



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ELECTION PETITION NO.2 OF 2017

MICHAEL GICHURU.....PETITIONER

VERSUS

HON. RIGATHI GACHAGUA.....1ST RESPONDENT

KAHURA KANUA JOHN.....2ND RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION....3RD RESPONDENT

JUDGMENT

1. Background:

[1] The petitioner was an employee of some sort for one Phyllis Christabel Wambura Maranga during the general elections of 8th August, 2017. His employer turns out to be one of the eight aspirants who contested in the elections to represent Mathira Constituency in the National Assembly. She, however, lost the contest to the 1st respondent who was declared the successful aspirant after he garnered 52,757 votes against Wambura's 28,893. The rest of the candidates were a considerable distant behind as their combined haul amounted to a little over 5,000 votes. Compared to the two leading contestants these candidates only managed what one would consider as nothing more than a handful of the total valid votes cast.

[2] The petitioner was not satisfied with the election result and so by a petition dated 7th September, 2017 and subsequently amended on 24th October, 2017, he challenged it in this Honourable Court on various grounds. It is apparent on the face of the petition that apart from suing the declared winner, the petitioner also sued the 2nd respondent, no doubt in his capacity as the constituency returning officer. According to **regulation 4(b) and (c) of the Elections (General) Regulations, 2012** (herein after "the Elections Regulations") such an officer is tasked with, amongst other duties, the tallying of results from various polling stations in any particular constituency and the declaration and announcement of the tallied results whenever elections are held.

[3] The 3rd respondent was sued as the body responsible for, among other things, conducting or supervising elections to any elective body or office established by the Constitution, including the office of Member of National Assembly, and in this particular instance, the representative of Mathira Constituency to that Assembly. This is one of the purposes for which the 3rd respondent is established under **Article 88** of the Constitution.

2. Pleadings:

(a) Petitioner's petition:

[4] Generally speaking, the petitioner disputed the election outcome because he was not satisfied with the vote count and the subsequent tallying; according to him the counting and the tallying of votes in Mathira constituency was not transparent or credible; neither was the exercise accurate. The election itself, so he contended, was marred by various errors, flaws, illegalities and irregularities which, in his view, were perpetrated by the respondents in brazen contravention of the letter and the spirit of the Constitution and the Elections Act No. 24 of 2011 (hereinafter "the Elections Act).

[5] In particular, the petitioner averred that the right to vote freely was compromised at Kamunyuini polling station where voters who, for one reason or the other, could not vote without assistance, were not accompanied by the candidates' agents. In the absence of the agents, so the petitioner contended, this category of voters was exposed to manipulation by the 3rd respondent's officers who apparently assisted them to vote.

[6] The petitioner also impugned the election result on the ground that the 2nd respondent relied on invalid and unauthenticated results from various polling stations to declare the 1st respondent as the winner of the impugned election. According to him, the validity and authenticity of the result was shrouded in doubt because some of the forms 35A, which were the forms in which the results for election of member of National Assembly were filled at the polling station level, were either not stamped by the presiding officers, or were not signed by the candidates' agents yet no reason whatsoever was given for the omission of their signatures. In other polling stations, only the agents of the victorious candidate signed the forms and, similarly, no reason was given why the signatures of the agents of the rest of the candidates were omitted. In at least one polling station the form was not signed by the presiding officer while in others, the vote counts were not entered in the forms.

[7] To be specific, the petitioner singled out the following polling stations as the stations in which the forms were not stamped by the presiding officer:

1. Kieni primary school;
2. Gitangaruri;
3. Gathogorero primary school;
4. Ndunduini primary school;
5. General China primary school;
6. Ngurumo;
7. Kiangi primary school;
8. Rititi primary school;
9. Gatura primary school;
10. Kiangoma;
11. Gikororo primary school;
12. Old Kiaruhiu;
13. Itundu primary school;

14. Karindudu primary school;
15. Huruma nursery;
16. Gatui primary school;
17. Kahutini primary school;
18. Gikumbo primary school;
19. Karura;
20. Gathirathiru;
21. Kiamigwi primary school;
22. Karatina stadium;
23. Kiangurwe primary school;
24. Unjiru primary school;
25. Karatina open air polling station;
26. Railway canteen;
27. Hiriga primary school;
28. Chehe primary school; and
29. Kiaritha-ini primary school.

