



REPUBLIC OF KENYA



**Wanjohi & 2 others v Independent Electoral and Boundaries Commission & 3 others (Election Petition E001 of 2022) [2023] KEHC 1873 (KLR) (Election Petitions) (7 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1873 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ELECTION PETITIONS  
ELECTION PETITION E001 OF 2022**

**M MUYA, J  
MARCH 7, 2023**

**BETWEEN**

**SAMUEL NDUHIU WANJOHI ..... 1<sup>ST</sup> PETITIONER  
PETER WAIHENYA MACHARIA ..... 2<sup>ND</sup> PETITIONER  
STANLEY KYARO MULI ..... 3<sup>RD</sup> PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT  
MILLIAM W GACHIHI THE CONSTITUENCY RETURNING OFFICER  
STAREHE ..... 2<sup>ND</sup> RESPONDENT  
ALBERT GOGO, THE COUNTY RETURNING OFFICER  
NAIROBI ..... 3<sup>RD</sup> RESPONDENT  
AMOS MWANGO MAINA ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The election for the member of National Assembly for Starehe Constituency was held on the 9<sup>th</sup> day of August 2022.  
The candidates were MAina Mwago Amos, Mbugisa Simon Nganga And Wachira Mary Mumbi.
2. The results were as follows



NO	Name Of Candidate	Votes
1.	Maina Mwago Amos	50,777
2.	Mbugua Simon Nganga	36,548
3.	Wachira Mary Mumbi	1,733

3. The results were declared on 12<sup>th</sup> August 2022. The 1<sup>st</sup> Respondent declared MAINA MWAGO AMOS as the member of National Assembly for Starehe Constituency in Kenya Gazette Number 9950 dated the 22<sup>nd</sup> August 2022.

### The Petition

4. The Petitioners contend that the Parliamentary election for Starehe constituency was so fundamentally flawed and marred with irregularities, violence, bribery, and discrepancies that the whole process was compromised and the overall results were substantially affected.
5. That the Petition is premised on electoral inconsistencies, malpractices, irregularities and offences perpetrated, by the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup>, and 4<sup>th</sup> Respondents either by themselves, their agents, servants and/or with their express knowledge and connivance.
6. These electoral irregularities are deemed to have occurred:-
- Prior to the election
  - On the day of and during the election
  - During the counting and tallying process and
  - At the time of the announcement and declaration of the results
7. The scope of the electoral inconsistencies, malpractices, irregularities and offences upon which this Petition is founded include the following
- Corrupt practices and voter bribery by the 4<sup>th</sup> Respondent and or persons acting at his behest and or for his benefit.
  - Violence orchestrated by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents prior to the election and during the tallying process at the tallying Centre.
  - Procedural non-compliance and anomalies occasioned by the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in the stamping, execution and issuance of forms 35A comprising the results declaration forms for each polling station in Starehe Constituency.
  - Threats, harassment and intimidation of other Candidates, other agents and voters by all of the Respondents during the elections.
  - Threats, harassment and intimidation of other candidates, other agents and voters by Police Officers under instructions of the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents manning polling Stations, Polling Centre's and the constituency tallying Centre with the tacit approval and consent of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as well as at the instigation of the Respondent.



- f. Undue influence by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents in the process of the announcement of the election results by the 2<sup>nd</sup> Respondent and
- g. Illegal Practices by all the Respondents in the conduct of and Participation in the elections.

### **Corrupt and Illegal Practices**

8. It is the contention by the petitioners that on the 9<sup>th</sup> day of August 2022, there was rampant voter bribery an across most of the Polling Centre's in Starehe Constituency including but not limited to Labour Office at around 9.30 a.m. as witnessed by Obed Mogaka Mogoi, Kariokor Social Hall at around 11.00 a.m. – 12 noon which bribes were given by one Millie as witnessed by Scolastica Wanjiku Alube, Pumwani Primary School at around 10.00a.m. as witnessed by Scolastica Wanjiku Alube, Mwariro Market, Pangani Primary School at around 9.00a.m bribes issued by uniformed administration Police as witnessed by Hussein Suleiman Polling Station manager, Ainsworth Primary School at around 10.00 a.m. as witnessed by ward manager Stephen Mwangi and Pangani Girls Secondary School bribes issued by 4<sup>th</sup> Respondents Chief Agent, Jacky, the 4<sup>th</sup> Respondent's Aunt and a local MCA at around 11.00a.m. 3.00p.m as witnessed by James Kuria Mburu Mwaniki.
9. That these corrupt practices implicated presiding officers of the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the 4<sup>th</sup> Respondent, sitting MCA's relatives known associates and agents of the 4<sup>th</sup> Respondent.
10. It is the Petitioners contention that the petition and the evidence sworn in support demonstrate that the 4<sup>th</sup> Respondent and his people were openly permitted by the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and police officers assigned to various polling stations to influence the voting process with the use of money and other favours as an inducement on the 9<sup>th</sup> of August 2022 between 9.00 a.m. – 500 p.m.
11. That the presiding officers of the 1<sup>st</sup> Respondent together with the police under their supervision and control were openly curveting with the 4<sup>th</sup> Respondent, sitting MCA's associates and relatives who' were allowed to remain in polling station compounds even where they were not voting.
12. It is the petitioners contention that in Pangani Girls Secondary School in particular, the aunt and chief agent of the 4<sup>th</sup> Respondent a Ms. Jacky were witnessed seated in a private vehicle Registration number KDA 946M belonging to one of them while in the company of the presiding officer.
13. In Labour Office polling Station a supporter of the 4<sup>th</sup> Respondent who was visibly drunk and dishing out money within the Polling Centre compound, was allowed to operate undisturbed in the full glare of voters and the loud inaction of the 1<sup>st</sup> Respondent's Presiding Officers and Police Officers under their supervision.
14. That there were instances of ballot papers stuffing at Pangani Girls Secondary School Polling Centre, as during tallying some ballot papers were found bunched up in bundles of four to five as witnessed by James Kuria Mburu Mwangi who was a Polling Centre. Manager at Pangani Girls Secondary School.

### **Violence**

15. It is the Petitioners contention that the 3<sup>rd</sup> and 4<sup>th</sup> Respondents openly sponsored violence before, during and after the voting process when tallying was being conducted.
16. That the 4<sup>th</sup> Respondent in a bid to intimidate voters personally led and financed violent attacks against the chief agents of the opponents, including an assault of the UDA chief agent one Michael Banyanya Waithigo on the night of 5<sup>th</sup> August 2022 next to Moi Avenue Primary polling Centre, with a view to incapacitating their ability to participate in and monitor the election process.



17. Further that the Petitioners contend that in spite of formal complaints to the police and recording of Statements linking the 4<sup>th</sup> Respondent with electoral malpractices, no action was taken either by the police or the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents.
18. That the 1<sup>st</sup> 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents promoted physical confrontations and melee and in the process forced a complete stoppage and or interruption of the tallying process at the tallying Centre for Starehe Constituency at Jamhuri High School on at least two occasions during the night of 10<sup>th</sup> and 11<sup>th</sup> August 2022.
19. That it is the contention by the Petitioners that as a result of the violent physical confrontations authored by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents that the 2<sup>nd</sup> Respondent was compelled to announce the results before the tallying process was complete and when several polling stations were yet to make their returns.
20. The 4<sup>th</sup> Respondent continuously maintained a mob of youths numbering more than 500 who held a continuous siege on the tallying Centre day and night from the 10<sup>th</sup> of August, 2022 through to the 12<sup>th</sup> posing a threat to the security of the entire parliamentary election in Starehe and in particular the tallying process.
21. Procedural irregularities in results declaration – Anomalies in form 35 A  
It is contended by the petitioners that anomalies and procedural non-compliance in the issuance of forms 35 A were registered in at least 12 of the 30 polling Centres in Starehe Constituency including and not limited to the following:-  
St. Peters Clavers Primary School ,Muthurwa market, Kenyatta International Conference Centre (KICC),Jamhuri High School, Parkroad Primary School, Pangani Girls High School, Mukuru Kaiyaba Primary School, Labour Office, Our lady of Mercy Secondary School, and Nairobi South Primary School.
22. Below is a table showing the alleged anomalies



No.	Name of Polling Station	Type of form	S/NO.	Anomaly
1	St. Peters Claver Primary School Station 11 of 19	35 A	N/A 107684	One Stamp only
2	Muthurwa Market Station 6 of 15	35A	N/A 107712	Votes counts not indicated
3	Muthurwa Market Station 12 of 15	35A	N/A 107724	Votes obtained 388 Total No. of votes 393
4	Muthurwa Market Station 13 of 15	35 A	N/A 107726	Valid Votes Obtained 340 valid votes cast 344
5	KICC Polling Station 5 of 11	35A	N/A 107740	Valid Votes Obtained 383 Valid votes cast 390
6	Jamhuri High School Station 5 of 6	35A	N/A 107776	Valid Votes Obtained 296 Valid Votes cast 300
7	Jamhuri High School Station 6 of 6	35A	N/A 107810	One Stamp
8	Parkroad Primary School Station 3 of 10	35A	N/A 107810	One Stamp
9	Parkroad Primary School Station 6 of 10	35A	N/A 107816	Faint Stamp
10	Pangani Girls High School Station 1 of 19	35A	N/A 107857	No. of Valid Votes Obtained 294 Valid Votes Cast 295



11	Pangani Girls High School Station 10 of 19	35A	N/A 107874	Valid Votes Obtained 356 Valid Votes Cast 357
12	Pangani Girls High School Station 17 of 19	35A	N/A 107888	No. of Total Valid Votes not shown
13	Mukuru Kaiyaba Primary School Station 9 of 12	35A	N/A 107994	One Stamp
14	Labour Office Station 3 of 11	35A	N/A 108007	Valid Votes cast not Indicated
15	Our Lady of Mercy Secondary School Station 1 of 10	35A	N/A 108078	Valid Votes 371 shown instead of 370
16	High Way Secondary School Station 5 of 9	35A	N/A 108092	One Stamp Only
17	High Way Secondary School Station 9 of 9	35A	N/A 108100	One Stamp Only
18	Nairobi South Primary School Station 3 of 8	35A	N/A 108106	One Stamp Only
19	Nairobi South Primary School Station 6 of 8	35A	N/A 108112	One Stamp Only

23. The anomalies in the forms 35 A include

- a. Forms with single stamps instead of two.
- b. Blank forms with polling station voter counts omitted or not included
- c. Inconsistencies between actual calculated totals of Votes cast in favour of all the three Parliamentary Candidates combined against the total valid votes declared by various presiding officers.



