



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
ELECTION PETITION NUMBER 4 OF 2017

KALLA JACKSON MUSYOKA.....PETITIONER

VERSUS

THE INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (I.E.B.C.).....1ST RESPONDENT

KABAKA BONIFACE MUTINDA2ND RESPONDENT

JUDGEMENT

Introduction and Background

1. The Petitioner herein **KALLA JACKSON MUSYOKA** filed the present Petition dated 6th September, 2017 in which he challenged the declaration of **KABAKA BONIFACE MUTINDA** (2nd Respondent) as the winner in the election held on the 8th August, 2017 for the position of Member of Parliament (Senate) for Machakos County. The Petitioner in his said petition alleged that the election was marred with irregularities and anomalies culminating in the alteration of votes in favour of the 2nd Respondent. The Petitioner therefore sought for the following reliefs:-

(a) An order of scrutiny, recount and re-tally of the votes for the Senatorial elections in Machakos County and the winner be declared therefrom.

(b) A declaration that the election for the position of the Senator Machakos County was not free, fair and verifiable and therefore null, void and invalid.

(c) A declaration do issue that the 2nd Respondent was not duly elected as Senator for Machakos County.

(d) Without prejudice to and in the alternative to (a) above the Honourable court be pleased to issue an order for fresh elections for the position of Senator Machakos County.

(e) Costs of the petition.

2. The 1st Respondent filed its response to the petition with replying affidavit dated 28th September, 2017 denying all the allegations raised by the Petitioner in his petition and sought for the dismissal of the petition with costs and further indicated that the 2nd Respondent was validly elected and that the elections conducted on the 8th August, 2017 were credible, verifiable and in accordance with the Constitution and

the election laws.

3. The 2nd Respondent filed his response to the petition with replying affidavit dated 28th September, 2017 in which he denied the allegations raised in the petition and maintained that the Petitioner has not proved the said allegations and sought to have the petition dismissed with costs.

4. It is imperative to first begin with a summary of the respective cases for each of the parties as gleaned from the pleadings before coming to the actual evidence tendered by the witnesses.

SUMMARY OF PETITIONER'S CASE

(1) That the elections were not free and fair since there was cheating in the counting and tallying of votes across all the 8 constituencies of Machakos area (para.5) of the petition):

For instance, in **Kangundo Poling Station-**

- In 3 polling stations agents were not involved and did not sign forms.
- In 7 polling stations, the forms had been signed by more than one agent from the same party
- In 28 polling stations, the forms do not contain authenticity and cannot be verified
- In 30 polling stations, Wiper Democratic Party agents were not involved.

In Matungulu Constituency

- In Kiliku Primary school the number of registered voters is indicated as 260 yet the number of votes cast is 440 (para. 13(a)) of the petition).
- In Kitulumi Primary School polling station 025 stream 1 the number of registered voters were 144 and valid votes cast was 500 (para. 13(b)) of the petition).
- In Ngunga Primary School polling station 027 stream 1 registered voters were 391 yet total votes cast was 447(para. 13(c) of the petition)

(2) In significant number of polling stations, the votes cast as captured in form 38A differs from the results as captured in the 1st respondent's form 38B (para. 15 of the petition).

- For instance, at Ndalani Primary school Polling station code 016076037600802 in Yatta Constituency Boniface Kabaka got 212 votes as per form 38A while in 38B it is captured as 272 votes (para. 15(A) of the petition).
- At Kithuiani Primary school polling station code 021 in Matungulu Constituency Boniface Kabaka got 205 votes as per form 38A while in Form 38B he was awarded 405 votes (para. 15(B) of the petition).

(3) The Returning officer who presided over the elections in Yatta Constituency was not the one designated to conduct elections in that constituency. Similarly in Masinga Constituency. (para. 16 of the petition) the same situation arose.

(4) Irregular appointment of Machakos County Government workers as returning officers, presiding officers and polling clerks (para. 17 of the petition).

(5) That a sizable number of Form 38A were signed by strangers to the election contrary to Regulation 79(2A)(b) (para. 19 of the petition).

(6) In other numerous instances the forms 38A had the names of the agents written but no signatures (para. 20 of the petition).

(7) That the cumulative number of invalidated votes materially affected the final result declared (para. 21 of the petition).

SUMMARY OF 1ST RESPONDENT'S CASE

(1) On the issue of forms not signed by agents, it is the first Respondents contention that all accredited party agents available at the polling stations were allowed to sign the forms 38As as was required and none was denied the forms or refused the right to sign. On all forms not signed by the agents, the presiding officers have given remarks which show the reason for not signing. Most of the remarks given by the presiding officers included such reasons as agent not signing, agents had left, not available, none was available etc.

(2) On issue of forms not stamped with IEBC stamps, the same was denied. It is the first Respondent's contention that all the forms contained all security features such as IEBC logo, micro text, serial number, anti-copying features and watermark which indeed proved they were authentic and emanating from the IEBC.

(3) The first Respondent denied the allegations that Wiper agents were not involved in the signing of the forms since IEBC had a policy to only allow one agent per party at the polling station to avoid unnecessary crowding.

(4) On the allegation that persons not gazetted as returning officers and presiding officers presided over elections, the first respondent stated that there was a corrigendum gazette notice swapping the returning officers for Masinga and Yatta constituencies respectively.

(5) On the allegations that Machakos County public officers were employed by the first respondent as presiding and deputy presiding officers, it was their case that there was no law barring employees from presiding over elections. Further it was their case that the appointment of presiding officers and their deputies and any other appointments made by the commission had followed due process in the sense that-

a. The advertisement was done through newspaper adverts.

b. Short listing was publicly done by displaying the names to the public for 14 days before appointment.

c. Interviews were conducted; and

d. Appointments were done on merit.

Further, it was their case that no complaint was made by any candidate or party regarding the appointments of those persons and therefore their participation in the election exercise was quite legitimate.

(6) On the allegation that the forms lacked handing over notes by returning officers and taking over notes by county returning officers on Form 38B, it was the 1st respondent's case that all forms had been duly signed before being handed over to the county returning officer and therefore the forms were quite authentic and passed the test.

SUMMARY OF 2ND RESPONDENT'S CASE

(1) That the elections were conducted substantially in accordance with the principles of the constitution and that any irregularity was not substantial to affect the integrity of the process.

(2) That the Petitioner failed to prove the allegations in the petition to the standard required by law; that he did not produce evidence to support his allegations. That he failed to particularize the polling stations in which the alleged malpractices occurred.