[8] The allegation of the omission of candidates' agents' signatures without any reason given for such omission was in respect of the form 35A relating to the first of the two polling stations at **Kieni primary school polling centre**. And it was at **Gitangaruri tea buying centre**, that it was alleged that only the agents of candidates of the victorious Jubilee party signed. Failure by the presiding officer to sign the form was in respect of the first of the two polling stations at **Hiriga primary school polling centre**. Finally, the omission to make entries of the vote counts was at **Kiangoma primary school** and **Old Kiaruhiu primary school**.

[9] According to the petitioner, these defects were material and no doubt affected the final result of the election of the member of National Assembly for Mathira constituency. It is also his contention that since the results from the polling stations were vitiated by irregularities and illegalities, the final tally of the results at the constituency level in form 35B could not have been a fair representation of the will of the electorate since it was based on those tainted results in the impugned forms 35A.

[10] Other defects which the petitioner brought to the fore as illegalities and irregularities that marred the election of the 1st respondent were instances of inconsistencies in entries made of the votes in forms 35A and form 35B; for instance, at Gitangaruri tea buying centre polling station, while the number of valid votes cast was entered in form 35A as 378, the same category of votes was entered in form 35B as 438. In the same polling station, the number of valid votes cast is alleged to have exceeded the registered voters by more than 100 votes.

The 3rd respondent's officers are also alleged to have been engaged in fraud by making false entries in various polling stations. This, according to the petitioner, was in breach of **section 6** of the **Elections Offences Act No. 37 of 2016** that proscribes false entries in statutory forms. In further violation of this

particular provision, the 2nd respondent is alleged to have manipulated the results before entering them in the **Kenya Integrated Elections and Management System (KIEMS)** in favour of the 1st respondent.

Again, in other polling stations, so the petitioner contended, the exercise of counting of votes was shambolic and could not be verified because the ballots were not shown to the candidates' agents at the time of counting, prior to the tallying.

[11] The ballots themselves, according to the petitioner, were not authentic and did not have the requisite security features. The statutory forms, that is, forms 35A and 35B, on the other hand, did not have anti-photocopy features and barcodes.

Since both the ballots and the statutory forms were neither authentic nor were protected by the necessary security features, it was contended that the results from the polling stations in the entire Mathira Constituency were not authentic or verifiable; they were also not accountable.

[12] The petitioner also alleged that the numbers of votes garnered by each candidate were strikingly similar in several polling stations to the extent that they lacked credibility. According to the petitioner, it is logically, scientifically, mathematically and humanly impossible that the votes garnered by all the candidates would be similar in several polling stations across Mathira constituency. By the same token, the number of valid votes cast or rejected in various polling stations could not have been similar. These similarities, according to the petitioner, were not mere coincidences; for purposes of this petition, they rendered the election of the member of National Assembly of Mathira constituency invalid and contrary to the constitutional principles of an ideal electoral system as set forth in **Article 81** of the **Constitution**.

[13] The petitioner had also a bone to pick with the application of technology to the electoral process. According to him, an electronic system known as the Kenya Integrated Elections Management System (KIEMS) had been put in place to not only register and identify the voters but also to transmit the election results. The petitioner pleaded that the legal underpinnings for the technological support requirement in the electoral process is **Article 81(e) (iv) and (v)** of the Constitution which, inter alia, enjoins the 3rd respondent to ensure that the results transmitted from the KIEMS kits to the Constituency Tallying Centres are accompanied by the corresponding scanned copy of the duly filled form 35A.

Contrary to this requirement, the results from various polling stations were transmitted to the constituency tallying centre without the scanned image of form 35A. In any event, the petitioner contended that the data entered in the KIEMS kits was inconsistent with the data in the corresponding forms 35A.

[14] In view of these omissions, it is the petitioner's case that the 3rd respondent did not administer the election in an efficient, accurate and accountable manner and more importantly, it contravened **Article 81(e)** of the **Constitution**. He contended further that the discrepancies, disparities and inequalities in the number of voters registered, votes cast and the overall distribution and entry of election results in polling stations in Mathira constituency are sufficient to arrive at the conclusion that the KIEMS kits either did not work or were not employed in the constituency; consequently, the results cannot be said to meet the minimum acceptable credibility standards of a free, fair, accountable, credible and transparent election and as such contravened **section 44** of the **Elections Act**.