- d. Forms bearing stamps other than the official IEBC stamps.
24. It is the Petitioner Contention that the said anomalies were not as a result of Human error but they were designed to favour the 4<sup>th</sup> Respondent and confer an unfair benefit and advantage to him.
25. That the 1<sup>st</sup> Respondent permitted its officials to use unstamped form 35'A' to declare the results. That the said forms were rendered invalid and void for the failure to meet the constitutional test of accuracy and verifiability.
26. That there were arithmetic anomalies in the said forms 35'A' which were as a result of the manipulation of the results.

### **Threats Harassment And Intimidation By IEBC Officials**

27. The Petitioners contention is that the 1<sup>st</sup> Respondent consented to and Permitted widespread discrimination of voters candidates and their agents by presiding officers in various Polling Centres across Starehe Constituency including:- Pangani Primary School, Mariakani Primary School Kariokor Social hall, Our Lady of Mercy Secondary School and Pangani Girls Secondary School.
28. The 1<sup>st</sup> Respondent and its agents specifically targeted agents of one particular party the United Democratic Alliance Party (UDA) while favouring another, Jubilee Party/Azimio one Kenya Coalition Party to which the 4<sup>th</sup> Respondent belongs.
29. That the 1<sup>st</sup> Respondent had declared a cold war against UDA Party agents
- a. Agents denied badges at Pangani Girls High School and Mariakani Primary School despite presenting their formal letters of appointment. These agents were:-
- Flora Murange Abatsa(polling Station No.4 Mariakani Primary School). Steven Macharia Muchui (polling station 18 Pangani Girls High School) and Jessica Murungi Kinungi (polling station 9 Pangani Girls High School)
- b. The Said agents were denied entry and or access to polling Stations despite being lawfully appointed. Ainsworth Primary School – Stephen Mwangi was denied access to the polling Centre, James Kuria, Mburu Mwaniki was denied access to the polling Centre. In the afternoon of 9<sup>th</sup> August 2022, the said agents were denied copies of form 35'A' despite being appointed lawfully.
- © Further that the 1<sup>st</sup> Respondent permitted the arrest of the agents by police officers under their control and supervision on spurious allegations and failed to intercede on their behalf.

### **Threats, Harassment and Intimidation by Police Officers**

30. The Petitioners contention is that the Respondents connived, conspired, promoted and condoned the dissemination of agents of United Democratic Party (UDA) while favouring those of Jubilee. That in Labour Office, Mariakani Primary School, Pangani Girls School and Ainsworth Primary School there were unwarranted arrest of UDA Agents at the instigation of the 1<sup>st</sup> and 4<sup>th</sup> Respondent.
31. The Agents arrested were
- a. Scholastica Wanjiku Alube, on 9<sup>th</sup> August 2022 at 2.00 p.m. at Kariokor Social Hall. She was picked by a vehicle with private number KCQ 230L



- b. Samuel Mbugua Wangechi arrested at Pangani Girls Secondary School. At about 11.30 a.m. and held up upto 2.30 p.m.
- c. Steven Macharia Munyui arrested at Pangani Girls Secondary School at 11.30 p.m. and held upto 2.30 p.m at Pangani Police Station
- d. Jessica Murugi Kinugi arrested at Pangani Girls Secondary School at around 11.30 a.m. and held up till 2.30 pm at Pangani Police Station.

That the said agents were arrested while serving and taking tea and this undermined the integrity and the entire election process by using state officers to eliminate competition with the 4<sup>th</sup> Respondent.

### **Undue influence in the tallying process and announcement of Results**

- 32. The Petitioners contend that the 3<sup>rd</sup> Respondent abused his office by exerting influence on the 2<sup>nd</sup> Respondent who was his junior to prematurely announce the election results for member of National Assembly Starehe Constituency when the tallying process was not complete and when reported incidences relating to missing ballot papers and marked ballots were still unresolved.
- 33. That the 3<sup>rd</sup> Respondent and the 4<sup>th</sup> Respondent used undue influence and use of force by Edwin Sifuna, Maina Kamanda, Rachel Shebesh, Anne Kananu Mwendwa and Charity Ngilu on the night of 10<sup>th</sup> and 11<sup>th</sup> August to compel the 2<sup>nd</sup> Respondent to involuntarily announce the results of the Starehe Constituency Parliamentary election by Physically confronting the 2<sup>nd</sup> Respondent when the 3<sup>rd</sup> Respondent had no role in the election process for member of National Assembly under the law.
- 34. Further that the 4<sup>th</sup> Respondent pressurized the 2<sup>nd</sup> Respondent and unduly influenced the announcement of results of the Starehe Constituency Parliamentary Election by Accosting the 2<sup>nd</sup> Respondent severally in the course of the tallying process while in the company of the 3<sup>rd</sup> Respondent and other officials of Azimio One Kenya Coalition Party.
- 35. That the net effect of the electoral malpractices as enumerated was to disenfranchise 112,881 voters spread across 17 out of 30 Polling Centres and 168 out of 257 Polling Stations in Starehe Constituency in an election that was fettered, prevented or unfairly hindered and influenced by the Respondents.
- 36. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to act in accordance with the provisions of article 81 (a) of the Constitution which provides for a free and fair elections devoid from violence, intimidation, improper influence and corruption, elections which are transparent and administered in an impartial, neutral, efficient, accurate and accountable in manner.
- 37. That the Petition is instituted by ordinary voters with the aim of promoting the tenets of the constitution.
- 38. The Petitioners contend that the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were under a constitutional duty to eliminate electoral malpractices and to ensure that the process is impartial and free from electoral, corruption and illegal practices.
- 39. In respect of Starehe Constituency the election for Member of National Assembly, it is contended that the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents failed in ensuring fidelity to the Constitutional Principles of Independence and Non-discrimination
- 40. That the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents neglected to act in accordance with the Constitution and National Legislation and thereby subverted the sovereign will of the people and the electorate.



41. Further that the elections were so badly conducted and marred with electoral Malpractices some in the nature of criminal offences that it is impossible to determine who actually won the election.
42. That Section 83 of the Elections Ad.No.24 of 2011 contemplates that where an election is not conducted in accordance with the Constitution 2010 and written laws then that election must be invalidated notwithstanding the fact that the result may not be affected.

### **Legal Foundation**

43. This Petition is expressed to be brought under
  - the Constitution of Kenya 2010, articles 1(1) 1 (2), 10, 27 (1),27 (1) Article 38(1), 38 (2), 38 (3) Article 81, Article 86, Article249 (1) Article 249 (2)
  - [Independent Electoral and Boundaries Commission Act](#) No.9 of 2011 Section 25 (a) of the IEBC Act
  - Elections Offences Act No.37 of 2016.
  - Section 9 of the Act
  - Section 10 of the Act
  - Section 12
  - Election Act No.24 of 2011
  - Section 39 of the Election Act
  - Section 83 of the Act
  - Elections (General) Regulations 2012
  - Regulation 79
  - Regulation 83
  - Sub regulation 1 (f)
  - Sub regulation 1 (g)
  - Regulation 84

### **The Petitioners seek**

44. (1) A declaration be and is hereby made that the election for member of National Assembly for Starehe Constituency held on 9<sup>th</sup> August 2022 was not concluded in accordance with the Principles laid down in the Constitution of Kenya, the [elections Act](#) No.24 of 2011 and the rules and regulations thereunder and therefore the election and the results as declared are void.
- (2) A declaration be and is hereby made that the 4<sup>th</sup> Respondent was not validly elected as member National Assembly for Starehe Constituency and that the declaration by the 2<sup>nd</sup> Respondent on 12<sup>th</sup> August 2022 is null and void.
- (3) A declaration be and is hereby made that the Non-compliance with the Law, irregularities and Improprieties in that election for member National Assembly for Starehe Constituency held on 9<sup>th</sup> August, 2022 were substantial and significant that they affected the results thereof:
- (4) Spent