(3) On the issue of unstamped forms and the requirements for comments on the forms by the presiding officers, it is the second respondents case that the petitioner has failed to particularize the polling stations affected. Further, it is his case that the Petitioner has failed to state whether the lack of signing of the declaration forms by the said agent was occasioned by the agent's refusal to sign or denial by the first Respondent to sign. The 2nd Respondent further contended that the petitioner has not adduced any evidence to show that his party or his party's agent were present in the polling station complained of. The 2nd Respondent sought reliance on **Regulation 79(6) and (7) of the Elections (General) Regulations which** provides that:

The refusal or failure of a candidate or an agent to sign a declaration form or to record the reasons for their refusal to sign as required shall not by itself invalidate the results announced.

(4) On the issue of failure by the presiding officers to make comments on the declaration forms, the 2nd respondent contended that the forms availed in court have comments on them as required.

(5) On the allegation that some forms were not stamped, it is the 2nd respondent' case that there is no legal provision cited by the petitioner requiring the declaration forms to be stamped.

5. The hearing started in earnest on the 29th November, 2017 starting with the Petitioner who called two witnesses. It is as follows:-

PETITIONER'S EVIDENCE

PW1 - JACKSON MUSYOKA KALLA

6. He stated that he was a candidate for the Senatorial Election in Machakos County. He stated that forms 38A were not signed by his agents in 13 polling stations. On cross examination he did confirm the **polling stations in issue vide paragraph 4 of the Affidavit in support of Petition were three polling stations and not the 13 as indicated** and he thus abandoned the remaining 10 polling station which were **Kangundo East, Kangundo west and Athi River. He stated that his agent at Kangundo East Polling station was one Annah Mutuku. He confirmed that** IEBC had indicated at the bottom of form 38A for Kangundo East polling station that there was no available agent. He admitted that he garnered 49 votes at Masewani primary school but he couldn't recall the name of the agent and that IEBC indicated that none of the agents were available to sign.

He admitted that he got 76 votes at Kilindaloni Primary school where the IEBC indicated that there were no agents to sign. He confirmed that there were party agents representing Wiper Democratic Party and that **Several forms 38A were not stamped by IEBC such as for Kwa Mangu polling station despite the fact that the same had a logo and serial SN 004759 by IEBC and was signed by the Presiding officer.** He confirmed that the stamp authenticates the document.

He confirmed that two agents duly signed the form 38A for Kikondeni primary school polling station despite the lack of stamp and that he garnered 46 votes. He also confirmed that the form had a serial number and logo and which the presiding officer indicated the exercise to have been free and fair. He confirmed forms 38As were signed by agents but that who were not Wiper Democratic Party agents but some strangers. He maintained that he complained to IEBC about **refusal of his agents to the polling station and there was a letter to that effect.**

He confirmed that in several forms 38A, the presiding officer indicated that the exercise was free and fair. His understanding of the presiding officers remarks "N/A" meant that it was not applicable as opposed to not available. He could not remember off head names of his agents. He maintained that his agents were barred from accessing the polling stations and that in some stations more than one agent for one party signed the forms. **He confirmed that all agents were party agents and that there were no agents for Jackson Kalla Musyoka. He maintained that Wiper Democratic Party did not complain about the issue of the agents** and that he was the regional co-ordinator of Wiper Democratic Party and

that the party had its national officials but they did not lodge complaints.

The Petitioner upon being shown form 38A for KMC Primary school he confirmed that it had a logo and serial number and signed by the agents but that there was no IEBC stamp. He also confirmed another form Serial SN 010076 for Mlolongo primary school which was signed by agents. As far as the petitioner was concerned, absence of stamp invalidates the votes cast. The petitioner was shown an IEBC stamp for Oloshaiki primary school and he confirmed that the same emanated from IEBC but he maintained that he did not know all IEBC stamps. He could not ascertain whether the stamp emanated from IEBC.

The Petitioner was shown the relevant form 38A for Kiliku primary school and he confirmed that the registered voters were 582 while votes cast were 440 which was contrary to what he had claimed in his petition and affidavit in support.

The petitioner admitted that he was not aware of the transfer of the returning officers for Masinga and Yatta constituencies.

As regards employees of Machakos County government being hired during the elections, the petitioner maintained that he had worked with them in the same County Government when he served as a chief officer. He further confirmed that indeed the vacancies for the jobs were advertised and everyone was free to apply. The list of those hired was put out to the public for scrutiny. The petitioner claimed that he did a letter of complaint to the County government over the selection of staff to work in the elections but he agreed with the Respondents counsels that there was no law or rule barring Civil Servants from participating in the elections as IEBC temporary staff and that the hiring might have been right. On being cross examined by counsel for the 2nd Respondent, the petitioner admitted that Logo; serial numbers, stamp and anti-copying are security features. **He could not find any of the forms 38A that lacked IEBC logo and serial numbers** and further admitted that his affidavit was silent on any allegations that forms were not signed by the presiding officers. He also admitted that the forms were exact replica of each other and that the names were arranged in the same pattern. He also confirmed that he had a polling agent at AIC Kangundo polling station. Even though the petitioner claimed his agents were denied admission to the polling station, the complaint letter he lodged was not part of the documents in support of his petition. He admitted that he was conversant with the process of what goes on during the counting of votes and that agents were supposed to be present during the counting process with one party appointed agent per polling station. He could see two agents for Wiper Party signed form 38A for Kwa Mangu polling station. Mathithini polling station had two Wiper Party agents signing the form 38A. The forms 38 A were signed by Two agents for Wiper Party. That there was nowhere in his affidavit in support that he indicated that he was reiterating the contents of the Petition. That **he did not particularize cheating in counting of votes vide his affidavit in support of the petition**. That there was no complaint addressed to the IEBC regarding the issues vide paragraphs 6 of the Petition. That **there was no evidence of lack of handing over notes as claimed in paragraph 7 of the Petition**. That **paragraph 9 of the petition is by itself with no other complaint**. That there was **no proof of the complaint on paragraph 9G of the Petition**. That there was **no other complaint as per paragraph 10 of the supporting affidavit other than the petition**. That **the supporting affidavit supports claims in paragraph 11 of the petition**. That there was no proof of complaint in paragraph 12 of the supporting affidavit other than the Petition. That the affidavit in support did not aver to the contents of paragraph 13 (a) (b) (C) and (d) of the Petition. That he got the data for Kiliku primary school from the IEBC. That there was a Kenya gazette Notice of 30/06/2017 Vol. CXIX No.86 regarding the gazettelement of returning officers. That he annexed form 38B as per the allegation in paragraph 13 (d) of the petition. That **paragraphs 14 of the Petition is not particularized**. He did not make averments in paragraph 15 of the petition in his affidavit in support. There was no annexure of form 38B as per the allegation in paragraph 15(A) of the Petition. His affidavit did not aver the contents of paragraph 16 of the petition. There was no other complaint apart from the petition as far as paragraph 16 of the petition was concerned.

