



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ELECTION PETITION NUMBER 6 OF 2017

IN THE MATTER OF ELECTIONS ACT, NO. 24 OF 2011 LAWS OF KENYA

AND THE ELECTIONS (GENERAL) REGULATIONS, 2012 AND

ELECTIONS (PARLIAMENTARY AND COUNTY) PETITIONS RULES 2017

AND

IN THE MATTER OF SENATORIAL ELECTIONS FOR KISII

COUNTY, COUNTY NO. 45, HELD ON 8TH AUGUST 2017

CHARLES OBARA ORITO.....1ST PETITIONER

GEORGE OGAKI PIUS.....2ND PETITIONER

VERSUS

1. THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

2. ROBERT ISAAC SIDNEY NAMULUNGU

3. SAMSON ONGERI KEGENGO.....RESPONDENTS

JUDGMENT

Background

1. General elections were conducted on the 8th August, 2017 on which date, voters in the entire country, Kisii County included, went to vote for among other elected leaders, their Senator, and when the results were declared, the 3rd Respondent emerged the winner and was declared the duly elected Senator.
2. The Petitioners herein were registered voters in Kisii County during the said elections in which the votes garnered by each of the candidates as declared by the 2nd Respondent were as follows:

N O	NAME	V O

		T E S
a.	SAMSON ONGERI KEGENGO	18 3, 37 5
b.	JAMES OMINGO MAGARA	11 8, 68 8
c.	CHARLES NYACHAE AYACKO	71 ,7 47
d.	SAMWEL OKEMWA	4, 37 6
e.	RICHARD ATEMBA	9, 66 9
f.	VINCENT MOSE	2, 49 8
g.	RICHARD MOKUA	4, 37 6
h.	BENAYO NYAMWENGA	1, 69 1
i.	KENNEDY MOMANYI	2, 68 4
	ISAAC MOKUA	3,5 92
	JUSTUS OOGA	2,7 49
	TOTAL	405 ,44 5

3. The above results show that the margin of votes between the 3rd respondent over the runners up, James

Omingo Magara, was 64,687 votes.

The Parties

4. The petitioners herein, CHARLES OBARA ORITO and GEORGE OGAKI PIUS, describe themselves as residents of South Mugirango and registered voters for purposes of taking part in 8th August, 2017 elections in Kisii County. They filed this petition on 5th September, 2017.

5. The 1st respondent is the Independent Electoral and Boundaries Commission (hereinafter "IEBC"), an Independent Commission established under **Article 88** as read with **Articles 248 and 249 of the Constitution of Kenya 2010**, which has the constitutional mandate to conduct elections to all the elective offices established under the Constitution. The 2nd respondent is the Returning Officer duly appointed by the 1st Respondent in respect to the elections in Kisii County while the 3rd respondent was one of the candidates in the Kisii County Senatorial elections under the ticket of Orange Democratic Movement Party (hereinafter "ODM") who was declared the winner of the Senatorial seat through gazette notice number 7847 dated 16th August 2017.

The Petition

6. The petitioners were aggrieved with the above stated results of the Kisii senatorial elections and in their said petition dated 5th September, 2017 challenged the declaration of the 3rd respondent as the duly elected Senator of Kisii County and sought the following reliefs:

a. A declaration that the non-compliance, irregularities and improprieties in the impugned election for Senator Kisii County were substantial and significant that they affected the integrity and quality of the election and the result thereof.

b. A declaration that the 3rd Respondent was not validly elected to the position of senatorial election in Kisii County and that the declaration of the results is invalid, null and void;

c. An order directing the 1st Respondent to organize and conduct a fresh senatorial election in Kisii County in strict conformity with the Constitution and the Elections Act, 2011;

d. The Respondents be condemned to pay your Petitioner's costs of this petition; and

e. Such further, other and consequential orders as this Honourable court may lawfully make.

7. The reliefs sought are intended to void the 3rd respondents said election. The petition is supported by the 1st petitioner's affidavit sworn on 4th September 2017.

8. The petitioners have, in their petition and affidavit in support thereof, set out several complaints ranging from grave errors, flaws, fraud, irregularities and illegalities which they allege were committed by the respondents and which they state, constituted fundamental contraventions of the letter, spirit and objects of the Constitution of Kenya and they further accuse the respondents of failing to ensure a free, fair and credible elections that reflects the will of the people of Kisii County. According to the petitioners, the contravention by the respondents of the Constitution and the laws governing elections related to the following matters:

a. Lack of credible voters' register.

b. Differences in the number of votes cast in the 6 elections.

c. Votes cast more than the number of registered voters.

d. Striking coincidences and incredible figures

e. Use of Kisii County Government employees by the 3rd respondent to further his political interest.

9. The Petitioners claimed that there was no credible voters' register for the purposes of the 8th August 2017 polls in Kisii County and that the voters' register was manipulated with a view to undermining the integrity of the senatorial election in favour of the 3rd respondent. The petitioners further stated that the total number of registered voters in various constituencies in Kisii county varied significantly in the statutory forms returning the results in the 6 elections which, they claimed, had a pattern of two varying entries as numbers of registered voters in several polling stations and which, according to the petitioners, was an indisputable indicator that the voters roll had been tampered with and the number of voters inflated to favour the 3rd respondent in many polling stations. They highlighted a total of 184 polling stations, in Schedule 1 attached to the petition, which they claimed had different figures as the registered number of voters. The petitioners argued that the difference in the numbers of voters in the register undermined the integrity of the said elections.

10. On the issue of difference in the number of votes cast in the 6 elections, the petitioners argued that since every voter in the said elections was issued with 6 ballot papers, it followed that the difference in the 6 elections could not be as big as was shown in the statutory forms and maintained that the argument that there were instances of stray ballots could not account for the wide margins.

11. On the issue of votes cast being more than the total number of registered voters, the petitioners claimed that there were instances of some polling stations reporting results showing more valid votes cast than the number of registered voters in those polling stations. The petitioners also claimed that there were striking coincidences and incredible figures and stated that it was scientifically, mathematically, and humanly impossible for the number of votes garnered by all the candidates including the number of rejected votes to remain consistently similar for two streams of the same polling station. The petitioners particularized the polling stations with alleged the striking coincidences in Schedule 4 attached to the petition.

12. Lastly, the petitioners claimed that the 3rd respondent engaged the services of one Naftali Obwocha, a public officer employed in the Health Department of Kisii County Government, as his agent during the elections contrary to the provisions of **Section 15 (1) (a)** of the **Election Offences Act** and **Section 23 (3) (a)** of the **Leadership and Integrity Act**.

Responses

13. Pursuant to **Rule 11(1)** of the **Elections (Parliamentary and County Elections) Petition Rules, 2017** (hereinafter "the **Election Petition Rules 2017**"), the Respondents filed their respective responses and replying affidavits. The 1st and 2nd respondents filed replying affidavits of **Moses Daula, Okeyo J. Meja, Amosi N. Chilai, Imbo Hilda Akumu and Robert Isaac Sidney Namulungu**. Similarly, the 3rd Respondent filed a response to the petition together with a supporting affidavit all dated 17th September 2017.