- (5) Spent
  - (6) Spent
  - (7) An order quashing the certificate of election form 35C issued to the 4<sup>th</sup> Respondent by the 2<sup>nd</sup> Respondent upon his impugned election as member of National Assembly for Starehe Constituency on 12<sup>th</sup> August 2022.
  - (8) An order permanently barring the Respondents and their agents, howsoever, acting in giving effect in any way to the results declared and announced vide form 35B dated 12<sup>th</sup> August, 2022.
  - (10) A declaration electoral malpractice of a Criminal Nature Occurred during the election of member of National Assembly for Starehe Constituency on 9<sup>th</sup> August 2022 for which the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Respondents are culpable.
  - (11) An order directing the 1<sup>st</sup> Respondent to conduct a fresh election for the member of National Assembly for Starehe Constituency in Strict Compliance with the Constitution and the Law.
  - (12) Costs
45. This Petition was supported by affidavits sworn by Samuel Nduhiu Wanjohi, Peter Waihenya Macharia, Stanley Kyalo Muli, Michael Banya Wathigo, James Kuria Mburu Mwaniki, Obed Mogaka Mogoi, scholastic Wanjiku Alube, Hussein Suleiman, Girland Ndirangu Mahugu, Joyce Mutio Nzamuli, Micah Ngare Mwangi, Flora Muranje Abasta, Stephen Mwangi, Consolata Kagenyi Amata, Illiyasa Watako Idris, David Manyasi Kasina, Jessica Muhugi Kirungi, Stephen Machara Munyui and Samuel Mbugua Wangeci.
46. A Response was filed by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> Respondents to the Petition dated 26<sup>th</sup> September 2022. The 2<sup>nd</sup> Respondent filed a replying affidavit sworn on 26<sup>th</sup> September 2022 by William Gachichi the 3<sup>rd</sup> Respondent filed an affidavit Sworn on 26<sup>th</sup> September 2022 by Albert Gogo. The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents response to the Petition was supported by witness affidavits of Stephen Mwaura Njoroge, Vivian Awino Okoth, John Mathenge Macharia and Wilson Njogu Njiru all sworn on 26<sup>th</sup> September 2022.
47. The 4<sup>th</sup> Respondent filed a witness affidavit sworn by Julius Kamau Ngatia on 27<sup>th</sup> September 2022, a response to the Petition dated 27<sup>th</sup> September 2022 and an affidavit sworn by the 4<sup>th</sup> Respondent on 27<sup>th</sup> September 2022.
48. The three Petitioners, Samuel Nduhiu Wanjohi, Peter Waihenya Macharia and Stanley Kyalo Muli testified and called as their witness Michael Banya Wathigo, James Kuria Mburu Mwaniki, Obed Mogaka Mogoi, Scholastica Wanjoki Alube, Hussein Suleiman, Girland Ndirangu Mahugu, Stephen Mwangi, Consolata Kadenyi Amata and David Munyasi Kasina.
49. The 4<sup>th</sup> Respondent was heard on 16 Dec 2022. He called one witness.
50. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were heard on 19<sup>th</sup> December, 2022 and they called as their witnesses Albert Gogo, Vivian Awino Okoth, Wilson Njogu and Milliam W. Gachihi.

### **The Petitioners case**

51. The Petitioners contention is that it clearly came out from the evidence of the Petitioners and the Respondents that there were electoral inconsistencies malpractices and offences prevalent during the process and they single out several instances.



- a. The 2<sup>nd</sup> Respondents failure in her duties by proceeding to announce the results and declaring the 4<sup>th</sup> Respondent as the Winner without receiving the results from five polling stations namely:-
  - Moi Avenue Primary School Station 7 of 19, Parklands Primary School Station 4 and 8 of 10, Pangani Girls High School Station 8 of 19 and Pumwani Secondary School Station 5 of 5.
- b. While under cross-examination of the 4<sup>th</sup> Respondent evidence was adduced by way of videos showing that some ballot boxes went missing at the Starehe Constituency tallying Centre and some IEBC Officials were arrested for being in possession of election materials and that the 4<sup>th</sup> Respondent had invited the constituency Returning Officer to his table so as to assist him to be declared the winner.
- c. Discrepancy in the number of valid votes cast in specified polling stations.
- d. Some polling stations did not indicate the total number of Valid Votes Cast for example Pangani Girls High School polling Station 17 of 19 Labour Office Polling Station 3 of 11, Our Lady of Mercy Secondary School Polling Station 1 of 10
- e. That Vivian Awino Okoth, the Presiding Officer at Pangani Girls High School Polling Station 13 of 19, in her evidence indicated that she completed counting on 10<sup>th</sup> August 2022 while her form 35 A was signed on 9<sup>th</sup> August 2022.
- f. Discrepancy on the dates of signing form 35A between the agents and the Presiding Officer at Moi Avenue Primary School Polling Station 6 of 19 Agents shown to have signed on 9<sup>th</sup> August whereas the Presiding Officer signed on 10<sup>th</sup> August, 2022.
- g. At Kenyatta International Conference Centre grounds Polling Station 7 of 11, the Presiding Officer signed the form 35A on 9<sup>th</sup> August 2022 whereas the Agents signed on 10<sup>th</sup> August 2022.
- h. At Kenya Polytechnic University Polling Station 2 of 18, form 35A shows, the number of registered voters as 325 whereas form 35B show 625 valid votes shown as 322 and two rejected ballot papers.
- i. Petitioners witness, Consolata Kandenyi Amata testified to have noted a strange marking being a small circular one at the top of 294 ballot papers which are the same number with the vote the 4<sup>th</sup> Respondent garnered.
- j. During cross-examination of Consolata Kandenyi Amata, it transpired that our Lady of Mercy Secondary School polling station 2 of 10 and Our Lady of Mercy Primary School Polling Station 2 of 4 had similar results.
- k. During 2<sup>nd</sup> Respondents testimony in court she informed the court that she was storing some election materials in her office whereupon she would open the ballot boxes and access the materials contained therein and reseal the boxes.
- l. The 2<sup>nd</sup> Respondent admitted to having access to the Polling Station diaries but annexed a few to her replying affidavit.



- m. James Kuria Mwaniki Mburu 2<sup>nd</sup> Petitioners witness testified to have witnessed bribery, intimidation and harassment of his agents at the Pangani Girls High School by the IEBC Officials and Police
  - n. It is contended that the 2<sup>nd</sup> Respondent allowed an impostor to sign form 35B on behalf of the UDA candidate.
  - o. Julius Kamau Ngatia the 4<sup>th</sup> Respondent Chief Agent did not show in court that he had the necessary authorization to sign form 35B.
  - p. The 2<sup>nd</sup> Petitioner did challenge the existence of George Karanja as the UDA Chief Agent. One Michael Banya Waithigo did adduce evidence to the effect that he was the UDA Chief Agent.
  - q. It is submitted that the 2<sup>nd</sup> Respondent did not substantiate the existence of the registered votes in the five challenged Polling Stations as 3362
  - r. Failure by the Returning Officer to indicate the correct number of registered voters at Kenya Polytechnic University, form 35B Showing 625 whereas form 35A showed 325
52. The court did order for Scrutiny and recount in Seven Polling Stations.
- a. Only five ballot boxes were availed instead of seven. No explanation was forthcoming. At the 1<sup>st</sup> Respondents Warehouse, 258 ballot boxes were observed for the 258 Polling Stations.  
The issue is to whom did the two missing ballots boxes in excess belonged to?
  - b. Out of the 5 ballot boxes presented in court only one contained a sealed tamper proof envelope
  - c. Out of the Seven Polling Stations only one printed copy of the Register of voters used during the Elections was availed for Scrutiny. The one for our Lady of Mercy Primary School Polling Station
  - d. In respect of Our Lady of Mercy Primary School Polling Station 2, the apertures seals before the opening the box during Scrutiny were different from the seals opened during Scrutiny.
  - e. During recount of the ballot Papers in respect of Our Lady of Mercy Primary School Polling Station 2. The 4<sup>th</sup> Respondent was found to have been given 100 extra votes as per tally sheet found in the box
  - f. As per Polling Station diary, there was no record of the Valid Votes Cast in respect of Our Lady of Mercy Primary School Polling Station 2.
  - g. In respect of Moi Avenue Primary School Station 7 there were two seals that were different from the time of opening the ballot boxes for Scrutiny.
  - h. The Number of Valid Votes cast in respect to Moi Avenue Primary School Polling Station 7, there were 18 rejected votes but there were no statements on the rejected ballot papers.
  - i. In respect of Our Lady of Mercy Secondary School Polling Station 2, there were no seals as per the polling station diary, could this mean that the box was unsealed before being taken to the Constituency Returning Officer.
  - j. At Our Lady of Mercy Secondary School Polling Station 2, there were no results whatsoever as per the tally sheet found in the ballot box, where did the results in form 35A come from. The Presiding Officer is alleged to have been attacked by a mob and arrested. Where could the ballot papers have come from?



- k. In respect of Parkroad Primary School polling Station 4. Upon recount of the valid votes cast, it was established that one Candidate Simon Mbugua Nganga had been given an extra vote as per the tally sheet in the box.
- l. At Parkroad Primary School Polling Station 4, there were no counterfoils presented for Scrutiny. The question, in the absence of counterfoils where did the ballot papers come from?
- m. In respect of Parkroad Primary School polling Station 8.  
The polling station diary showed the serial No. as 140934 whereas the ballot box showed 121159
- n. In all the ballot boxes presented for scrutiny all polling stations had not accounted for ballot papers save for one – Our Lady of Mercy Primary School Polling Station 2. There were no sealed packed or unsealed ballot papers.
- o. There were no statements of rejected ballot papers in 5 out of the 7 polling stations that were ordered for scrutiny.

### **Issues For Determination**

#### **The agreed issues**

53.

