signed on the results for the MP. Although he claimed there were many agents, he was hard pressed to explain why form 39A was not signed by any agent.
 139. DW22 was Vincent Monda, a UDA agent at Nyambogo SDA Polling Station. He disputed the evidence of PW15 about agents being harassed ejected from the polling station. In cross examination he conceded that he signed off the results for the governor as one of the agents for a candidate known



as Nyambati. He could thus not say who signed Form 39A. He also conceded that the form for stream 1 was not signed by any agent and no reasons were entered by the presiding officer.

140. Kennedy Nyakega (DW23) was a UDA party agent at Kenyerere Polling Station. He rebutted the claims made by PW15 that agents were harassed or evicted from the station. However, upon cross examination by Mr. Ondieki, he could not conclusively state what was happening outside the polling station. He also stated that since they were many agents, they would agree on whom to sign and those who had not done so were given opportunity to sign. He did not sign form 39A. He confirmed it was signed by two agents from Wiper Party.
141. The last witness was the 3rd respondent, Mongina Momanyi Jerusha (DW24). She is the Woman County Representative for Nyamira to National Assembly having been declared the winner with 84,843 votes to the petitioner's 72,434. She dismissed the petitioner's claims that she (petitioner) was the more popular candidate as "delusional expectations".
142. She relied largely on her replying affidavit sworn on 28th September 2022. She testified that she was born, bred and married in Kitutu Masaba. Her mother hails from Kemera Ward Kitutu Masaba. DW24 attended primary and secondary school in the same area and taught at Itongo Sengera in Rigoma Ward. She was also a school and church leader in the constituency.
143. She disputed the petitioner's claims that she (petitioner) hailed from Kitutu Masaba. She said the petitioner was born in West Mugirango, married in Kisii County and lives in Borabu. She said the petitioner's mother was born in Kitutu Chache. I heard the 3rd respondent to be saying in all this that she had deeper roots in Kitutu than the petitioner.
144. She denied that there was a substantial variation between the votes cast in the Governor's election and that of Woman Representative. The difference was 2,973 votes and not 29,976 votes as alleged by the petitioner. Referring to paragraph 13 and 18 of her deposition, she said the difference between the votes in forms 39B and 39C was only 3. In her view, the incongruence between forms 39B and 39C was an issue that could have been addressed during the tally and did not affect the election.
145. Regarding cancellations or alterations of forms, she testified that the errors were minor and had been well explained by the IEBC. She denied that there were homogenous results, padding or switching of votes as claimed by the petitioner. She repudiated the claims that the petitioner's agents or those of ODM were denied entry into polling stations or ejected. She said the election was also devoid of violence save for the incident at Moruga ELCK Primary School Polling Station where her agent, Nyamweya (DW7), was attacked.
146. In her view, the elections were conducted in a free, fair, accurate and verifiable manner. She also touted the wide margin between her and the petitioner; and, that the discrepancies highlighted at the trial had no significant effect on the final outcome.
147. She disputed the petitioner's claims of electoral malpractices by the former Cabinet Secretary for the Interior, the former Solicitor General or IEBC officials pleaded in paragraph 13 of the petition. She admitted that when Azimio's presidential candidate visited Nyamira, she (3rd respondent) "shared a podium with CS Matiangi and SG Ogeto. My name was never mentioned". She also denied that she or her agents engaged in acts of bribery. She testified as follows-

I know CS Fred Matiangi and SG Kennedy Ogeto. I don't think they campaigned for me. I am not aware. Bribery is grave. Why was it not brought to the attention of authorities? I am not aware that police were distributing monies. I did not give out money to voters. No such agent has been named. I did not bribe anyone



148. When cross examined by Mr. Ondieki, she said the Form 37C annexed by the petitioner was not the one used to declare the winner in the governor’s race and that the variance between the two elections was minimal. She said the analysis by the petitioner was based on a different Form 37C.
149. Pressed further, she said she “shared platforms with CS Matiang’i during development projects because I was Woman Representative. I was not endorsed by anyone. That was when e.g. Azimio presidential candidate came to the county. We were government officers. I was not endorsed”. She could not recall any government official making derogatory remarks about the petitioner.
150. In re-examination, she said the “minor infractions” in the results declaratory forms do not justify annulment of the election. She was also unaware of any investigations or arrest of her agents for bribery, violence or other electoral offences. She prayed that the petition be dismissed with costs.
151. That marked the close of the 3rd respondent’s case.

Report on Scrutiny

152. The petitioner had lodged a notice of motion dated 14th November 2022 seeking scrutiny of all election materials in close to 249 polling stations spread out across the four constituencies.
153. The court ordered a full scrutiny and recount of the votes cast at Embaro D.O.K Primary School 1 of 2, located in Kitutu Masaba Constituency. There was also to be partial scrutiny limited to a recount of the votes cast in 12 polling stations situated in Kitutu Masaba Constituency; 3 in North Mugirango Constituency; 16 in West Mugirango Constituency; and, 3 polling stations situated in Borabu Constituency. In addition, and in the interests of transparency, I ordered a re-tally of the results in Forms 39Bs and Form 39C from the original Forms 39As submitted to the County Returning Officer.
154. On 25th January 2023, the Deputy Registrar formally submitted his scrutiny report to the court and to all the parties. Under the Petition Rules the report became part of the proceedings in this petition and parties were at liberty to address it in their final submissions. I will analyze some of its key findings in the course of this judgment.

Final Submissions

155. The petitioner filed final submissions dated 9th February 2023 together with a volume of authorities and case digest. The 1st and 2nd respondents’ submissions were made on even date and are also accompanied by a list of precedents. The 3rd respondent’s submissions are also dated 9th February 2023 with an attached bundle of authorities.
156. On 13th February 2023, all learned counsel for the disputants addressed the court on those submissions. I am greatly indebted to counsel for their detailed submissions and courtesy to the Court. I will make references to the submissions in the course of the judgment.

Issues for Determination

157. The following five broad issues were agreed for determination:
 - i. Whether the election of the County Woman Member to the National Assembly for Nyamira conducted on 9th August 2022 was held in accordance with *the Constitution*, the *Elections Act* and the Regulations thereunder.



- ii. Whether the election was tainted by irregularities, illegalities or malpractices and whether they substantially affected the result.
 - iii. Whether the 3rd respondent was validly elected as the County Woman Member to the National Assembly for Nyamira.
 - iv. Whether the petitioner is entitled to the reliefs sought in the petition.
 - v. Who shall bear the costs of the petition?
158. A close inspection of the issues shows they can be condensed into one principal enquiry: The election court is simply being asked to determine whether the 3rd respondent was validly returned as the County Woman Member to the National Assembly for Nyamira.

Legal Framework and the Burden and Standard of Proof

159. A good starting point is the grundnorm: Article 1 of *the Constitution* underpins the sovereignty of the people. Article 38 guarantees citizens the right to make political choices. That is partly exercised through regular elections such as the one in issue in this petition.
160. Articles 81 and 82 on the other hand call for free, fair, transparent and credible polls. Article 81(e) of *the Constitution* provides:
- The electoral system shall comply with the following principles-
- (e) free and fair elections, which are-
 - (i) by secret ballot;
 - (ii) free from violence, intimidation, improper influence or corruption;
 - (iii) conducted by an independent body;
 - (iv) transparent;
 - (v) administered in an impartial, neutral, efficient, accurate and accountable manner.
161. The *Elections Act* and the Regulations thereunder are the legislation contemplated by Article 82. The amended section 83 (1) of the Act; and, which applies to the present dispute, provides-
- (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.
162. The opening words of the provision are framed in the negative: It reinforces the rebuttable presumption in favour of the respondents that the election was conducted properly and in accordance with the law. It is also implied that elections are not always perfect. See *Ayiera v Kimwomi & 3 others, Nyamira*, High Court Election Petition E002 of 2022 [2023] KEHC 816 (KLR); *Steven Kariuki v George Mike Wanjohi and others* Nairobi, High Court Petition No 2 of 2013 [2013] eKLR.
163. Consequently, not all malpractices will lead to nullification of the result. See the dissenting opinion of Njoki SCJ in *Raila Odinga & another v IEBC & 2 others*, Supreme Court of Kenya, Presidential Petition 1 of 2017 [2017] eKLR, *Morgan and others v Simpson and another* [1974] 3 ALL ER 722.



