REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

THE ELECTION ACT 2011

ELECTIONS(PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017

ELECTION PETITION NO. 2 OF 2017

KHAMISI BUTICHI RAMADHANI.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT

SHINALI BENARD MASAKA.....2ND RESPONDENT

HUDSON SALENOI (RETURNING OFFICER IKOLOMANI.....3RD RESPONDENT

JUDGMENT

Introduction

1. The election for the Member of the National Assembly of Ikolomani Constituency, Kakamega County held on the 8th August, 2017 attracted a total of six (6) candidates. These candidates were;-

(a) Bernard Masaka Shinali

(b) Butichi Ramadhan Khamisi

(c) Mukhuno Vincent

(d) Masindi David Muyonga

(e) Albert Stanslous Mwilitsa

(f) Mbapale David Liyali

2. The election was conducted and supervised by the Independent Electoral and Boundaries Commission [IEBC] pursuant to its mandate under Article 88(4) of the Constitution and Section 4 of the Independent Electoral and Boundaries Commission Act (No. 9 of 2011)

3. At the conclusion of the election, the 3rd Respondent, Hudson Salenoi, IEBC's duly appointed Retuning Officer (R.O) for Ikolomani Constituency announced the results on 09.08.2017, returning the 2nd Respondent as the duly elected Member of the National Assembly for Ikolomani Constituency. The 2nd Respondent had the majority votes totaling 15731 as opposed to the petitioner's votes of 14600. The other four candidates scored as follows;-

- Mukhuno Vincent – 3414
- Masindi David Muyonga – 1717
- Albert Stanslous Mwilitsa – 569
- Mbapale David Liyali – 391

The Petition

4. The Petitioner felt aggrieved by the results of the elections, and on 05.09.2017 he filed this petition on grounds that the 2nd Respondent had contravened Articles 38(1)(c) and Article 2 of the Constitution by engaging in violence. The Petitioner made the following allegations against the respondents

(a) widespread use of force or violence during the election period by 2nd Respondent

(b) undue influence and misuse of state resources by the 2nd Respondent

(c) election malpractice on the part of the 1st Respondent; bias, discrimination and special treatment of agents, thereby contravening Article 88(5) of the Constitution, Section 30 of the Elections Act as well as rules 62, 73(1) 76, 74, 79, 79(2A) and (c), 82(1), 81 and Article 81(e) (ii) of the Constitution.

5. On the basis of the above complaints, the Petitioner sought the following reliefs:-

(a) A declaration that the non-compliance, irregularities and improprieties in the Member of the National Assembly, election in Ikolomani was [so] substantial and significant that it affected the result thereof

(b) A declaration that the Ikolomani Member of the National Assembly elections held on 8th August, 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void.

(c) A declaration that the 2nd Respondent was not validly declared as the Ikolomai Member of the National Assembly elect and that the declaration is invalid, null and void.

(d) An order directing the 1st respondent to organize and conduct a fresh Ikolomani Member of the National Assembly election in strict conformity with the Constitution and the Elections Act.

(e) A declaration that each and all of the respondents jointly and severally committed election irregularities and malpractices;

(f) Costs of the petition; and

(g) Any other orders that the Honourable Court may deem jut and fit to grant.

6. In addition to the petition, the petitioner filed an affidavit dated 31.08.2017 to support his claims in the petition

1st and 3rd Respondents' Response to the petition

7. The response is dated 12.09.2017 and the same is supported by an affidavit of even date sworn by the 3rd Respondent. In brief, the 1st and 3rd Respondents deny the petitioner's allegations and aver that the Member of the National Assembly (Parliamentary) elections in which the 2nd Respondent emerged the winner were conducted in accordance with the Constitution, the IEBC Act, the Elections Act, the Regulations made thereunder and all other relevant provisions of the law. On allegations of widespread violence bribery and undue influence the 1st and 3rd Respondents aver that there were no reported incidents of the same and that those allegations are not only mere after thoughts on the part of the Petitioner, but were unsubstantiated. The 1st and 3rd Respondents invite the court to dismiss the petition with costs.

The 2nd Respondent's Response

8. The 2nd Respondent's response is dated 13.09.2017 and filed in court on 15.09.2018. According to the 2nd Respondent, the result of the election held on 08.08.2017 for Member of the National Assembly of Ikolomani Constituency was as follows;-

(a) Bernard Masaka Shinali…….15898

(b) Butichi Ramadhani Khamisi…….14765

(c) Vincent Mukhono……. 3430

(d) David Muyonga Musindi……1650

(e) David Liyayi Mpapale…… 196

(f) Stanslous Mwilitsa……285

9. The 2nd Respondent denies all the allegations made by the petitioner in the petition in general and avers in particular that the contents of paragraph 14 of the petition are denied and further that the said contents are not true or correct for the following reasons:-

(a) On 5th August, 2017, the 2nd Respondent was holding a rally in Eregi and was not at Malinya or anywhere near there,

(b) Malinya Stadium cannot hold 20,000 people as claimed.

(c) There was no Red Cross presence during the electioneering period and Red-Cross does not have an office in Malinya

(d) The 2nd Respondent did not have any T-shirt printed "Shinali Tano Tena." during the campaigns.

(e) There is no report in any police station within Ikolomani Constituency over the alleged injuries caused to 5000 people.

10. Regarding allegations that the petitioner's agents were denied access into polling stations, the 2nd Respondent averred that the said allegations are without basis and put the petitioner to strict proof of the same and the many other allegations contained in the petition. The 2nd Respondent prayed that the petition be dismissed with costs.

11. The 2nd Respondent also filed an affidavit in support of the response to the petition. The same is dated 14.09.2017. It is accompanied by a number of annextures.

12. During the hearing of the petition, the petitioner testified on his own behalf and also called 12 witnesses. Though the petitioner intended to call the pathologist who performed the post mortem examination on the body of one Maureen Khahukani, another intended witness for the Petitioner, the doctor did not turn up inspite of having been bonded. The petitioner himself who had sworn an affidavit on the post mortem examination was recalled and cross examined on the report.

13. The 1st and 3rd Respondents called only one witness Hadson Oloishuro Salenoi, the R.O who testified as DW1. The 2nd Respondent called eight witnesses including himself. More about the evidence of these witnesses later.

14. Before I delve into the issues raised both by the petitioner and the respondents, it behoves me to set out the principles of law on which I shall rely in determining this matter.

Principles applicable to Elections Disputes.

15. It is no longer in doubt what these principles are, and counsel in their respective written submissions have appreciated these principles to a very great extent. Counsel have also appreciated, as the courts have done that elections are not an event but a process whose chief purpose is to ensure that the will of a people is respected and preserved. To this end, the Constitution of Kenya 2010 makes it clear under Article 1 thereof that all sovereign power belongs to the people and that such power shall be exercised only in accordance with the Constitution. Sub-article 2 of Article (1) specifically states. "*The people may exercise their sovereign power either directly or through their democratically elected representatives."* This is why the electoral process is such a critical component of the lives of the people of Kenya.

16. Article 38 sets out the political rights of which Article 1 speaks, and the same provides:-

> *"(38)(1) Every citizen is free to make political choices which include the right-*
>
> *(a) to form, or participate in forming, a political party;*
>
> *(b) to participate in the activities of, or recruit members for a political party; or*
>
> *(c) to campaign for a political party or cause.*
>
> *(2) 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-*
>
> *(a) any elective public body or office established under this Constitution; or*
>
> *(b) any office of any political party of which the citizen is a member*
>
> *(3) Every adult citizen has the right, without unreasonable restrictions-*
>
> *(a) to be registered as a voter*
>
> *(b) to vote by secret ballot in any election or referendum ; or*
>
> *(c) to be a candidate for public office or office within a political party of which the citizen is a member and, if elected, to hold office.*

17. The Constitution further provides for the realization of the people's rights as secured under Article 38 through various other provisions and in particular Articles 81(e) and 86(a) – (d). Article 81 which sets out general principles for the electoral system provides:-

> *" 81. The electoral system shall comply with the following principles:-*

(a) freedom of citizens to exercise their political rights under Article 38:

(b) not more than two thirds of the members of elective public bodies shall be of the same gender;

(c) fair representation of persons with disabilities

(d) universal suffrage based on the aspiration for fair representation and equality of vote; and

(e) free and fair elections which are:-

(i) *by secret ballot*

(ii) *free from violence, intimidation, improper influence or corruption*

(iii) *conducted by an independent body;*

(iv) *transparent; and*

(v) *administered in an impartial, neutral, efficient, accurate and accountable manner.*

18. Article 86 provides thus;-

"86 Voting

At every election, the Independent Electoral and Boundaries Commission shall ensure that-

(a) whatever method is used the system is simple, accurate, verifiable, secure, accountable and transparent;

(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station,

(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and

(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

19. From the above provisions, it is clear to the court that the actualization of the provisions of Articles 1,38,81 and 86 of the Constitution comes to fruition during an election, and in that regard all the structures set in place are intended to ensure that the will of the people, expressed during the election is assured, remembering always that an election belongs to the people and not institutions and their officials. The electoral process as defined under the Constitution is intended to give meaning to the will of the people.

20. A part from the Constitutional provisions outlined above, other provisions geared towards securing the will of the people during the electoral process are found in the Independent Electoral and boundaries Commission Act (No. 9 of 2011) and the Elections Act (No. 24 of 2011) together with the regulations and rules made thereunder. Section 42 of the Elections Act provides for accreditation of observers, agents reporters etc, while Section 83 of the Act provides:-

"*83 Non – compliance with the law*

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."

21. Other relevant provisions are sections 80 and 82 of the Elections Act. Section 84 thereof donates powers to the court to award costs of and incidental to a petition and such costs shall follow the event.

Burden of proof

22. As stated earlier in this judgment, an election is a process which involves many actors and that means that anybody wishing to overturn the result of an election must meet the threshold of the burden of proof. It is the burden of the petitioner to show by clear evidence that there were breaches of the Constitution during the electoral process, whether such breaches were by way of electoral misconduct and/or malpractices which would lead the court to nullify the election or through other ways. In this case, the court will keenly consider whether the evidence adduced by the petitioner shows that the elections were not free and fair and whether the process was free from violence, intimidation, improper influence or corruption. The court will also be keen to see whether the evidence adduced by the petitioner shows that the election herein was not transparent, impartial, neutral, efficient accurate and accountable, so as to lead to the conclusion by this court that the election held on 08.08.2017 for Member of the National Assembly of Ikolomani Constituency was invalid.