- a. Whether there were irregularities and illegalities committed in the conduct of the member of National Assembly Starehe Constituency in the election held on 9<sup>th</sup> August, 2022
- b. Whether the elections for member of National Assembly, Starehe Constituency held on 9<sup>th</sup> August 2022 was conducted in accordance with the principles laid down in the constitution and the written law relating to elections.
- c. Whether there exists sufficient grounds for nullification of the elections for member of National Assembly Starehe Constituency held on 9<sup>th</sup> September 2022.

#### **(i) Whether there were irregularities and illegalities committed in the conduct of the member of National Assembly, Starehe Constituency held on 9<sup>th</sup> August 2022.**

54. It is submitted that there were profound irregularities, illegalities and blatant non-conformity with the Law that affected the conduct of the election for member of National Assembly, Starehe Constituency.

It is submitted that the 2<sup>nd</sup> Respondent did not deny that she announced the results and declared the winner when tallying had not yet been completed.

Further she admitted in court on relying on the wrong provision of the Law by saying that she relied on regulation 87 (3) (g) of the election of the election (General) Regulation 2012 in her decision to declare the results before completing tallying of all the votes cast. The Scrutiny and recount ordered by the Court did reveal irregularities and illegalities which go to the core of the electoral process.

Further that a presiding officer one Wilson Njogu Njiru in his evidence did state that he inadvertently locked his form 35A in the ballot box and submitted the said box to the 2<sup>nd</sup> Respondent at the tallying Centre but this ballot box was never accounted for.

The absence of two ballot boxes with no proper explanation is deemed to be a serious breach of the Constitution.



That there was anomaly in the results captured in form 35B of Our Lady of Mercy Primary School polling station No.2 where the 4<sup>th</sup> Respondent was given 100 extra votes.

55. It is submitted that the credibility, verifiability and accountability of the elections held on 9<sup>th</sup> August 2022 is called into question.

**(b) Whether the elections for member of National Assembly Starehe Constituency held on 9<sup>th</sup> August, 2022 was conducted in accordance with the Principles laid down in the Constitution and the written Law relating to elections.**

56. It is submitted that Article 81 and 86 of the Constitution and the *Elections Act* 2011 provide for the Principles through which an election in the Country is to be conducted.

Article 81 of the Constitution provides: - “The electoral system shall comply with the following principles:-

- a. Freedom of Citizens to exercise their political rights under article 38;
- b. Not more than two thirds of the members of elective public bodies shall be of the same gender;
- c. Fair representation of persons with disabilities
- d. Universal suffrage based on the aspiration for fair representation and equality of vote; and
- e. Free and fair elections, which are:-
  - i. By secret ballot,
  - (ii) Free from violence, intimidation, improper influence or corruption;
  - (iii) Conducted by an independent body
  - (iv) Transparent and
  - (v) Administered in an impartial, neutral, efficient, accurate and accountable manner.”

57. Article 86 of the Constitution provides:- At every election, the independent Electoral and boundaries Commission shall ensure that:-

- (a) Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent
- (b) The votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station
- (c) The results from the polling stations are openly and accurately collated and promptly announced by the returning officer, and
- (d) Appropriate structures and mechanisms to eliminate Electoral malpractices are put in place, including the safe keeping of election materials.”

It is submitted that the impugned elections failed to meet the threshold as set forth in the Constitution. They were not simple, accurate verifiable, secure, accountable and transparent, free and fair.

58. The Petitioners place reliance in the case of *Odinga & Another Versus IEBC & 2 others: Aukot & another* (interested parties: Attorney General & Another (Amicus Curiae) Presidential Election Petition 1 of 2017) (2017) KCSC 42 (KLR) (Election Petitions) (20<sup>th</sup> September, 2017) *Raila 2017*



where it was held.” of importance are the expectations of transparency, accountability simplicity, security, accuracy efficiency and especially, verifiability of the electoral process.

59. These terms should be understood to refer to:
- a. An accurate and competent conduct of elections where ballots are properly counted and tabulated to yield correct totals and mathematically precise results;
  - b. An election with a proper and verifiable record made on the prescribed forms.  
Executed by authorized election officials and published in the appropriate media,
  - (c) A secure election whose electoral processes and materials used in court are protected from manipulation, interference, loss and damage.
  - (d) An accountable election whose polling station, constituency and national tallies together with the ballot papers used in it are capable of being audited and:-

“ A transparent election whose polling, counting and tallying processes as well as the announcement of results are open to observation by and copies of election documents easily accessible to the polling agents, election observers, stakeholders and the Public and as required by Law, a prompt publication of the polling results forms is made on the Public Portal.”

60. It is submitted that the impugned elections were marred with corrupt and illegal practices, violence, procedural irregularities and illegalities in the declaration of the results, threats harassment and intimidation by the 1<sup>st</sup> Respondents’ officials, threats and harassment by police, illegalities and irregularities in the process of tallying and undue influence by the 3<sup>rd</sup> and 4<sup>th</sup> Respondents on the 2<sup>nd</sup> Respondent to prematurely and illegally announce results, further that there were numerous instances of bribery, violence, threats harassment and intimidation by police officers and the 1<sup>st</sup> Respondents’ officials, undue influence on the 2<sup>nd</sup> Respondent to announce results, and numerous procedural illegalities and irregularities of the form 35 ‘A’s.

The 2<sup>nd</sup> Respondents admission to have announced the results without tallying the results from five polling stations was in total disregard of the Provisions of Article 86 of the Constitution which required her to openly and accurately collate the results from all the polling stations.

Further that upon scrutiny ordered by the court, two ballot boxes were found missing.

61. The Petitioners place reliance in the case of James Omigo Magara – Versus – Manson Onyango Nyamweya & 2 others (2010) e KLR where it was held” “Though I agree with the assertion, I must nevertheless ask myself:-

- (1) How is the will of the electorate manifested?
- (2) Is the court simply to look at the figures and say:-

“ A has 25000 votes and B has 2000 votes and therefore A has won? That would be very basic, and in my view an unrealistic way of looking at the matter.

The court must still ask questions similar to these asked by the learned trial judge.

In which polling station were those votes cast?

Who presided over the poll in the stations?

How many voters were registered in that Station?



How many of them actually voted?

How many votes did each candidate get in each polling station?

I agree with the learned judge that the matter must go beyond simple arithmetic and certain basic questions such as ones listed must be easily answerable. In this appeal those questions were not easily answerable and the party responsible for that position was the 2<sup>nd</sup> Respondent for whose actions the Electoral Commission of Kenya was responsible, the present 3<sup>rd</sup> Respondent took over the Responsibilities of the Electoral Commission of Kenya hence the failures of the 2<sup>nd</sup> Respondent.

Add to the above the missing three ballot boxes whose disappearance the 3<sup>rd</sup> Respondent could not explain, the broken seals on some of the ballot boxes and the attempt to burn down the building in which the ballot boxes were kept and it would indeed be unreasonable to conclude that the appellants 9,832 votes represented the true will of his constituents.

No attempt was made to explain who tampered with the ballot boxes seals and why anyone would want to do that .... An election is not a matter solely between the Winner and the Losers, all the voters in the constituency have a valid interest. ....”

62. Reliance is also placed in the Raila 2017 case on the legitimacy of elections thus:- here in Kenya, the issue of elections as a process was discussed in the case of *Karanja Kabage Versus Joseph Kiuna Kariambagu Nganga & 2 others* where it was observed.” An election is a process that begins with registration of voters, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally declaration of the winner by gazettment. In determining the question of the validity of the election of a candidate, the court is bound to examine the entire process up to the declaration of the results.

The concept of free and fair elections is expressed not only on the voting day but throughout the election process... Any non-compliance with the Law regulating these processes would affect the validity of the election of the member of National Assembly.”

It is submitted that the election for the member of Assembly was conducted in total disregard to the Principles laid down in the Constitution, the [Elections Act](#) and the rules and regulations.

**(c) whether there exist sufficient grounds for nullification of the elections for member of national assembly, starehe constituency held on 9<sup>th</sup> august 2022.**

63. Reliance is placed in section 83 of the Election Act which stipulates that
1. A court shall not declare an election void for non-compliance with any written law relating to that election if it appears that:-
    - a. The election was conducted in accordance with the Principles laid down in the Constitution and in that written Law : and
    - b. The Non-compliance did not substantially affect the results of the election.

64. It is further submitted that the supreme court in Raila 2017 interpreted Section 83 of the Election Act thus:-

In our Respectful view, the two limbs of Section 83 should be applied disjunctively. In the circumstances a Petitioner who is able to satisfactorily prove, either of the two limbs of the section can



void an election. In other words a Petitioner who is able to prove that the conduct of the election in question substantially violated the Principles laid down in our Constitution as well as other written Law on elections will on that ground alone void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the Principles laid down in our Constitution as well as other written Law on elections, it was fraught with irregularities or illegalities that affected the result of the election.

Section 83 was amended to replace the disjunctive “or” with the conjunctive “and” however this said amendment was declared unconstitutional in the case of Katiba Institute and 3 others Versus Attorney General & 2 others Nairobi Petition No.548 of 2017 where it was held:-

There was no Constitutional Compulsion or rational in amending section 83 of the Election Act to remove the disjunctive word “or” and introducing the Conjunctive word “and” so that only where there are failures in complying with the constitution and election Laws and they substantially affect the result should an election be annulled.

Removing the twin test of annulling a faulty election. Results, negates the Principles of Electoral Systems in the Constitution. An allowing such an amendment would be to ignore Constitutional Principles in the transformative Constitution that there should be free fair transparent and accountable elections.”