14. In summary, the respondents' case was that the elections of the Senator of Kisii County conducted on 8th August 2017 was free, fair and conducted in compliance with the principles of the Constitution and all the laws governing elections. The respondents maintained that if at all there were any instances of non-compliance with the law, then the said non-compliance was in very isolated instances and were mundane, insignificant and due to human errors such as could not materially affect the outcome of the election or undermine the will of the voters in Kisii County.

15. The respondents urged the court to dismiss the petition with costs and determine that the 3rd respondent was duly and validly elected the Senator of Kisii County.

The hearing

The Petitioners' case.

16. At the hearing, only the 1st petitioner testified for the Petitioners' case. He relied on his affidavit in support of the petition sworn on 4th September 2017 together with the annexures. In the said affidavit, the 1st Petitioner contested the results that were declared by the 2nd Respondent which he claimed were not correct or accurate as envisaged by the Constitution and the laws governing elections on the basis of lack of a credible voters' register, differences in the number of votes cast in the 6 elections, votes cast being more than the number of registered voters, appointment of County Government employees to act as Presiding Officers, clerks, observers and agents, use of fraudulent forms, striking coincidences and incredible figures,.

17. On the claim that there was no credible and verifiable voters' register, the 1st petitioner averred that the total number of registered voters in various polling stations in the county varied significantly in the statutory forms returning the results of the six elections and that the total number of registered voters for the senatorial elections was increased in many polling stations in order to make up for votes inflated in favor of the 3rd respondent. He specified the polling stations with the alleged varying number of registered voters in Schedule 1 attached to the Petition and further attached a bundle of copies of forms alleged to contain anomalies which were marked as annexure "COO3". On cross examination, he stated that he compiled the information contained in Schedule 1 attached to the petition based on data and information that he had received from his friends and presiding officers at the polling stations. He however did not disclose the names of his said friends or presiding officers. He conceded that he had not attached any voters' register to his petition. During cross examination, a comparison done between the information contained in the petitioners' Schedule 1 and Form 38B attached to the 3rd respondent's replying affidavit, in three randomly selected polling stations namely; Nyamuya Primary School, Borangi PAG Station and Obuya Primary School, revealed that there was no difference in the total number of registered voters in both documents. The 1st petitioner admitted that the figures contained in both documents tallied and further conceded that he had no evidence to support his claim that the number of registered voters had been inflated in many polling stations.

18. In his further testimony before the court, the 1st petitioner stated that he was aware that the 1st respondent conducted mass voter registration and verification campaign prior to the impugned election but claimed that he was not aware if the voters register was published in the Kenya gazette. He also confirmed that he checked his voter registration details in the register posted at the polling station prior to the election date and found them to be in order. He conceded that errors could occur during the transfer of data from Form 38A to 38B and that there were instances of stray ballots or rejected votes affecting the number of the total valid votes cast.

19. On the claim that the 3rd respondent benefitted from the inflated number of registered voters in Bobaracho Primary School stream -01 and Riondonga Secondary School stream -02 polling stations, the 1st petitioner conceded, during cross examination, that the actual beneficiaries of the discrepancies were other candidates in the senatorial race namely; one **Justus Rasugu** and **Isaac Onchonga**. He further confirmed that even if the results for the two polling stations were to be excluded from the final tally, the outcome of the election would not change as 3rd respondent would still emerge the winner of the said senatorial election since the discrepancies amounted to only 438 votes when the margin of votes between the winner and the runners up was 64,687 votes.

20. On the claim that there were differences in the number of votes cast in the 6 elective positions of the President, the Governor, the Senator, the Women Representative, the Member of Parliament and the Members of County Assembly, the 1st Petitioner conceded that he had not attached all the statutory returning forms and a tabulation of the results relating to all the said six elective positions to his petition so as to demonstrate that there were differences in the votes cast in all those positions. He also confirmed that all the statutory forms had been signed by the agents of the different political parties that participated

in the elections and that none of the agents had complained of any rigging.

21. When cross examined on the claim that there were two streams that had striking coincidences and similarity in the number of votes garnered by the candidates in two streams, the 1st petitioner was not able to identify the alleged two streams and neither was Schedule 4 which, he alleged, contained the particulars of the affected stations attached to the petition.

22. On the claim that the 3rd respondent engaged the services of Kisii County Government employees as his agents during the elections contrary to the law, the 1st petitioner relied on an undated and unsigned document marked as “**COO7**” containing a list of names of party agents that showed that one Naftali Obwocha was the chief agent of ODM party at the County tallying center. He also referred to a letter dated 7th August 2017 (“**COO12**”) from the ODM Gubernatorial Candidate purporting to appoint one Naftali Obwocha as a Chief Party Agent. To support his claim that the said Naftali Obwocha was an employee of Kisii County Government, the 1st Petitioner relied on a payslip marked “**COO13**”. On cross examination, he stated that he was aware that party agents were appointed by the various political parties and issued with letters of accreditation by IEBC and that in this case, he did not have any proof that the 3rd respondent appointed the said Naftali Obwocha as his chief agent and neither did he have any proof that IEBC issued him with an accreditation letter or that the said Obwocha signed any of the statutory forms as an agent of ODM party or the 3rd respondent.

The 1st and 2nd Respondents’ case.

23. The 1st and 2nd Respondents called a total of 6 witnesses who had all filed their respective replying affidavits. The first witness for the 1st and 2nd Respondents was **Robert Sidney Namulungu Isaac**, the Kisii County Returning Officer. He relied on his replying affidavit as his evidence in chief wherein he denied the allegations that the total votes cast were more than the number of registered voters and attributed the differences in the total number of registered voters and the number of voters indicated in Forms 38B in respect to Riondonga Secondary School and Bobaracho Primary School stream 1 to human error that could have occurred at the time the data was being transferred from Form 38A to 38B, which errors, he stated, did not affect the actual number of votes garnered by each candidate. He confirmed that he declared the results of the senatorial elections using Form 38C which was signed by all the party agents present at the tallying centre and that none of the agents or candidates lodged any complaint over the outcome of the said elections.

24. While acknowledging that errors of transposition occurred as results were being transferred from Form 38A to Form 38B in respect to Riondonga Secondary School stream 2 and Bobaracho Primary School stream 1, he stated that the said errors were not significant as they could not affect the overall outcome of the elections in the said polling stations and that the 3rd respondent would still have emerged the winner in the impugned elections even if the affected polling stations were to be excluded from the final tally. He maintained that the elections were free and fair and explained that it was not possible to have the same total number of votes for each of the 6 elective positions because of instances of stray votes or rejected votes that were not included in the final tally of valid votes cast.

25. The 2nd Witness for the 1st and 2nd Respondents was Moses Duala, the returning officer for Bobasi Constituency. While relying on his Affidavit sworn on 15th September 2017, he denied the petitioners’ claim that there were instances of total votes cast exceeding the total number of registered voters and explained that he did not come across any instance where the votes cast exceeded the total number of registered voters.