23. In the case of **Raila Odinga and 5 Others – vs – Independent Electoral and Boundaries Commission and 3 others – Supreme Court of Kenya Election Petition No. 5 of 2013,** the Supreme Court held inter alia:-

"A petition seeking to nullify an election should clearly and decisively demonstrate that the conduct of the election was so devoid of merits and so distorted as not to reflect the expression of the peoples' electoral intent and that the evidence should disclose profound irregularities in the management of the electoral process,"

24. The Court went further to say that:-

"*Where a party alleges nonconformity with electoral law, the petitioner must not only prove that there had been non-compliance with the law but that such failure and non-compliance did affect the validity of an election. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies* ***Omnia Praesumuntur rite solemniter esse acta*** *(All acts are presumed to have been done, rightly and regularly). So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the presumption of the law* "

25. In the earlier English case of *Morgan & another – vs – Simpson & another [1974] 3 ALL E.R 722,* the Court stated the same principle in the following words:-

"An election court was required to find an election invalid:-

(a) if irregularities in the conduct of elections had been such that it could not be said that the elections had been conducted as to be substantially in accordance with the law as to the election; or

(b) if the irregularities had affected the results.

"*Accordingly, where breaches of the election rules, though 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."*

26. **In the case of Benard Shinali Masaka- vs – Boni Khalwale & others [2011] eKLR**, Lenaola J

(as he then was) had this to say on the issue in hand;-

"*It is now trite that election petitions are a special category of cases and reading the authorities submitted by parties, I am in agreement with Maraga J in* ***Joho – vs – Nyange & another (2008) 3KLR (EP)*** *and Rawal J. in* ***Onalo – vs – Ludeki & others [2008] 3KLR (EP) 507*** *where the learned judges held the view that the burden of proving any allegation made in a petition lies with the petitioner. 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 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."*

27. The threshold of proof as stated by the Court in the **Bernard Shinali Masaka Case** (above) was adopted by the Supreme Court in the Raila Election Petition No. 5 of 2013(Supra) when the Supreme Court stated the following at paragraph 203 of its Judgment.

"*203 … 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."*

28. To prove the allegations to the required standard, the petitioner has to offer cogent and credible evidence, and in this regard, the credibility of the petitioner and his witnesses will be examined carefully by the court. The court is thus under a duty to check the following parameters for the purpose of establishing the credibility of each individual witness:-

(a) his knowledge of the facts to which he testifies;

(b) his disinterestedness in the matter;

c) his integrity

d) his veracity and

*(e) his being bound to speak the truth by such an oath as he deems obligatory, or by such affirmation or declaration as may by law be substituted for an oath. The degree of credit his testimony deserves will be in proportion to the jury's assessment of these qualities." (****See Archibald Criminal Pleading, Practice and Evidence (1997) page 1037.****)*

29. It is thus the duty of every witness in general and the petitioner in particular to prove to the court that he knows the facts to which he testifies, and to show interest in his case. The petitioner is also expected to be consistent and wholesome in his testimony to the court and thus to testify without wavering. The petitioner is also expected to be accurate in what he tells the court and to conform to the facts of his case, and testify only to the matters pleaded in the petition. (**see Kimaru J in Mahamud Muhumed Sirat – vs – Ali Hassan Abdirahaman & 2 others – Nairobi Election Petition No. 15 of 2008 [2010]eKLR**.

30. In the case of **Ndungu Kimanyi – vs – Republic [1979] KLR 282**, the Court of Appeal at paragraphs A and B on page 284 expressed itself thus;-

"……..We lay down the minimum standard as follows. The witness upon whose evidence, it is proposed to rely should not create an impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence."

<u>Issues for Determination</u>

31. During the pre-trial conference on the 11.10.2017, parties agreed upon the following issues for this court's determination:-

(a) Whether the election of the Member of National Assembly for Ikolomani Constituency held on 08.08.2017 was so held in accordance with the Elections Act and the rules made there under.

(b) Whether the 2nd Respondent committed any election malpractice and if so, what is the effect thereof on the elections held on 08.08.2017

(c) Whether the 2nd Respondent was validly elected as a Member of the National Assembly for Ikolomani Constituency.

(d) Whether the petitioner is entitled to the reliefs sought in the petition.

(e) Which party bears the cost of the petition

Submissions

32. All the parties filed and exchanged their final written submissions in support of or against the petitioner's case. Each party also filed their authorities alongside the written submissions. I have carefully read though the submissions' and the authorities. I shall refer to the detailed submissions in the course of the analysis and determination.

Analysis and Determination

33. As I now move into the real issues in controversy in this petition, it is helpful to point out that any evidence given on matters that are unpleaded will have no room in my judgment. Secondly, I wish to reiterate the provisions of Section 83 of the Elections Act (Supra) and to point out that it is the duty of the petitioner to prove the allegations of non-compliance with the Constitution and the electoral laws and to further show that the irregularities and malpractices complained of in the petition were such that they went to the root of the electoral process as to affect the result of the election.

34. In light of the above, it is necessary at this point also to revisit the provisions of Section 83 of the Act and what the Supreme Court said about the said provisions in the case of **Raila Odinga & another – vs – Independent Electoral and Boundaries Commission and 2 others – Presidential. Election Petition no. 1 of 2017 [2017]eKLR**. The Supreme Court gave the following interpretation to Section 83 of the Act:-

"In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections will on that ground alone void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.

*Having analyzed the wording of Section 83 of the Elections Act, bearing in mind its legislative history in Kenya and genesis from the Ballot Act and also in light of the need to keep in tune with Kenya's transformative Constitution, it is clear to us that the correct interpretation of the section is one that ensures that elections **are a true reflection of the will of the Kenyan people**. Such an election must be one that meets the constitutional standards… In addition, the election which gives rise to this result must be held in accordance with the principles of **free and fair elections**, which are by secret ballot, **free from intimidation; improper influence, or corruption**' and administered by an independent body in an impartial, neutral, efficient, accurate and accountable manner as*

stipulated in Article 81. Besides the principles in the Constitution which we have enumerated that govern elections, Section 83 of the Elections Act requires that elections be "conducted in accordance with the principles laid down in that written law." The most important written law on elections is of course the Elections Act itself. That is not all. Under Article 86 of the Constitution, IEBC is obliged to ensure, Inter alia, that:

" Whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent; the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station; the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials."

35. I entirely agree with the interpretation of Section 83 of the Act as given by the Supreme Court. This was also the court's view in the case of **Gatirau Peter Munya – vs – Dickson Mwenda Kithinji and 2 Others – SCK Petition No. 2B of 2014 [2014]eKLR.** At paragraphs 216 – 220 of its judgment, the Supreme Court expressed itself thus;-

"[216] it is clear to us that an election should be conducted substantially in accordance with the principles of the Constitution, as set out in Article 81(e). Voting is to be conducted in accordance with the principles set out in Article 86. The Elections Act, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections.

[217] If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Elections Act, then such election is not to be invalidated only on ground of irregularities

[218] Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection are not enough, by and of themselves, to vitiate an election.……..

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

[220] Where an election is conducted in such a manner as demonstrably violates the principles of the Constitution and the law, such an elections stands to be invalidated."

36. There is no doubt therefore as to what mistakes committed during the election process would invalidate an election. For the umpteenth time the Supreme Court set the bar for nullifying an election by saying that the election malpractices and irregularities complained of must be of such magnitude that they substantially and materially affected the election results. Under Section 2 of the Act, "**election results**" is defined to mean. "*The declared outcome of the casting of votes by voters at an election*."

37. I now move to the next stage of considering the framed issues. I shall do so in light of the petitioner's pleadings, the oral evidence given by witnesses, the applicable principles and parties' submissions.

(A) Whether the election of the Member of National Assembly for Ikolomani Constituency held on 08.08.2017 was so held in accordance with the election Act and the rules made thereunder.

38. It is the petitioner's case that the election for Member of National Assembly for Ikolomani

Constituency held on 08.08.2017 was not held in compliance with the law due to irregularities, illegalities and election malpractices committed during the entire electoral process. The petitioner alleges contravention of Articles 38 and 81 of the Constitution. Since there are many different allegations under this larger issue I will break their down into the individual allegations.

Whether the results as declared were accurate and verifiable

39. The Petitioner's case is that the results as declared were neither accurate nor verifiable. It was contended that the figures given by the 2nd Respondent in his pleadings and also by DW8 Vincent Mukhono – who unsuccessfully contested the same seat- were not in agreement with the results contained in form 35B. According to the 2nd Respondent and DW8, the declared results for the 2nd Respondent and the Petitioner as well as for DW8 when compared to the figures in form 35B produced by the 3rd Respondent were as follows;

Item	Name of Candidate	Votes as given by 2nd Respondent and DW8	Votes as contained in form 35B produced by 3rd Respondent
1.	Benard Masaka Shinali	**15898**	**15731**
2.	Butichi Ramadhani Khamisi	**14765**	**14600**
3.	Vincent Mukhono	**3420**	**3414**

40. In both his response to the petition and at paragraph 5 of his replying affidavit in support thereof and in his evidence under oath, the R.O Hadson Oloishuro Salenoi, DW1 testified that the 2nd respondent's votes after counting and tallying were 15731 and that those were the results announced by himself. Further, and according to DW1, the Petitioner got 14,600 votes. The difference in votes between the 2nd Respondent and the Petitioner according to DW1 was 1131 votes, while the difference in the figures given by the 2nd Respondent and DW8 would be 1133 votes.

41. Under Rule 8(1) of the Elections Petition Rules, an election petition shall state-

(a) the name and address of the petitioner

(b) the date when the election in dispute was conducted

(c) the results of the election if any, and however, declared.

(d) the date of the declaration of the results of the election;

(e) the grounds on which the petition is presented; and

(f) the name and address of the advocate if any, for the petitioner which shall be the address for service.