164. In *Kakuta Maimai Hamisi v Peris Pesi Tobiko and others*, Nairobi High Court Petition 5 of 2013 [2013] eKLR, I had the following to say on the subject-

The crux of the matter is whether all the grounds raised by the petitioner sufficiently challenge the integrity of the poll. The court has to weigh the impact of the alleged irregularities on the outcome of the election. See *James Omingo Magara v Manson Nyamweya and others* Kisumu, Court of Appeal, Civil Appeal 8 of 2010 [2010] eKLR. In the context of a general election for six electoral offices, it would be impractical to demand or expect mathematical precision

165. The significance of quality and persuasive evidence in an election petition was underlined by the Supreme Court in *Odinga & 16 others v Ruto & 10 others* Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated) [2022] KESC 56 (KLR) -

(28) The law of evidence complements the existing civil and criminal substantive and procedural laws in this country. The outcome of a case depends on the strength, accuracy and reliability of evidence. In an adversarial court system like ours, the courts and Judges are ‘blind’, in the sense that they do not carry out any investigative roles or gather evidence on behalf of the parties before them. They depend on and determine disputes from what parties present. Consequently, cases are won or lost on the evidence placed before the Court.

166. This is intertwined with the legal and evidential burden of proof. The formal responses to the petition by all the respondents join issues on all the allegations in this petition. The respondents have thus put the petitioner to strict proof. The legal burden of proof remains throughout on the shoulders of the petitioner: the petitioner must lead cogent evidence to impeach the poll. The cardinal precept of the law of evidence is that he who alleges must prove; and to the required standard of proof. See section 107 and 109 of the *Evidence Act*.

167. If the petitioner marshals sufficient or quality evidence, she will have discharged that burden at which point then the evidentiary burden shifts to the respondents and calls for a rebuttal. Ultimately, the petitioner must show that the preponderance of evidence inures in his favour. If she fails to rise to that standard, the petition must be dismissed. See *Henry Tiole ole Ndema v IEBC & 2 others*, Kitale High Court Election Petition 2 of 2017 [2018] eKLR.

168. The distinction between the legal and evidentiary burden was restated by the Supreme court in *Odinga & 16 others v Ruto & 10 others* [supra]-

(32) Suffice to stress that the Court has been consistent that a petitioner who seeks the nullification of elections for alleged non-conformity with *the Constitution* or the law or on the basis of irregularities and illegalities, has the duty to proffer cogent and credible evidence to prove those grounds to the satisfaction of the Court. Once the Court is convinced that the petitioner has discharged that burden, then the evidentiary burden shifts to the respondent (who in most election-related cases is IEBC), to present evidence by way of rebuttal of the assertion.

169. In the earlier decision in 2013, the Supreme Court in *Raila Odinga and others vs Independent Electoral and Boundaries Commission et al, Petitions Nos. 3 & 4 of 2013 (consolidated)*; [2013] eKLR, the court had held-

Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary. This emerges from a long standing common law approach in respect



of alleged irregularity in the acts of public bodies. *Omnia praesumuntur rite et solemniter essa acta*: all acts are presumed to be done rightly and regularly. So the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law.

170. The standard of proof in election petitions is higher than a balance of probabilities in ordinary civil cases but not beyond reasonable doubt as required in criminal cases. See *Ayiera v Kimwomi & 3 others* [supra]; *Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others*, [2013, supra]; *Henry Tiolo ole Ndema v IEBC & 2 others* [supra]; *Rishad Amana v IEBC & 2 others*, Malindi, High Court election petition 6 of 2013 [2013] eKLR.
171. However, with regard to allegations by the petitioner of a criminal nature such as those of bribery, unlawful use of state resources by former government officials; or, unlawful campaigns by such officials pleaded at paragraphs 42 to 46 of the petition, the standard of proof is beyond reasonable doubt.
172. Lastly, the parties to the petition are bound by their pleadings. See generally *Ayiera v Kimwomi & 3 others* [supra]; *Jackton Ranguma v IEBC & 2 others*, Kisumu High Court E.P. 3 of 2017 [2018] eKLR; *Henry Tiolo ole Ndema v IEBC & 2 others* [supra].

Analysis and Final Determination

173. The petitioner and her 13 witnesses led evidence on a plethora of complaints including: suspiciously high variances between the votes cast for the office of Woman Representative and that of the Governor; bribery or attempts to influence electors; interference by some high ranking government officials; blocking, harassment or intimidation of her polling agents; "padding of votes"; suspicious "homogeneous results" for candidates in some stations; and, multiple alterations and cancellations in results declaration forms.
174. The petitioner's case is that the 1st and 2nd respondents failed to conduct a free, fair, transparent and accurate election in breach of *the Constitution*, the *Elections Act* and Regulations. Paraphrased, that the 3rd respondent was not validly elected and the result should be nullified.
175. An important context is that this was a county-wide election. There were 643 polling stations in Nyamira spread out in four constituencies. 206,905 votes or thereabouts were cast for the seat of the County Woman Representative alone. In addition, the disputed poll was part of the general election for six electoral offices.
176. The other important consideration to keep in mind is that the results at the polling station are final. See *IEBC v Maina Kiai & 5 others*, Court of Appeal, Nairobi, Civil Appeal 105 of 2017 [2017] eKLR. The obvious implication is that the primary and most important declaratory form for this election is 39A: The 39B and 39C series of forms are spreadsheets transferring and consolidating the scores in 39A.
177. Furthermore, an aggrieved candidate or agent has a right to call for a recount at the polling station. Regulation 80 of the Elections (General) Regulations 2012 provides as follows: -

" 80.

- (1) A candidate or agent, if present when the counting is completed, may require the presiding officer to have the votes rechecked and recounted or the presiding officer may on his or her own initiative, have the votes recounted: provided that the recount of votes shall not take place more than twice.



“(2). No steps shall be taken on the completion of a count or recount of votes until the candidates and agents present at the completion of the counting have been given a reasonable opportunity to exercise the right given by this regulation”.

173. At paragraphs 12 to 18 of the supporting affidavit, the petitioner claims that there was a discrepancy between the votes cast in the election of County Woman Member and that of the Governor. She also queried how the 3rd respondent ended up with more votes in Kitutu Masaba Constituency than the area Member of Parliament. Her analysis was disputed at the trial by the County Returning Officer (DW1) primarily on the ground that the Form 37C she relied on was not the one used to declare the gubernatorial results. I will revisit the matter shortly.
174. I agree with the petitioner that ideally the number of valid votes cast should be largely the same in all the six elections. However, the variance complained about is not in the primary forms 39A for election of the Woman Representative but in the consolidation or totals indicated in form 37C for the election of governor. This distinction is important because, like I stated earlier, the elections end at the polling station; and, as a corollary, the primary and most important declaratory form for this election is 39A.
175. The other disputed variance is in the number of registered voters in the two elections. The dissimilarity between the registered voters in forms 39B and 39C was 3 votes. I do not wish to trivialize it, but as I shall discuss in the following paragraph, the edition of form 37C used by the petitioner is also disputed.
176. The petitioner testified that her joint analysis of form 39C with her chief agent showed that 29,976 more voters cast ballots for the election of Woman Representative than that of the Governor. The major variance was in Kitutu Masaba Constituency where the votes cast for the Woman Representative were 69,386 compared to 47,459 for the governor.
182. It is thus imperative to interrogate the form 37C relied by the petitioner in her analysis. But I do so with great circumspection because I am presiding over a different election. The petitioner was given a copy of the form 37C by no less than the County Returning Officer and claims to be the one she has attached marked MEK2. DW1 freely admitted that he gave the petitioner a copy of the form but testified that it was a “draft form”. He also claims that when he was served with the electronic copy of the petition that he used for the Response, it did not have the attachments. Hence he did not respond to the allegations about the form.
183. I find that to be strange because at paragraph 15 of the petition and paragraph 12 of the petitioner’s affidavit, she has presented tables clearly showing the variances between the two elections. So much so that with or without the annexures, DW1 had sufficient information about the allegations.
184. Nevertheless, DW1 was emphatic that the form relied on by the petitioner was not the one used to declare the results for the governor’s election. He said in examination in chief-

The Form MEK 2 is strange and I never certified it. I do not know its origin. The difference in votes cast for the 2 offices is made up of rejected votes and stray ballots.