He confirmed that there was a candidate vying on Maendeleo Chap Chap party but who came last in the race. He did not indicate vide paragraph 17 of the petition that the 2nd Respondent benefitted from the conduct of the staff alleged to have been hired from the County Government. He did not avail evidence showing that the persons listed as employees of IEBC were public officers. Paragraphs 18 of the petition

was not averred in his affidavit. He admitted that a presiding officer could not go looking for an agent who had absconded his duties since either an agent or candidate present could sign the declaration form. He admitted that the allegations as per paragraph 19 of his affidavit were not particularized as regards forms signed by strangers and did not indicate the evidence of the allegations. The affidavit in support talked of strangers signing the forms. **He did not particularize the particular polling stations in issue vide paragraph 20 of his petition. He did not indicate the cumulative number of invalidated votes as per paragraph 21 of the petition.** He admitted that he garnered 152, 940 while 2nd Respondent got 162,530 votes. He did not compute the number of invalidated votes. He had an agent at the County tallying centre at Machakos Academy. His agent signed the final declaration of the results and her name was Margaret Nzioki. His said tallying agent did not swear an affidavit to challenge the results. He admitted that he did not state anywhere in the petition or affidavit that the 2nd Respondent committed any electoral malpractice.

He vied under Wiper Democratic Party which was affiliated to other parties such as Muungano party as well as NASA which were to help each other's interest in a situation where they did not compete. He voted at St Mary's girl's primary school. Paragraph 4, 5, 6, 7, 8, 9, 10, 11 of his affidavit showed that the allegations were particularized. The anomalies mentioned in paragraph 12 of his affidavit in support were not particularized. There was no such candidate at AIC Kangundo going by the names Itumo and Joyce Kamene. The alleged agents were imposters. The agents for Wiper were acting for his interest. He had grievances on the forms 38As which were not stamped. The stamp used for Oloshaiki polling station was suspect. The hiring of staff from the County Government was not proper. IEBC should have been careful not to allow more than one agent per party. He was not in a position to direct IEBC to restrict itself to only one agent per political party. **He did not have any knowledge of any gazette Notice on transfer of presiding officers. Wiper Party sent agents to all polling stations.** He did not get any report of agents absconding from their duties since they had been hired. He wished to have his own agents and he requested IEBC but it rejected the request. He agreed that he was not an expert on security features on the IEBC documents. The stamp ought to be on forms 38A and 38B. After the declarations, there was no mechanism for lodging complaints to IEBC but to Court through this Petition. He lost votes in form 38B which were not reflected on forms 38A's and there was a complaint to that effect. The presiding officers who were staff of the County Government worked against him as he had been their Chief Officer.

PW.2 - PHYLLIS KASALU NDUVA

7. She was an agent of Wiper Party. Her duties were to oversee the Elections for all the six elective positions at the polling station and to ensure the party's interests were taken care of as far as votes for the six elective seats were concerned. She was hired by Wiper Party and not Jackson Kalla Musyoka. She was attached to Mulu Mutisya Recreation Centre.

She had no right to move to other polling stations. She reported for duty at 4.30 a.m. and was alone for the wiper Party and did not bother to know the other agents for the other parties. She saw the voters participating in casting their votes. She did not see the Petitioner at the polling station. She took oath of office before some lawyer in Nairobi and the lawyer signed the relevant form. She did not have the copy of the oath. She reported for duty at 4.30 a.m. and handed in her appointment letter to the presiding officer whose name she could not recall. She did not enter the polling station since the presiding officer received her letter but directed her to remain outside. She was not allowed into the polling station. She called the Petitioner at around 8.00 a.m. and briefed him about the incident and he advised her to hang around there as he tried to intervene. She did not call the other candidates as she did not know their mobile numbers. She only called the Petitioner who was their candidate as Senator. She remained till 10 p.m. when she decided to go away. She did not know the number of streams at the polling station but had been directed to proceed to room number six. She did not see other agents as she assumed they were inside. Her letter directed her to proceed to room 6. The returning officer started counting the votes but she was not inside. She did not manage to learn of the results garnered by the candidate, and did not know of a place called Machakos Recreational Park and that Mulu Mutisya Recreational Centre was not Machakos Recreational Centre. Her letter indicated she was to work at Mulu Mutisya Recreational Centre but she did not have it with her.

She handed over the letter to the presiding officer. They were not trained to report problems to the presiding officer. She maintained they were trained.

She did not know if her name had been forwarded to the IEBC as regards her role as an agent.

She had nothing else apart from the affidavit to indicate that she was barred from accessing the polling station.

PW.3 - EVANS WAMBUA MUENDO

8. He was a campaign manager for the Petitioner herein during the Senatorial election of 8/8/2017. He voted at Kenyatta stadium. His duties were to manage the campaign teams, ensure the posters were made, and to organize the campaign routes. He was the only one assisting the Petitioner. Agents were to communicate to him in case of anything. One of the agents who contacted him was Phyllis Kasalu. His duty was only to oversee the affairs of the Senator Jackson Kalla Musyoka. He did not know all the agents. The agents were trained by Wiper Party in Nairobi, Machakos and Mwala. On 8/8/2017, he moved around within the County and attended to complaints. He visited various places such as Machakos Teachers college after receipt of complaint by an agent whose names he could not recall. His affidavit did not indicate that he received complaints from Machakos Teachers College. **He alerted the Petitioner over the complaints to take them up. He did not call the presiding officer or Returning officer or the police.**

He could not recall the other names hired by Wiper Democratic Party and he also could not recall the polling stations where the agents had been denied access. He accompanied the Petitioner when he was presenting the protest letter. He did not have the protest letter. He did not indicate the polling station where the problem had been reported. He stated that Mulu Mutisya Recreational Centre was a polling station. He personally knew Phyllis Kasalu as she resided in Machakos and they were in the campaigns together. Phyllis Kasalu was an agent at Mulu Mutisya Recreational Centre where there were 6 streams. He visited Machakos Teachers college and spoke to the agent but he was not allowed into the polling station. He could not recall the name of the agent and the number of polling station within Machakos Training College. Form 38A for Machakos Teachers Training College was signed by one Peter Wambua for Wiper Party. **The wiper agents were not personally known to him, except Phyllis Kasalu.** The agents at Machakos Teachers Training College alerted him that they had been denied access.