42. In this petition, though the petitioner set out at paragraphs 3 and 4 thereof the names of all the contestants for Ikolomani Member of National Assembly position, he did not indicate results of the elections in respect of each contestant as required by the rules. He however proceeds to state the following at paragraph 5 of the petition:-

"5. Subsequently Benard Masaka Shinali (2nd Respondent) was gazetted as the newly elect Member of National Assembly for Ikolomani Constituency having won with a total of 15731 votes"

43. It is to be noted that the figure pleaded by the petitioner as the votes garnered by the 2nd Respondent is the same figure that was given by the R.O both in his replying affidavit in support of the response to the petition and in his oral evidence in court. It is also to be noted that the petitioner did not plead at paragraphs 3 and 4of the petition the votes garnered by each candidate.

44. It was the duty of the petitioner to clearly plead in the petition the results of the election for each candidate as was required of him by the provisions of Rule 8(1) of the Elections Petition Rules which are mandatory in nature. The petitioner cannot shift that burden by seeking to rely on the figures given by the 2nd Respondent and Dw8 both of whom were under no duty to do what the petitioner was meant to do as by law required. As the allegation was unpleaded, I find that the petitioner has not proved that the results as declared were neither accurate nor verifiable. I am fortified in this finding by the evidence given by the R.O. In any event, the petitioner's statement at paragraph 5 of the Petition appears unequivocal and the complaint of inaccurate and unverifiable results is in my considered view an afterthought.

45. In this regard, I am satisfied that the results announced by the R.O, which are in agreement with what is contained in paragraph 5 of the petition are the results pertaining to the election of Member of the National Assembly for Ikolomani Constituency.

Results of Ikhulili polling station 2 of 2

46. The petitioner's second limb of his argument on alleged doubtful accuracy and verifiability of results is about Ikhulili. Ikhulili polling station 2 of 2 generated the most heat and dust during the hearing of this petition, and the petitioner's prayer for nullification of the results for the election of Member of the National Assembly for Ikolomani Constituency substantially rests on the complaints touching on this polling. For this reason, the polling station deserves special mention. The complaint related to an admitted error with regard to the entry on form 35B which indicated that the 2nd Respondent had got 89 votes as opposed to the 79 votes shown and recorded in form 35A. According to the testimony of the 3rd Respondent, this was a human error which he attributed to copy and paste by the data entry clerk. It was also the 3rd Respondent's testimony that this error affected all the candidates who included the petitioner.

47. The court has been invited to make a finding that this copy and paste of the results which clearly favoured the 2nd Respondent by 10 votes so affected the results of the election that the said results should be cancelled. Before making a conclusion either way, the practical implications of that copy and paste is that the petitioner's votes for Ikhulili polling station went down by 2 votes while the 2nd Respondent's votes went up by 10 votes from 79 to 89 votes.

48. In the petitioner's submissions, it was contended that the copied and pasted results for the 2nd Respondent of Ikhulili 2 of 2 were the actual results he got at Ikhulili 1 of 2, and therefore that this action by the 3rd Respondent of recording more votes for the 2nd Respondent was in breach of Article 86(b) of the Constitution which requires the 1st Respondent to, among other duties, ensure that "*The votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station.*"

49. The petitioner contented further that the law does not provide for copy and paste results, hence his plea to the court to find and hold that the results announced by the 3rd Respondent were not accurate, and could not be verified.

50. In their submissions, the 1st and 3rd Respondents contended that the petitioner's contention that he result of the election for Member of the National Assembly for Ikolomani Constituency was not accurate because of the copy and paste result for Ikhulili Polling station 2 of 2 in ill –founded. Counsel for the 1st and 3rd Respondents placed reliance on the case of **Paul Gitenyi Mochara – vrs- Timothy Moseti E. Bosire and 2 Others [2013] eKLR** where Muriithi J. observed thus at paragraph 57 of the judgment:-

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

51. Though the complaint in the **Mochara case** (above) concerned alterations in the forms, I am in agreement with the general principle espoused by Muriithi J and as confirmed by the Supreme Court in the Raila case [2017] that errors in the recording of results in an election, and especially, where human beings are used to do the recording cannot be avoided. In my considered view what the electoral system seeks to guard against are deliberate errors/mistakes committed for the benefit /prejudice of any of the parties in a contest.

52. Counsel for the 1st and 3rd respondents also relied on what Maraga J (as he then was) observed in the case of **Joho – Vs – Nyange case (**above) to the effect that.

"*Irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result. This court in mindful of the fact that at the stage where election officials are required to tally the results, some of them would have stayed awake for more than thirty six (36) hours and therefore simple arithmetical mistakes are bound to happen."*

53. Further reliance was placed on the words of Muriithi J in the **Mochara case** (above) where the learned Judge stated as follows:-

"*The General Elections of 2013 comprised elections for six different elective positions of the President, the County Governor the Member of the Senate, the Woman Representative and County Ward representatives and this must be taken to have increased six fold the probabilities of innocent human errors in computation of the figures entered as votes for the respective candidates, the falling (sic) and subsequent record thereof in the constituency form 36. It is not inconceivable and therefore definitely not inaccessible that the election officials who conducted the six elections over a period of three days on the 4th, 5th and 6th March, 2013 would have in[all] human probability made errors in their record of the elections."*

54. The 2nd Respondent through his counsel submitted that the copy and paste result for Ikhulili 2 of 2 is not a reason to warrant nullification of the results of the elections for Member of the National Assembly for Ikolomani Constituency. The position of the 2nd Respondent is informed by the holding in the case of **Henry Okello Nadimo – vs – IEBC & 2 others [2013] eKLR** where the court held the view that errors in transposition between form 35 and 36 in 4 polling stations are understandable human errors. The court expressed itself thus on the issue.

"*The anomalies do not seem designed to benefit or prejudice any candidate. More importantly, the variations make a minute difference to the outcome of the results. Even if the errors were to be corrected, it would fail to significantly close the big gap between the winner and the runners –up. It also needs to be noted that the mistakes were in the results of 4 out of 64 polling stations. The errors were neither systemic nor pervasive. I accept the explanation by the Commission that the mistakes were not deliberate or intended to advantage the 3rd Respondent. In this regard, I recall the words of Justice Majanja [in] Machakos High Court Petition No. 4 of 2013 – WAVINYA NDETI – VS – IEBC & 4 OTHERS (Ruling No. 3)*

"An election is a human endeavor and is not carried out by programmed machines. Perfection is an aspiration but allowance must be made for human error. Indeed the evidence is clear that the counting and tallying was being done at night and in less than ideal conditions hence errors, which

were admitted, were bound to occur particularly in the tallying of the results. What is paramount is that even in the face of such errors, whether advertent or otherwise is that the ultimate will of the electorate is ascertained and upheld at all costs."

55. Counsel for the 2nd Respondent also placed reliance on the Supreme Court decision in the case of **Zachariah Okoth Obado – vs- Edward Akong'o Oyugi [2014]eKLR** where it was held, inter alia, as follows;

" It is clear that the trial court, having evaluated the evidence before it, and the report by the Deputy Registrar on the vote re-tally, was satisfied that the election, though tainted with irregularities, was essentially free and fair, and the re-tally showed that the declared Governor elect for Migori County had retained his lead –indeed with an enhanced vote. We find therefore, that the irregularities complained of did not affect the outcome of the election. The appellate court, by not applying the binding precedent, had contravened Article 163(7) of the Constitution."

56. It is on the basis of the above cited authorities that counsel for the 2nd Respondent argued that the election results for Member of the National Assembly for Ikolomani Constituency should not be nullified or declared inaccurate. I have myself carefully considered the evidence on record and the rival submissions on the matter. I have also carefully considered the relevant authorities relied upon by parties and even considered other authorities. There is no dispute that the results at Ikhulili polling station 2 of 2 were duplicated with the result that the 2nd Respondent had 10 more votes than his rightful entitlement. From the evidence by the 3rd Respondent, the 2nd Respondent got 15731 votes, as opposed to the petitioner's 14,600. If the 10 "extra" votes were to be deducted from the 2nd Respondent's tally his votes would be 15721. The petitioner also got 2 "extra" votes during the commission of this admitted error and if those votes were to be subtracted from his tally of 14,600, he would end up with 14598 votes, so if the 3rd Respondent had declared the final results without considering the Ikhulili 2 of 2 results, the 2nd Respondent would still have had an edge over the petitioner with 15721 votes for the 2nd Respondent as compared to 14598 votes for the petitioner.

57. After considering the provisions of Article 86(b) and all the relevant authorities, I am satisfied that the error committed in transposing the votes for the 2nd Respondent at Ikhulili polling station 2 of 2 was an innocent human error and not a deliberate error committed to benefit the 2nd Respondent and prejudice the petitioner. I appreciate the evidence given by the 3rd Respondent that together with his team, he had worked for 4 consecutive days and nights from 05.08.2017 to 09.08.2017 when the results were announced. Just like it was during the General Elections of 2013, there were six elections in one during the General Elections of 2017. The 3rd Respondent was the one responsible for the smooth running of all the elections comprising the six elective positions for President, Governor, Senator, Member of the National Assembly Women representative and member of the County Assembly within Ikolomani Constituency. Having worked through four consecutive days and nights under extreme pressure, I am unable to find as the petitioner would want me to find that the error was either deliberate, or intended to benefit the 2nd Respondent or prejudice the petitioner. In any event, this error occurred only at one polling station out of the entire Ikolomani Constituency comprising 103 polling stations

58. In any event, the evidence clearly shows that the error was not fraudulent and that it affected all the candidates. As no fraud was either pleaded or proved against any of the respondents, I will let the matter of Ikhulili Polling station 2 of 2 rest with the conclusion that that single mistake, committed under the circumstances alluded to by the 3rd Respondent cannot possibly be a basis for nullifying a whole election for Member of the National Assembly for Ikolomani constituency.