184. DW1 insisted that he shared with the petitioner the final copy of Form 37C as per her request of 2nd September 2022. In his evidence in chief, he tabulated the figures showing that the valid votes cast for the governor were 207,096 and not 176,929 as claimed in this petition. He stated- Petitioner’s allegations of variance in votes of Woman Representative and Governor in 37C is untrue. The figure in Governor results declaration - 207,096 and not 176,929. There is column No. 1 for Kitutu Masaba in petition stating figures 69,386 and 47,459 for Governor for Kitutu Masaba. The correct figure is



- 69,127 for Governor. Petitioner claims [witness reads table at paragraph 15 of Petitioner]. The true figures for Governor in North Mugirango were 42,564. For Borabu, the true vote for Governor in Borabu was 39,063. In MEK 2 to petition, the petitioner has attached Form 37C which corresponds to the figures they pose at paragraph 15. That Form is not the one I shared with her. What is attached is a draft 37C. I shared her with a final copy of Form 37C as per her request of 2nd September 2022.
186. When pressed further by Mr. Ondieki, he conceded the form produced by the petitioner was signed and contained security features. But he answered further as follows-
- I communicated with the petitioner but she has produced a different [annexture] MEK2. If they had used the right form, there would be no discrepancies. The form she attached has security features.
187. DW1 belatedly tried to produce the “correct form” relating to the governor’s election at the hearing. It was disallowed for considered reasons on the record. I am alive that DW1 was trying to clarify that the form he gave the petitioner was not the one she produced in court. A classic situation of s(he), he said. It is thus not surprising that the petitioner’s learned counsel, Mr. Ondieki, submitted that DW1 was now trying to “do a summersault by saying that the form was a draft yet it was duly signed and stamped and it was after the results had been declared. The only plausible explanation for his turnaround was to align the evidence with the lie that was being perpetrated”.
188. But where does that leave us? Firstly, this election court is trying the case of the disputed election of the Woman Representative and not that of the Governor. I stated earlier that any comparisons of data between the two elections poses both evidential and legal challenges. Secondly, IEBC has disputed the annexture MEK2 and referred to a second or final form 37C that declared the result in that election.
189. Thirdly in paragraph 19 of DW1’s affidavit, he has attributed any variances to stray ballots or spoilt votes. Inherent in that explanation is that if the variance was as high as the petitioner claims, it would not be so easily dismissed.
190. Fourthly, it is not entirely true as argued by Mr. Ondieki that since the original form 37C declaring the results of the election of Governor was not produced by DW1, the form is buried. For starters, there is the oral and tested evidence of both DW1 and the 3rd respondent. They both testified that the variance between the votes cast for the Governor and the Woman Representative was 2,973 votes and not 29,976 votes as alleged by the petitioner.
191. Secondly, the court is now entitled to refer to the final judgment in the gubernatorial election in issue in *Ayiera v Kimwomi, Nyamira, High Court Election Petition E002 of 2022 [2023] KEHC 816 (KLR)* and which I delivered just a fortnight ago. In one of the material paragraphs, I found as follows-
- (263) That said, I am satisfied that the first form 37C contained some errors. For instance, the total number of valid votes cast for all candidates appearing in the second-last column of the form did not include the votes of two candidates, Bosire Anthony Mosei and Bwo’ndieki John Nyariki in three constituencies of Kitutu Masaba, North Mugirango and Borabu. [underlining added]
192. That notwithstanding, the argument by the petitioner cannot be dismissed off-hand. Regulation 69 (2) provides that “a voter shall, in a multiple election, be issued with ballot papers for all the elections therein at the same time and shall after receiving the ballot papers-(a) cast his or her votes in accordance with Regulation 70 without undue delay”.
193. This simply means that in a general election, the voter is given six ballot papers which must be dropped into the respective ballot box. So much so that all other factors remaining constant, the total votes



cast across the county-wide offices of governor, Senator or Woman Representative should not have a significant variance.

194. I heard the petitioner to say that the variance in this case can only be explained by fraud or ballot stuffing. I am alive that variances in the different elections may result from other factors including, stray ballots, rejected votes and spoiled ballots. The petitioner thus needed to present clear evidence, for instance that officials of the IEBC or other government agencies tampered with the data to pad up votes for the 3rd respondents. In addition, some of the allegations, for instance of knowingly presenting false results, were of a criminal nature requiring a high standard of proof: that of beyond reasonable doubt. Unfortunately, beyond the disputed copy of form 37C, there was paucity of evidence of that quality.
195. The Supreme Court had occasion recently to confront the matter in *Odinga & 16 others v Ruto & 10 others* Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated) [2022] KESC 56 (KLR). The learned judges delivered themselves as follows-
- (198) We understand ballot stuffing, which includes illegal addition of extra ballots, to be a type of electoral fraud aimed at swinging the results of an election towards a particular direction. Not a single document has been presented by the 1st or 3rd petitioner to prove systematic ballot stuffing. A figure of 33,208 votes relied on in this claim is based on unproven hypothesis, that since the number of votes cast for President is higher than those for the other positions then, without more, it must follow that there was fraud committed in the form of ballot stuffing. [underlining added]
192. In the end, I am not satisfied that the petitioner proved above a balance of probabilities that the variance between the two elections amounted to 29,976 votes; or, that there was a fraudulent scheme to puff-up the data to justify the 3rd respondent's score or to rig the election.
193. I will turn to a different issue. The petitioner was quite suspicious of the votes obtained by the 3rd respondent in Kitutu Masaba. She averred at paragraph 15 of her affidavit that the MP Elect for Kitutu Masaba Constituency who was a "very popular candidate" had garnered 31,815 votes. In her view it was inconceivable that the 3rd respondent could have obtained 39,751 votes.
194. That argument is difficult to sustain. Like I stated, this election court was examining the conduct of the election of the Woman Representative. Naturally, the key evidential materials before the court related to that contest. Paraphrased, beyond the tally of the votes garnered by various candidates for MP in petitioner's exhibit MEK4 for Kitutu Masaba, I do not have any solid basis to measure the MP's popularity or to objectively find that he was more popular in that constituency than the 3rd respondent.
195. The petitioner also testified that she was the more popular candidate in Kitutu Masaba. The retort by the 3rd respondent is that she (the 3rd respondent) had deeper family and political roots in the area and was running as an incumbent. In cross examination the petitioner conceded that the 3rd respondent was born, raised and married in Kitutu Masaba. She had also been a school teacher there.
196. But the petitioner claimed she was also born in Kitutu Masaba and had staged a better campaign in the constituency. She said-
- I had a very rigorous campaign there and all opinions showed I was ahead. My mother comes from Mwabogonko clan, the largest. She was born in Kitutu Masaba
192. According to the petitioner, she should have won in Kitutu Masaba, or in "a worst-case scenario, the election would be a close race between the two of [them]". Yet, the 3rd respondent achieved nearly three times of the votes cast for the petitioner. I also found some contradictions. At paragraph 7 of