26. The 3rd witness for the 1st and 2nd respondents was Amosi Nyongesa Chilai the Returning Officer for Bomachoge Constituency. He also relied on his replying affidavit sworn on 15th September, 2017.

27. The 4th witness was Hilda Okumu Imbo the Returning Officer of Kitutu Chache South Constituency

who similarly relied on her replying affidavit sworn on 15th September 2017. Her testimony was that there were no instances of valid votes cast exceeding the number of registered voters and stated that if such a scenario could have arisen, then the results in the affected polling stations could have been rejected. She explained that the few instances where valid votes cast appeared to exceed the number of registered were as a result of human error and inadvertence in the recording or posting of the results in the respective statutory forms. She gave the example of St Mary's Mosoch Primary School stream 1 where the number of registered voters is 381 but was erroneously recorded as 387 where the number 1 in 381 appeared as 7 in one of the forms.

28. The 5th witness Julius Meja Okeyo, the returning officer of Nyaribari Chache Constituency, also relied on his replying affidavit dated 15th September 2017 and explained that **Rule 83 (b) of the Election Regulation Rules** provides that election results in instances where the number of valid votes cast exceed the number of registered voters should be disregarded. He however explained that in the case of Bobaracho Primary School stream 1 and Riondonga Secondary School stream 2 polling stations that were in contest, an error of transposition occurred when the results were being transferred from forms 38A to 38B which error, created the impression that the number of votes cast exceeded the number of registered voters and that the error was also reflected in form 38C but that form 38A for both polling stations contained the correct entries. He further explained that the results of the elections would remain the same and the margin between the winner and the runners up could not be altered significantly or at all even if the results from the 2 affected polling stations were to be excluded from the final tally of the results.

29. The 1st and 2nd respondent's last witness was David Kipkemoi Cherop the returning officer of Bonchari Constituency. He also adopted his affidavit dated 15th September 2017 as his evidence in chief and explained that the total number of votes cast for the Gubernatorial position could differ with the votes cast for the Senator or Women Representative due to instances of stray ballots which stray ballots were recorded in the polling station diaries.

The 3rd respondent's case

30. The 3rd respondent relied on his replying affidavit sworn on 18th September 2017 and stated that he perused and was satisfied with the voters register for Kisii County that had been published in the Kenya Gazette Notice No. 6397. He testified that the voters register was a public document that was available for verification by any interested voter and confirmed that the voters register attached the 2nd Respondent's affidavit and marked "RISNI" was credible as it agreed with the register that he had attached to his replying affidavit in all respects. He also confirmed that he won the Kisii County Senatorial election in a free and fair contest and beseeched the court to reaffirm his win.

31. He made reference to the data contained in the petitioner's Schedule 1 attached to the petition and stated that his own analysis of the said schedule when compared with the voters register per polling station in the constituencies under contest showed that there was no difference in the figures.

Issues for determination

32. At the pre-trial conference, parties outlined several issues for determination which may be summarized as follows:

a. Whether the election for the Senatorial seat for Kisii County in the general election of 8th August 2017 was conducted in conformity with the Constitution and the laws governing elections.

b. Whether there were irregularities and/or illegalities that materially affected the validity of the result of the election for Senator of Kisii County.

c. Whether the 3rd Respondent committed election offences under section 15 (2) and 20 of the

Election offences Act, 2016 and Section 35 (1) b) of the Leadership and Integrity Act 2012 and

d. Who should bear the costs of this petition?

33. Parties thereafter filed their respective written submissions and on 4th December 2017, the Petition came up for the highlighting of the submissions. The Petitioner was represented by Mr. Omwanza while Mr. Rigoro appeared for the 1st and 2nd Respondent, and Mr. Omogeni S.C. appeared for the 3rd Respondent. I have considered both the oral and the written submissions made by all the parties in this case together with the authorities that they cited. Before delving into the evaluation and in-depth analysis of the evidence tendered by the parties before this court, I find it necessary to first address and highlight the question of the burden of proof and standard of proof in election cases.

34. Burden of proof (*onus probandi*) is a common law concept which can be described as the duty which lies on one or the other of the parties either to establish a case or to establish the facts upon a particular issue. **Black's Law Dictionary** defines the concept as:

“{a} party’s duty to prove a disputed assertion or charge... {and} includes both the burden of persuasion and the burden of production.”

35. From the above definition, the question which then arises is which party to the proceedings bears the burden of proof. **Section 107 of the Evidence act Cap 80 of the Laws of Kenya** stipulates as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

36. The law is now settled that in an election petition the burden of proving the allegations lies with the petitioner throughout the petition. This means that the petitioner is under a duty to discharge the evidentiary and legal onus of proof. This position was reiterated by the Supreme Court in the case of **Raila Odinga & Others vs Independent Electoral and Boundaries Commission & Others Petition No. 5 of 2013 (as consolidated with Petition No. 3 and 4 of 2013)** wherein it was held:

“a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt- save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in Article 38 (4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.”

...Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been con-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. 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 departure from the prescriptions of the law.”

37. In the case of **Ntwiga v. Musyoka & 3 others (No. 2) (2008) 2 KLR (EP)**, the Court cited the decision of **Mohamed Jahazi v. Shariff Nassir A. Taib; Election Petition No. 9 of 1983**, wherein it was held: -

“The burden of proof throughout rests on the Petitioner and the quality of evidence that is advanced is to be considered with a thoroughness and gravity which is commensurate with the dire consequences that can follow by virtue of the provisions of Section 6 of the National Assembly and Presidential Elections Act and Section 35 of the Constitution.”

38. From the above decisions, it is clear that the law is now settled that legal burden rests with the Petitioner to prove that there was non-conformity with the law on the part of the Respondents in conducting the elections and in the declaration of results and that the alleged non-compliance affected the validity of the elections.

39. The debate on the applicable standard of proof in election petitions was similarly put to rest by the Supreme Court in **Raila Odinga & Others V Iebc & Others**(Supra) when it held at paragraph 203 of the judgment as follows: -

“The lesson to be drawn from the several authorities is, in our opinion, that this Court should freely determine its standards of proof, on the basis of the principles of the Constitution, and of its concern to give fulfilment to the safeguarded electoral rights. As the public body responsible for elections, like other public agencies, is subject to the “national values and principles of governance” declared in the Constitution [Article 10], judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfilment to the right of franchise. But at the same time, a petitioner should be under obligation to discharge the initial burden of proof, before the respondents are invited to bear the evidential burden. The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt – save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of data-specific electoral requirements (such as those specified in Article 38(4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt”.

40. In the case of **Bernard Shinali Masaka vs Boni Khalwale & 2 Others [2011] eKLR** Lenaola J. (as he then was) had the following to say on the standard of proof applicable in election petitions:

“Further, I agree with the proposition grounded on the decision in Mbowe vs Eliufoo [1967] E.A. 240 that any allegations made in an election petition have to be proved to the “satisfaction of the court”. Like Rawal J. in Onalo, I am certain that the standard of proof, save in matters where electoral offences are alleged, cannot be generally beyond reasonable doubt, but because of the quasi – criminal nature of some election petitions, it is almost certainly on a higher degree than merely on a balance of probabilities, the latter being the standard in civil cases.”