65. It’s the petitioners contention that the above decision has not been reviewed and or set aside and that the previous stipulation of Section 83 in its dis-functive form is the applicable one.

It’s submitted that the conduct of the election subject matter of this Petition substantially violated the principles laid down in the constitution and in particular Articles 81 and 86, the Election Act and other Written Laws.

66. That the election was not free, fair, simple accurate transparent, verifiable, credible and accountable and that the 4<sup>th</sup> Respondent was not validly elected as the member of National Assembly for Starehe Constituency. That the Petition be allowed as prayed, the election be nullified and fresh ones be ordered.

### **The Respondents submissions**

67. In the introduction, the 4<sup>th</sup> Respondent has cited the un reported case of William Odhiambo Oduol Versus IEBC and others Kisumu Election Petition No.2 of 2013. Where Muchelule -Judge

Observed “An election, by its very nature is a fiercely competitive exercise in which each contestant wants to win. In the campaign the various parties and candidates concentrate their resources – Financial, Political and Personal – on producing victory on the election date.

It is pointed out that none of the candidates in the Starehe Member of National Assembly Election have challenged the election. The three Petitioners have described themselves as voters in the Starehe Parliamentary Elections of 9<sup>th</sup> August 2022.

68. The 4<sup>th</sup> Respondent submits

- a. That some of the submission made and filed by the petitioners in this petition are matters not pleaded in this petition at all and that they lack relevance.
- b. Some of the grounds set out in the petition do not meet the legal threshold for nullification of an election.
- c. Some of the allegations made in the said petition were not founded on any credible evidence



- d. The evidence as adduced by the Petitioners was on multiple occasions admitted by petitioners counsel to have been torn into smithereens when tested in cross-examination.
- e. Some of the allegations made in the petition relied on threadbare evidence that could not reach the evidentiary threshold for nullification of an election outcome.

#### The Burden And Standard Of Proof In Election Petitions

Reliance has been placed in the supreme court case of Odinga & 16 others versus Ruto and 10 others Law society of Kenya & 4 others (Amicus Curiae) Presidential Election Petition E005 (consolidated) 2022 where it was observed:-

“ There is a rebuttable Presumption of the Validity of Election results as declared by the returning officer, nevertheless the body conducting elections has constitutional as well as statutory obligation which it must discharge. That notwithstanding, the legal burden of proof of all allegations in the Petition rests with the petitioner being the person alleging”

It is further submitted by the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Respondents that the supreme court has set down the standard of proof in an election petition to be higher than the balance of probabilities but lower than beyond reasonable doubt – Raila Odinga & 5 others versus IEBC & 3 others (2013) eKLR

Except where there are allegations of electoral malpractices of criminal nature where the standard of proof is beyond reasonable doubt.

#### Issues

69.

- (i) Whether there were any irregularities, Illegalities or non-compliance with the Law in the Conduct of Election of Starehe Constituency Member of National Assembly held on 9<sup>th</sup> August, 2022.
- (ii) Whether the same has been pleaded as required by Law and proven to the required standard
- (iii) Whether the alleged irregularities, illegalities or non-compliance meet the legal threshold to upset the outcome of the election.
- (iv) Whether the petitioners have made out a case for grant of orders sought in the petition; and
- (v) Who will bear the costs?

On the 1<sup>st</sup> issue- whether there were any irregularities, illegalities or non-compliance with the Law in the conduct of the election of the Starehe Member of National Assembly.

70. It is submitted that there were allegations

- a. On the announcement of results without tallying results from five polling stations.

It is submitted that the 2<sup>nd</sup> Respondent did depone (at paragraph 14 of her affidavit) that at the time of declaration of results, 5 polling stations were yet to submit their results.

Further that upon inquiry 3 of the presiding officers had indicated that they had inadvertently locked forms 35As in the ballot boxes while the other two had indicated that they had misplaced their original form 35As during transportation to the tallying Centre.

The 2<sup>nd</sup> Respondent did also testify in court that she had sought consensus from the candidates and their chief Agents to open the ballot boxes so as to retrieve the form 35As but they declined.



71. Further out of the five polling stations, three ballot boxes were retrieved for purposes of scrutiny, from that scrutiny, in one of the polling stations (Parkroad Primary School Station 4 of 10), The original form was found locked in the ballot box, in the two other stations – Moi Avenue Primary School Station 7 of 19 and Parkroad Primary School Station 8 of 10) the polling station diaries captured the presiding officers comments on misplacement of the original forms, carbon copies were in the ballot boxes.

In the three polling stations, the forms 35As and or their carbon copies were properly signed by the presiding officers and agents present which was an indication that vote counting and announcement of the results at the polling station was properly done save for the mistake of locking and or misplacing the form 35A.

72. It is the Respondents submission that the scrutiny report corroborates the 2<sup>nd</sup> Respondents affidavit and evidence as regards the five polling stations. The number of registered voters in the five polling stations is 3,362 and this was not disputed.

It is not in dispute that the 2<sup>nd</sup> Respondent did indicate that the number of registered voters was 3362 and this would not affect the final tally if added to the second candidate with highest votes.

Reliance is placed in the case of Jackton Nyanungo Ranguma Versus IEBC & 2 Others (2018) e KLR para 43 where the court while faced with a similar situation opined:-

“At the end of the day, the failure to record the results of the five polling stations within Kisumu East Constituency on form 73B and form 37C would not in any way affect the results as the Respondent was the winner of the election even assuming that the petitioner would have garnered all the votes in those stations. Applying the provisions of Section 83 of the Act, I find that these irregularities would not have affected the ultimate result given the margin of votes and the fact that the irregularity occurred in only 5 polling stations out of the over 1000 polling stations in the county”

**(a) Mistakes, errors, and irregularities in form 35 As and form 35B**

73.

(i) Issue of one IEBC stamp and non-stamping of forms 35'A'

It is submitted that this issue was dealt with by this court in its ruling delivered on 26/1/2023

(ii) The issue of total valid vote's case not indicated at the polling station count.

This was the case at Pangani Girls High School Station 17 of 19

Labour Office 5 of 11, Our Lady of Mercy Secondary School Station 1 of 10 where the total number of valid vote's cast was not indicated in the polling station count.

It is contended that the valid votes obtained by each candidate, the number of rejected ballot papers and the aggregate total were correctly captured. Further, the said forms were duly signed by the presiding officers and party Agents present.

It is submitted that the omission did not in any way affect the outcome of the election results.

The petitioners had contended that forms 35As in Kenya Polytechnic university station 6 Pangani Girls High School Station 8 Kariokor Social Hall Station 14 and Our Lady of Mercy Secondary Station 8 the total number of valid votes cast was not properly tallied.



74. It is submitted that the number of rejected ballot papers is inadvertently included in the total number of valid votes in the polling station count.

However, the petitioners did admit that the individual results of all the candidates was not affected by this error in forms 35A and 35B, the 2<sup>nd</sup> Respondent in her affidavit and evidence did testify that at the Tallying Centre, she recorded, the number of valid votes obtained by each candidate and the number of rejected ballots directly as recorded in form 35As and independently calculated the total number of votes cast. It is the contention by the Respondents that the wrong tally in form 35As did not affect the outcome of the impugned election

(iii) Allegations of the presiding officer signing forms on different days with the agents

75. Which dates were 9<sup>th</sup> August and 10<sup>th</sup> August 2022. It is submitted that one witness who was a presiding officer one Vivian Awino did present the explanation that voting took place on 9<sup>th</sup> August 2022 and the process continued upto the following day without breaking and hence the error on dates which was not deliberate.

(iv) Allegations of unauthorized agents signing forms 35As and 35B.

76. The Petitioners contention is that the final form 35B was signed by an impostor on behalf of UDA Candidate

The 2<sup>nd</sup> Respondent in her affidavit did tender evidence to the effect that George Karanja was the liaison person between her and the UDA Candidate and that the said George Karanja was introduced to her by the UDA Candidate:-

The UDA Candidate was not called to testify on the issue.

The petitioners also contend that in a number of polling station the form 35 As were signed by unauthorized agents or agents whose political parties did not have a candidate in the election.

The Respondents place reliance in the case of Dickson Mwanda Githinji. Versus Gatirau Peter Munya & 2 others (2014) e KLR

Where it was held:

“In the instant case, the net effect is that the appellant has not shown that the total number of votes cast for each candidate was materially affected by the presence or absence of agents signatures on form 35s subject to the testimony of DW10, we find that the appellant has failed to point out and prove that an irregularity of Law occurred as to the signatures appended on forms 35s, 36s and this irregularity materially affected the result.”

Alleged Election offences and Malpractices of Criminal Nature committed during the election of member of National Assembly for Starehe Constituency held on 9<sup>th</sup> August, 2022.

77. The petitioners made several allegations against the Petitioners themselves or through their agents committed in the nature of electoral offences.

### **Voter bribery**

78. It is submitted that the standard of proof is beyond reasonable doubt.

Allegations by Scholastica Wanjiru Alube. Issue of bribery reported to her by other voters. She did not witness the act, hence this was hearsay evidence. She did not know the political inclination of these committing the bribery offence.



Hussein Suleiman. Had in his affidavit deponed that the bribery was committed by police and area chief. He testified that this was reported and 1<sup>st</sup> Respondents officials asked the culprits to leave the polling Centre. He had testified that these people were associates of the 4<sup>th</sup> Respondent but he did not know their names or political affiliations.