- her affidavit she averred that “the constituency was going to be a battleground”. The use of the term battleground can only mean that neither candidate had a clear advantage.
193. The matter is also compounded by the fact that the petitioner ran on the ticket of the ODM Party while the 3rd respondent was the Jubilee Party candidate. I stated at the beginning that I took judicial notice, as a matter of local notoriety, that the two political parties were affiliated to the Azimio La Umoja- One Kenya Coalition Party.
 194. I was thus being asked, in the absence of any other reliable evidence, to draw an inference or reach conclusions on the influence of the disputants local roots in the minds of the voters; and, their choices between these two candidates. But in all this, it was not lost on me that the 3rd respondent, who was running as an incumbent, may have gained an unfair advantage from the open support of some government officials. I will deal with that subject later.
 195. I will now turn to the claim that in some stations, particularly in Kitutu Masaba, there were homogeneous results. At paragraph 35 of her affidavit, the petitioner displayed a table showing “homogeneous results with the 3rd respondent and myself garnering a specific number of votes extremely close in each polling station.... pointing to a sinister plan to rig the election”. She submitted that in those polling stations, the 3rd respondent ended with a higher number of votes which cast a long shadow of doubt on the integrity of the poll.
 196. All the respondents at first flatly denied the claim of homogeneous results. But the 1st and 2nd respondents later conceded that the entire results for one stream at Embaro D.O.K Primary School 1 of 2 in Kitutu Masaba were unaccounted for. In the certified forms 39B and 39C presented to court by IEBC, the results for polling station 2 of 2 are presented as if they were in fact for stream 1 of 2. During the scrutiny exercise, the IEBC failed to provide the missing results.
 197. At paragraph 39 of her affidavit, the petitioner accused the 1st respondent and his officers of “making false returns contrary to Section 6(a) of the [Election Offences Act](#), 2016. Similarly, the Petitioner avers that the 2nd Respondent, failed to perform his duties in accordance with Regulation 87 of the Elections (General) Regulations, 2012, contrary to the provisions of Section 6(k) of the [Election Offences Act](#), 2016”
 198. For starters, the allegations are of a criminal nature and calling for a very high threshold of proof. The complaint was also made within the context of homogeneous results. Although the 1st and 2nd respondents made a general denial, it transpired that in some cases, for example at Embaro D.O.K Primary School 1 of 2 in Kitutu Masaba, results for one stream were reproduced for another. Even in the certified forms presented to court by IEBC, the results for stream 1 are presented as those for stream 2.
 199. In the majority of cases there was no direct or concrete evidence to support the allegation that the 1st and 2nd respondents or their officers deliberately declared results they knew were untrue. The one exception remains Embaro D.O.K Primary School 1 of 2. Learned counsel, Mr. Ondieki, submitted that the fact that Constituency Returning Officer, Ambuko (DW5), produced the form “he sanctioned this illegality further by using fake results and declaring it as true and correct result”.
 200. Although the petitioner frames Embaro DOK Polling Station as a case of homogeneous results, the truth is that the entire results for stream 1 were lost. I readily find that the allegation has been proved above a balance of probabilities.
 201. I have more to say on the matter. Regulation 73 provides the following procedure on close of polling-



- (1) At the end of voting, the presiding officer shall declare the polling station closed and shall proceed to seal the ballot boxes in the presence of the candidates or agents and observers at his or her polling station.
 - (2) Immediately after the close of the polling at his or her polling station, the presiding officer shall make in the polling station diary a written statement of—
 - (a) the number of ballot papers issued to him or her under regulation 61;
 - (b) the number of ballot papers, other than spoilt ballot papers, issued to voters;
 - (c) the number of spoilt ballot papers; and
 - (d) the number of ballot papers remaining unused.
 - (3) Immediately after the completion of the statement under subregulation (2), the presiding officer, in the presence of the candidates or agents shall seal in separate tamper proof envelopes —
 - (a) the spoilt ballot papers, if any;
 - (b) the marked copy register, where necessary;
 - (c) the counterfoils of the used ballot papers; and
 - (d) the statement specified in subregulations, and shall seal each of the envelopes with his or her own seal and the seal of the Commission and shall allow any candidate or agent who may wish to do so, to affix his seal to the envelope and any statement recorded under these regulations.
 - (4) After complying with the provisions of this regulation, the presiding officer shall, as soon as practicable, deliver the ballot boxes, and the tamper proof sealed envelopes to the returning officer who shall take charge thereof. [underlining added]
192. Clearly, the Presiding Officer after counting and declaring the result was mandated to seal the ballot box for Embaro stream 1 of 2 and deliver the results and ballot box to the County Returning Officer. The results for that stream in form 39A went missing and so did the ballot box. Despite the order for scrutiny the IEBC did not produce the election materials. Two questions then logically arise: Upon what basis was the result at that polling station announced? And did the County Returning Officer, Benson Ambuko (DW5) knowingly enter nonexistent results into form 39B for Kitutu Masaba?
193. I have come to the inevitable conclusion that malpractices of a criminal nature may have occurred at Embaro D.O.K Primary School stream 1 of 2 in Kitutu Masaba. In accordance with section 87 (2) of the *Elections Act*, I now direct that an order be transmitted to the Director of Public Prosecutions for investigation and action as provided under section 87 (3) (a) & (b).
194. That said, I take judicial notice that the maximum number of voters in a polling station were not to exceed 700. In fact, in stream 2 at Embaro, the total number of votes cast, and verified in the scrutiny exercise, were 323. Of course every vote counts. All the 12 candidates must have suffered from the loss of the results in stream 1. But keeping in mind the overall margin between the petitioner and 3rd respondent, the results for Embaro D.O.K Primary School stream 1 of 2 would not dent the lead of the 3rd respondent.
214. Although the petitioner alleged that Fred Matiang’i, the former Cabinet Secretary for Interior, “marshalled national security organs, the police, to intimidate and evict” her agents, little evidence was



- led in that regard. The exceptions were: Kepha Gichana Osoro (PW3) who claimed the petitioner's agents were intimidated by "too many" security agents or that they were denied access into polling stations. But when pressed, he clarified that his stream had only two police officers present. Justus Nyakwara (PW6) testified that four policemen were handing out Kshs 100 to voters and "whispering to them" to vote for the 3rd respondent; and, when he protested they were thrown out of the polling station. He also averred that during the count, police officers harassed and threw him out of the station but the other people present protested.
215. The respondents submitted that the petitioner did not prove that government officials interfered in the campaign or were biased against her. Anthony Njoroge (DW1), Ruto Wesley (DW2) and Benson Ambuko (DW5) all said they received no written complaints and were unaware of voter intimidation, acts of violence or campaigns by government officials.
216. The 3rd respondent in particular testified that in the few instances when she was in the company of Matiang'i, the agenda was "development" of the county and that no politics were discussed. I think she took the court for granted and was being too simplistic. For starters, I have kept in mind that the 3rd respondent was the incumbent. She was in one of the main arms of the government and there was nothing wrong in holding meetings with government officials. But surely, she cannot be heard to say that the messaging at those rallies was just development with no word of support for her re-election.
217. From the evidence of Geoffrey Mosinga (PW14), CS Matiang'i addressed a meeting on 22nd July 2022 at Endiba. Notwithstanding the fact that the video recordings were disallowed, I am satisfied from his oral evidence that during the height of the campaign season the CS had no kind words for the petitioner. Some of the comments were misogynistic. The ones on the dress code of the petitioner were denigrating. At the funeral of an Assistant Chief at Endiba, PW14 recorded him saying: "do not elect mtu yuko na makucha marefu kama ya paka". At Manga, he asked the public to vote for someone who "dresses decently". The 3rd respondent was paraded "as one who dresses better".
218. I am cognizant that the CS did not mention any names, but the innuendos were graphic, and the witness had no doubt that he was referring to the petitioner. I found the responses by the 3rd respondent feigning that she never shared such a platform to be unbelievable. True, she was the sitting Woman Representative and would, naturally, attend development meetings. But the timing here was a few days to the general election and the line between development meetings and full campaigns was growing thinner and hazier by the day.
219. I cannot objectively measure the number of votes that it cost the petitioner or the opposite gain by the 3rd respondent. But I have reached the conclusion that such open support for a candidate by a State officer was highly irregular.
220. The allegations relating to a meeting addressed by the former Solicitor General, Ken Ogeto, were not proved. The witness admitted he got the information from a secondary source, Watchtower, and bordered on hearsay.
221. I will now turn to the allegations of bribery. I set out earlier in detail about all the allegations and counter allegations on the subject by witnesses. At this point, I will just highlight a few and juxtapose them against the burden of proof.
222. The petitioner deposed that former CS Matiang'i "offered bribes to voters, facilitated by state machinery, to convince the voters to vote for the 3rd respondent, thereby committing an election offence under Section 9 of the Elections Offences Act". No firm particulars were provided. I remain alive that by the very nature of the vice, it seems unfair to demand more facts from the petitioner. But the truth is that the threshold of the proof is very high and cannot be met by such a sweeping statement alone.