Further, the discrepancies, disparities and inequalities between the 3rd respondent's portal and forms 35A in Mathira constituency on the number of registered voters are a sufficient proof that the results were manipulated in further breach of **section 44** and **section 44A** of the **Elections Act**.

[15] Challenges of technology aside, the petitioner also alleged instances of violence, intimidation, voter bribery and harassment perpetrated by the 1st respondent or his agents against the petitioner's agents during the electioneering period; these acts, according to the petitioner, undermined the election result.

In particular, the 1st respondent is alleged to have openly given out bribes to voters in Mathira constituency to entice them to vote for him.

[16] It is the petitioner's case that the cumulative effect of the omissions and actions of the respondents, jointly and severally, affected the result of the election. In particular, he contended that the election was not substantially conducted in accordance with the law and the Constitution.

Accordingly, the petitioner sought this court to declare that as a result of the respondent's non-compliance with the law, and as a result of the irregularities and improprieties, the election of the member for National Assembly for Mathira constituency was null and void. Consequently, the petitioner also asked this Court to make a declaration that the 1st respondent was not validly elected as the member of National Assembly for Mathira constituency. In the same vein, he also sought for an order for a fresh election to be conducted to elect a representative of this particular constituency in the National Assembly.

(b) Respondents' response:

[17] The 1st respondent contested the petitioner's petition and in an attempt to comply with **rule 11 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017** (herein "the Elections Petitions Rules") he filed a response to the petition on 27th September, 2017. I say it was an attempt to comply advisedly because the response was filed outside the limitation period; for reasons I gave in my ruling on the petitioner's application to strike it out, I allowed the response as duly filed and served.

Apart from the response, the 1st respondent also filed three replying affidavits, no doubt to controvert the petitioner's allegations of fact in his affidavit in support of the petition. I will deal with the evidence at a later stage; my concern at the moment is the parties' pleadings and at this particular stage, the 1st respondent's.

[18] The 1st respondent started by attacking the petition as being fatally and incurably defective because it does not comply with the mandatory provisions of the **Elections Petitions Rules** and in particular, **rule 7(1) (c) and (d)** for the reasons that the petitioner did not disclose the date of the declaration of the results and secondly, the numbers particularised in his petition as the declared results were inconsistent with the correct results declared by the 2nd respondent. An application to strike out the petition on these grounds was dismissed and since I gave my reasons for the dismissal in my ruling, I find it unnecessary to regurgitate the issues that arose in that application in this judgment.

[19] The 1st respondent also questioned the petitioner's standing or capacity to lodge the petition considering that he has neither provided his voter's card nor declared whether he is a registered voter in Mathira constituency. Moreover, he has not disclosed the details of his identity.

The 1st respondent is also not satisfied with the petitioner's description as an "administrative officer" of Phyllis Christabel Maranga since an officer of such a description is not known in electoral law, in particular, the Elections Act.

[20] According to the 1st respondent, the election in which he was elected to represent Mathira constituency in the National Assembly was free, fair, transparent and accountable and was in any event, held in accordance with **Article 86 of the Constitution** and the Elections Act together with the appurtenant regulations.

In particular, he pleaded that the vote counting was accurate and that the tallying of the votes from all the polling stations was transparent and credible. Further, contrary to the petitioner's allegations, the election was not marred by grave errors, flaws, fraud, illegalities and irregularities but rather the result of the election represented the will of the electorate in Mathira constituency.

As far as the question of assisting of voters is concerned, the 1st respondent averred that those voters were assisted by persons of their own choice and that, in any case, they were assisted in the presence of the candidates' agents. According to **regulation 72(2) of the Elections Regulations**, so the 1st respondent contended, the presiding officer may assist a voter in the presence of the candidates' agents.

[21] The 1st respondent also discounted the notion that the petitioner may have been given any reports by agents because the petitioner was not a candidate in the first place and therefore it is not plausible that he could have received any reports from agents. In the same breath, the 1st respondent denied that the petitioner had agents who could possibly have been ejected from any particular polling station.