Stephen Mwangi had deponed at para 16 – 21 of incidences of bribery. Persons handing out bribes at the polling Centre. Their identities not known identity of voters being bribed not known. Stanley Kyalo, James Kuria and Mburu Mwangi.

They alleged incidences of intimidation. The affidavits do not indicate so.

Kyalo Muli had alleged that there were corrupt practices within Moi Avenue polling station and pointed out an officer of the 1<sup>st</sup> Respondent who had asked him to vote for the 4<sup>th</sup> Respondent but he refused.

3<sup>rd</sup> petitioner's witnesses, David Kasina, Girland Ndirangu and Obed Mogaka did testify of the presence of a man with a dust coat bearing the names of the 4<sup>th</sup> Respondent at a polling Centre who was later removed from the premises. Nothing more. No nexus was drawn between the alleged bribery and the 4<sup>th</sup> Respondent whether the recipients of the alleged bribes if any were voters.

### **Alleged Violence**

79. Michael Mbanya Waithigo did allege (at para 24 of his affidavit) and in his testimony that on 5/8/2022 prior to the Election day he did see a group of youth vandalizing other candidates posters and that they assaulted him in the presence of 4<sup>th</sup> Respondent but he did concede that he did into report the matter to IEBC.

80. The Respondents place reliance in the Supreme Court case of Sammy Ndungu Waita Versus IEBC & 3 others (2019) e KLR Where it was held:- "Pre-election disputes are to be resolved as provided under the Constitution by the IEBC or where applicable by PPDT. Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute and chooses through any action or omission not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election court.

81. It is submitted that the alleged incidence cannot be a ground upon which an election can be challenged. There were allegations that there was violence at the Tallying Centre on 10<sup>th</sup> and 11<sup>th</sup> of August 2022. It is submitted that there no evidence tendered to prove existence of violence nor was there interruption at the tallying Centre. All the result at the polling stations were the ones announced at the tallying Centre.

It is the Respondents Submissions that the alleged violence if any did not substantially affect the exercise of voters rights under Article 38 of the Constitution and the Results of the election.

### **Whether the alleged illegalities, Irregularities or non-compliance meet the legal threshold to upset the outcome of the election.**

82. It is submitted that save for our lady of Mercy Secondary School Station 2 of 10 (which was sufficiently explained) no witness testified to the effect that whatever result that was entered in form 35A was not the result found in Counting of ballots and the results announced at the polling Centre or captured in form 35 B

Reliance is placed in the court of appeal case of Martin Nyaga Wambora Versus Lenny Maxwel Kivuti & 3 others (2018) eKLR where it was appreciated that procedural and administrative errors are inevitable



in any election and “If elections can easily be annulled on the basis of administrative errors, Public Confidence in the finality and legitimacy of election results will be eroded”

83. It is submitted that form 35B clearly shows the summary of results from various polling stations and was signed by all agents present save for Our Lady of Mercy Secondary School Station 2 of 10, the results tally with the entries in forms 35A hence verifiable.

Section 83 of the Election Act recognizes the sanctity of the right of people to choose their political leaders. Errors and irregularities, or the non-compliance with election Law must be of such gravity that the integrity of the election is materially compromised.

Reliance is placed in the Supreme Court case in *Gatirau Peter Munya Versus Dickson Mwenda Githinji* (2014) eKLR.

Where it was acknowledged the practical reality that imperfections in the electoral process are expected that elections are conducted by Human beings under stressful circumstances and therefore mistakes do sometimes occur.

It follows that an election court should not lightly overturn the election, especially where the results substantially reflect the will of the voters and where neither a candidate nor voters have engaged in any wrong doing.”

84. In the Supreme Court Petition 21 of 2018 *Gedion Sitehu Konchellah Vs Julius Lekakeny Sunkuli & 2 others* 2018 e KLR, it was held:-

“Irregularities in the conduct of an election should not lead to annulment, where the election substantially complied with the applicable Law, or that the Results of the election are unaffected”

In *Nathig Juma Adan Versus Abdikhaim Osman Mohamed & 2 others* Supreme Court Petition No.12 of 2014 it was held:-

“As to the effect of irregularities and the point at which a court should overturn an election, we state that courts must only act on ascertained facts, not conjecture, and must demonstrate how the final statistical outcome has been compromised.

85. Recently in *Raila 2022* the Supreme Court addressed the issue of anomalies thus:-“The reasons for irregularities were plausible it had not been established that those minor infractions and errors were of a magnitude that would lead to a different result from that declared by IEBC. There was no difference between forms 34As uploaded on IEBC public portal, those received at NTC and those issued to the candidates agents in the polling station”

### **Whether The Petitioners Have Made Out A Case For Grant Of The Orders Sought In The Petition**

Reliance is placed in the Supreme court decision in *Gatirau Peter Munya Versus Dickson Mwenda Githinji* 2014 e KLR where it was held:-

“An election that was substantially conducted in accordance with the Principles of the Constitution and *elections Act* that, election should not be invalidated only on grounds of irregularities, it can only be invalidated if it is shown that the irregularities were of such magnitude that they affected the election result. As such procedural or administrative, irregularities and other errors occasioned by human imperfection are not by and of themselves to vitiate an election”



Raila 2017 made reference to Section 83 of the *Elections Act* which is to the effect that no election should be voided for non-compliance with any written law relating to elections if it appears that the election was conducted substantially in accordance with the Principles laid down in the Constitution and Written Law, or that the non-compliance did not affect the results of the election”

86. It is submitted that the Petitioners did not adduce evidence to the effect that the elections were conducted contrary to the principles set out in the constitution and that if there was non-compliance with the Law and regulations affected the results of the election.

### **The Scrutiny Report**

87. The order for scrutiny and recount was made by the court in respect to 7 polling station on 26 January, 2023 and it was carried out on 31<sup>st</sup> January, 2023 and the report produced in court on 3<sup>rd</sup> February, 2023.

a. It is submitted that although two ballot boxes were not availed during the scrutiny it does not in any way show that the election was flawed.

88. During the scrutiny exercise a total of 258 ballot boxes were retrieved from the warehouse. This presents the total number of polling stations within Starehe Constituency, save that there was difficulty in retrieving the two ballot boxes by way of the serial numbers as captured in the polling station diaries. This could have been as a result of arrangement challenges and possible mis-serialization of the ballot boxes. Further that the polling station diaries were conclusive proof that the elections were conducted in all the polling station the 2 included.

The Petitioners had alleged that the 4<sup>th</sup> Respondent was given an extra 100 votes at Our Lady of Mercy Primary School Polling Station 2.

89. It is the Respondents contention that this was not a correct finding because:-

The number of counterfoils of used ballot papers did correspond with the total votes cast in the said polling station. It is contended that from the number of counterfoils used 300 ballot papers were used but on counting the votes cast only 200 were present. The ballot paper control annexed to the scrutiny report shows that 299 ballot papers had been issued at 1700 hours. This shows that the count during the scrutiny was deficient by 100 votes and it's not logically correct to allege that the difference of 100 votes captured in the tally sheet were extra votes.

90. Secondly, that this was the only ballot box where they encountered a sealed envelope marked “unused ballot papers”

There was no consent to unseal and open it for scrutiny. During the recount the 4<sup>th</sup> Respondent was found to have received 79 votes instead of 179 votes which had been recorded.

In respect to Moi Avenue Primary polling station 7 the Petitioners submitted that there were additional seals on the ballot box.

The parties' representatives had placed their seals at the warehouse during the retrieval of the ballot boxes.

In Parkroad Primary School polling station 8, the 1<sup>st</sup> petitioner's submission states that the serial number of the Ballot box was found to be different during scrutiny from what was recorded in the polling station diary.



91. It is submitted by the Respondents that in the polling station diary. It was indicated that the Serial Number for member of National Assembly box was 121159. The serial number 140934 referred to by 1<sup>st</sup> Petitioner is for women Representative box as indicated in the diary.
92. It is submitted that from the scrutiny and recount the findings were so minimal to warrant nullification of the results of the election Reliance is place in the court of appeal case of Martin Nyaga Wambora Versus Lenny Kivuti & 3 others (2018) e KLR where it was held:- We think there was no basis to say that failure to seal used ballot papers and counterfoils of used ballot papers in 12 ballot boxes whose ballot booklets could not be located, and the alleged excess of 111 ballot papers, were irregularities of such magnitude that they seriously undermined and affected the election result.”
93. Further that in Raila 2013 the Supreme Court had ordered scrutiny of all 33,400 form 34As in the country but unfortunately scrutiny only happened for 13,000 forms. Further, it was found that forms from station were missing. The court also ordered for re-tallying of results in 22 stations. It was found that 5 polling station out of 22 (which had been scrutinized) had discrepancies as to the number of votes cast as reflected in form 34 and 36. In addition the aggregate result of form 36 voters from 76 constituencies were missing.

The court held:- “In Summary, the evidence, in our opinion, does not disclose any profound irregularity in the management of the electoral process, nor does it gravely impeach the mode of participation in the electoral process by any of the candidates who offered himself or herself before the voting public. It is not evidence on the facts of this case, that the candidate declared as the president-elect had not obtained the basic vote-

Threshold justifying his being declared as such”

It is submitted that there is nothing in the scrutiny report to show that the election was not conducted in accordance with the principles laid down in the constitution and the electoral Laws. That the errors have been explained and do not affect the integrity and outcome of the election.

The Respondents prayer is that the petition be dismissed with costs of Kshs 6 million.