Election Malpractices on the part of the 1st Respondent. Bias, discrimination and special treatment of agents

59. These allegations are spread throughout the petition and in particular at paragraphs 26 to 48 thereof. The petitioner's affidavit at paragraphs 33 -38 speak of the same allegations. The petitioner alleged that

despite his ANC party having appointed agents to cover all the polling stations, and despite the agents having in their possession all the requisite identifying documentation, the 1st and 3rd Respondents totally denied them entry into the polling stations while allowing other parties' or candidates' agents. Thus, the petitioner averred there was discrimination. The petitioner singled out the following polling stations as those where discrimination was perpetrated by the 1st and 3rd Respondents: Shitoli, Lirhembe, Iluya, Musasa, Shiseno, Mmbaka market, Maduvini, Kaluni, Lubambo, Shijiko Shimanyiro, Shiduha,Mumbetsa and Eregi Mixed 1 of 2.

60. To support these claims the petitioner relied on the evidence of Cecilia Khabere, PW4, Margaret Muhonja Mugodo, PW5 Consolata Stella Kanenje, PW8 Pearl Buyanzi Liatema, PW9, Thomas Bendera Mukabwa, PW10, , Bernard Amukaka Ludeshi, PW11 who was also ANC'S chief agent and Milliam Mkasa Ambani PW13.

61. Before going deeper into the evidence of the above named witnesses let me revert to the Elections (General) Regulations 2012 (The Regulations) for the purpose of establishing what was expected of the 1st and 3rd Respondents regarding the role and duty of agents. Regulation 79(6) thereof provides that "*The refusal or failure of a candidate or agent to sign a declaration form under sub regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not in itself invalidate the results announced under sub-regulation 2(a),"* Regulation 62(3) provides that "*The absence of agents shall not invalidate the proceedings at a polling station.*"

62. PW4 (Cecilia) testified that she was appointed agent for the petitioner under the umbrella of ANC party. She however did not have any accreditation card. She admitted that she did not know all the agents who were accredited by ANC and that she could therefore not tell whether everybody who came to the polling station was an agent. On the material day, she reported to Eregi polling station 1 of 2 and reported her presence only to their chief agent, telling him that she had not been allowed access. She did not know the name of the agent at Eregi polling station 2 of 2. Cecilia further testified that she did not make any report of any misshappenings at the polling station though she reported for work at 5.30am. Cecilia also testified that she did not know what form 35A and 35B were nor did she know what a polling station diary was. She however did not raise any objection to the announced election result. Cecilia also alleged that she was chased away from the polling station by the Presiding Officer (P.O) and could therefore not vote.

63. In her sworn affidavit dated 31.08.2017, Cecilia deponed that when she got to the polling station at 5.30am, she found "*two other agents who purported to be agents of petitioner and acting on behalf of Amani National Congress party interests.*" And further that she had been informed by the chief agent, Bernard Amukaka, PW11(Amukaka) that she was the only accredited agent of behalf of ANC, so that the purported agents known as Cresenzia Muida and Josephat Alema were imposters:

64. From Cecilia's evidence in cross examination, she could not say who was and who was not an accredited agent for ANC. She also had no accreditation card. She also did not know the names of all the ANC agents within the constituency, leave alone even the name of the presiding officer. Nor could she tell the name of the agent who covered Eregi polling station 2 of 2 and she had no idea what forms 35A, 35B and the polling station diary were. In my considered view, Cecilia was no a reliable witness nor was she credible. She was also ignorant of the things she was made to testify about, the result being that her evidence did not support the petitioner's case.

65. Margaret Muhonja Mugodo (Muhonja) told the court that she was the ANC agent at Musasa Primary School polling station. Her allegation at paragraph 2 of her witness affidavit dated 31.08.2017 was that she was denied access to the polling station despite being an accredited agent. At paragraph 3 she deponed; *" THAT I was informed by the 1st Respondent's agent presiding officer, manning the polling station that another accredited agent on behalf of the petitioner [was] already present, therefore I denied entry and sent away."*

66. During cross examination, Muhonja testified that she was stationed at Musasa Primary School Polling Station 1 of 1 and that she duly signed form 35A, though in the same breath she said she was forced to

sign the said form. She also testified that she signed the Polling Station Diary and that she had no objection to the results as contained in form 35A. She also said she was given a badge between 10.00 and 10.30 am on the voting day, but had signed the polling station diary at 6.00am. She admitted in further cross examination that the signature appearing against her name on the Polling Station Diary was hers. In her further testimony, Muhonja told the court that the chief agent, Amukaka was at Musasa Primary Polling station around 9.30am and found her there. She confirmed there was no fracas of any kind and none of ANC voters complained to her that they had been denied an opportunity to vote.

67. In brief, Muhonja's evidence does not support the allegations contained in her affidavit. She could not have signed the polling station diary at 6.00am right inside the polling station and been outside of the polling station at the same time. Her evidence does not therefore support the petitioners allegations of bias, discrimination and special treatment of some agents

68. Consolata Stella Khanenje (Stella) was PW8 and told the court that she was appointed an agent of the ANC party at Ikhulili polling station. She raised two complaints in her witness affidavit dated 31.08.2017. At paragraph 3, thereof, she alleged that the results declared on form 35A were not reflected on form 35B, and at paragraph 5 thereof, she alleged that upon the declaration of the results by the presiding officer on behalf of the 1st Respondent, she was not issued with Form 35A.

69. In part of her evidence on cross examination, Stella stated the following. "*I got to the polling station at 5.30 am at Ikhulili Primary School 2 of 2. I signed the polling station Diary and also signed the diary at the closure of voting. I signed form 35A. I just signed the form. I did not write any report. Signing the form means I agreed with what was contained in form 35A's contents. After sealing of ballot boxes and tallying done I signed the polling station diary accepting what had taken place. No. I do not know if anybody was prohibited from voting , ……..everybody who came voted. The voting went well and I agreed with what had been recorded."*

70. The above evidence by Stella falls short of proving her allegations to the required standard. In any event, she does not say that she asked to be supplied with form 35A and denied the same. She did not also adduce any evidence concerning alleged discrepancy between the entries in Forms 35A and 35B, but I have myself checked the two forms and find that the result is the same on both forms. For the above reasons, I find and hold that Stella's evidence is of little value to the petitioner's case on the matter in controversy.

71. Pearl Buyanzi Liatema, PW9 (Pearl) swore her witness affidavit on31.08.2017. She alleged at paragraph 2 thereof that when she reported to Shisejeri Tea Buying Centre at 5.50am where she was Petitioner's agent, she found out that the 1st Respondent had illegally allowed access to one Maurin L. Nguse as the agent on behalf of the petitioner. She said she raised the issue with the Presiding Officer who declined to allow her access despite the fact that she had with her, her letter of accreditation. At paragraph 4 she depones that she was eventually allowed access after Amukaka intervened, and she worked together with the illegal agent, Maurin Nguse. It was Pearl's contention that the presence of Maurin Nguse at the polling station did not serve the petitioner's interest, and accordingly compromised the outcome of the election.

72. During her evidence in cross examination, Pearl stated that she signed form 35A because the results thereon is what she had seen and witnessed, and that she did not write any report objecting to the results. She also testified that all people who came to vote voted. It was also her evidence that when she arrived at the polling station she had no badge showing she was an agent and was told the badges were finished. According to her further testimony, she entered the polling station at 5.50am but was sent out and readmitted at 7.00am. She also testified that though she signed form 35A which showed the petitioner's votes as 131, she could not say that the results were correct but all the same she signed form 35A to confirm the correctness of those results. The witness also said she saw other agents sign form 35A.

73. In brief, the evidence by Pearl was contradictory as she was approbating and reprobating at the same time. The sum total of her evidence is that everything went on well and that she and other agents signed the form 35A to confirm correctness of the results. Her allegation that she could not vouch for the

correctness of the results is not supported by her testimony because she was careful not to mention the time when she was asked to leave the polling station before re-admission at 7.00am. Pearl's testimony does not therefore support the petitioner's case that there were election malpractices on the part of the 1st Respondent including bias, discrimination and special treatment of agents. Her evidence also revealed that any concerns she raised with the Presiding Officer were attended to promptly. Just one word about the admission of Maurin Nguse as an agent. Evidence came from both the petitioner and his chief agent that decisions were taken to replace agents who had not reported or were slow to report or appoint agents who were not initially on the list forwarded to the 1st respondent. As for the petitioner, he stated that he did not know all the agents of his party, and therefore the question of illegal agents being admitted into polling stations by the 1st Respondent did not arise. In any event, Maurin Nguse was an ANC agent.

74. The petitioner's chief agent, Amukaka swore his witness affidavit on 31.08.2017. He alleged that there was violence against the petitioner and his supporters on 05.08.2017 at Malinya Stadium. I have already dealt with that allegation and dismissed it as being sensational and without evidence to support it. Amukaka also alleged at paragraph 15 of his affidavit that the petitioner's accredited agents were denied entry at the following stations: Shitoli, Lirhembe, Iluya, Musasa, Shiseno and Mmbaka, all in Idakho East ward. The other polling stations where agents were allegedly denied access were Madivini, Kaluni, Lubambo and Shijiko all in Idakho south ward as well as Shimanyiro, Shiduha and Mumbetsa primary school. He deponed that it took his personal intervention as chief agent to visit all the named polling stations before the agents were allowed access except for Shimanyiro and Mumbetsa primary school where the presiding officers completely denied the agents entry. At paragraph 18 of his witness affidavit, he deponed that most of the petitioner's accredited agents were never issued with form 35A as required by law and that some of the form 35A's were signed by persons who purported to be the petitioner's agents, to the detriment of the petitioner as true agents were barred from entering polling stations to witness the counting of votes. He also deponed that some results on form 35A did not tally with those on form 35B. A case in point was Ikhulili Primary School where the 2nd respondent garnered 79 votes as per form 35A and 89 votes as per form 35B. The issue of Ikhulili polling station 2 of 2 has been adequately addressed elsewhere in this judgment.