1ST RESPONDENT'S EVIDENCE

DW1-JOYCE NAKHANU WAMALWA

9. She worked in Machakos County as the County Returning Officer. She declared the 2nd Respondent as the duly elected Senator and issued a certificate. The County had eight constituencies with their respective Returning Officers namely-

- (1) Machakos Constituency –Returning officer-Marvin Mungah Karanja
- (2) Mavoko – Returning officer – Samuel Chacha
- (3) Kangundo – Returning officer is Rosaline Kasale
- (4) Kathiani – Returning officer is Vincent Saitabau
- (5) Matungulu – Returning officer is Jacob Machekele
- (6) Mwala – Returning officer is Leonard Njenga
- (7) Yatta – Returning officer is Nicholas Kalili

(8) Masinga – Returning officer is Lucy Mbithe John

All the Returning officers were gazetted as per the gazette Notice of 5/5/2017 Vol CXIX No. 58. The said Gazette Notice indicated Lucy Mbithe John was initially gazetted for Yatta while Nicholas Kalili was to oversee Masinga Constituency. There was a corrigendum done on the changes vide gazette Notice dated 26/5/2017 Vol. CIXIX No. 4980 which affected the two Returning officers who swapped places. The swapping aforesaid affected several returning officers. The two returning officers therefore participated in the nominations and the elections of 8/8/2017 and were still in charge of those two constituencies. The said witness confirmed that the issue of using stamps was a best practice but even if it was not used, the same did not invalidate the results. They required the presiding officers to use the stamps on the forms. They relied on the security features on the forms and also whether they had been signed by agents. Agents were to be brought to the polling stations by the candidates and when there were no agents, the results were accepted nonetheless. They had unique security features on the forms such as the logos and they took them as genuine even if they were not signed by the agents. All forms brought by the presiding officers who had taken oath were deemed genuine. **There was an assumption that each party had one agent. Agents represented parties in the coalitions such as Nasa or Jubilee.** Failure by agents to appear at the polling station would not bar the election exercise from being conducted.

Her work was to add together the cumulative forms figures and declare the person with the highest votes as the winner. The number of form 38A's on the handing over report from Masinga Constituency was not indicated. The handing over details for several constituencies showed that the numbers of forms 38A were not indicated. Her duty was to collect the details on the statutory forms. The presiding officers did not fill the form indicating receipt of all forms 38 A.

The witness confirmed that indeed the Petitioner made a complaint to her that some of his agents had been locked out but he did not particularize the specific polling stations. The complaint was made on 8/8/2017. She visited the polling stations following the complaints but found out that the same were false since all agents were at the particular polling stations. The Petitioner requested her to appoint more than one agent but same was declined and restricted him to avail only one agent. The witness stated that they **accepted forms even if they were not signed and without comments by the presiding officers since the officers had been trained and had taken oath. The absence of signatures and comments on forms did not invalidate a result.** According to the witness, the election was conducted in accordance with the law. She further stated that there was no legal requirement for stamping documents though it was a best practice. She did not receive forms that did not have any security features. All forms 38A were signed by the presiding and returning officers. All forms 38B were signed by the officers. The details on forms 38A and 38B were prima facie valid unless a complaint was raised. An IEBC officer could not force an agent to sign forms as they did it willingly. Form 38B was the final declaration of the results. The Masinga Constituency Returning officer Lucy Mbithe signed and stamped the form 38B. Form 38B from Masinga Constituency was signed by a Wiper agent and which declared the authenticity and validity of the election for that area.

Her reply to paragraph 2 of the petition denied the contents of paragraph 15 of the petition. The witness further stated that the petitioner did not claim any inconsistencies in the election as he did not particularize the specific areas of complaint and therefore the first Respondent could not pin point the same. Form 38C which was the final declaration of results from the entire County had all the security features and was signed and stamped. Agents for parties signed form 38C and she did not receive any complaints from the candidates.

10. DW2- LEONARD NJENGA

Was the Mwala Constituency elections co-coordinator and returning officer for Mwala constituency. He stated that stamping of forms was part of the administrative procedure, but was not a must. If agents were absent, the process could still proceed. He accepted the figures as indicated by the presiding officer. He did not receive any complaints within his Constituency. **Form 38B was witnessed by an agent of wiper party.**

DW3- VINCENT SAITABAU

11. Was the Returning officer for Kathiani Constituency. He signed

Form 38B as the returning officer for Kathiani Constituency. Stamping of documents were administrative procedures but its absence did not invalidate documents as long as other security features were available. He had not been shown any form without any security features.

DW4-ROSALINE YIAMAT KASALE

12. Was the returning officer for Kangundo Constituency. There were no complaints made to her over the election in her area. Agents present could sign the forms but if absent, the forms would still be valid. They could not force an agent to sign if he was not willing to.

DW5-MARVIN MUNGAH

13. Was the Returning Officer for Machakos Town Constituency. He stated that they did not have any polling station called Mulu Mutisya Recreational Centre by the IEBC records. That Machakos Recreational Park was within Machakos Township and that stamping of documents was not statutory obligation but administrative. He confirmed that as long as the form was signed by the presiding officer even if there were no agents signatures, he would accept the same as valid. He confirmed that form 38A for Machakos Teachers Training College was stamped and signed by the presiding officer but not by the agents but had security features. He stated that he did not receive any complaints over the election at Machakos Teachers Training College or any other polling station.

DW6 SAMUEL N. CHACHA

14. Was the Mavoko Constituency returning officer. He confirmed that the handing over document was not signed by him but that his ID card number was there. He also confirmed that the handing over document was not stamped. He further confirmed that the lack of stamp did not invalidate results unless there was a complaint raised to the results. That the stamp on the form 38A for Oloshaiki polling station belonged to IEBC. That any accredited agent present at a polling station was allowed to sign the forms. No complaint was made to him about denial of access to agents as several agents did sign the forms.

DW7 -JACOB MACHEKELE

15. Was the returning officer for Matungulu Constituency. He stated that stamping of documents was an administrative procedure and was for best practises. He confirmed that there was a typographical error in regard to votes for Kithunyani primary school. He was not shown any evidence that 2nd Respondent garnered more votes than those registered at Kithunyani primary school.

DW8-LUCY MBITHE JOHN

16. Was the Masinga Constituency Returning Officer. She was gazetted as such vide Kenya Gazette No. 44120 of 2017 which was a corrigendum in which she took over from one Kalili who was taken to Yatta Constituency. She confirmed that the handing over notes for Masinga was not signed by herself due to lateness and fatigue. She did not receive any formal or oral complaint in her area. She confirmed that form 38B for Masinga was signed by her and it had the security features. She finally stated that the agents for wiper party signed form 38B.

DW9- NICHOLAS KALILI KAMANDALI

17. Was the returning officer for Yatta Constituency. He was initially appointed as returning officer for Masinga Constituency but since the area was his home, he was taken to Yatta Constituency where he took over from Lucy Mbithe John. The changes were effected vide Kenya Gazette No. 44120 of 26/06/2017. He stated that the claim about Ndalani primary school was not correct as there could have

been a typing error and not in bad faith and further no evidence had been shown to him about the claim on Ndalani primary school results.

2ND RESPONDENT'S EVIDENCE

DW10 - KABAKA BONIFACE MUTINDA

18. He stated that he had won the elections for Senator on 8/8/2017. That his Party Chama cha Uzalendo provided the agents to the polling stations. He learnt that his party did not avail the agents to some of the polling stations. He maintained that the allegations by the Petitioner were unfounded since IEBC conducted the elections properly. That the IEBC had directed that the parties to avail one agent each. He had no agents in the polling stations but was satisfied with the election process. He prayed for the dismissal of the Petition with costs.