41. From the above decisions, it follows that while the Petitioner bears the evidentiary burden to adduce ‘factual’ evidence to prove his case, the burden shifts to the 1st and 2nd respondents to adduce evidence rebutting the petitioners’ case and proving that there was compliance with the law or if the claim is one of irregularities, that they did not affect the results of the election.

42. The threshold or standard of proof in election petitions is above a balance of probability that is applicable in Civil Cases, though not as high as beyond reasonable doubt that is applicable in Criminal cases. The rationale for this higher standard of proof is based on the notion that an election petition is not an ordinary suit involving the two or more parties to it but involves the entire electorate in a ward, constituency, county or, in the case of a presidential petition, the entire nation. The Tanzanian High Court had the following to say about standard of proof in the old case of **Madundo v. Mweshemi & A-G Mwanza HCMC No. 10 of 1970:**

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

43. In the Kenyan context, Githua J. aptly captured the importance of the higher standard of proof expected in election cases in the case of **Sarah Mwangudza Kai v. Mustafa Idd & 2 Others [2013] eKLR** in the following words:-

“[29]...it is important for this court to address its mind to the burden and standard of proof required in election petitions. This is because election petitions are not like ordinary civil suits. They are unique in many ways. Besides the fact that they are governed by a special code of electoral laws, they concern disputes which revolve around the conduct of elections in which voters exercise their political rights enshrined under Article 38 of the Constitution. This means that electoral disputes involve not only the parties to the Petition but also the electorate in the electoral area concerned.

It is therefore obvious that they are matters of great public importance and the public interest in their resolution cannot be overemphasized. And because of this peculiar nature of election petitions, the law requires that they be proved on a higher standard of proof than the one required to prove ordinary civil cases.”

44. Having set out the burden and standard of proof expected in an election petition, and having highlighted the issues for determination in the petition, this court will now delve into addressing the specific areas of concern raised by the petitioner as grounds for invalidating the election of the 3rd respondent as the Senator of Kisii County based on the evidence tendered by the parties during the hearing.

Lack of a Credible Voters’ Register

45. On the allegation that there was lack of credible voters’ register during the election that is the subject of this petition, the petitioners stated, at paragraphs 20, 21, 22 and 23 of the petition that the voters register was manipulated with a view to undermining the integrity of the election and giving undue advantage to the 3rd respondent. The petitioners’ claim that the voters’ register was not credible was based on their assertion that the total number of registered voters in various polling stations varied significantly in the statutory Forms returning the results in the 6 elective positions and further that the total number of registered voters for senatorial elections was increased in many polling stations in order to make up for the votes inflated in favor of the 3rd respondent. They highlighted the affected polling stations and constituencies in Schedule 1 that was annexed to the petition wherein they made a summary of 184 polling stations where they alleged that there were anomalies in the voters roll as there was variance in the number of registered voters shown in the statutory forms. It was the petitioners’ claim that this variance in the number of voters showed that the 1st and 2nd respondents filled the statutory forms with figures that did not emanate from the official register.

46. In their submissions to court on the importance of a credible voters’ register, the petitioners cited the decision of Aburili J. in the case of **Okiya Omtatah vs. Independent Electoral & Boundaries Commission and 2 Others [2017] eKLR** wherein the court stated at paragraph 321:

“This court does acknowledge that elections are the heart of democracy and that only a free, fair, credible and inclusive electoral system and related processes can contribute to the meaningful institutionalization of democracy and gain public trust. This is only possible if citizens come under the voter registration process and participate in elections. The significance of voter registration is that it restricts ineligible persons to the poll and ensures that only those people who are entitled to vote in a given polling area can do so and only once. Voter registration therefore brings eligible citizens into the electoral process, ensures quality of the vote and prevents ineligible people from voting thus ensuring that political rights are free from fraud and manipulation. A more accurate and reliable voter register is therefore inevitable for purposes of elections, and it is the registration exercise that results in the compilation of entirely new voters register.”

47. In the instant case, the petitioners faulted the 1st and 2nd respondents for failing to make correct entries of the number of registered voters in the statutory forms and attributed this failure to the absence of a credible voters register. They maintained that the incorrect entries meant that the elections could not be said to be accurate, transparent, credible and verifiable. To further bolster their argument on the

importance of correct entries in the statutory forms, the petitioners cited the decision of Mutuku J. in the case of **Mohamed Ali Mursal vs Shadia Mohamed & 2 Others [2013] eKLR** wherein it was held:

“It is the view of this court that some errors cannot be excused. For instance it cannot be explained how figures from Forms 35 could not be transmitted correctly to Forms 36 or why all forms do not have statutory declarations. Returning Officers had the responsibility of correctly transmitting all the data from all Forms 35 to the Constituency Form 36 without errors or with minimal errors. Kenya is coming from the history of lack of confidence by the citizens in some of the organs of the Government including the 2nd Respondent and especially its predecessor, the ECK. I think it was time for this institution to rise above board in order to give the electorate confidence that their political rights will protected.”

48. The 1st and 2nd respondent’s submitted that the allegation that there was no credible voters’ register was not substantiated because the petitioners did not tender any evidence to show that the number of registered voters recorded in the various forms for one polling station with respect to the six elective positions differed. It was the 1st and the 2nd respondents’ case that their witnesses attributed the difference in the number of valid votes cast in the different elective positions to stray ballots and or rejected ballots which differ in each of the elective positions as each has its own ballot box in every polling station and since the number of stray ballots or rejected ballots cannot be the same in each ballot box, the number of valid votes cast could be different in each elective position.

49. On his part, the 3rd respondent submitted that the allegation that the voters’ register was not credible was completely baseless for reasons, inter alia, that the authenticity and source of the information contained in the petitioners’ Schedule 1 attached to the petition was in doubt.

50. **Section 2 of the Elections Act** defines a Register of Voters to mean:

“a current register of persons entitled to vote at an election prepared in accordance with Section 3 and includes a register that is compiled electronically”

51. **Article 38 of the Constitution**, provides that every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for any elective public body or office established under this Constitution and at paragraph (3) provides that every adult citizen has the right, without unreasonable restrictions to be registered as a voter and vote by secret ballot.

52. **Section 6 (1) and (2) of the Elections Act** stipulates as follows:

Inspection of the register of voters

1. The commission shall cause the Register of voters to be opened for the inspection by members of the public at all times for the purpose of rectifying the particulars therein, except for such period of time as the commission may consider appropriate.

2. The commission shall, within ninety days from the date of the notice for a general election, open the Register of Voters for the inspection for a period of at least thirty days or such period as the commission shall consider necessary.