75. During his oral evidence on cross examination, Amukaka testified to the following matters:

- he was not aware of the provisions of article 81 of the Constitution
- all polling stations were opened at the appointed time
- he did not give evidence of any voters who were denied the opportunity to vote
- there was no pictorial evidence of people wearing 2nd Respondent's T-shirts bearing the writing "Shinali Tano Tena"
- he had not adduced any evidence confirming his reports to police about the alleged violence at Malinya
- he did not inform the 1st Respondent that his vehicle had been detained
- there were ANC agents in all polling stations
- he had not mentioned any polling station by name where there was rampant bribery
- there was no bribery at polling station
- ANC changed 9(nine) agents on the polling day and he personally crossed out names of agents who were replaced, both on 07.08.2017 and 8.8.2017
- He had given no details of polling stations which had no form 35A.
- He had no names of polling stations where ballot boxes were left behind, though later he mentioned Isulu Primary School and Mwikhomo
- Erick Kweyu and Milliam Ambani were ANC agents
- Agents were to buy their own food and he had his own food
- No supporter of the petitioner was shot on 05.08.2017
- The alleged shooting incident by Bosire took place outside Ikolomani constituency
- he could not say whether Assistant Chief Naftali disrupted campaign rallies in Ikolomani Constituency.
- Before entering a polling station, an agent had to have the following documents.
- Letter from the relevant party

- Accreditation letter from IEBC
- Oath of secrecy
- Photocopy of his/her national ID
- Letter form the candidate
- If an agent did not have all the above documents, IEBC had a right to keep them out of the polling station.
- Did not visit any homes to confirm alleged bribery
- He had no details of reports by any agent disputing results

76. The petitioner himself also gave evidence touching on agents. Initially he was not sure whether Stella was an ANC agent, though he eventually said she was. He confirmed that some agents' names were canceled and replaced with others on the very day of the voting. He also testified that where the accredited agents could not be traced on the material day, Amukaka could replace them and further that a Presiding Officer had no authority to stop an agent from leaving the polling station.

77. From the above analysis, I find that the petitioner's complaints that his agents were barred from accessing the polling stations either for part of the time or completely are not supported by evidence. The respondents have placed before this court both oral and documentary evidence to show that all the 103 polling stations had ANC accredited agents, who all signed the requisite form 35A and the polling station diaries. Amukaka also testified and confirmed that he did not receive reports of any anomalies taking place at polling stations. Further, and apart from Musasa polling station, the agents from Shimanyiro and Mumbetsa polling Stations were not called as witnesses to support the allegation by the petitioner that the 1st Respondent's Presiding Officers completely barred the said agents from accessing the polling stations.

78. The form 35A's produced by the 1st and 3rd Respondents clearly show that the petitioner's allegations in this regard are unfounded. The evidence given by the 1st Respondent on behalf of the 1st and 3rd Respondents confirms that the polling stations were all well manned by party agents, polling clerks, presiding officers, police officers, observers and the media. Agents were free to go in and out of the polling station as they wished. If any agent did not have a badge, the presiding officer had the right to keep him outside until the anomaly was rectified. Wearing a badge is mandatory under Regulations 62(4) of the Regulations which reads.

> *"Every agent appointed by an independent candidate or political party for the purposes of the regulations shall at all times during the performance of their duties authorized by the independent candidate or political party display the official badge supplied by the commission*."

79. For the above reasons, I find no merit in the petitioner's allegations that the 1st Respondent committed election malpractices by being biased and discriminatory against the petitioner's agents nor has the petitioner proved that the 1st Respondent afforded special treatment to some other agents who in any event have not been named.

(B) <u>Whether the 2nd Respondent committed any election malpractice and if so, what is the effect thereof on the elections held on 08.08.2017</u>

80. The petitioner's case on this issue is centered around alleged violent attacks at Malinya stadium and at Keveye on 05.08.2017. It was alleged that there was widespread use of force and/or violence during the petitioner's final rally at the Malinya stadium where some 20000 strong crowd had gathered. It was alleged by the petitioner, the petitioner's chief agent Amukaka, Bernard Lidero Muliro, PW2 all of whom testified about the Malinya incident, that there were chaos at Malinya stadium on 05.08.2017, and that the chaos were caused by goons who had been hired by the 2nd Respondent.

81. Benard Lidero Muliro who testified as PW2 stated that on 05.08.2017, at about 4.00pm, he was at Malinya Stadium where he had been for about 1½ hours when hell broke loose. He alleged that some 20-25 people who were wearing T-shirts with the writing "Shinali Tano Tena" disrupted the rally, but when pressed in cross examination, he admitted he had no evidence of such people and such T-shirts. He also

stated that though he mentioned that three vehicles pursued them, he had no particulars of such vehicles, nor did he give names of the owners of the said vehicles; though he alleged that he knew the people who owned the vehicles.

82. When cross examined by Mr. Luseno, PW2 stated that he met the petitioner between 3.00 – 400pm before the rally began. PW2 could not however say whether or not Malinya stadium was big enough to accommodate 20,000 people at once. According to PW2 his evidence, about 10-20 people got injured. The witness also stated that after Malinya, he proceeded to Madebe police post before going to Shikokho secondary school. He also stated that he met the petitioner at Madebe police post. Though he alleged to have been assaulted, he did not produce any evidence to confirm he was assaulted.

83. Regarding the violent incident which allegedly took place at Keveye junction, PW2 stated that the convoy of vehicles escorting the petitioner was blocked at Keveye at about 7.30pm. Admittedly, the time was past official campaign time which hadended at 5.00pm on 05.08.2017. PW2 did not make a report of the alleged incident at Madebe police stadium

84. Amukaka had the following to say about the two incidents at Malinya and at Keveye. That there was more than 20000 people at Malinya Stadium though he could not avail any pictures of people wearing T-shirts with the writings "Shinali Tano Tena". He said he saw some people dressed in such T-shirts. He also said his vehicle was detained by IEBC though he did not make any report of it.

85. According to Amukaka, 5000 people were injured during the Malinya incident and were treated by the Red Cross and at the local health facilities. He added that one supporter was shot on 05.08.2017. Amukaka further testified that after they left Malinya stadium, they headed for Chavakali, but on the way their vehicles were blocked and they were attacked.

86. All these allegations of violence both at Malinya Stadium and Keveye junctions were denied by the 2nd Respondent and his witnesses. In their written submissions, counsel for the petitioner contended that there is concrete evidence proving that there was stone throwing which led to a fracas and abrupt ending of the rally at Malinya Stadium. It was also contended that there is evidence on record showing that the petitioner's team was persued by the 2nd respondent's team from Malinya stadium and beaten up on their way to Chavakali, and that the attackers had guns and crude weapons, and that the incident was reported at Madebe police station. It was also submitted that the petitioner's team apart from having their vehicles blocked, were whipped and kicked forcing them to flee from the scene. It was also submitted that Amukaka had positively identified the 2nd respondent's bodyguard Denis Bosire as the one who shot at the petitioner and his team.

87. The petitioner also spoke of a violent attack at Ikhulili Primary School on 08.08.2017 where it was alleged both Thomas Mukabwa and Julius Ooro were pulled out of their vehicle and attacked and their mobile phones and cash stolen. There was also an allegation of a violent attack at Lirhembe involving a supporter of the petitioner whose hand was chopped off.

88. In support of the petitioners quest to have the 2nd Respondent found guilty of election malpractices, reliance was placed on the case of **Raila Amolo Odinga & Another – vs – IEBC & 2 others [2017] (above)** regarding standard of proof which is on a balance of probabilities.

89. The 2nd respondent's counsel filed written submissions in which they dismissed the petitioner's allegations of widespread election violence as weak and baseless. It was the 2nd Respondent's case that the petitioner did not adduce any evidence of any report having been made to any police station within the constituency to support the allegation of widespread violence. Further that no evidence was adduced to prove that the 2nd respondent's supporters were wearing T-shirts bearing the words, "Shinali Tano Tena" and that these allegations about the T-shirts was torn apart when the 2nd Respondent produced and showed to the court the type of T-shirts worn by his supporters. The 2nd Respondent also contended that not one single witness out of the 5,000 people allegedly injured during the fracas at Malinya Stadium came forward to testify, nor was there any report from any of the nearby hospitals where such causalities

may have been treated.

90. Regarding the alleged shooting by DW4, Dennis Bosire the 2nd Respondent's case is that from the evidence on record, there was no shooting incident at Malinya as alleged, since PW2 clearly stated that the shooting incident he was testifying about happened at Keveye which is outside Ikolomani Constituency.

91. The 2nd Respondent further submitted that allegations of violence at Ikhulili were also not proved since Thomas Mukabwa, who was at the centre of the alleged shooting incident was not a truthful witness, in addition to the fact that no report of the incident was made to any police station within Ikolomani Constituency.

92. The 2nd Respondent also asked the court to direct that Thomas Mukabwa who had admitted having kshs.100,000/= on him be investigated by the office of the Director of Public Prosecution (DPP) with a view to preferring appropriate charges against him in accordance with Section 87 of the Elections Act as read with Section 9 of the Election Offences Act No. 37 of 2016. Section 87 of the Elections Act Provides:-

> *" 87(1) An election court may at the conclusion of the hearing of a petition in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature may have occurred."*
>
> *(2) Where the election court determines that an electoral malpractice of a criminal nature may have occurred, the court shall direct that the order be transmitted to the Director of Public Prosecutions.*
>
> *(3) Upon receipt of the order under subsection (2) the Director of Public Prosecutions shall:-*
>
> > *(a) direct an investigation to be carried out by such state agency as it considers appropriate*
> >
> > *(b) based on the outcome of the investigations commence prosecution or close the matter.*

93. Section 9 of the Election Offences Act deals with bribery and provides that a person who commits an offence under the Section shall, on conviction be liable to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both.

94. There was another minor complaint that the 2nd Respondent called the petitioner an al shabab and that he also spread rumours to the effect that the petitioner had been shot dead. To these allegations, the 2nd Respondent submitted that no evidence had been placed before the court to prove the same and urged the court to dismiss the same for lack of evidence.

95. Having carefully analysed and considered the evidence on record, and taking into account the law and the submissions, I have reached the conclusion that the petitioner did not prove, on a balance of probabilities that the 2nd Respondent committed any election malpractice. The Petitioner's evidence on the incidents of alleged violence at Malinya Stadium, Lirhembe Ikhulili and Keveye was shattered by the evidence adduced by the 2nd Respondent. To say the least, the alleged incidents were not only exaggerated, but the petitioner completely failed to place cogent evidence before the court to prove that the incidents occurred. Further, the available evidence touching on allegations of violence was both inconsistent and contradictory.