SUBMISSIONS

19. At the close of the evidence of the respective parties herein, learned Counsels filed written submissions first on the report of the Deputy Registrar dated 29/11/2017 regarding resealing of ballot boxes and on the petition itself.

Petitioner's Submissions:

20. As regards the report of the Deputy Registrar on the resealing of ballot boxes dated 29/11/2017, the Petitioner submitted that there were some seals broken, damaged while others missing. It was also noted that some lids were broken. It was the conclusion of the Petitioner that discrepancies were manifested which ought to be considered for a just determination of the suit.

It was submitted for the Petitioner that all the grounds and allegations raised in the petition have been proved namely that the elections were not conducted fairly as there was cheating in the counting and tallying of votes across all the 8 constituencies in Machakos County, that the returning officers for Yatta and Masinga Constituencies had not been gazetted to conduct elections, that County Government workers were irregularly appointed as returning officers who suppressed the Petitioner's chances of winning in the election, that the cumulative number of invalid votes materially affected the final results declared by the 1st Respondent, that a significant number of polling stations had discrepancies on the **forms 38A** as compared with **form 38B**, that the Petitioner's agents were denied access to polling stations and finally that **forms 38A** were neither signed by agents nor stamped and had no comments by the presiding officers.

Learned Counsel for the Petitioner finally submitted that due to the myriad discrepancies as borne from the pleadings, documents and evidence, this court should invalidate the election of the 2nd Respondent and call for fresh elections. Reliance was sought in the case of **WILLIAM KABOGO =VS= GEORGE THUO & 2 OTHERS [2000] eKLR** and **NICHOLAS KIPTOO ARAP SALAT =VS= IEBC & 7 OTHERS - SCK. PET NO.23 OF 2014** and **RICHARD KALEMBE NDILE & ANOTHER =VS= PATRICK MUSIMBA & 2 OTHERS – MACHAKOS ELECTION PET. NO. 7 OF 2013.**

1st Respondent's Submissions

21. As regards the report by the Deputy Registrar, the first Respondent submitted that the purpose of undertaking the exercise of placing seals to the ballot boxes by parties was to preserve the status of the ballot boxes or secure them pending hearing and determination of the petition and was done in the presence of all parties. It was submitted that the discrepancies noted were purely typographical errors on serial numbers because the report was prepared in a hurry. It was further submitted that the boxes were sealed at the polling station and hence not affected save only during their movement from one point to another and that if any breakage occurred, then it did not affect the results declared.

Learned counsel for the 1st Respondent submitted that the Petitioner has failed to prove the allegations raised in the petition. As regards the alleged lack of signatures by agents and lack of stamps on forms 38A's, it was submitted that the wiper Democratic Party agents duly signed the forms and that forms without stamp were still valid in view of the fact that they had micro text serial numbers, anti-copying features and watermark and further the failure by the presiding officers to stamp or make comments thereon did not have any serious impact on the eventual results.

It was also submitted that the Petitioner's claim that some Returning officers were not gazetted was untrue since all the returning officers for all the 8 constituencies had been duly gazetted and where there was a swapping of officers, a corrigendum was duly provided.

As regards the allegation that Machakos County public officers had been employed as presiding officers, it was submitted that no complaint had been lodged by the Petitioner prior to the election exercise and further that the 1st Respondent had duly advertised for the jobs and conducted interviews for those shortlisted and therefore there was nothing untoward in the recruitment.

As regards the issue of lack of handing over notes, it was submitted that the lack thereof did not affect the results as declared since the statutory forms had been duly signed.

Finally as regards the request for scrutiny, it was submitted that the Petitioner had failed to plead with a degree of specificity the areas requiring such an order and besides the issue of scrutiny had already been dealt with when the Petitioner made an Application dated 3/10/2017 which was disposed of by the court before the reception of the evidence herein.

It was also submitted that the 1st Respondent discharged its constitutional responsibility by conducting a free, fair, accurate and transparent election in which it declared the 2nd Respondent as the duly elected Member of Parliament (Senate) for Machakos County.

Finally it was submitted that irregularities (if any) did not affect the outcome of the election and in any case the Petitioner had failed to prove to the required standard of proof that the irregularities complained of affected the outcome of the results.

2nd Respondent's Submissions

22. As regards the report by the Deputy Registrar dated 29/11/2017, it was submitted that the purpose of resealing the ballot boxes was to comply with the court's direction to preserve the election materials and as such any damage or discrepancies on ballot boxes serial numbers were typographical and did not affect the electoral process. There was no complaint or allegation of manipulation or interference with the ballot boxes and further the breakages or discrepancies were post election irregularities which have no effect or bearing on the outcome of the election and as such the same should not be considered in the determination of the petition.

Learned counsel for the 2nd Respondent further submitted that the Petitioner failed to prove that the election did not substantially comply with the law and that irregularities affected the result. It was also submitted that the Petitioner failed to particularize the polling stations that had irregularities so as to enable the Respondents to respond appropriately. It was further submitted that failure by agents to sign statutory forms or the lack of stamps thereon or comments thereon by presiding officers was curable under Regulation 79(6) & (7) of the Elections(General) Regulations.

It was also submitted that the Petitioner's witnesses such as Phyllis Kasalu Nduva came out as unreliable and liars as they not only could not remember names of their fellow agents at the polling stations and further could not provide proof of their having been denied access to polling stations and therefore this court should not believe their testimonies.

It was also submitted that the Petitioner is bound by his pleading and that his learned counsel now

attempting to particularize polling stations with alleged irregularities during the submissions stage amounts to the amending the petition outside the statutory period which should not be allowed.

It was also submitted that the request for scrutiny by the petitioner during submissions is irregular and unhelpful to the Petitioner since the issue had already been dealt with vide this court's ruling dated 14/11/2017 and therefore the same issue should not be re-litigated again.

Finally it was submitted that the elections had been conducted in accordance with the provisions of Articles 81 and 86 of the Constitution as well as the elections Act.

DETERMINATION

23. I have considered the evidence adduced by the parties herein as well as the submissions and authorities by their learned counsels. I have also considered the report of the Deputy Registrar of this court dated 29/11/2017. The issues for determination are as follows:-

(i) Which party bears the burden of proof in this petition?

(ii) Whether or not there were irregularities and whether the same (if any) affected the results of the elections,

(iii) Whether the first Respondent discharged its responsibility to conduct free, fair, accurate, credible and transparent elections for the Member of Parliament (Senate) for Machakos County on the 8th August, 2017,

(iv) Whether or not the Petitioner has laid sufficient grounds for an order of scrutiny,

(v) Whether or not the 2nd Respondent was validly elected and declared the winner of the Member of Parliament (Senate) for Machakos County,

(vi) Which party bears the costs of the petition?