53. In the instant case, even though the petitioners did not produce any copy of the voters register in support of their claim that the voters register was not credible, the 1st petitioner testified that he duly registered as a voter in the impugned elections and was able to inspect the Register of Voters before the said elections and to vote on the election date without any hitch. The 1st petitioner had the following to say on the voting process:

“I participated in the elections. The elections were peaceful. I was not forced to vote. I went to vote voluntarily. I voted by secret ballot”.

54. The 1st and 2nd Respondents produced an extract of the Kenya gazette being Gazette Notice No. 6397 containing the Register of Voters for Kisii County which was used during the 8th August, 2017 elections as one of their exhibits (annexture “RSIN1”). I note that the Petitioners did not tender any evidence disputing the gazette notice or to prove that persons who were ineligible to vote, voted or that persons who were entitled to vote were prevented from registering or voting in the said elections so as to justify their claim that the voters’ register was not credible. Regulation 83(1) (e) of the Election Regulations Rules 2017 stipulates as follows:

Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present complete the relevant Form 35B and 36B for the respective elective position set out in the Schedule in which the returning officer shall declare, as the case may be, the—

- (i) name of the respective electoral area;**
- (ii) total number of registered voters;**
- (iii) votes cast for each candidate or referendum side in each polling station;**
- (iv) number of rejected votes in each polling station;**
- (v) aggregate number of votes cast in the respective electoral area; and**
- (vi) aggregate number of rejected votes;**

55. The Petitioners’ evidence in support of the allegation that the voters’ register was not credible was centered in the differences in the number of total votes cast in the respective six elective positions being the Senatorial, Gubernatorial, Women Representative, Member of Parliament, Parliamentary, Member of County Assembly and the Presidential elections. The petitioners’ contention was that the recorded total number of votes cast for each of the positions differed and therefore, that impliedly, a different voter’s register was used in each of the elections. My humble view is that the assumption that the votes cast in each of the 6 elective positions must be the same is incorrect as it was sufficiently explained, by the 2nd respondent, that rejected or stray ballots in any of the 6 elective positions could create an imbalance in the total votes cast in each of the said positions. The petitioners’ claim that the voters’ register was not credible was however put to test during cross examination when, a comparison was done between the entries made in the said schedule 1 and the number of registered voters according to the said gazette notice in respect to randomly selected polling stations namely; Nyamuya Primary School code – 063, Borangi PAG Station code -041 and Obuya Primary School code -119 steam 1 and the 1st petitioner had the following to say on the tallies noted in both documents:

“All my figures agree with the figures contained in the register.”

56. My finding therefore, is that the 1st petitioner’s own testimony, during cross examination, does not support his claim that the voters’ register was not credible in view of his admission that the number of registered voters contained in schedule 1 tallied with the number of registered voters in the official IEBC register. Even though the petitioners claimed that Schedule 1 was a table showing discrepancies in the number of registered voters in all the 6 elective positions that were contested during the 8th August 2017 elections, at the hearing, the 1st petitioner admitted that the said schedule referred to only 5 positions of the President, Governor, Senator, Women Representative and Member of Parliament thereby excluding the position of the Member of County Assembly (MCA). I therefore find that the said schedule is incomplete and does not support the petitioner’s claim that there were discrepancies in the 6 elections.

57. Furthermore, besides the 1st petitioner’s inability to explain, to the satisfaction of this court, the source of the information contained in the Schedule 1 attached to the petition, I also find that he did not prove

that he was a qualified data analyst possessing the ability to collate and analyze the data contained in the said schedule. The 1st petitioner had the following to say when cross examined about the source of the information contained in the said schedule:

“I got the data listed in the schedule from friends.”

58. This court notes that even though Schedule 1 contained the data that the petitioners relied upon in support of their claim that the voters’ register was not credible, the 1st petitioner’s own testimony cast doubts on the authenticity of the said schedule as the exact source of the contents of the schedule were not disclosed and can at best be deemed to be made up of hearsay evidence that is inadmissible considering that the ‘friends’ who availed the data to the 1st petitioner were not called as witnesses in the case. I also find that the petitioners did not tender any evidence to support their claim that the voters’ register was manipulated so as to give the 3rd respondent an undue advantage over the rest of the senatorial election candidates. In fact, the 1st petitioner conceded, during cross examination, that he did not have any evidence in support of such a claim. A perusal of form 38C that was used in declaring the 3rd respondent the winner of the senatorial contest shows that the total number of registered voters in the said form tallies with number of voters indicated in the voters register published in the Gazette Notice No. 6397 attached to the 2nd and 3rd respondents’ replying affidavits.

59. My humble view, therefore, is that there is a clear distinction between lack of a credible voters’ register and the entry of erroneous figures in the statutory forms. I find that the petitioners’ argument that the erroneous entries made in the statutory forms in respect to the number of registered voters was proof that the voters’ register was not credible to be incorrect and misleading. The mere fact that there could have been instances of wrong entries being made in the statutory forms, which was not proved, did not connote lack of a credible voters’ register as the respondents established that there was a duly gazetted voters’ register which register was not disputed by the petitioners. In sum, I find that the petitioners did not discharge their burden of proof in respect to the claim that the voters’ register used in the impugned elections was not credible.

Differences in the Total Number of Votes Cast in the Six Elections.

60. The Petitioners alleged that the difference in the total votes cast in the six elective positions implied that the elections were not free and fair and that the senatorial elections were manipulated in favour of the 3rd Respondent. The 1st and 2nd respondents however maintained that the difference in the votes cast in the six elective positions was attributed to the stray ballots and rejected ballots which are different in each ballot boxes and submitted that the petitioners’ allegation had no basis. **Regulation 77 of the Elections (General) Regulations, 2012** stipulates as follows in respect to rejected ballot papers:

“(1) At the counting of votes at an election, any ballot paper –

- a. which does not bear the security features determined by the Commission;**
- b. on which votes are marked, or appears to be marked against the names of, more than one candidate;**
- c. on which anything is written or so marked as to be uncertain for whom the vote has been cast;**
- d. which bears a serial number different from the serial number of the respective polling station and which cannot be verified from the counterfoil of ballot papers used at that polling station; or**
- e. is unmarked, shall... be void and shall not be counted.”**

61. The 1st and 2nd respondents explained that a stray ballot is a ballot which is a correctly marked, but

put on the wrong ballot box and gave the example of a correctly marked ballot paper for the position of Presidency but mistakenly placed in the Member of County Assembly ballot box by the voter. A rejected vote, on the other hand, was described as a marked ballot paper that fails to comply with the approved marking format, or in some way infringes the prescribed vote-casting standards. They stated that such votes are at the time of counting, not tallied to the advantage of any candidate, but are accumulated separately and numbered in the category of rejected votes.

62. In the case of **Raila Odinga & 5 Others (supra)** the Supreme stated as follows in respect to rejected votes:

“Since, in principle, the compliant ballot paper, or the vote, counts in favour of the intended candidate, this is the valid vote; but the non-compliant ballot paper, or vote, will not count in the tally of any candidate; it is not only rejected, but is invalid, and confers no electoral advantage upon any candidate. In that sense, the rejected vote is void”.