96. Ultimately, the beneficiary of such inconsistencies and contradictions is the 2nd Respondent. In my considered view, the seriousness of the alleged violent attacks on the petitioner and his supporters would have sent any right thinking person running for safety at the nearest police station and ensuring that the records of such reports are issued for use at the appropriate time. For example, if the Malinya incident

truly occurred in the manner, and in the proportions given by the petitioner and his witnesses, there was no way the police could not have been involved. The lack of police reports in general cogent and evidence in particular in support of the allegations can only mean that the incidents did not occur, or if they occurred that they were of such minor magnitude that they were unnoticeable and therefore had no effect whatsoever on the elections held on 08.08.2017. Infact, according to Amukaka no supporter of the petitioner was shot on 05.08.2017.

97. Before I leave this issue, there is the case of Thomas Bendera Mukabwa, PW10, who admitted to having ksh.100,000/= on him as he went round the polling stations. The evidence on record shows that Mukabwa was not a resident of Ikolomani, nor was he an agent of the petitioner. He only said he was the petitioner's security adviser, though he had not known the petitioner for a long time.

98. When questioned about the kshs.100,000/= in his possession on the voting day, he told the court that the money was meant for lunch for the agents. When Milliam Mkasa Ambani PW13 was being cross examined, she stated that following about lunch:- *" I voted in [Lirhembe] 2 of 2 at 1.00pm. I took lunch – I had carried my own food – soda and bread. That was about 3.00pm. I had carried my food from home. The money for soda and bread was mine*." Amukaka also told the court that he had made arrangments for his own lunch.

99. From Milliams and Amukaka's eivdence, the agents had made their own arrangements for their lunch and therefore the Kshs.100,000/= Mukabwa had on him on 08.08.2017 was not for the purpose of buying lunch for agents. In any event, if there was need for money to be given to agents for lunch, the proper person who should have carried that money was Amukaka the chief agent and not a stranger from another constituency who said he was going round the polling stations to see how the voting was going on. The only inference this court can make, and in line with the evidence given by the 2nd Respondent, is that Mukabwa's mission within Ikolomani Constituency was to bribe voters with the Kshs.100,000/= which had been given to him by the petitioner. I am satisfied that an electoral malpractice of a criminal nature may have occurred through the conduct of Thomas Bendera Mukabwa, PW10. I shall at the opportune time issue appropriate directions on the matter.

<u>The case of Maureen Khaukani</u>

100. The case of Maureen Khaukani deserves special mention because she died just before the hearing of this petition commenced. She was one of the potential witnesses for the petitioner. It was alleged that she was attacked and badly injured on 05.08.2017. The petitioner deponed at paragraphs 2, 3 and 4 of his affidavit dated 9.10.2017 thus:

> "2. *THAT Maureen Khaukani (now deceased) is named as witness number 2 (two) in my list of witnesses dated the 31st of August, 2017 and filed in court on the 5th of September, 2017*
>
> *3. THAT the deceased was attacked on the 5th day of August, 2017 by the supporters of the 2nd Respondent, during a political rally at Malinya Stadium and sustained serious injuries that lead (sic) to her hospitalization and thereafter discharged.*
>
> *4. THAT on the 2nd day of October, 2017, the deceased died and I have reason to believe that she succumbed to the injuries sustained on the head."*

101. Upon her death on 02.10.2017, a post mortem examination was performed on her body by Dr. Dixon Mchana of Kakamega County General Hospital. Although Dr. Mchana did not appear to testify, the post mortem report was attached to the petitioner's affidavit of 09.10.2017 as annexture KBR –1. From the said report, upon which the petitioner was cross examined by respondents' counsel, the following observations emerged. On the exernal appearance of the body:

- *Absent defence injuries*
- *No fractures of limbs/neck*

- *No stigmata of chronic ill – health*

102. On the respiratory system, it was noted he ribcage/pleura was intact and the head was said to have intact scalp/cranium/skull bone. Of the spinal column, it was noted, "intact cervical spine," while the spinal cord was said to have "intact spleen. No lymphodenopathy" And as a result of the doctor's examination, the cause of death of Maureen Khaukani was given as "Consistent with acute heart failure."

103. During his evidence, the petitioner agreed that contrary to what he had deponed to in his affidavit of 09.10.2017, Maureen Khaukani died from acute heart failure and not from injuries on the head. The petitioner also confirmed that the deceased died as she walked home. He also confirmed that from the doctor's report under physique, the deceased had "moderate trunkal obesity"

104. The above evidence has therefore completely destroyed the petitioner's allegations that Maureen Khaukani died from serious injuries inflicted upon her head by the 2nd Respondent and his supporters on 05.08.2017 at the Malinya Stadium. My considered view of the allegations by the petitioner concerning Maureen Khaukani is that these alalegations were purely sensational and no more. The allegations must therefore fail.

Rampant bribery and undue influence of voters

105. During Amukaka's testimony, he told the court that the 2nd Respondent bribed voters with goodies to vote for him. At paragraph 46 of the petition, the petitioner also alluded to some form of bribery when he stated:-

> " *46 The 2nd Respondent's supporters further made attempts to solicit for votes inside the polling station by walking around with placards written "MP- Shinali" which were habitually flashed at the voters with the intention of influencing their voters.* At paragraphs 27 and 28 of his supporting affidavit, the petitioner deponed-
>
> *" 27 THAT the 2nd Respondent engaged in acts of bribery on the eve of the election date and on the material day. Voters were bribed with goodies which were being distributed within Ikolomani Constituency by the 2nd Respondents agents.*
>
> *28. THAT on several other occasions during the election period, the 2nd respondent and "his agents engaged in acts of bribery throughout Ikolomani Constituency. These allegations shall be corroborated by video evidence to be adduced at the hearing."*

106. From the pleadings, Amukaka deponed to allegations of bribery and undue influence at paragraphs 11, 12 and 13 of his witness affidavit:-

> *"11. THAT during campaign period, the 2nd petitioner [Respondent?] used the local Administration to intimidate the Petitioner's supporters led by the Assistant Chief of Savane sub-location Idakho East ward, Mr. Naftali Mutsotso.*
>
> *12. THAT Mr. Naftali Mustosto openly participated in campaigning for the Jubilee candidate, and openly disrupted the petitioner's campaign in his sub-location and denied the petitioner permission to campaign in Savane Sub-location.*
>
> *13. THAT there was rampant, bribery and inducement of voters by the 2nd Respondent on the Election Day. Voters were bribed with goodies which were being distributed within Ikolomani Constituency*."

107. To support the above allegations, the petitioner relied on his own evidence and on the evidence of, Amukaka and also on the testimonies of Ferdinand Bihembo Muleka PW6 (Muleka) and Denis Musabi, PW7 (Musabi). Both Muleka and Musabi were casual employees with the National Youth Service (NYS)

at the material time. It was the petitioner's case that the NYS casual employees were paid their wages on the understanding that they would vote for the 2nd Respondent, and that the 2nd Respondent clearly told the casuals that if they did not vote for him, they would lose their employment with NYS. The bone of contention was that whereas the casuals used to be paid daily wages accumulated over one week, on the 07.08.2017, they and in particular Muleka, was paid a day's wages. The Petitioner contended that since that payment was made on the eve of the elections, the same must have been intended to induce Muleka and others to vote for the 2nd Respondent. Mpesa statements were produced to support the claims.

108. Muleka stated that he had worked for NYS for about 5 months by the time the elections were held on 08.08.2017. He testified that the 2nd Respondent did not ask him to go for recruitment, but that he told him (Muleka) and others that if they did not vote for him, they would lose their jobs. Regarding payments to the casuals, Muleka stated that they were paid once a week though he did not know how the NYS paid its people and that there was no specific day for the payments. It was also Muleka's testimony that he got double pay because he had not been paid for one previous week. Then he went on and stated:-

> *" There is usually nobody to tell one to vote for this or that man. I voluntarily voted. Nobody gave me money to vote. Hon. Shinali was not at the polling station. He was not in the booth."*----------

109. On re-examination by Mr. Kingori for the petitioner, Muleka stated,

> "*I was hired by NYS in March, 2017. We were being paid through M-pesa. The payment was in arrears of one week. I have been shown the payments for 05.08.2017. I got paid twice. The two payments were for 2 weeks because prior to that, we had not received payment for one week. Before 07.08.2017, no payments had been made for one day……."*

110. On his part, Musabi stated that he was not threatened with job loss if he did not vote for any of the candidates, and further that the money he was paid on 07.08.2017 was for work already done. He admitted that though he eventually lost his job with NYS, he did not attribute that job loss to Shinali. He also testified that any telephone calls made to him were from persons who supervised the NYS casual workers, but later stated that after receiving the pay on 07.08.2017, a person rang him and told him to vote for Shinali. He did not give the name of the person who called him on telephone.

111. For Amukaka, this is the evidence he gave concerning the allegations of bribery and undue influence:-

> "*Yes, I spent between 1 -2 minutes in polling stations without issues. I did not visit any polling stations where there was bribing of voters. No, I did not see any lorry carrying goodies. Bribery was in homes. It is true I did not go to homes. I only went to polling stations and tallying centre. ------- I see paragraph 13 of my affidavit…….his agents were bribing but the word agent is not in the paragraph. I have not identified the goodies that were being distributed……."*

112. In response to other questions put to him concerning the allegations at paragraphs 11 and 12 of his witness affidavit, Amukaka stated, inter alia,

> " *I see paragraphs 11 and 12 of affidavit. Naftali Mutsotso was an assistant chief of Savane sub-location but I have not given details of the dates and places where he disrupted campaign schedule…… I see paragraph 12 of my affidavit. I could not tell if the Assistant chief Naftali disrupted campaigns*".

113. Touching on the matters in controversy, the petitioner testified that if the NYS casuals received any payments prior to the end of the working week, such payment would be considered as advance payments and no illegality would be attached to the same, though he said it was wrong for the 2nd respondent to pay the casuals on 07.08.2017. Referring to a letter from the Director General of the NYS shown to him by counsel for the 2nd Respondent the petitioner stated that according to the said letter, NYS had no definite

policy for making end of the week payments and that they could pay at any other time in intervention situations.