24. As regards the first issue, it is well established that the burden of proof rests upon the person who has made an allegation against another. Section 107 of the Evidence Act aptly captures the maxim "He who alleges must prove". In the case at hand, the burden of establishing the allegations of non-compliance with the Constitution and the Elections Law, electoral malpractices and misconduct which would result in the election being declared invalid rests on the Petitioner. The burden of proof in election petitions such as the instant petition is one above that required in civil suits (preponderance of probability) but below the criminal standard (beyond reasonable doubt). In the Supreme Court of Kenya case of **RAILA AMOLLO ODINGA & ANOTHER = VS= IEBC AND 2 OTHERS - Presidential Petition NO. 1 OF 2017 [2017] eKLR** the court stated as follows:-

193 "It is trite law that whoever alleges must prove. Section 107 of the Evidence Act, Chapter 80 laws of Kenya stipulates this in the following terms:-

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

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

Further Section 109 in narrowing down to proof of particular facts stipulate:

The burden of proof as to any fact lies on the person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

.....

(195) Regarding the incidence of burden of proof, Section 108 provides that:-

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

The Supreme Court of Kenya in the above cases was reiterating on its earlier decision in **RAILA ODINGA & OTHERS =VS= IEBC & 3 OTHERS – SCK PETITION NO. 5 OF 2013 [2013] eKLR** where it stated thus:-

“ this emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies, omnia praesumuntur rite et solemniter esse acta, all acts are presumed to be done rightly and regularly. So the Petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the laws.”

The court in the case of **MOSES WANJALA LUKOYE =VS = BENARD ALFRED WEKESA SAMBU – BUNGOMA ELECTION PETITION NO. 2 OF 2013** followed the above Supreme Court decision when it held as follows:-

“The evidential burden initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence. Of the essence is that the evidential burden is the obligation of the Respondent once it has been properly created by the evidence tendered, and failure to discharge the evidential burden disadvantages the Respondent with the result that he fails and the Petitioner succeed in this petition, he ought to satisfy the onus of proof required”.

Going by the above court decisions, I find that the burden of proof in this matter rests squarely upon the Petitioner to discharge. He is the one who has lodged this petition and in which he has raised several allegations against the Respondents and therefore he is duty bound to prove the same to the required standard so as to shift the burden to the Respondents to adduce evidence to prove compliance with the law as regards the elections conducted on the 8/8/2017. It is noted that the Petitioner in his petition dated 6th September,2017, made a raft of allegations against the Respondents as follows:-

- (a) A number of polling stations did not have IEBC stamps on the forms 38As hence the results could not be authenticated.***
- (b) A number of forms 38A’s were not witnessed by any agents and in some reasons are not given.***
- (c) A number of f0rm 38As were signed by two or more agents from other political parties.***
- (d) A number of form 38As were not signed by Wiper Agents.***
- (e) A number of polling stations had agents from other parties without candidates signing the said forms.***
- (f) The 1st Respondent failed to accurately tabulate and collate the results.***
- (g) A number of forms 38Bs lacked handing over notes and failed to show how many form 38As were received.***
- (h) The entries in form 38As did not match with the ones in form 38B.***
- (i) Machakos County Public officers were enlisted as the 1st Respondent’s employees for***

purposes of conducting the said election.

(j) Person not gazetted presided over the elections.

The Petitioner herein testified and called two witnesses in support of the petition. An analysis of the entire evidence shortly will establish whether in the end the Petitioner has discharged the burden of proof imposed upon him.

25. As regards the second issue, the Petitioner in his petition made several allegations in his petition claiming that there were myriads of irregularities and anomalies in the election conducted by the 1st Respondent on the 8/8/2017. Indeed the conduct of elections is governed by Article 81 and 86 of the Constitution and the Elections Act plus Rules and Regulations thereunder which demand that the electoral system should entail free and fair elections which are transparent and administered by an independent body in an impartial, neutral, efficient, accurate and accountable manner. Hence this court is now called upon to determine if the elections had been conducted substantially in accordance with the principles laid in the Constitution and the elections laws and whether the non-compliance as contended by the Petitioner substantially or materially affected the results of the elections. Before embarking on the irregularities and anomalies pointed out by the Petitioner, I need to point out that it is a matter of public knowledge and notoriety that elections' the world over are never perfect due to the inherent fallibility of human beings who are prone to err. Indeed Section 83 of the Elections Act No. 24 of 2011 seems to have taken into account the circumstances aforesaid and provided some measure of allowance as follows:-

Section 83:

“No election shall be declared to be void by reasons 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.”

The Supreme Court of Kenya in **Presidential Election Petition 1 Of 2017 Raila Amollo Odinga & Anor =Vs= IEBC & 2 others** pronounce itself on Section 83 of the Elections Act when it held as follows:-

“ 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 with the principles laid down in the Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election”.

The Supreme court in the above case went further to state as follows:-

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

It is under those parameters that the Petitioner herein was obligated to prove the several allegations in his petition that the same were of such magnitude and extent to have affected the results of the election warranting this court to invalidate the same. I shall now proceed to analyze the said irregularities as follows:-

(i) Forms not signed by agents

The Petitioner herein testified and stated that forms 38As for Various polling stations were not signed by agents as required and that agents representing the interests of Wiper Democratic Party had not been involved. The Petitioner upon being cross-examined admitted that he had not particularized the specific polling stations in his petition. The Petitioner on being shown several forms 38As, confirmed that indeed they had been signed by Wiper Democratic Movement Party agents. The Returning officers who testified for the 1st Respondent stated that all accredited agents available at the polling stations were allowed to sign the forms 38A as was required and none was denied and that where agents did not sign, the presiding officers made remarks such as “*Not available*” or “*None was available*”. The Petitioner indeed admitted in his evidence that he did not have personal agents but relied on the agents provided by the political party namely Wiper Democratic Movement. It is noted that the Petitioner did not call any of the party agents who had been denied an opportunity to sign the forms. This court notes the fact that even though the forms were not signed by the agents, the same would not invalidate the results announced by the presiding officer. The Elections (General) Regulations 79(6) and (7) provides as follows:-

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

The absence of a candidate or agent at the signing of a declaration form or the announcement of results under sub-regulations (2) shall not by itself invalidate the results announced.

The Petitioner was under obligation to prove that the results contained in the forms was not a true reflection of the ballots cast. The Petitioner appeared to dwell so much on the non- signing of the forms by some agents but abandoned the more germane issue of the number of the ballots cast. In the circumstances I am of the considered view that though there were some forms not signed by agents and despite particulars thereof not pleaded and particularized by the Petitioner, the irregularity did not affect the results declared.