223. The more pointed complaints were those made by other witnesses including Kepha Gichana (PW3) and Nemuel Okore PW5. PW3's affidavit did not particularize the polling stations where the offences took place. PW5 on the other hand said while queuing at Kipkembe Primary School Polling Station, the 3rd respondent's agents offered him a bribe of Kshs. 100 but he turned it down. On cross examination he said he never reported the matter. Those claims were denied by the respondents' witnesses including Fred Karamu Mwakania (DW8).
224. That type of evidence cannot pass the muster of the burden of proof for three main reasons: Firstly, the agents or persons who sought to bribe remain unknown; secondly, the facts have been denied by counter-evidence; and, thirdly, and more importantly, the allegations are of a criminal nature requiring proof beyond reasonable doubt.
225. There are then the more specific and detailed allegations of bribery. I will start with the evidence of Geoffrey Mosinga (PW14). At paragraph 8 of his deposition he claimed that at Nyambaria Polling Station, Magambo Ward he "discovered the agents of the 3rd respondent and police officers bribing voters before they proceeded to vote". That was a bare statement unadorned by concrete evidence. He did not have details of any of those people or that they were agents of the 3rd respondent. The same applies to the allegations he made at Kiamogiti Polling Station in Gachuba Ward. He claimed there was bribery of Kshs 50 per vote for "Matogoro" which referred to the 3rd respondent. He "formed the impression the persons bribing were from her camp".
226. The same witness said that at Mosobeti DOK Polling Station, he "discovered the 3rd respondent's agent holding cash meant to bribe voters". He testified that he met a woman who said "I am happy to have received my flour today." He concluded that the beneficiary could only have been the 3rd respondent. It is not that I do not believe the witness. The incidents may have taken place though he embellished them. The trouble is that the threshold of proof is very high and has not been discharged to the required standard.
227. There is however the evidence of PW11, Robinson Masita. He heard that John Matiang'i, a brother to the former Cabinet Secretary Matiang'i was bribing voters at Embaro. He said he went there and saw John bribing voters but upon him noticing that the petitioner's agents were around, he took off. It raised a commotion. Strikingly, he claimed he was also offered a bribe of Kshs 200 but declined it. He informed some policemen who were on the site but they took no action.
228. The same witness said that that he witnessed bribery at Keroka Farmers Coop Society Polling Station. That evidence was contested by Evans Momanyi Kasimiri (DW18), a Jubilee Party agent in stream 2 and Paul Mosioma (DW19). There is a further rebuttal by David Nyambane (DW17) a voter at Metamaywa Primary School.
229. Beyond the public meetings addressed by the former CS, there was also no specific evidence of the use of public resources or misuse of provincial administration. In cross examination, PW14 argued that because the former CS was the head of the provincial bureaucracy, it must be assumed that he used the system to prop up the campaign by the 3rd respondent. That falls way below the standard of proof of such allegations.
230. Closely allied to bribery was the allegation that the 3rd respondent or her agents were influencing voters by distributing branded campaign materials such as lessos on voting day. Two incidents come to the fore. The first one was at Muruga ELCK Primary School Polling Station as detailed by Duke Omwega (PW2). He testified that on election day at about 10:00 a.m., he saw two men inside a Toyota Probox registration number KCY 273P distributing the 3rd respondent's campaign merchandise. They were apprehended and handed over to the area chief, Justus Momanyi Okenye (DW6).



231. One of the two suspects was Jackson Nyamweya who testified as DW7. He was an agent of the 3rd respondent in charge of Bosamaro Ward. He did not deny that he or the driver of the vehicle were there but he was categorical that he was neither distributing money or influencing voters. According to DW6 the search on the suspects and their car revealed no evidence of the merchandise or any money.
232. The second incident was highlighted by Rebecca Ombuki (PW15). She saw a white Probox vehicle distributing money to voters or mobilizing them to vote for the 3rd respondent. She said the vehicle was also spotted in Nyambaria, Gekano, Rionguti, Sirate and Nyamwanga polling centers. But Felix Obwoye (DW21) who was a polling agent at Nyamwanga denied the allegations by PW15. The standard of proof was that of beyond reasonable doubt. Given the general nature of the allegations and the evidence at hand, I find that the bribery was not proved.
233. I now return to the subject of homogeneous results. The petitioner asserted that the results for Esanige stream 2 and 3; and, Ekerenyo EDN Centre streams 1 and 2 were homogeneous, a fact contested by DW1. I have studied the forms 39B for West Mugirango and the form 39C. The results for both polling stations in the two streams are completely identical. The results at for Getaari DEB Primary School streams 1 and 2 are close but not exactly the same. DW3 Sylvia Jepchumba admitted to some of those errors in form 39B.
234. The petitioner has thus proved that some results entered in forms 39B and 39C for different streams are homogeneous or identical twins. I note however that in all the above three cases, the certified forms 39A for each of the streams were not similar or homogeneous. Rather, the discrepancies occurred in the transfer of data to the forms 39B and 39C. That is why the petitioner asserts that there were different sets of results. The truth however is that the final results are those at the polling station as captured in form 39A. The claim for homogeneity thus fails on the merits.
235. There are then those stations highlighted by Kepha Gichana PW3. He averred there were homogeneous results at one unnamed stream as well as those in the table at paragraph 9 of his affidavit including Borabu DEB Primary, Metamaywa Primary School, Nyachichi Primary School, Moitunya Primary School, Motembe Primary School, Nyamwanga Primary School and Kiogutwa Primary School.
236. I have closely studied form 39B for Kitutu Masaba. In Borabu DEB Primary streams 1 and 2, the petitioner's score is 72 and 71 respectively. The 3rd respondent's is entered as 233 and 234 respectively. They agree fully with the two respective forms 39A. At Metamaywa Primary School streams 1 and 2, the petitioner obtained 76 votes in each stream. The 3rd respondent had 157 and 158 respectively. They again correspond with form 39A. I also note the form for stream 2 is signed by an ODM agent.
237. At Nyachichi DOK Primary School 2 of 2, I ordered a recount. It established that the petitioner garnered 63 votes against the 3rd respondent's 117. They are the same scores in form 39B. But in stream 1 of 2, the petitioner had 64 against the 3rd respondent's 117. At Moitunya SDA Primary School 2 of 3, I again ordered a partial scrutiny. The figures in form 39A were validated. In the 3 streams, the petitioner had 57, 57 and 60 votes respectively. The 3rd respondent had 150, 146 and 138 votes respectively. In Motembe DOK Primary School 1 of 2, the petitioner had 70 and 61 in stream 2. The 3rd respondent had 90 and 90 respectively.
238. All those results are strikingly close for each candidate. In all of them the 3rd respondent comes tops. I must agree with the petitioner that the results on their face look extremely suspicious but there is no clear-cut evidence to show that that the respondents doctored them. I have also referred to results of the partial scrutiny that did not fully support the allegations.