[22] On the question of stamping of forms 35A, the 1st respondent responded that stamping of such reforms is not a legal requirement. As far as the signing of those forms by the agents was concerned, the 1st respondent's answer is that failure by any of candidates' agents to sign was not, in itself an irregularity or an illegality, because it is only those agents present at the polling stations at the material time who can sign the forms if they so wish.

And even in the polling station where the petitioner alleged that the presiding officer had not signed form 35A, the 1st respondent countered that the form issue had not only been signed but it had been stamped as well.

[23] As for those polling stations where it has been alleged that there were no vote counts in forms 35A, the 1st respondent averred that contrary to the petitioner's allegations, the forms from those particular polling stations have the necessary entries showing the total number of registered voters, rejected ballot papers objected to, disputed and valid votes cast.

At Gitangaruri tea buying centre, where the petitioner alleged that there were inconsistencies in the number of votes cast and that of registered voters, the 1st respondent's answer was that the first "0" in an entry of "00" was misconstrued as number "6" but this mistake did not affect the total number of votes cast which was properly entered in form 35A. At any rate the mistake did not affect the final election outcome.

[24] The 1st respondent also denied that there was any manipulation of votes by the returning officer at the constituency level; according to him, that sort of manipulation of results could not have been possible because the polling results would ordinarily be entered in the KIEMS kit at the polling station level by the presiding officers without any input from the returning officer. He also contended that the counting of votes was done in accordance with the law and the in the presence of, among others, election observers and agents for all the candidates.

[25] The ballot boxes on the other hand were serialised and were properly sealed and that the sealing was done in the presence of the agents in accordance with the **regulation 81(1)** of the **Elections Regulations**. These boxes were then delivered to the returning officer by the presiding officer of any particular polling station and that any agent who wished to put his seal to the box or boxes was free to do so.

[26] The 1st respondent also contested the allegation that forms 35A and 35B did not have anti-photocopy features or barcodes because it was apparent from the ones filed in court that these statutory forms had the features.

On the similarity of votes across polling stations, the 1st respondent's answer was that there was no evidence of such a similarity across the polling stations in Mathira constituency.

As far as the question of transmission of results is concerned, the 1st respondent cited **section 5(1)(A)** of the **Elections Act** and pleaded that electronic transmission of results was only necessary in presidential elections and was not a legal requirement in respect of the results for the election of members of National Assembly.

[27] The 1st respondent reiterated that since the petitioner was not a candidate, it is not possible that he could have had agents against whom violence was visited; for the same reason, he could not have had agents who were denied entry into polling stations and also, he could not also have been given the opportunity for a recount of the votes or re-tally the results of the elections in any particular polling

station.

As for allegations of bribery, the 1st respondent denied that he bribed any person, and even then, no report of this offence was made to the police or any other relevant agency or to the returning officer himself for appropriate action.

[28] Finally, the 1st respondent averred that the petitioner has not discharged the burden of proof that his election was not in compliance with the **electoral laws** or was illegal and irregular or that there was any impropriety on the part of the respondents. To the contrary, it was his position that the elections were conducted substantially in accordance with the law and the result reflects the will of the electorate in Mathira constituency. For these reasons, so the 1st respondent contended, the petition is not only deficient of any merit but it is also frivolous, vexatious and discloses no grounds for the prayers sought, in particular the nullification of his election as the member of National Assembly for Mathira Constituency.

[29] On their part, the 2nd and 3rd respondents filed a joint response and pleaded that they discharged their mandate in accordance with the Constitution and all the electoral laws in the election in which the 1st respondent was elected as the representative of Mathira constituency in the National Assembly.

In particular, they ensured that the election process was simple, accurate, verifiable, secure, accountable and transparent. According to them, the votes cast at each polling station were counted, tabulated and the results announced promptly by the presiding officer for that particular station. They also put in place structures and mechanisms to eliminate electoral malpractice and such measures included the safe custody of election materials. They also ensured that these materials were delivered timely and that the voting process took place within the prescribed time which was between 6 AM and 5 PM on the material day.

[30] Further, the election was conducted in the presence of at least one authorised agent representing a candidate vying for the election or their respective political parties in accordance with **section 30** of the **Elections Act**. Also present were members of accredited observer groups and police officers who were tasked with maintaining law and order.