63. It was the respondents’ position that since the rejected votes in all the six ballot boxes for the respective elective position are not considered in the final tally, this succinctly explained the difference in the total votes cast for each elective positions and they argued that the petitioners had failed to tender any evidence pointing towards a manipulation of the results.

64. On their part, the petitioners attached Schedule 2 to the petition in support of their claim that there were differences in the number of votes cast in the 6 elections. They claimed that the said schedule contained the particulars of constituencies where there were varying number of votes cast in the six elections. The petitioners did not however disclose the source of the information contained in schedule 2 which referred to only 5 elective positions and not 6 as they had claimed. I therefore find that the said schedule 2 was incomplete and did not prove the petitioner’s claim to the required standards. I further find that the petitioner did not prove that there were no rejected votes or that there is any law that requires that the number of votes cast in all the 6 elections must be the same. The petitioners did not also prove how the alleged differences in the total votes cast in all the 6 positions, if any, affected the results of the said election.

65. I find that the respondents’ explanation that the variance in the number of votes cast in the six elections was attributed to the rejected and stray votes is plausible as the petitioners did not prove that there was any manipulation of votes in favour of any candidate.

66. A perusal the schedule 2 shows that it has several unexplained gaps and blank spaces in Bomachoge Borabu, Bomachoge Chache and Nyaribari Masaba constituencies. The said schedule is therefore incomplete and does not prove the petitioner’s claim that there were discrepancies in the number of registered voters. At the hearing, the 1st petitioner admitted that he was not an agent for any party in the impugned elections and that he was not aware if any of the agents had complained about the results shown in the statutory forms that had been duly signed by the respective parties agents. I therefore find that differences in the total number of votes cast in the six elections, per se, is not a ground for invalidating an election.

Votes Cast Exceeding the Number of Registered Voters in Some Stations.

67. The petitioners also claimed that the total number of votes cast exceeded the total number of registered voters in some polling stations and that the election was therefore not transparent and did not communicate the will of the people. He referred to schedule 3 attached to the petition to highlight the alleged discrepancies and maintained that the 1st and 2nd respondents ought to have rejected the results from the affected stations. He explained that Schedule 3 attached to the petition was a table containing a list of polling stations where the votes cast allegedly exceeded the number of registered voters.

68. A perusal of schedule 3 however showed that out of all the polling stations listed therein, only two polling stations namely; Bobaracho Primary School 06-01 and Riondonga Secondary School 31-02 contained the results of the senatorial election that is the subject of this petition. During cross

examination, the 1st petitioner conceded that forms 38A in respect to the two affected polling stations had the correct entries while the respective forms 38B had incorrect entries in respect to 2 candidate namely; **Rasugu Justus Ooga** who was shown to have garnered 0 votes in form 38A, while in form 38B his votes were erroneously shown to be 320, and one **Onchonga Isaac** who garnered 262 extra votes. The 1st petitioner confirmed that in both instances, the 3rd respondent did not benefit in any way from the errors in the entries made in the said statutory forms and further, that even if the said votes were to be deducted from the total votes garnered by the 3rd respondent, the margin of the votes between the winner and the 2nd position would not change significantly or at all. The 1st petitioner stated as follows during cross examination:

“At page 70 of Okeyo Meja’s affidavit, Rasugu got 0 votes while at page 113 of my petition Rasugu had 320 votes so it is Rasugu who benefitted. If we remove the votes cast at Riondonga polling station, the outcome of the elections will not change. The 3rd respondent will still be the winner.

At Babaracho primary School, The 3rd respondent got 262 votes while Isaac got 267 votes. It is Onchonga who benefitted from the extra votes”

69. My observation is that forms 38B and 38C are not the primary documents used in the declaration of the senatorial election results but are instead, documents derived from form 38A which is the primary document that contains the first results declared at the polling stations. The importance and finality of the results declared at the polling stations was discussed by the Court of Appeal in the case of **Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR** wherein it was stated:

“Accuracy of the count is fundamental in any election. Voter turnout determines the outcome of any electoral contest. Numbers are therefore not only unimpeachable, but they are everything in an election. The lowest voting unit and the first level of declaration of presidential election results is the polling station. The declaration form containing those results is a primary document and all other forms subsequent to it are only tallies of the original and final results recorded at the polling station.”

70. Even though the above cited case was in respect to votes cast in the presidential election, I find that the decision is relevant to this case as it established the importance and finality of the votes cast and tallied in the primary document at the polling station. From the said decision, it is clear that in determining whether or not the votes cast actually exceeded the total number of votes, the court’s main focus should be on the record from the polling station which is the first port of call in as far as establishing the votes garnered by any candidate is concerned. In the instant case, I note that the information contained in the forms 38A, from the two affected polling stations of Bobaracho Primary School stream 1 and Riondonga Secondary School stream 2, were not contested by the petitioners and do not show that the votes cast exceeded the total number of registered voters in which case I find that the respondents’ explanation that the errors in the two polling stations were errors of transposition that occurred at the time the data on the results was being transferred, by the polling clerks, from forms 38A to 38B and eventually to 38C, was plausible. Courts have time and again held that there is no perfect election and that errors often occur due to fatigue, pressure of work, and the sheer number of documents that the polling clerks have to contend with within a short period of time. In the case of **Joho V Nyange & Another (No. 4) High Court at Mombasa Election Petition Nos. 1 and 2 of 2005** Maraga J. (*as he then was*) held that:

“Errors are to human. Some errors in an election like this conducted under a frenetic schedule are nothing more than what is always likely in the conduct of any human activity. If they are not fundamental they should always be excused and ignored. But where deliberate irregularities or forgeries are committed different considerations come into play. In either case, however, serious consideration should be given as to what effect if any, that those errors whether innocent or deliberate, have on an election before the same is vitiated.”

71. In the instant case, I am satisfied with the explanation offered by the 1st and 2nd respondent regarding the errors noted in the two affected polling stations in the secondary forms 38B and 38C which did not in any way affect the entries in the crucial forms 38A and did not benefit the 3rd respondent as the petitioners had alleged. I find that the petitioners did not prove that the said errors were fundamental or deliberate considering that they did not benefit the 3rd respondent. Having found that the said errors cannot significantly change the overall outcome of the election, it is my further finding that this ground for nullification of the impugned election was not proved to the required standards.

Striking Coincidences and Incredible Figures

72. The petitioners also claimed that there were striking coincidences and incredible figures of results from certain specific polling stations which they particularized in an annexure marked Schedule 4. At the hearing, however, the 1st petitioner confirmed that there was no such schedule marked as schedule 4 attached to the petition. I therefore find that this claim was not proved at all.

Involvement of a public officer in political activities of the 3rd Respondent

73. The petitioners alleged that the 3rd respondent engaged the services of one **Naftali Obwocha**, an employee of Kisii County Government, as his chief agent during the elections contrary to the provisions of **Section 16 and 23 (3) (a) of the Leadership and Integrity Act, 2012** which requires state or public officers to remain politically neutral and avoid situations of conflict of interest, and further stipulate that a state or public officer is prohibited from acting as an agent of a political party or candidate in an election. The petitioners also cited **Section 15 of the Election Offences Act** which creates the offence of participation of political activities of a party by a public officer.