239. Furthermore, the nature of the allegations point to not just a simple irregularity but one touching on criminal conduct. It was pleaded that there was complicity between the 3rd respondent, certain government officials and IEBC personnel in contravention of section 6 of the *Election Offences Act*. The threshold of proof for such malpractices is extremely high and has not been met. In the end, and, for the reasons I pointed out earlier, I am unable to say that those particular results were homogeneous; or, that the petitioner proved that 12,234 votes were unaccounted for; or, that criminal conduct was ascertained.
240. I will turn briefly to transpositional errors. Some of the homogeneous results I dealt with above in forms 39B and 39C also fall into this segment. Some of the errors were freely conceded by the IEBC. For instance, Sylvia Jepchumba (DW3), the Constituency Returning officer for West Mugirango agreed with learned counsel for the petitioner that at Nyakemincha Polling Station 1 of 2, the votes cast are 267. The entry in Form 39B is different. The petitioner's votes are 161 but Form 39B captures them as 016. She attributed it to a typing error. She was of the view that the errors were minimal and did not affect the final results.
241. In answer, it bears repeating that the results at the polling station are final. See *IEBC v Maina Kiai & 5 others*, [supra]. The primary and most important declaratory form for this election remains 39A: The 39B and 39C series of forms are spreadsheets transferring and consolidating the scores in 39A.
242. In her oral testimony and paragraph 41 of her affidavit in support of the petition, PW1 also claimed that there was "padding up of the 3rd respondent's votes" in 8 polling stations in West Mugirango. She averred that her votes would be reduced while those of the 3rd respondent would be added.
243. Those claims were denied by the 2nd respondent and by the West Mugirango Constituency Returning Officer, Sylvia Jepchumba (DW3) in paragraphs 16 to 21 of her replying affidavit. They were also contested by the 3rd respondent (DW24) in paragraph 34 of her replying affidavit her oral testimony. Her view was that she won fair and square; and, that the petitioner failed to present cogent evidence to prove such serious or criminal allegations.
244. I ordered for partial scrutiny in all of those 8 stations and an additional 7 streams in West Mugirango. The results of the exercise did not fully support the allegations by the petitioner. Accordingly, this claim was not proved to the required standard. I will discuss the findings of the scrutiny report in detail further below.
245. The petitioner averred that Forms 39As in 24 polling stations in Kitutu Masaba; 14 stations in West Mugirango; 4 stations in North Mugirango; and, 3 others in Borabu contained alterations that were not countersigned by the Presiding Officers. I heard rebuttals on that point from the 2nd respondent (DW1) and his Constituency Returning Officers (DW2 to DW5).
246. At Nyamira DEB Primary School 4 of 8 the score for the petitioner is unclear because of overwriting. It is countersigned but remains illegible. However, the ballot box was intact, save that 3 serial numbers for 3 seals had been altered by hand in the PSD. The recount however established that the petitioner got 199 votes which tallies with what was recorded in the certified forms 39B and 39C.
247. Some of the errors complained of by the petitioner are arithmetic or poor summation. At Kiamogiti Polling Station 2 of 2 in Kitutu Masaba, the petitioner complains that the 3rd respondent got 238 votes which "was more than the 117 valid votes cast". I ordered a re-count there. It confirmed that the petitioner got 32 votes whereas the 3rd respondent garnered 238. The total valid votes cast were 317. The allegation was thus not proved.



248. Some of the other complaints on the forms are generic. For instance, at Menyenya Primary School 2 of 5, the petitioner contends that Form 39A was signed by the Deputy Presiding Officer on 9th August 2022 but the Presiding Officer only signed it the following day. I ordered a partial scrutiny there. It confirmed the results were accurate and correctly captured in both forms 39A and 39B. I will return to the remainder of the scrutiny exercise shortly.
249. I am alive that forms 37A are pre-printed forms that are populated by hand by the presiding officers. It is done at the end of the count. The entire exercise in some cases went for days and obviously took a toll on the IEBC officials and agents. For instance, Justus Nyakwara (PW6) confirmed that the count and recording at Makomoni TBC Polling Station ended at 3.00 a.m. on 10th August 2022. Errors are bound to arise and may be corrected by crossing, countersigning or stamping. However, the exercise should be transparent. That is why agents sign the form and are given copies.
250. In West Mugirango, the petitioner claimed there was a lengthy and suspicious delay in delivering the results for Etono DOK Primary School (which were announced at 7:00 p.m. on election day) but did not get to the nearby Constituency Tallying Centre until the following day at 3:00 p.m., a fact contested by the IEBC. The scrutiny report and recount established that the suspicions remained just that: the votes recorded in form 39A were correct.
251. There were other complaints of breach of the Regulations. For instance, Justus Nyakwara (PW6) claimed that the presiding officer did not give sufficient time to voters who required assistance but “just marked their ballots in favour of the 3rd respondent”. I think he exaggerated it. But analogous complaints were made by Jane Momanyi (PW9) who voted at Enkinda Primary School and by Edward Getange (PW10) at Ekerenyo EDN Polling Station. The latter claimed that the Presiding Officers were assisting aged voters in the absence of agents of the candidates. But it was denied by Jackline Kemunto (DW20) who said that the Presiding Officer would assist old or illiterate voters in presence of agents.
252. These were serious complaints. Some bordered on malpractices of a criminal nature. They required backing-up by a few more facts. I have also contrasted them with the evidence of Joash Momanyi (DW9). He was at Enkinda Primary School. He averred that the election officials did not interfere with the voting process and all those who turned up to vote were given a chance to do so without undue influence. He said that any voters requiring assistance were “given assistance through Presiding Officers with agents present. The Presiding Officer would call at least two witnesses or agents before marking the ballot. It is the person assisting the voter who would mark”.
253. Regulation 72 (1) is clear on this issue. If a voter suffers from disability or is illiterate for example, the presiding officer shall permit the voter to be assisted by a person of the voter’s own free choice. That is the first port of call. The involvement of agents would only come in under Regulation 72 (2) if the voter is not accompanied by a person qualified to assist him. In that case the presiding officer shall assist the voter in the presence of agents.
254. A related complaint was that the petitioner’s agents were blocked from entering polling stations or were intimidated, harassed or denied the role to oversight the poll. The petitioner testified that her sponsoring party, ODM, had advised candidates to appoint their own agents. She thus contended that the blocking or absence of her agents meant that the results were opaque.
255. Examples were given at polling stations in Kitutu Masaba at Kegogi P.A.G. Primary School 1 and 2 of 2; Nyai basa D.O.K Primary School 1 of 2; and Nyachichi D.O.K Primary School 2 of 2. Others were Amakura D.E.B. Primary School 2 of 2 in Borabu; and, three stations in West Mugirango (Getaari D.E.B. Primary School 2 of 2, Otanyore ELCK Primary school I of 2 and Kebirigo S.D.A Primary School 4 of 4).



256. Learned counsel for the petitioner submitted that the 1st and 2nd respondents “in cahoots with the 3rd respondent unlawfully ejected and obstructed the petitioner’s agents”. That submission has to be moderated. For instance, one of the petitioner’s witnesses, Jones Masita (PW11), who was a super-agent for ODM, admitted in re-examination that he was not prevented by any Presiding Officer from doing his work.
257. Learned counsel cited the case of Jones Arasa (PW7) who was denied entry into Nyankoba Primary School Polling Station. However, his appointment letter stated he was an agent for Kitutu Masaba, a point I will revisit shortly. DW16 Kepha Oyugi, an ODM party agent for a candidate for MP at the station denied that any agent was ejected. However, he conceded that the Presiding Officer only allowed one agent into the polling station due to constraints of space; the others were to be allowed in during the counting. Mr. Ondieki submitted that “unlawful means was adopted by the 1st and 2nd respondents to lock out” the petitioner’s agents. I do not entirely agree.
258. The IEBC did not call its presiding officers to reply to those allegations in line with the best evidence rule. Instead, sweeping rebuttals were made by the County Returning Officer and the four respective Constituency Returning Officers. But there were also rebuttals by agents or voters called by the 3rd respondent who denied that the petitioner’s agents were unfairly ejected. They included Kepha Oyugi (DW16), Jackline Kemunto (DW20), Felix Osinde (DW21) and Kennedy Nyakega (DW23).
259. I have weighed all that evidence against the right of a candidate to have agents at polling stations. Section 2 of the Act defines agent in the following terms:
- Agent means a person duly appointed by-
- a. A political party or an independent candidate for the purposes of an election under this Act; or
 - b. A referendum committee for the purposes of a referendum under this Act, and includes a counting agent and a tallying agent.
233. The Regulations on the other hand define agent “as a person appointed under section 30 of the Act”. Section 30 in turn provides as follows-
- (1) A political party may appoint one agent for its candidates at each polling station.
 - (2) Where a political party does not nominate an agent under subsection (1), a candidate nominated by a political party may appoint an agent of the candidate’s choice.
 - (3) An independent candidate may appoint his own agent.
 - (3A) A registered referendum committee may appoint one agent at each polling station. [underlining added]
233. It follows that a party candidate would only be entitled to appoint an agent if her party does not nominate one. Profoundly, the petitioner was an ODM Party candidate. Assuming that the party did not nominate agents, she had an undoubted right to appoint agents. I say that carefully because a number of the disputed forms 39A have been signed by agents of ODM Party. But one of the recurring themes was that those were not her agents.
234. Learned counsel for the petitioner submitted that since the ODM Party did not appoint agents, the petitioner’s agents should have been freely admitted under section 30 (2) of the Act. That is not entirely accurate. For instance, at paragraph 49 of her affidavit the petitioner referred to her agents as “agents appointed through the ODM Party”.