(ii) Forms not stamped with the IEBC Stamp

The Petitioner raised an issue to do with lack of IEBC stamp on several forms 38As in all the eight constituencies of Machakos County. However it is noted that the petition itself does not contain the specific polling stations in question. I find the Petitioner was under a duty to particularize the specific polling stations in dispute in the petition but not to just make a generalized allegation about them. The Petitioner on being cross-examined by counsel for the 1st Respondent admitted that indeed the sample of the forms 38A did have IEBC logo, bar code, micro-text serial number as well as anti-copying features and watermarks. He also confirmed that the forms had been duly signed by the presiding officer and their deputies. All the returning officers for the 8 constituencies testified herein and confirmed that the stamping of documents was purely an internal administrative exercise. Indeed the said Returning Officers admitted that the stamping of documents is a best practice but the lack of a stamp does not invalidate the results.

The testimonies of the Returning Officers for the eight constituencies indeed confirmed that the lack of stamp on the statutory forms did not create a problem as long as the forms had the requisite security features namely a barcode, micro text serial number, water mark and anti-copying features and further the forms had been duly signed by the presiding and deputy presiding officers making them authentic. I am convinced that the lack of stamp on the documents did not affect the results of the elections.

iii. Persons not gazetted as Returning officers for certain Constituencies

The Petitioner in his testimony stated that certain persons had acted as returning officer in some constituencies yet they had not been gazetted for that area. He particularly pointed out Masinga and Yatta constituencies. The first Respondent did call all the eight returning officers for the eight constituencies in Machakos County and they all confirmed that they had been duly gazetted for the respective areas. The County Returning officer Mrs Joyce Wamalwa stated that there was a corrigendum Gazette Notice

interchanging the Returning officer for Masinga Constituency with that of Yatta Constituency. The specific gazette Notice was dated 26/05/2017 and the reason was due to the fact that the then Returning Officer for Masinga constituency Nicholas Kalili hailed from the same area and was thus directed to move to Yatta constituency and swap places with Lucy Mbithe John. The two returning officers testified before court and confirmed the authenticity of the corrigendum. Again all the eight returning officers for the eight constituencies had been duly gazetted after their names had been advertised and interviews conducted for those short listed and there is no evidence that they had not been gazetted for the areas as contended by the Petitioner. The Petitioner did not avail any evidence that the said officers had not been gazetted. I am convinced that the Petitioner might not have been aware of the corrigendum gazette Notice swapping the two Returning Officers for Masinga and Yatta Constituencies. Hence the swapping was quite legitimate and did not affect the results in any way.

iv. Machakos County Staff being hired by IEBC to conduct elections:

The Petitioner testified that most of the presiding and deputy presiding officers engaged in the election comprised of staff of the Machakos County government and who were against him by virtue of the fact that he had been their former boss. However, on being cross-examined by the counsels for the 1st and 2nd Respondents, he admitted that he had not availed the evidence and further agreed with them that the process of hiring and interviewing them had been publicly done by way of advertisement and further admitted that there was no law barring civil servants from participating in the elections as temporary staff. I find that the Petitioner did not adduce evidence to the effect that the said officers were biased towards him and further failed to present any evidence that he had even lodged a complaint against any one of them during and after the recruitment and further failed to adduce concrete evidence that the participation of the Machakos County employees in the election interfered or affected his votes in the election.

v. Lack of handing over and taking over notes by Returning Officers and County Returning Officers:

The Petitioner in his evidence castigated the returning officers and the County Returning Officer for not ensuring that handing over and taking over notes were endorsed on forms 38Bs. The first Respondent called all the 8 Returning Officers to testify herein and they confirmed that all the forms had been duly signed and that the lack of handing over notes did not affect the results as declared. Both the Petitioner and witnesses for the 1st Respondent are in agreement that all the statutory forms 38As and 38Bs had been duly signed by the respective officers and the only point of disagreement is that some of the forms were not accompanied by handing over and taking over notes. Indeed the making of handing and taking over notes is supposed to be good practice and should be encouraged as they will aid persons seeking to refer to them afterwards. However as long as the forms have been duly signed by the relevant officers confirming the contents and authenticity of the forms, I find the failure to make notes is not fatal and does not in my view invalidate the results so declared.

vi. Agents being turned away from polling stations:

The Petitioner testified that several of his agents were denied entry into polling stations and upon being alerted, he wrote a letter to the County Returning officer who promised to investigate. The Petitioner called his two witnesses Phyllis Kasalu Nduva and Evans Wambua Muendo. The evidence of the three confirmed that each party or candidate was to present one polling agent per polling station to avoid overcrowding. The Petitioner admitted that it was his political party Wiper Democratic Movement which provided the agents. The Petitioner admitted that he did not have proof that he had lodged a complaint with the County Returning officer over the denial of his agents into the polling stations. His agent Phyllis Kasalu Nduva in the her evidence appeared to have no clue as to the polling station she had been assigned to and also failed to avail her accreditation letter as well as oath of secrecy. Even though she claimed to have been turned away, it is highly likely that the presiding officers could not indulge her as she had no accreditation documents. The other agent Evans Wambua Muendo could not recall the names of the agents who had been denied access to polling stations yet he claimed to have been the chief agent of the Petitioner. In the end, I found the two witnesses to be untruthful and unhelpful even to the Petitioner as

they came out as unreliable and untrustworthy. The Petitioner did admit that several wiper agents had signed the forms 38As and since he had indicated that it was the Wiper Party that provided the agents it could have been appropriate for his political party to avail evidence that its agents were denied access to the polling stations which affected the performance of their candidate. In the end I have no option but to find that the Petitioner has not established that agents had been denied access to the polling stations and therefore the results declared in those polling stations should not be invalidated.

In the result, I find that despite the few irregularities noted, the same did not substantially affect the results as declared in the elections.

vii. Irregularities found during resealing of ballot boxes:

Petitioner in his submissions on the Deputy Registrar's report dated 29/11/2017 noted that some seals were broken and others damaged or missing and it was his contention that there had been serious discrepancies that ought to be considered by this court in determining the petition.

Both the Respondents submitted that the purpose of the resealing was to preserve the elections materials and that the discrepancies noted were post elections irregularities which have no effect on the hearing and outcome of the Senatorial election.

Indeed this court ordered for the resealing of ballot boxes as it did not have storage facilities and it was thus necessary to preserve the said election materials in the event an order for scrutiny and recount would be made. The report of the Deputy Registrar dated 29/11/2017 noted that certain seals and lids were broken while others were missing. The exercise had been conducted in the presence of the parties and their agents. It is noted that no complaint had been raised at the time of the exercise or even prior or thereafter by any of the parties. It is highly likely that the breakages or damages occurred during the movement of the ballot boxes and election materials from the polling station to the tallying centre and to the stores and therefore should be deemed as post election irregularities which did not affect the results that had already been captured and relayed. In the premises, I find the discrepancies noted did not affect the results that had already been declared.