114. Having set out the evidence, I now move to consider relevant provisions of the law pertaining to this issue. Section 10(1) of the Election Offences Act provides that;- " (1*) A person who, directly or indirectly in person or through another person on his behalf uses or threatens to use any force, violence, including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or on account of:-*

> *(a) inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election:*
>
> *(b) inducing or compelling a person to refrain from becoming a candidate or to withdraw if he had become a candidate or*
>
> *(c) impeding or preventing a person from being nominated as a candidate or from being registered as a voter commits the offence of undue influence"*

115. In the instant case, the petitioner's case is hinged on Section 10(1) (a) because it is alleged that the payments to both Muleka and Musabi were intended to induce them to vote for the 2nd Respondent. It was also alleged that Assistant chief Naftali Mutsotso interfered with the campaign schedule for the benefit of the 2nd Respondent. It was also alleged that the 2nd Respondent bribed the voters to vote for him by distributing goodies carried in lorries to the voters. The question is' were these allegations proved to the required standard, namely beyond reasonable doubt, because the acts complained of are of a criminal nature? While the Petitioner contended that those allegations were proved, the 2nd Respondent submitted that the allegations were not proved. Submitting specifically on the allegations of bribery, counsel for the 2nd Respondent stated that the threshold set by section 9 of the Election Offences Act as to what constitutes bribery was not met.

116. I have myself carefully considering the pleadings, the evidence and the law, and I am in agreement with counsel for the 2nd Respondent that the allegations of bribery intimidation and undue influence were not proved by the petitioner. The allegations that payments to Muleka and Musabi was an inducement was satisfactorily countered by the evidence placed before the court by the 2nd Respondent, and in particular the documentary evidence of the letter from the NYS Director General explaining how and when payments to its staff are made. In any event the petitioner himself conceded that there was nothing illegal about the payments to the NYS casuals. Further, a close look at the evidence of both Muleka and Musabi reveals that these are men who were not sure of what they wanted to tell the court regarding the allegations of inducement. In one and the same breath, they said they were not forced to vote for any of the candidates, and that they were forced to do so Musabi alleged that a man rang him after he was paid his wage for work done on 07.08.2017 and told him to vote for "Shinali" I find that these two witnesses were not credible.

117. I hasten to add that the payments to the NYS casuals were not being made by the 2nd Respondent but by NYS. In this situation, can it be inferred that there was a nexus between the 2nd Respondent and the allegations levelled against him of bribery, intimidation and due influence? In my humble view, no such nexus has been established particularly in view of nameless persons being thrown at the face of the court as having committed this or that illegal act. Such evidence is not the kind of evidence that can prove such serious allegations made by the petitioner against the 2nd Respondent. The proof of such allegations must be beyond reasonable doubt. The evidence on record does not even meet the threshold of a balance of probabilities.

118. As to alleged threats to lose the job, if he did not vote for Shinali, Muleka was clear in his evidence that he was not threatened that he would lose his job if he did not vote for so and so; and further that though he eventually lost his job, he did not attribute that loss to the 2nd Respondent. As the petitioner has failed to prove the allegations, I have no reasons to believe that there was intimidation of voters in favour

of the 2nd Respondent. No video evidence was tendered, nor was any pictorial evidence of intimidation given by the petitioner.

119. There was also the allegation that the voters were bribed with goodies transported in lorries. Amukaka's testimony did not support these allegations because he said he did not witness the distribution of the alleged goodies. It is important to remember that pleadings are not evidence. They are allegations which must be proved to the required standard. That standard was not met in this regard.

120. There was also the allegation that the 2nd Respondent used the local administration to intimidate the petitioner's supporters but again from the evidence given by Amukaka, the allegation was not proved. He could not give dates when and places where the alleged disruptions occurred. He also testified that because the petitioner's and the 2nd Respondent campaign schedules were held at different times and in different places, there was no chance of the campaign rallies being held back to back for disruption by the local administration and in particular Assistant Chief Naftali Mutsotso.

121. It was also alleged in the petition and the affidavits that the 2nd respondent who was the sitting member of the National Assembly for Ikolomani misused public resources during campaigns. The petitioner was required to prove this allegations beyond reasonable doubt since misuse of public resources by a public officer is a criminal offence. In my considered view, the petitioner failed to place before the court unshakable evidence in support of the allegation. My conclusion on this matter has been informed by the court's observations in the case **of Moses Wanjala Lukoye – vs – Bernard Alfred Wekesa Sambu & 3 others [2013] eKLR** where the court, inter alia, stated the following.

> *"As I stated earlier, the claim for use of public resources for purposes of campaigns in an election is a criminal offence which must be proved beyond reasonable doubt. More cogent evidence is needed to specifically prove that the 1st Respondent committed the offence. The Petitioner must show by way of evidence; that indeed the buses used were school buses and, therefore, public resource; that they were used by the 1st Respondent; that they were used for campaign purposes of the 1st Respondent. Proof of ownership of those buses is a critical matter. No formal document that was tendered to prove ownership of those buses by public schools stated in the petition. Likewise, there was no evidence to show that the buses were used by the 1st Respondent for campaign purposes except that the petitioner wrote protest letters and he saw the buses ferrying voters. Those voters were not identified or called as witnesses in this case. There was no evidence that the passengers in those buses were being ferried at the behest of the 1st Respondent to register as voters or to vote. The particular registration centers and polling stations to which the alleged voters were transported were not stated in the petition, supporting affidavit or in his evidence during the hearing of the petition. In sum, the allegation has not been proved at all beyond reasonable doubt, it fails and is rejected."*

122. I entirely agree with the observations of the court in the above case and add that the situation was worse for the petitioner in the instant case because apart from the allegations in the petition and the affidavits, no evidence of any kind was given to support those allegations. The specific resources that were misused or abused were not named. The dates on which those resources were either misused or abused were not given. The specific places where the misuse or abuse of these resources took place were not given. In brief, the petitioner's allegations under this head remain bare allegations and must fail and I so find.

123. As stated above, no evidence was given by the petitioner during the trial to prove the allegations of misuse of public resources, but in his submissions and more specifically at paragraph 60 thereof, the petitioner submitted that the 2nd Respondent admitted to have moved around with the state assigned driver and bodyguard during the campaign period, and that he was using the state resources for campaigns because the state assigned driver and bodyguard are paid using the tax-payers' money. It was Petitioner's contention that the driver and the bodyguard were meant to perform only official duties and not move around with the 2nd respondent during campaigns.

124. Whereas the petitioner may have had a valid point to make, this "evidence" contained in the submissions does not have any legs to stand on because the specific allegation to which it relates was not pleaded. There is no overemphasizing the legal position stated in the very first few paragraphs of this judgment that parties are bound by their pleadings and a court would have no business making a pronouncement on what has not been pleaded by the parties. The question of unpleaded issues arose before the Supreme Court of Kenya in the case of **Zacharia Okoth Obado case (above)** where the Court expressed itself thus on the issue:-

> " *The Court of Appeal overlooked these vital observations of the trial court, and made findings of fact regarding the Kosodo, Siala and Marera Parimary School polling stations, as well as Nyamaharaga ACk Nursery school which had not been pleaded as an item of dispute. The Court of Appeal, as we hold, ought not to have overstepped the evidentiary bounds marked out by the trial court, whether on the basis of pleaded or unpleaded issues. By making findings regarding irregularities in those polling stations, which the trial judge discounted on the ground that the petitioner had not pleaded them- and thus denying the respondents the right of reply – the Court of Appeal made plain findings of fact, and in this way misdirected itself. Parties, as is well recognized, are bound by their pleadings*."

125. As correctly submitted by the 2nd respondent, there was no allegation by the petitioner that the 2nd Respondent was in breach of section 14(3) of the Election Offences Act under which the IEBC is under a duty to require in writing "*any candidate who is a Member of parliament a County Governor, a Deputy County Governor or a member of the County Assembly to state the facilities attached to the candidate or any equipment normally in the custody of the candidate by virtue of that office*." The response to the request was required to be given within fourteen days from the date of the notice. It was upon the petitioner first to plead the breach and second to prove by cogent evidence that the 2nd Respondent was in breach of the law in that regard. The 2nd Respondent was truthful in answering the question to the effect that he had a vehicle, a d river and a bodyguard allocated to him as a sitting Member of Parliament.

126. Though the court has sympathetically read the petitioner's submissions on the issue of alleged misuse of state resources by the 2nd Respondent, it is unable to find for the petitioner since those submissions are not anchored in the pleadings. Had the pleading been right the court would have had no problem bringing down the full force of Section 14(1) of the Election Offences Act which prohibits candidates from using public resources for the purpose of campaigning.

127. Before I conclude on this issue of alleged misuse of public resources during campaigns I want to point out an interesting observation made by counsel for the 2nd Respondent to the effect that Section 14 of the Election Offences Act does not seem to give any guidance on how an incumbent should be treated when it comes to resources attached to him by virtue of the office he holds.

128. This is an important observation because it is not clear what should follow after a person who has been requested to supply particulars under Section 14(3) is expected to do once the particulars are supplied. Does he continue to use the resources, or does he surrender the same to the issuing office? This is food for thought for the IEBC as well as the Judiciary Committee on Election (JCE) as they prepare for the next elections in 2022.

129. The sum total of the analysis of all the grounds alleging commission of election malpractices on the part of the 2nd Respondent is that the petitioner has failed in his duty to prove those allegations beyond reasoble doubt. This second issue is therefore determined in favour of the Respondents in general and the 2nd Respondent in particular.

(C **) Whether the 2nd Respondent was validly elected as a Member of the National Assembly for Ikolomani Constituency**.

130. It was the petitioner's case that since the 1st and 2nd Respondents so badly conducted the elections for Member of the National Assembly for Ikolomani the 2nd Respondent cannot be said to have been

validly elected and therefore that the election should be declared a sham. The petitioner submitted that the provisions of Articles 2(1) 4, 81 and 86 of the Constitution were breached, thus throwing the whole process of the election into disarray, the result thereof notwithstanding. Reliance was placed on the case of **William Kabogo Gitau – vs – George Thuo & 2 others [2010] eKLR** where the court observed, and rightly so in my view, that "*the validity of an election is not dependent on the results alone, but is a factor of the entire electoral process as recognized under the Constitution, the National Assembly and Presidential Elections Act and the Regulations made there under and international law, and the convention and treaties which Kenya is signatory to and party to*." Counsel also relied on one sentence made by the judge in ***the Benard Shinali Masaka case (above)*** *to the effect that "where there was no way of authenticating an election by use of statutory documents, the results were irrelevant because the whole process was as crucial as the final results*."