### **Issues for determination by this court**

94. The agreed issues are:-
  1. Whether there were any Irregularities, Illegality or non- Compliance with the Law in the Conduct of the election of the Starehe Constituency Member of National Assembly Ltd on 9<sup>th</sup> August 2022.
  2. Whether the same had been pleaded by Law and proved to the required Standards.
  3. Whether the alleged Irregularities, illegality or non-compliance meet the Legal threshold to upset the outcome of the elections.
  4. Whether the Petitioners have made out a case for grant of the orders sought in the petition.
  5. Who will bear the costs?

### **Analysis**

95. Before delving into the exercise of analysis deem it important to bear in mind the standard of proof in Election Petitions.



The Supreme Court in the Presidential Election No.E005 of 2022 Raila Odinga & 10 others Versus Ruto & 10 others held:-

“There is a rebuttable presumption of the validity of election results as declared by the Returning Officer, never the less, the body conducting elections has a constitutional as wide as a Statutory obligation which it must discharge, that notwithstanding the legal burden of proof of all allegations in the petition rests with the Petitioner being the person alleging.

The Supreme Court in the case of Raila Odinga & 5 others Versus IEBC & 3 others (2013) e KLR did set out the burden of proof in an election petition to be higher than on the balance of probabilities but lower than beyond reasonable doubt except, however, where allegations of malpractices of criminal nature are made, the Standard of Proof is beyond reasonable doubt.

**i. Whether there were any irregularities, illegalities or non-compliance with the Law in the conduct of the Election of the Starehe Constituency Member of National Assembly held on 9<sup>th</sup> August, 2022.**

96. It is the Petitioners’ contention that there were many irregularities, illegalities perpetrated by the Respondents as shown in the petition, the affidavits and evidence adduced in court by the witness.

a. The announcement of results without tallying results from the five polling stations

97. It is the petitioner’s contention that the 2<sup>nd</sup> Respondent was influenced and announced the results before the tallying process was completed and before discharging her constitutional mandate to ensure that results from the polling stations are openly and accurately collated promptly and announced by the Returning Officer. It is further contended that her act was contrary to the requirements and stipulations laid down in Article 86 (b) and (c) of the Constitution and Regulation 83 (1) of the Election (General) Regulation 2012.

The 2<sup>n</sup> Respondent at paragraph 14 of her affidavit did admit that at the time of declaration of results, 5 Polling Stations were yet to submit theirs.

She inquired and was informed that 3 of the Presiding Officers out of the five polling stations had locked form 35 As in the ballot boxes while the other two indicated that they had misplaced their original forms during transportation to the Tallying Centre.

In her testimony before the court she insisted that she had sought consensus from the candidates and their agents but they declined to allow the opening of the affected ballot boxes.

98. It is the Respondents contention that after the court ordered for scrutiny and recount, out of the five polling stations, three ballot boxes were retrieved for scrutiny. From the scrutiny report in one of the polling stations (Parkroad Primary School Station 4 of 10) the original form 35A was found locked in the ballot box.

99. While the other two stations (Moi Avenue Primary School Station 7 of 19 and Parkroad Primary School Station 8 of 10) the polling station diaries were recovered which captured the presiding officers comments on misplacement of the original forms and carbon copies. That in all the three Polling Stations the said forms 35 As or their carbon copies were properly signed by the Presiding Officers and agents present.

100. The Petitioners have placed reliance on the case of James Omigo Magara Versus Manson Onyango Nyamweya & 2 others 2010 e KLR where it was held:- “Though I agree with the assertion I must nevertheless ask my self



1. How is the will of the electorate manifested
2. Is the court simply to look at the figures and say:-

‘A’ has 25000 votes and B has 20,000 votes therefore ‘A’ has won?

That would be very basic and an unrealistic way of looking at the matter. The court must ask questions similar to those asked by the Judge.

In Which Polling Stations were those Votes Cast? Who presided over the poll in the stations? How many of them actually voted? How many votes did each Candidate get in each polling station?...”

In the case cited by the Respondents of Jackton Nyamungo Ranguma-Versus-IEBC & 2 others 2018 at Paragraph 43 It was held:- “At the end of the day, the failure to record, the results of the five Polling Stations within Kisumu East Constituency on form 73B and for 37c would not in any way affect the results as the Petitioner was the Winner of the Election, even assuming that the petitioner would have garnered all the votes in those stations. Applying the provision of Section 83 of the Act, I find that these irregularities would not have affected the ultimate result given the margin of votes and the fact that the irregularity occurred in only 5 Polling Stations out of over 1000 polling stations in the County.”

The court of appeal did observe that at (Paragraph 90) in our considered view, unless expressly authorized by Law, the Presiding or Returning Officer can only declare results once the results of all Polling Stations have been received.

It is an irregularity to declare partial results, failure to include results from all polling stations may vitiate the Election if such failure affects the results of the election.

The court proceeded further at Paragraph 91 to observe” on our part, persuaded by the soundness of the reasoning in Josiah Tarayia Kippellan Kores & another Versus Joseph Ole Lenku & 4 others 2018 e KLR and convinced of the sound reasoning by the Judge we find that the Trial Court did not err in finding that failure to include the results from the five polling stations did not Vitate the result of Kisumu County Gubernatorial Elections. We hasten to add that whereas the 2<sup>nd</sup> Respondent admitted to failure to include the results from the five Polling Stations, it is our considered view that given the margin between the Winner and runner up the will of the people of Kisumu County was loudly and clearly stated in electing the 3<sup>rd</sup> Respondent as the Governor elect and the peoples will was not vitiated and rendered a nullity by failure to include the results of the five Polling Stations in the final results.”

101. I find that the Ranguma case is in all fours with the present petition.

The results that were not recorded before the final announcement were for five Polling Stations. The Returning Officer clearly admitted the Omission of the results of the five polling stations before final announcement.

102. In the present petition the 2<sup>nd</sup> Respondent did make an attempt to explain the reasons behind non-inclusion of the results of the five Polling Stations before the announcement and declaration of the 4<sup>th</sup> Respondent as the Winner. Those reasons I find are Plausible.

- b. Mistakes errors and irregularities in form 35As and form 35 B

103. Issue of one stamp faint IEBC and non-stamping of forms 35As. This issue is a non-starter as this Court loudly pronounced itself in its Scrutiny ruling dated 26 January, 2023.



Total Votes Cast not Indicated at the Polling Station Count

104. It is the petitioners' contention that the total Vote Cast at Pangani Girls High School Station 17 of 19, Labour Office 3 of 11 and Our Lady of Mercy Secondary Station 1 of 10 were not indicated in the Polling Station Diary.

105. The Respondents Contend that all the said forms at the (Number of valid Votes Cast in favour of each Candidate) the respective number of Valid Votes obtained by each Candidate, the number of rejected ballot papers and the aggregate total were recorded. Further the said forms were duly signed by the Presiding Officers and the party Agents present. The omission if any did not affect the results. Total valid votes cast wrongly tallied in the polling count.

This is alleged to have taken place at Moi Avenue Primary School Station 11. Kenya Polytechnic University Station 6. Pangani Girls High School Station 8, Kariokor Social Hall Station 14.

Our Lady of Mercy Secondary Station 8.

The Respondents Content that from all the forms the difference between the two figures alleged to be inconsistent is the number of rejected ballot papers. The number of rejected ballot papers was inadvertently included in the total number of Valid Votes in the Polling Station Counts table.

106. It is also contended by the Respondents that the petitioners did admit that the individual results of all the Candidates were not affected by the error in the forms 35 As or 35B. No evidence of disenfranchisement of any Candidate.

Further the 2<sup>nd</sup> Respondent did testify that at the Tallying Centre she did record the number of Valid Votes obtained by each Candidate and the number of rejected ballots directly as recorded to form 35A and calculated the totals independently of the Valid Votes Cast.

Allegations of Presiding Officers signing forms on different days as form those of the agents.

107. The Petitioners did raise this complaint as regards Several Polling Stations where the Presiding Officers did sign forms on different dates from the agents. The two conflicting dates are the 9<sup>th</sup> and 10<sup>th</sup> of August, 2022.

Vivian Awino Respondents witness did testify that the confusion arose from the fact that the elections took place on 9<sup>th</sup> August, 2022 and the process continued to the following day. She denied the allegation that the Presiding Officers Signed the forms before the counting of votes was done.

Un authorized Agents Signing Forms 35A's and 35 Bs

108. The petitioners did allege that the final form 35B was signed by an Imposter on behalf of the UDA Candidate.

The 2<sup>nd</sup> Respondent did produce evidence to the effect that George Karanja was the liason Man between herself and the UDA Candidate. She further testified that the said George Karanja was personally known to her as he was introduced to her by the UDA Candidate. The allegation of an Imposter was made by one Michael Mbanya. It is instructive to note that the UDA Candidate himself did not present any evidence on the alleged Imposter.

109. In the case of Gatirau Peter Munya Versus Dickson Mwanda Githinji (2014) e KLR, the court held:-  
"In the instant case, the net effect is that the appellant has not shown the total number of Votes Cast for each Candidate was materially affected by the presence or absence of agents signatures on form 35 S subject to the testimony of DW 10, we find that the Appellant has failed to point out and prove



that an Irregularity of Law occurred as to the Signature appended on form 35s and 36s and that this irregularity materially affected the results”

## **Electoral offences.**

### **Voter Bribery**

110.

- (a) Alleged bribery at Labour Office witnessed by Obed Mogaka.