74. At the hearing however, the 1st petitioner did not tender any proof, by way of an appointment letter or any other evidence to show that the 3rd respondent employed the said Naftali as his agent. The 1st petitioner confirmed, at the hearing, that the 3rd respondent was not an employee of Kisii County Government so as to be in a position to appoint the said county government employees as his agent. In fact, there was no proof of any nexus whatsoever between the 3rd respondent and the said Naftali Obwocha. A perusal of all the statutory forms produced by all the parties to this case did not reveal if any of the said forms were signed by the said Naftali Obwocha as an agent for any party during the said elections. The 1st and 2nd respondents confirmed that the said Naftali Obwocha was not one of the agents to whom they had given accreditation to participate in the impugned elections. I find that it was not enough for the petitioners to merely allege that the services of a public servant had been engaged in the electioneering exercise. The petitioners were under an obligation to prove, with certainty and to standards above a balance of probability, that the 3rd respondent indeed engaged the services of the said public servant. I find that this claim was not proved at all.

75. The petitioners further claimed that the 3rd respondent appointed Kisii County Government officials as polling officials during the impugned elections. The petitioners attached a schedule 7 to the petition which, they stated, was a list of Kisii County Government employees who were allegedly engaged in the elections as returning officers. I have perused the said schedule 7 and I note that it is a list of names and that it is not signed and whose origin and purpose is not disclosed. Regulation 5 and 6 of the Election (General Regulations) 2012 specifically provide for the manner in which presiding officers, their deputies and the polling clerks are recruited and appointed. Of great relevance to this petition is the provision of section 6 (2) Election (General Regulations) 2012 which stipulates as follows:

“The commission shall make the list of persons appointed under sub regulation (1) available to political parties and independent candidates within fourteen days from the date of appointment to enable them raise any objections”

76. It is worthy to note that in his evidence before the court, the 2nd respondent was categorical that the list of all appointed polling officials was made available to all the political parties and independent

candidates prior to the date of the election and was further displayed in the various constituencies in line with Regulations 5 and 6 of the Elections (General Regulations) 2012 stated hereinabove. The petitioners did not demonstrate that they raised any objections to the said list prior to the elections or at all. Furthermore, the petitioners did not avail the 1st respondent's list of all the polling officials and accredited agents so as to prove that the names shown in schedule 7 correspond with the names in 1st respondent's list of agents or polling officials in order to satisfy this court that the services of county government employees were unlawfully engaged during the elections. As I have already stated in this judgment, the 3rd respondent's case was that he was not an employee of Kisii County Government so as to be in a position to appoint the said county government's employees as polling officials. I find the petitioners claim that the 3rd respondent appointed Kisii County Government employees as polling officials to be not only false and absurd but also farfetched in view of the fact that sections 5 (1) and 6 (1) of the Election (General Regulations), 2012 specifically provide that the presiding officers, their deputies and the polling clerks shall be appointed by the 1st respondent (the commission). This court is at a loss as to how the 3rd respondent, who was a candidate in the impugned elections, could at the same time be in a position to perform the statutory duties of the 1st respondent.

Use of Fraudulent Forms

77. The petitioners' final claim was that the statutory forms 38B used in declaring the results for Bomachoge Chache, Kitutu Chache, and Nyaribari Chache were fraudulent because they lacked security features. During cross examination however, the 1st petitioner was not able to particularize the exact nature or form of security features that they were alluding to. This court also notes that the forms that the petitioners alleged lacked security features were photocopies which they attached to the affidavit in support of the petition. The petitioners did not seek this court's orders for scrutiny of the original forms held in the 1st respondent's custody so as to ascertain if they had any security features. It was therefore not possible for this court to decipher if the photocopies filed in court had any security features. Quite surprisingly, the 1st petitioner admitted, during cross examination, that he obtained the forms that he had attached to his affidavit from 'friends' and not the 1st or 2nd respondent. Clearly therefore, the petitioners could not vouch for the origin or authenticity of the said forms in view of the fact that they were allegedly obtained from faceless people who were not witnesses in the case. I concur with the submissions of counsel for the 3rd respondent that the circumstances of this case are totally different and distinguishable from the circumstances in the case of **Raila Odinga & Another vs IEBC & 2 Others Presidential Petition No. 1 of 2017** as in the cited case, the court specifically ordered for an audit and scrutiny of the original statutory forms before arriving at the conclusion that some of the said forms lacked security features. In the instant case, no scrutiny was sought, ordered for or carried out in order to establish the claim that the forms lacked security features. I therefore find that this claim was also not proved to the required standards or at all.

78. The issues for determination have already been outlined in this judgment and I find that the ultimate question that arises from all the issues raised is the question of whether the election for the Senatorial seat for Kisii County in the general election of 8th August 2017 was conducted in conformity with the Constitution and the laws governing elections. In other words, the main concern of this court should be to determine whether the election for the Senator of Kisii County was free, fair and credible. At the tail end of my determination of the above issue will be the question of which party should bear the costs of this petition.

79. I have carefully and extensively analyzed the evidence tendered by the petitioners in support of the grounds that they listed in the petition for the nullification of the 3rd respondent's election as the Senator of Kisii County. It is clear from the above foregoing findings and observations that the petitioners have not proved any of the grounds that they had set out in the petition. This court however acknowledges that the petitioners established that there were instances where there could have been some errors made during the transfer of data from one form to the next or arithmetic flaws in the number of votes garnered by the candidates. The Petitioners did not however prove that any of the errors pointed out were not genuine human errors that may be expected to occur in an elaborate nationwide exercise such as a general

election. The petitioners failed to prove that the said errors materially affected the outcome or integrity of the results that were declared by the 2nd Respondent. In fact, in all the instances where errors were detected, the 1st petitioner conceded that either the errors could not materially affect the outcome of the election or did not benefit the 3rd respondent. In the landmark case of **Morgan & Others v. Simpson & Another(1974) 3 All ER** the Court, in summing up the standard to be considered in determining whether or not an election should be declared invalid reasoned that,

“...an election court was required to declare an election invalid (a) if irregularities in the conduct of elections had been such that it could not be said that the election had been conducted as to be substantially in accordance with the law as to election, or (b) if the irregularities had affected the results. Accordingly, where breaches of the election rules, although trivial, had affected the results, that by itself was enough to compel the Court to declare the election void even though it had been conducted substantially in accordance with the law as to elections. Conversely, if the election had been conducted so badly that it was not substantially in accordance with the law, it was vitiated irrespective of whether or not the result of the election had been affected...”

80. The above sentiments are reflected in our laws under **Section 83** of the **Elections Act** which provides that:

“No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.”