131. It was also held in the **Moses Masika Wetangula** case (above) and I wholly agree with that holding that *"……for an election to be valid, substantial compliance with the law governing that election is mandatory. For instance, no election can be valid if it is not based on the principle of universal suffrage, if it is not by secret ballot, if it is not transparent and free from violence, intimidation, improper influence or corruption and if it is not conducted by an independent body and administered in an impartial , neutral efficient, accurate, and accountable, manner. No election can be valid if whatever method of voting is employed, it is not "simple, accurate, verifiable, secure, accountable and transparent," as well as " if appropriate structures and mechanisms to eliminate electoral malpractices are [not] put in place, and the counting and collation of votes and announcement of the results are not open and accurate*."

132. Based on the above principles and the evidence on record, the petitioner contended that the election of the 2nd Respondent ought to be nullified. The position taken by the 1st and 3rd Respondents is that the evidence on record shows that the petitioner failed in his duty to discharge the burden of proof imposed upon him by the law and also failed to prove the allegations which can only mean one thing: that the 2nd Respondent was validly elected as Member of the National Assembly of IKolomani Constituency.

133. The 2nd Respondent is in agreement with the 1st and 3rd Respondents on the issue of whether or not the 2nd Respondent was validly elected, and the 2nd Respondent's verdict is that he was validly elected Member of the National Assembly of Ikolomani Constituency.

134. I have myself gone through the petition, the affidavits in support, the responses to the petition and the affidavits sworn in support of those responses as well as the rival submissions as well as the law and decided cases. As I have considered all the above, there is no doubt in my mind that the legal burden of proof rests on the petitioner. But as stated by the Supreme Court in the **Raila case, 2017**, it all depends on the effectiveness with which he or she discharges this and for that reason, the evidential burden keeps shifting. **The Supreme Court made is clear, and this court is bound by the decision of the supreme court that:-**

> "T*he petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law*."

135. In the case before me, the Petitioner made only halfhearted attempts and as a result thereof, he completely failed to place before this court credible evidence of the respondents and especially the 1st and 3rd Respondents departure from the prescriptions of the law. Apart from that the petitioner also failed to prove that the alleged legal infractions and electoral malpractices attributed to the 3rd Respondent were so widespread and so grossly violated the Constitution that the 2nd Respondent cannot be said to have been validly elected.

136. Looking back at the evidence on record, I have no doubt in my mind that the elections for Member of the National Assembly of Ikolomani Constituency were conducted on the principle of universal suffrage. All the agents who testified, except for Cecilia testified that every person who came out to vote voted without any hitches. The evidence is also clear that the elections were conducted by secret ballot in a transparent manner. As all the allegations of violence, intimidation, improper influence and corruption

were not proved, the conclusion I have reached is that the elections were free and fair. The IEBC which is mandated by law to conduct elections did so and was represented by the R.O, Hadson Oloishuro Salenoi. There was no evidence to prove that the elections were not administered in an impartial, neutral, efficient, accurate and accountable manner. The evidence given by the agents, whose leader was Amukaka revealed that there were no issues that would have negatively affected the process as well as the outcome of the elections.

137. It is also clear from the evidence on record that the method of voting was simple, accurate and verifiable. It was also secure and accountable, with no evidence adduced by the petitioner to the contrary. The R.O testified that at the close of the voting exercise, the votes were counted, collated and the results announced in an open and accountable manner. The petitioner's agents all signed form 35A confirming that the results as counted and eventually announced were a true reflection of what they had observed and heard. Only Pearl alleged that though she signed form 35A, she could not vouch for the correctness of the figures because she was not present at the commencement of the voting. Her allegations are dealt with in full elsewhere in this judgment.

138. I find further that the issue of the copy and paste votes for Ikhulili 2 of 2 was adequately explained and considered by the court. For the above reasons, and having found that the elections were conducted in accordance with the Constitution, the Elections Act and the Rules and Regulations made thereunder, and the petitioner having failed to prove that the 2nd Respondent committed any election malpractice, or that the 2nd respondent committed any election offence, I am satisfied beyond doubt that the 2nd Respondent was validly elected as the Member of National Assembly for Ikolomani Constituency.

D) **Whether the petitioner is entitled to the prayers sought in the petition**

139. The petitioner maintained that because the election for Member of the National Assembly of Ikolomani was so badly conducted and so grossly breached the law the petitioner is entitled to all the reliefs sought in the petition.

140. I have already stated above that from the evidence on record and considering the law, the pleadings and rival submissions, the petitioner failed to discharge the onerous duty of proving his case against the respondents on a balance of probabilities. Where the petitioner alleged commission of criminal malpractices on the part of the 2nd Respondent, he failed to prove those allegations beyond reasonable doubt. The petition must therefore fail, and I so find.

E) **<u>Which party bears the costs of the petition?</u>**

141. It is trite that costs follow the event. Section 84 of the Elections Act, recognizing that position provides *"An election court shall award the costs of and incidental to a petition and such costs shall follow the cause*." Rule 30 of the Election Petition Rules 2017 also makes provision for an order for costs which should specify the total amount of cots payable, the ceiling of such costs and the person who shall pay the costs and the person to whom the costs are payable. Rule 30(2) further provides that:-

> *"(2) when making an order under sub-rule (1) the election court may:-*
>
> > *(a) disallow any prayer for costs which may in the opinion of the election court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the petitioner or the respondent; and*
> >
> > *(b) impose the burden of payment on the party who may have caused an unnecessary expense whether that party is successful or not, in order to discourage any such expense*."

142. Where the court does no determine the costs, the burden falls upon the Deputy Registrar of the court to tax the costs as provided under rule 31 of the Rules. In this case, the 1st and 3rd Respondents asked for costs of Kshs.10,000,000/= based on the finding in , ***Election Petition NO. 2 of 2017 at Kerugoya High***

Court – Martha Wangari Karua & another – Vs- IEBC & 2 Others where the petition was struck out on a technicality. The 1st and 3rd Respondents contended that the present case went to full hearing and counsel travelled to Kakamega for the hearing which lasted one week.

143. The 2nd Respondent on his part asked for costs for two (2) advocates against the petitioner. ***In Kalembe Ndile & another – vs – Patrick Musumba & others – Machakos HC EP No. 1 and 7 of 2013[2013] eKLR*** Majanja J. stated that:-

> "*costs awarded should be fairly adequate to compensate for work done but at the same time should not be [so] exorbitant as to unjustly enrich the parties or cause [an] unwarranted dent on the public purse or injure the body politic by undermining the principle of access to justice enshrined in Article 48 of the Constitution*."

144. It is to be noted that election court have not awarded uniform costs , and in my view the factors to be taken into account in determining the amount of costs awardable in this case are those set out under Rule 30(2) of the Elections, Petition Rules. I am also of that school of thought that costs awarded should be reasonable but no exorbitant.

145. Though the instant petition was not necessarily complex, it took much time to conclude due to the number of witnesses who testified and the length of time it took to conclude the hearing.

146. Taking all the factors into account, and considering my findings **in Kakamega EP No. 11/2017 – Hamzah Musuri Kevogo – vs – IEBC & 3 others [2017] eKLR,** I will cap the instruction fees at ksh.3,500,000 for the 1st and 3rd Respondents and Kshs.3,500,000/= for the 2nd Respondent.

Conclusion

147. Finally, having considered all the evidence and circumstances of the election for Member of the National Assembly of Ikolomani Constituency, it is clear to me that this was a very tight race between the 2nd Respondent and the Petitioner. The difference in votes between the two is evidence of the tight race, and that difference of less than 1,500 votes in the final result could make any loser salivate for a rematch, and show that the petitioner fought a good fight. The court afforded all the parties engaged in the combat an opportunity to ventilate their grievances to enable the court see if indeed a rematch was justified. The result of the hearing and after due consideration of the law and the rival submissions is that the petitioner totally failed to adduce tangible evidence in support of the allegations against all the three respondents, and especially against the 2nd Respondent. The petitioner's pleadings remained in the realm of mere allegations and conjecture because there was no evidence to support or substantiate them. The petitioner's case is a typical case of searching for a grain of wheat in a bag of chaff. The petitioner's allegations therefore failed the test of veracity, thereby rendering the petition untenable. It is impossible for this court to conclude that there were any breaches of the law that affected the result in this election.

148. As I now proceed to make the final orders, I must give credit to all counsel for their industry in handling this petition during the hearing and the subsequent demands of crafting and filing written submissions and relevant authorities. All counsel have full command of the law as to elections, the only difference being that they stood on opposite sides of the river.

Final Orders

These are the final orders in this election petition.

1. The petition be and is hereby dismissed with costs to the respondents.

2. The instruction fees for the 1st and 3rd Respondents are capped at kshs. Three Million five hundred thousand (Kshs.3,500,000/=) and those of the 2nd Respondent are also copped at Three Million Five hundred thousand. (KShs.3,500,000/=) and M/S Luseno and Anzala shall be paid for

two counsel.

3. The 2nd Respondent, Shinali Benard Masaka was the validly elected and gazetted Member of the National Assembly of Ikolomani Constituency

4. Having determined that an electoral malpractices of a criminal nature may have occurred this court directs the Deputy Public Prosecutor to carry out an investigation into the conduct of Thomas Bendera Mukabwa on 08.08.2017

5. The costs shall be taxed by the Deputy Registrar of this court

6. The certified costs awarded shall be paid out of the security deposit on a pro-rata basis

7. A certificate of this determination shall, in accordance with section 86(1) of the Elections Act 2011, issue to the Independent Electoral and Boundaries Commission the Speaker of the National Assembly and the Director of Public Prosecutions

Orders accordingly

Judgment delivered, dated and signed in open court at Kakamega this 1st day of February, 2018

RUTH N. SITATI

JUDGE

In the presence of:

Miss Diana Pere for Kingori (present)…..……..…for Petitioner

Mr. Maramba (present)……..for 1st and 3rd respondents

M/S Luseno & Angala (present)……..…for 2nd Respondent

Polycap Mukabwa & Erick Zalo……..……..Court Assistant