235. I have kept in mind that there were 12 candidates running for Woman Representative alone. Quite apart from demands of space at the polling stations, I take judicial notice that all the six elections were being conducted at the same time in each polling station; and, that all such candidates or their parties would be demanding representation by agents. In majority of the cases, the polling was taking place in primary school classrooms.
236. I received clear evidence on the pressure on space. Victor Okello DW14 said that at Kierira DOK Primary School Polling Station, each party had 2 agents, so there were about 12 or more agents at the station. Jared Makworo (DW15), an ODM Party agent at Rigoma Primary School confirmed the voting was taking place in a class room. There were 5 ODM agents and other parties' and candidates' agents. In total, there were about 18 agents never mind that some were dedicated to the other five elections.
237. I have also found that a number of the agents who claimed they were denied entry into polling centres carried appointment letters that did not clearly specify the polling station. I can give a few examples: Lucas Omangi Otiso (PW4) said he was an ODM agent at Borabu DOK polling station but his appointment letter stated he was an agent for Kitutu Masaba. Justus Nyakwara (PW6) was supposed to be an agent at Makomoni TBC Polling Station. However, his appointment letter read Kiabonyoru Ward. Jones Arasa (PW7) said he was denied entry into Nyankoba Primary School Polling Station but his appointment letter stated he was an agent for Kitutu Masaba Polling Station. Rebecca Ombuki (PW15) was to be an agent at Nyambaria Primary Polling Station but her letter read Magombo Polling Station. Bernard Matura (PW8) did not annex a copy of his appointment letter to his affidavit.
238. I must add that the problem was not unique to the petitioner. Even the 3rd respondent's agents, Jared Makworo (DW15) and Evans Kasimiri (DW18) did not attach their appointment letters to their affidavits.
239. Appointment letters couched in such general terms were defective and raised the risk of creating roving agents or converting them into super-agents. For instance, Rebecca Ombuki (PW15) visited a number of polling stations on election day including Nyambogo SDA Polling Station and Kenyerere Polling Station and made similar claims of blocking of the petitioner's agents.
240. According to Sylvia Jepchumba (DW3), any Presiding Officer was entitled to deny entry to such an agent with a letter stating "West Mugirango and without a name of polling station". She had however advised Presiding Officers to admit agents carrying a valid appointment letter, ID and oath of secrecy.
241. When agents' appointment letters were so vague and not pin pointed to a particular polling station, they were bound to cause confusion and raise unnecessary conflicts with Presiding Officers. In such situations, the Returning Officers were entitled to deny them entry. Under the Regulations, the Presiding Officers have power to remove disorderly persons from the polling station. Granted what I stated in the preceding paragraphs, it is not surprising that Bernard Matura (PW8), who had already cast his vote at Kierira Polling Station, was escorted out of the polling station by the Presiding Officer and a Police Officer.
242. On a full re-appraisal of the evidence including the high number of agents in the general election and constraints of space, I have found that there was no significant transgression of the law or Regulations merely because the petitioner did not have her personal agents in some of the polling stations. I have also found that the petitioner's agents had imprecise letters of appointment which prejudiced their right of entry into particular polling stations. Finally, the petitioner did not satisfy me above a balance of probabilities that there was a concerted effort by the respondents or other government to systematically harass, intimidate or block her agents.



243. My findings on that issue are also reinforced by the scrutiny exercise in a large number of centres where the certified Forms 39As were not signed by any agents. They included Amakura D.E.B Primary School 2 of 2 in Borabu Constituency; Nyamira D.E.B Primary School 2 of 8 and 4 of 8 in West Mugirango Constituency; and, other polling stations in Kitutu Masaba Constituency namely, Kegogi D.O.K Primary School 1 of 2, Sengereri D.E.B Primary School 2 of 2, Nyamwanga D.O.K Primary School 1 of 2, , Nyaibasa D.O.K Primary School 1 of 2, Otanyore ELCK Primary School 1 of 2, Nyaikuro D.E.B Primary School 2 of 2, Etono D.O.K Primary School 2 of 2, Kebirigo SDA Primary School 4 of 4 and Rionguti D.O.K Primary School 2 of 2.
244. Of the 12 stations in Kitutu Masaba where I ordered partial scrutiny, the ballot boxes and the seals were generally intact. The results for 8 stations as recorded in form 39A for the two protagonists did not change after the recount. Even in the four others, the change was insignificant. At Nyaibasa D.O.K Primary School 1 of 2 the votes as indicated in form 39A did not change save that the disputants gained 1 and 2 votes respectively from the bundle of rejected ballots that were found to be valid. The 3rd respondent similarly gained an additional 1 vote at Kegogi D.O.K Primary School 1 of 2, Moitunya S.D.A Primary School 2 of 3 and Nyaikuro D.E.B Primary School 2 of 2.
245. The only other matter of note was that at Moitunya S.D.A Primary School 2 of 3, one serial number in the PSD had been crossed by hand to read 4298853 but the ballot box was intact. At Sengereri D.E.B Primary School 2 of 2, one serial number was illegible as it had been crossed over or overwritten severally. Again the ballot box was intact. The recount at Sengereri gave the petitioner no additional votes, the 3rd respondent gained 2. From the validated pile of rejected ballots, the petitioner gained 1 and the 3rd respondent 6.
274. In North Mugirango the scrutiny at three stations revealed the following: At Ikonge 2 of 6, the ballot box was intact though the serial number for the seal for the aperture was not the same as that indicated in PSD. The recount confirmed the votes as indicated in form 39A save that the 3rd respondent lost 1 vote. In stream 6 of 6, the petitioner and 3rd respondent gained 1 vote each in the recount. At Kebariga Primary School Polling Station 2 of 2, the number for one of the seals on the ballot box was different from that in the PSD. But the recount did not change the result.
275. The scrutiny and recount in 15 polling stations in West Mugirango went as follows. In 8 of them, there was no change in the votes recorded in form 39A. In the remaining 7, the change in number of votes was minor and in single digits: At Masosa AIC Primary School 1 of 2 the petitioner and 3rd respondent gained an additional 1 vote. In stream 2, the petitioner added 4 votes and the 3rd respondent 1. At Girigiri D.E.B Primary School 1 of 2, the petitioner gained 1 more vote. At Nyamira D.E.B Primary School 4 of 8, the 3rd respondent gained an extra vote. At Bomondo C.O.G. Primary School 1 of 2, it turned out that the petitioner had been added 1 vote. But from the pile of rejected ballots, she and the 3rd respondent gained 2 each. In Otanyore ELCK Primary School 1 of 2, the disputants gained 3 and 2 votes respectively while at Nyagachi D.E.B. Primary School 2 of 2 each of them gained 4 votes. Lastly at Kuura D.E.B. Primary School 2 of 2, the 3rd respondent gained 1 more vote.
276. There were however other momentous findings at those 15 stations. They are well captured in the report by the Deputy Registrar but I will highlight a few. At Masosa AIC primary School 2 of 2, the PSD did not fully capture the serial numbers of the seals. The ballot box was intact. In stream 2, two serial numbers for the ballot box were given in the PSD; and, the seals found before the exercise did not match those in the PSD. At Moruga ELCK Primary School 1 of 2; Nyamira D.E.B Primary School 4 of 8; Bomondo C.O.G. Primary School 1 of 2; and, Girigiri D.E.B Primary School 1 of 2, serial numbers for the seals had been crossed or altered by hand. In the latter two stations, the aperture seal serial