81. The objective of **Section 83** is to insulate the electoral process from abuse and frivolous claims and it is the duty of the Court to preserve the will of the electorate where it is shown that the elections were by and large conducted in accordance with the law. The Petitioners were under a duty to prove all the allegations made in the petition by demonstrating how they were substantially prejudiced as a result of the cited infractions.

82. The Nigerian Court of Appeal had the following to say about allegations of breaches and irregularities in the case of **Olusola Adeyeye v Simeon Oduoye (2010) LPELR-CA-/1/EPT/NA/67/08** wherein it stated:

“It is not enough to merely catalogue instances of malpractices and breaches of the Electoral Act without adding up or tallying the number of votes involved or affected and their impact on the overall result of the election against his interest. The reason for tying such malpractices to votes affected thereby is because irregularities affecting minority votes would not upset the election of a candidate with majority of lawful votes. An election cannot be cancelled on the mere speculation of the probable effect of uncertain or unlawful votes procured through alleged malpractices.”

83. Taking a cue from the above-cited authority as read together with **Section 83 of the Elections Act**, I find that the petitioners ought to have juxtaposed the alleged irregularities to the votes that they affected and their impact on the overall results as irregularities affecting minority votes would not upset the election of a candidate with majority of lawful votes. In other words, the petitioners should have ensured that their case passed the materiality test by not only demonstrating that irregularities were committed during the elections but by also establishing that the irregularities were of such magnitude that they affected the outcome of the results. In the instant case, an estimate of the number of votes that may have been affected by the errors noted in the statutory forms cannot exceed 1000 votes. The margin of the votes between the 3rd respondent and his closest challenger was established to be 64,687 votes. In any event, the petitioners did not demonstrate that there was any instance in which the 3rd respondent benefitted from any of the irregularities that they highlighted in the petition so as to justify their claim that his election as the Senator of Kisii County should be nullified. Clearly therefore, one can safely say that there is no way in which the irregularities noted in the election could have affected the outcome of the

poll.

84. In addition to the materiality test, the petitioners needed to establish that the irregularities and errors were either occasioned by the outright negligence or deliberate action or omission on the part of the respondents as irregularities which can be attributed to innocent mistake or an unintended human error cannot constitute a reason for impeaching an election result.

85. Article 81(e) of the Constitution sets the yardstick for determining whether an election is held in a free, fair and credible manner. The said Article stipulates that the electoral system shall comply with the principle of free and fair elections, which are by secret ballot; free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner.

86. In the case of **Manson Oyongo Nyamweya v James Omingo Magara & 2 Others [2009] eKLR** Musinga J. (as he then was) stated as follows when considering whether an election was free and fair:

“The court has to consider whether the grounds as raised in the petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not transparent, free and fair. It is not just a question of who got more votes than the other. It cannot be said that the end justifies the means. In a democratic election the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that there existed favourable circumstances for a fair election and that no party was prejudiced by an act or omission of an election official.”

87. Article 86 of the Constitution provides that (i) whatever voting method is used, the system should be simple, accurate, verifiable, secure, accountable and transparent; (ii) the votes cast counted, tabulated and the results announced promptly by the presiding officer at each polling station; (iii) the results from the polling stations are openly and accurately collated and promptly announced by the Returning Officer and (iv) appropriate structures and mechanisms to eliminate electoral malpractice be put in place, including the safekeeping of election materials.

88. My finding is that the Petitioner did not show that the 1st and 2nd Respondents failed to comply with **Article 86** of the **Constitution** or any other relevant provisions of the law in the conduct of the elections. Courts have severally held that it is not possible to conduct a perfect election and that the mere presence of irregularities does not vitiate an election. I am guided by the words of the Court of Appeal in **Mercy Kirito Mutegi v Beatrice Nkatha Nyaga & 2 others [2013]** in reference to the case of **Peter Gichuki King'ara V Iebc & 2 Others, [2014] eKLR** wherein it was noted that:-

“It follows that electoral systems and processes all over the world are not perfect, they are susceptible to human errors and other inadvertent mistakes as long as those mistakes do not affect the overall results and the democratic will of the people”

89. In the instant case, as I have already stated in this judgment, the flaws noted in the impugned elections were minor and insignificant to the extent that they did not materially affect the overall outcome or integrity of the election.

90. In the end, I find that the elections in question met the credibility test. I also find that no election offence or malpractice has been proved against the 3rd Respondent. Having so determined, I also find that the Petitioner have not demonstrated that they are entitled to the prayers sought in the Petition. Consequently, the Petition is dismissed. I declare that the 3rd Respondent was validly elected as the Senator of Kisii County. A Certificate under **Section 86** of the **Elections Act** shall accordingly issue.

91. On costs, the general rule is that costs ordinarily follow the event which means that the losing party pays the winners costs. The petitioners and the 1st and 2nd respondents did not make any submissions on costs while 3rd respondent urged this court to consider that he was represented by a Senior Counsel based

in Nairobi who, together with his team, had to make numerous trips to and from Kisii to represent him. He relied on the decision in the case of **Martha Wangari Karua & another v Independent Electoral & Boundaries Commission & 3 others [2017] eKLR High Court of Kenya at Kerugoya Election Petition no. 2 of 2017** wherein the court capped the costs for the Petition at Kshs. 10,000,000.

92. Rule 30(1) of the Elections (Parliamentary and County Elections Petition) provides:-

“36 (1) The election court may, at the conclusion of an election petition, make an order specifying—

(a) the total amount of costs payable;

(b) the maximum costs payable;

(c) the person who shall pay the costs under paragraph (a) and (b) and

(d) the person to whom the costs payable under paragraphs (a) and (b) shall be paid.”

93. The above rule grants this court the power to specify the total amount of cost that shall be paid in a petition. The factors to be considered by court in making an award for costs are; the conduct of the parties, the complexity and importance of the issues before Court, the length of time it took for the petition to be heard and determined together with the effort and skills invested in prosecuting the case. In making a determination on costs the court is always mindful of its ultimate goal which should always be to uphold the interests of justice to all. With the above considerations in mind, I find that the Petitioner shall bear the costs of this petition. This court is alive to the fact that Counsel for the parties, one of whom is a Senior Counsel, travelled from their usual stations of practice to represent their clients before this court. I am of the view that an aggregate sum of Kshs. 8 million is adequate and reasonable as costs for all the parties. The 1st and 2nd Respondents shall be paid an award of costs that shall not exceed Kenya Shillings 3 Million, while the 3rd Respondent shall be entitled to an award of costs that is capped at an amount not exceeding Kshs. 5 Million. Costs shall be taxed by the Deputy Registrar of this court.

94. Finally, I wish to extend this court’s sincere gratitude to all the parties and advocates who appeared before me in this petition for their diligence, resourcefulness and exemplary conduct that facilitated the expeditious disposal of the Petition.

Dated, signed and delivered in open court this 5th day of February 2018

HON. W. OKWANY

JUDGE

In the presence of:

- N/A for the Petitioner
- Mr. Rigoro for the 1st& 2nd Respondents
- Mr. Kaburi for Okong’o Omogeni for the 3rd Respondent
- Omwoyo: court clerk