In his evidence Mogaka did confirm that he did not know the names of the women who were bribing voters. He did not know the voters being bribed. He did not take photographs of the alleged woman. No exhibits were produced

- b. Kariokor Social Hall as witnessed by Scholastica Wanjiku Alube . She testified to have bene arrested by Police and upon return mastered courage and returned to Kariokor Social Hall. She denied that in her affidavit she had deponed that she found the Polling Station locked as voting had come to a close. In her evidence it was an MCA who was dishing out money.

The nexus between the MCA and the 4<sup>th</sup> Respondent is not indicated and or shown.

Pumwani Primary School as witnessed by Scholastica Wanjiku Alube.

The witness claimed to have witnessed another incidence of Voters Bribery.

Mwariro Market and Pangani School witnessed by Hussein Suleiman. Allegation that bribes were issued by uniformed Administration Officers.

Uniformed Administration Police Officers fall under the National Police Service which is an Independent Entity.

It was the Respondent’s contention that there was no Joinder of Parties to include that institution.

The said witness did not state the name of the Chief issuing the bribes, the names of the agents of the 4<sup>th</sup> Respondent alleged to have participated in the Voters Bribery.

Ainsworth Primary – Witnessed by the Ward Manager Stephen Mwangi.

The witness testified that he did not know the names of the three persons who were dishing bribes. They were not in the company of the 4<sup>th</sup> Respondent. He claimed that there was a red card – which was allegedly issued together with the alleged bribes and voters asked to take photos of the ballot paper. The identity of the voters allegedly bribed was not disclosed.

111. The allegation of voter bribing is a Criminal Offence. The burden of proof is on the Petitioner to prove it beyond reasonable doubt. The evidence adduced falls for short of the degree required. There was no proper identification of those allegedly giving the bribes and the recipients. No photographs were produced in court of the same.

The bribes were alleged to have been in the form of money. It was not clearly established in what denomination the currency was. There was not a single exhibit produced in court to corroborate the allegations of bribery. The allegations of bribery remain just that.



### **Alleged violence**

112. Michael Mbanya Waithigo alleges that on the 5<sup>th</sup> August, 2022 prior to the election day, he witnessed a group of Youths Vandalizing other Candidates posters and that the youths assaulted him in the presence of the 4<sup>th</sup> Respondent.

Michael Mbanya did not report this incident to IEBC.

In the Supreme Court Case of Summy Ndungu Waity –Versus- IEBC & 3 others (2019) e KLR it was held:-

“That pre-election disputes are to be resolved as provided under the Constitution by the IEBC or where applicable by PPDT, That where a person knew or ought to have known of the facts forming the basis of a pre-election dispute and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a Petition to an election court”

113. It is abundantly clear that the alleged violence took place on the 5<sup>th</sup> day of August, 2022 which was before the date of election 9<sup>th</sup> August, 2022. The Petitioners are therefore barred from making it a ground in this petition.

### **Alleged violence at the Tallying Centre.**

114. It has not been made clear what kind of violence this was and against whom or was it intimidation against the 2<sup>nd</sup> Respondent so as to announce the results before the final tally?

Even if there was violence at the tallying Centre could it have substantially affected the results?

The court of appeal in the case of IEBC –Versus – Maina Kiai &5 others (2017) e KLR held:-

“Since the first level of declaration of results is at the Polling Station, those results should be final and should only be challenged in a court of Law: that the form filled out for the declaration of results at the polling station should be the Primary Election form and all other forms can only be tallies of the final results rather than confirmation forms”

115. I am of the considered view that the alleged violence at the Tallying Centre could not have affected in any way the results of the election as declaration of results at the Polling Station are the determinant factor.

(ii) Whether the alleged Irregularities, Illegalities or Non-compliance meet the legal threshold to upset the outcome of the election.

116. In the case of Martin Nyaga Wambora Versus Lenny Maxwell Kivuti & 5 others it was held:-

“Procedural and Administrative errors are inevitable in any election and if elections can easily be annulled on the basis of administrative errors public confidence in the finality and legitimacy of election result will be eroded.”

The Supreme Court in the case of Gatirau Peter Munya Versus Dickson Mwenda Githinji & 2 others opined that:-

Elections are conducted by human beings under stressful circumstances and therefore mistakes do sometimes occur.



The Supreme Court also in the case of *Gedion Sitelu Konchella Versus Julius Lekakeny Sunkuli & 2 others* (2018) e KLR held:-

“Irregularities in the conduct of an election should not lead to annulment, where the election substantially complied with the applicable law, or that the results of the election are unaffected.”

(iii) Whether the Petitioners have made out a case for grant of the orders sought in the Petition.

In the Supreme Court case of *Gatirau Peter Munya* case, held:- Where an election is substantially conducted in accordance with the Principles of the Constitution and *Elections Act*, then such an election is not to be invalidated only on grounds of Irregularities. It can only be nullified if it is shown that such Irregularities were of such magnitude that they affected the election results, procedural or administrative irregularities and other errors occasioned by human imperfections are not by and of themselves, to vitiate an election.”

117. In the *Raila 2017* case reference was made to Section 83 of the *Elections Act* which provides:-

“That no election should be voided for non-compliance with any written law relating to elections if it appears that the election was conducted substantially in accordance with the principles laid down in the constitution and written law or that the non-compliance did not affect the results of the election.

The Petitioners did establish that there were Irregularities, Illegals and Non-compliance but it was not proved that they were of such magnitude that they affected the election results.

### **The Scrutiny Report**

118. It is not in dispute that two ballot boxes were not accounted for after the Scrutiny. These were from Pangani Station 8 of 19 and the other one from Pumwani Polling Station 5. It was incumbent upon the 1<sup>st</sup> Respondent to explain the where about of these two ballot boxes. During the Scrutiny 258 ballot boxes were retrieved but those for Pangani and Pumwani were not found.

The reason given is that this was because of arrangement challenges at the Warehouse and possible mis-serialization.

The polling station diaries were conclusive proof that elections were conducted in all polling stations.

119. The Petitioners had alleged that the 4<sup>th</sup> Respondent was given an extra 100 votes at Our Lady of Mercy Primary School Polling Station 2.

The explanation by the Respondents is that this is not the correct position. It is explained that the difference in the count of votes reflects the missing 100 votes in favour of the 4<sup>th</sup> Respondent which by no doubt were sealed envelopes that was not opened.

As for Moi Avenue Primary School Station 7. It is submitted that there were additional seal which were placed by the Parties at the Warehouse during retrieval of the ballot boxes.

Parkroad Primary School Polling Station 8. The Petitioners allege that the Serial number of the ballot box was found to be different during scrutiny and recount from the one recorded in the Polling Station diary.



### Explanation by the Respondents.

120. In the polling station diary it was indicated that the Serial Number of the ballot box for member of National Assembly was 121159. The Serial No.140934 referred by the Petitioners was the one for the Women Representative as indicated in the polling station diary.

The court of appeal in the case of Martin Nyaga Wambora Versus Lenny Maxwell Kivuti & 3 others 2018 eKLR as regards Irregularities upon Scrutiny noted:- “ We think that there was no basis to say that failure to seal used ballot papers and counterfoils of used ballot papers in the ballot boxes, failure to locate some forms 37A in the ballot boxes, the presence of ballot papers in 12 ballot boxes whose ballot books could not be located and the alleged excess of 111 ballot papers, were irregularities of such magnitude that they seriously undermined and affected the election result.”

In the Raila 2013 case the Supreme Court had ordered re-tallying of result in 22 stations .....

.....It was found that 5 polling stations out of 22 (which had been scrutinized) had discrepancies as to the number of votes cast as reflected in form 34 and 36 in addition, the aggregate results of Form 36 voters from 75 constituencies were missing”

The court held:-

“ In summary, the evidence, in our opinion, does not disclose, any profound irregularity in the management of the Electoral process, nor does it gravely impeach the mode of participation in electoral process by any of the Candidates who offered himself or herself before the voting public. It is not evidence on the facts of this case, that the candidate declared as the president –elect had not obtained the basic vote.”

121. As to whether there were illegalities irregularities the court finds that they did exist in the conduct of the election of the member of National Assembly for Starehe.

These can be termed as procedural or administrative, irregularities, illegalities and errors. They were not of such magnitude such that they seriously undermined and affected the election results.

122. I am satisfied that the election was conducted substantially in accordance with the Principles laid down in the Constitution and written law, the non-compliance did not affect the results.

123. I find that the Election Petition has no merit and it is dismissed with costs to the Respondents.

124. It is instructive to note that this Election Petition was filed by voters. It had its fair share of interlocutory application mostly at the behest of the Petitioners.

125. I accordingly tax and allow costs in the sum of Kshs 4 million.

Ksh 3 million to the 4<sup>th</sup> Respondent, Ksh 1 million to the 1<sup>st</sup> and 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

**JUDGMENT DELIVERED, DATED AND SIGNED AT NAIROBI THIS 7<sup>TH</sup> DAY OF MARCH, 2023.**

**HON. JUSTICE M. MUYA**

JUDGE

In the presence of:

.....1<sup>st</sup> Petitioner

.....2<sup>nd</sup> Petitioner



.....3<sup>rd</sup> Petitioner  
.....1<sup>st</sup> Respondent  
.....2<sup>nd</sup> Respondent  
.....3<sup>rd</sup> Respondent  
.....4<sup>th</sup> Respondent  
Court Assistant:.....  
30 days R/A.