26. As regards the third issue, it is noted that the Respondent called all the eight returning officers for the eight constituencies in Machakos County – Machakos Town, Mavoko, Kangundo, Kathiani, Matungulu, Mwala, Yatta and Masinga. They all confirmed that all the statutory forms were duly signed and that the forms had the requisite security features namely: water mark, bar code, micro-text serial numbers, anti-copying features, IEBC logo thereby fortifying their authenticity. All the statutory forms 38As and 38Bs were duly signed by the relevant officers and also signed by polling and tallying agents for the candidates and political parties. The 1st Respondent was under a duty to ensure that it conducted an election that was free, fair, transparent and accountable as per the dictates of the Constitution and election laws. As earlier noted that there is no election the world over that has had a one hundred percent success rate due to the fact that they are conducted by human beings who are fallible and prone to err, the irregularities and anomalies that came to the fore during the reception of the evidence are not that substantial to affect the eventual results of the election as declared. Indeed the Petitioner only called two witnesses whose evidence had to do with denial of access to one or two polling stations. Even though the two witnesses did not manage to convince the court on the denial of access, this clearly leaves no doubt that the overall conduct of the 1st Respondent in the elections on all the eight constituencies for the position of Senator Machakos County is exemplary. This then leads me to conclude that the 1st Respondent conducted the election in accordance with the principles laid down in the Constitution and election laws and that the few irregularities and anomalies noted did not substantially affect the result of the election which reflected the will the voters.

27. As regards the fourth issue namely whether or not the Petitioner has laid sufficient grounds for an order of scrutiny, I need to point out from the outset that the Petitioner herein had moved this court vide his application dated 3/10/2017 seeking for an order for scrutiny among other prayers and that this court rendered its ruling on the 14/11/2017 in which it had declined a request for scrutiny. Since then no appeal has been lodged against the said ruling. It seems Counsel for the Petitioner has now sought to revive the

issue of scrutiny through the submissions yet the same had already been canvassed and dealt with. Even if the prayer for scrutiny still remained as pleaded in the Petition, the fact that the Petitioner had moved the court appropriately by way of application for scrutiny and the issue determined does not entitle him to revisit it again either by way of application or submissions since the same is *res judicata*. The Petitioner cannot therefore re-litigate an issue which has been substantially determined on merits. He is precluded. In the premises this court finds that it is already functus officio on the issue of scrutiny and therefore the same cannot be granted at this stage. The Petitioner therefore has not given sufficient reasons why the court should revisit the issue of scrutiny that had been determined.

28. As regards the fifth issue namely whether or not the 2nd Respondent was elected and declared the winner of the Member of Parliament (senate) for Machakos County, it is noted from the above observations that the 1st Respondent had conducted the election in accordance with the principles of the Constitution and election laws and which elections were generally free, fair, credible and transparent. It is also noted that there were no electoral malpractices leveled and proved against the 2nd Respondent. As the election reflected the will of the voters, I find that the 2nd Respondent was validly elected and declared the winner of the Member of Parliament (Senate) for Machakos County.

Petitioner's testimony and witnesses:

29. The Petitioner in his testimony alluded to the irregularities regarding agents not signing forms 38As, lack of stamping of the statutory forms, denial of agents to access polling stations, returning officers not being gazetted, staff of Machakos County being employed to work as presiding officers, lack of handing over or taking over notes by the returning officers and the County Returning Officer. The Petitioner admitted on cross – examination that indeed he had not particularized the specific areas affected in his petition. The Petitioner's two witnesses Phyllis Kasalu Nduva and Evans Wambua Muendo did not help the Petitioner's case as they too did not manage to prove the allegations that they had been denied access to the polling stations and they came out as witnesses. The effect of this is that the Petitioner's evidence was not at all corroborated. Again the failure by the Petitioner to particularize the specific polling stations in dispute in his petition made it difficult for the Respondents to address themselves on the generalized allegations. Hence I find the petitioner did not prove the allegations to the required standard of proof to warrant this court to invalidate the results. The evidence of the Respondents and their witnesses appeared to cast doubt on the Petitioner's case and therefore I find that he has failed to prove that the elections were conducted in a manner that violated the principles laid down in the Constitution as well as the election laws and that the irregularities he complained of were of such a magnitude that they affected the results declared.

Conclusion

30. From the foregoing observations, it is clear that the Petitioner who bore the burden of proof in these proceedings failed to prove his case beyond the required standard of proof. As the Petitioner has failed to prove his case against the Respondents, the petition is therefore dismissed.

Costs

31. The issues of costs is provided for under Section 84 of the Elections Act No. 24 of 2011 which provides as follows:-

An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.

- Learned Counsel for the Petitioner submitted that in the event that the petition is dismissed, the 1st Respondent should be condemned to pay the costs as they are the ones who did not adhere to their own best practises in the election leading to this petition. Reliance was sought in the case of **JOSEPH AMISI OMUKANDA =VS= IEBC & 2 OTHERS – KAKAMEGA ELECTION PETITION NO. 4 OF 2013** where the court ordered each party to meet their costs.

- Learned Counsel for the 1st Respondent sought for costs but however did not indicate the exact amount of costs.
- Learned Counsel for the 2nd Respondent sought for costs in the sum of Kshs.15,000,000/= and relied on the case of **MARTHA WANGARI KARUA & ANOTHER =VS= IEBC & 3 OTHERS [2017] eKLR** where a sum of Kshs.10,000,000/= was awarded to the Respondents.

32. I have considered the submissions on the issue of costs and note that Section 84 of the Elections Act provides for the capping of costs. I am not persuaded by the submissions of the Counsel for the Petitioner urging this court to penalize the 1st Respondent with costs because the irregularities have been found not to have affected the results of the election it had conducted. As costs follow the event, I order the Petitioner to meet the costs of the suit to the Respondents.

Indeed this petition was not a complex one and the issues were fairly straight forward as borne by the pleadings and submissions tendered. The witnesses were generally brief and the evidence was not that protracted. The learned Counsels must have taken some bit of time to conduct research and prepare the pleadings, Applications and submissions and participating in court during the hearing of the matter and hence the need for costs. Taking all these into account, I order that the instructions fees for each party shall be capped at Kshs.2,000,000/=.

ORDERS:

- (a) The petition be and is hereby dismissed with costs to the Respondents.*
- (b) The Respondents are awarded costs capped at Kshs.2,000,000/= each.*
- (c) The costs shall be taxed and certified by the Deputy Registrar of this court.*
- (d) A certificate of this determination shall issue to the IEBC and the Speaker of the Senate.*

Orders accordingly.

Dated and delivered at **Machakos** this 2nd day of **February, 2018.**

D. K. KEMEI

JUDGE

In the presence of:-

Wetaba - for the Petitioner

Mrs Wambua - for the 1st Respondent

Ligunya - for the 2nd Respondent

Kituva - Court Assistant