- number and two seals on the ballot box respectively did not match the ones in the PSD. One seal number 4288254 in the box for Embonga D.O.K. Primary School 2 of 2 was broken.
277. In Borabu Constituency the court ordered scrutiny in three stations. In all of them, the petitioner did not gain from the recount. The 3rd respondent was added 1 vote at Amakura D.E.B Primary School 2 of 2. However, the PSD recorded two different aperture serial numbers for Manga Girls Primary School 1 of 3. At Menyanya Primary School 2 of 5, one seal did not match with the record in the PSD.
278. One of the more serious findings was that the ballot box Manga Girls Primary School 1 of 3 was broken on its side and the contents were accessible. Mr. Ondieki submitted that “the box was broken into”. There is no reliable evidence of such a criminal act. Furthermore, the recount confirmed that each of the disputants received the votes indicated in form 39A. True, the form had cancellations where the Presiding Officer moved the entire row of results to a new column. He countersigned it and it did not affect the candidates’ results. Lastly, that form was signed by agents from ODM and Jubilee. Those were the political parties on which the two candidates were running.
279. Learned counsel Mr. Ondieki submitted that the discrepancies on recording of serial numbers for the seals or ballot boxes in the PSD “indicates swapping and or staffing (sic) of votes in ballot boxes”. The response by learned counsel for the 1st and 2nd respondents, Mr. Ng’eno, on the issue is that at Embaro, for instance, “the report did not indicate that the serial number of the box affected the validity of the votes cast for each candidate”. Learned counsel for the 3rd respondent, Mr. Nyaundi, did not specifically address the issue of the records of the seals or a broken ballot box. His view was that “the scrutiny report supports the respondents’ contention that the election met the qualitative test of a transparent election”.
280. I have approached this issue guardedly for two main reasons. The scrutiny was ordered after the close of oral testimony by all parties. Under the Petition Rules the report became part of the proceedings in this petition. But it meant that parties could only address it in their final submissions. Logically, no other evidence was led. Secondly, the petitioner is bound by her pleadings. To be fair to the petitioner, she prayed in the petition for preservation of all electoral materials (which was granted at the pre-trial conference); and, for “an order for scrutiny of the Polling Station Diaries kept by the Presiding Officers in the above-mentioned polling stations”. In short, the court has to be careful not to belatedly expand the boundaries of the petition.
281. Fundamentally, the entire report by the Deputy Registrar must be considered against all the other evidence by the parties in order to arrive at any conclusion about the integrity of the entire election. Save for the altered records of seals in the PSD and the serious finding of a broken ballot box for Manga Girls Primary School 1 of 3, the ballot boxes were all intact. Even in the case of Manga Girls stream 1, the recount validated the scores indicated in form 39A. The recount in all the stations resulted in no significant gain or loss for the petitioner or the 3rd respondent. It was in fact in single digits and often from the pile of rejected ballots that were found to be valid. The scrutiny report turned out to be a double edged sword: It partly reinforced the petitioner’s grievances; in other cases, it vindicated the respondents.
282. There is no doubt that there were irregularities or anomalies in this election. The striking ones are the missing results for a whole stream at Embaro D.O.K Primary School 1 of 2 in Kitutu Masaba; or, even the lopsided campaigning by a former cabinet secretary in favour of the 3rd respondent. There were also errors in transferring data from some forms 39A into the B and C series. I have also highlighted many cases of cancellations or alterations or overwriting in forms 39A. Some of those changes were countersigned by presiding officers; some of the affected forms were signed by agents.



283. But I have also borne in mind the gargantuan task of holding a general election. Like I observed earlier, this disputed poll was a county-wide election. There were 643 polling stations in Nyamira spread out in four constituencies. 206,905 votes or thereabouts were cast for the seat of the County Woman Representative alone. In addition, the disputed poll was a general election for six electoral offices.
284. When all those irregularities and anomalies are contrasted against the overall findings in the scrutiny report and the wide margin between the two leading candidates, I have reached the conclusion that they did not substantially affect the outcome of the election. The petitioner did not prove to the required standard that the respondents conspired to rig the election or subvert the will of the people of Nyamira. The petitioner also failed to prove beyond reasonable doubt the allegations of a criminal such as bribery or complicity between the 3rd respondent, certain government officials and IEBC personnel in contravention of section 6 of the *Election Offences Act*.
285. However, I find that malpractices of a criminal nature may have occurred at Embaro D.O.K Primary School stream 1 of 2 in Kitutu Masaba. And I will issue an appropriate order under section 87 (3) (a) & (b) of the *Elections Act*.
286. In the recent decision in *Ayiera v Kimwomi & 3 others*, Nyamira, High Court Election Petition E002 of 2022 [2023] KEHC 816 (KLR), I had the following to say-
- (272) It was never intended in the design of our laws to re-locate the campaigns to the election court. I concur on this point with my learned brother, Majanja J, in *Jackton Ranguma v IEBC & 2 others*, Kisumu High Court E.P. 3 of 2017 [2018] eKLR that-
- An election petition is not a do-over of the just concluded election. It is not an opportunity to conduct another election through the court as every election conducted in accordance with the law is presumed valid unless it is set aside by the court. [underlining added]
287. I am also well guided by section 83 of the *Elections Act* which contains a rebuttable presumption in favour of the respondents that the election was conducted properly and in accordance with the law. It also implied by that provision that elections are not always perfect. I stated at the beginning that petitioner must show that the preponderance of evidence inures in her favour. In the end, I find that the petitioner has failed to rise to that standard.

Disposition and Final Orders

288. The answer to issue number (ii) is partly in the affirmative. I find that the election was marred by a number of irregularities and malpractices. The scrutiny and recount also unearthed further anomalies but overall, the exercise resulted in no significant gain or loss for the petitioner or the 3rd respondent. However, the combined effect of all those anomalies did not substantially affect the results or final outcome of the poll.
289. Applying the binding precedent in *IEBC v Maina Kiai & 5 others*, [supra] that the results at the polling station are final, the further anomalies in transfer of data from forms 39A into forms 39B and 39C did not materially affect the outcome. I am thus unable to say that the election was not conducted in accordance with the principles laid down in *the Constitution* and written law. The answer to issue number (i) is in the affirmative: The election for County Woman Representative to the National Assembly for Nyamira County held on 9th August 2022 was substantially conducted in accordance with *the Constitution*, the *Elections Act* and Regulations.



290. It follows as a corollary that the 3rd respondent was validly returned as the County Woman Representative to the National Assembly for Nyamira County. That answers issue number (iii) in the affirmative.
291. The answer to issue number (iv) is in the negative. The petitioner is not entitled to an order nullifying the results or for fresh elections or to quash the Kenya Gazette Notice dated 22nd August 2022 or any such other instrument declaring that the 3rd respondent was validly elected. The upshot being that the petition is hereby dismissed.
292. Issue number (v) relates to costs. I grant the respondents costs of the petition. Those costs shall be paid by the petitioner. I find that although many witnesses testified, this petition did not raise any complex questions of law or evidence. The evidence was also taken within a week. I therefore order that the total costs shall not exceed Kshs 3,000,000 for all the three respondents and shall be shared between them. The Deputy Registrar of this Court shall tax any attendant Bill under Rule 31. I further direct that the whole or any part of those costs shall be paid pro-rata to the respondents from the money deposited in court by the petitioner.
293. A certificate of determination of this petition required under section 86 of the [Elections Act](#) shall issue forthwith.
294. Lastly, I have found that malpractices of a criminal nature may have occurred at Embaro D.O.K Primary School stream 1 of 2 in Kitutu Masaba. In accordance with section 87 (2) of the [Elections Act](#), I direct that an order be transmitted to the Director of Public Prosecutions for investigation and action as provided under section 87 (3) (a) & (b) of the Act.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF MARCH 2023.

KANYI KIMONDO

JUDGE

Judgment read virtually on Microsoft Teams in the presence of:

Mr Anyegah Ondieki for the petitioner instructed by Ondieki, A Hashi & Company Advocates.

Mr Ng'eno for the 1st & 2nd respondents instructed by Z. K. Yego Law Offices.

Dr K. Nyaundi for the 3rd respondent instructed by Marende & Nyaundi Advocates.

Ms. Anita, Ms. Aminah & Mr. Terer, Court Assistants.