They contended that the election was orderly and in particular, those persons eligible to vote would identify themselves at the polling station which they were supposed to vote, that is, in instances where there was more than one polling station in a particular polling centre. They would then queue to vote; prior to voting they would avail their original identification documents to the 3rd respondent's polling clerk to ascertain that their names were in the electronic voter register and proceed for voter identification. The eligible voter would then be issued with 6 ballot papers for the 6 elective positions which were the offices of the President, the Governor, the Senator, the Member of National Assembly, the member of County Assembly, and that of the Women Representative.

[31] With these ballot papers, a voter would then proceed to a secluded booth where he would be required to place a mark against his preferred candidate and thereafter cast his vote in the respective ballot box. The exercise was presided over by the 3rd respondent's presiding officers pursuant to regulation **5 (1A) (a)** of the **Elections Regulations**. According to the 2nd and 3rd respondents, the voting process met the constitutional threshold of a simple, accurate, verifiable, secure, accountable and transparent election.

[32] In an apparent answer to the allegations of violence and intimidation, the respondents averred that the election was largely peaceful without any incidents of unlawfulness and unrest, during or after the voting process and further that the voting exercise was concluded without any incidents of irregularity; as a matter of fact, no such incidence was recorded in any of the polling day diaries in the 190 polling stations.

The respondents also contended that in compliance with **regulation 5(1A) (b)** of the Elections Regulations, upon completion of the voting exercise, the presiding officer in any particular polling station would tally and count the votes cast for each of the candidates and immediately thereafter announce the results in the presence of the candidates or their duly authorised and identifiable agents. As it was during

the voting exercise, the tallying, counting and announcement of the results was conducted and completed peacefully and without any incidents of unlawfulness or unrest in all the polling stations within Mathira constituency.

[33] Again, in compliance with **regulation 34(2) (b)** of the **Elections Regulations** the presiding officers recorded the results of the election in the prescribed forms. The authorised agents of the candidates who were present at the polling stations at the time of announcement of the results were given the opportunity to append their signatures on those forms. A copy of the forms was made available to the agents and the candidates while another copy was affixed at the polling station.

Thereafter the presiding officers immediately transmitted the results of the 3rd respondent's respective constituency returning officer in compliance with **regulation 5(1A) (c)** of the **Elections Regulations**. The constituency returning officer would in turn collate the results, tally and recorded them in Form 35B in the presence of the candidates or their agents present at the tallying centre and immediately thereafter announce the results. A copy of form 35B was made available to each of the candidates or their agents.

[34] As far as Mathira constituency is concerned, the final results of the votes cast for each of the candidates as collated and tallied from all the polling stations were as follows:

Gachagua Rigathi	52,757
Kinyua Peter Weru	3,643
Kiruta Christopher	194
Maranga Phyllis Christabel	28,893
Murage Nancy Wanjiru	210
Thinwa George	1,153
Thuku Phenasio	147
Wanjohi Naphtaly	116

It is on the basis of this final tally that the 2nd respondent declared the 1st respondent as the duly elected member of the National Assembly for Mathira constituency.

[35] The respondents denied that the petitioner or his agents raised any concerns or complaints regarding the electoral process; neither was any complaint presented either formally or informally from the petitioner or his agents over the conduct of election in any of the polling stations.

[36] On allegations of assisting voters the respondents contended that the presiding officers do not vote for the disabled or illiterate voters except that they only assist them in marking the ballots; the choice of whom to vote for is, however, left to them. The assistance given is ordinarily in the presence of the candidates' agents.

They also contended that no particular polling station had been singled out in which the presiding officers are alleged to have enquired loudly from the voters their preferred candidates or where the agents were denied the opportunity to accompany those particular voters who required assistance. In any case, no report or complaint was ever made of this kind of misconduct to any presiding officer in any of the polling stations.

[37] Like the 1st respondent, the 2nd and 3rd respondents also denied that stamping of forms 35A by the presiding officers was a requirement. However, even in those polling stations the petitioner complained

about the lack of stamping, the candidates' agents had signed the forms which, in itself, goes to demonstrate that the results represented in those forms were authentic and a true reflection of the votes cast in the particular polling stations.

In cases where the agents did not sign the forms, it was only because they were not present at the polling station at the time the results were declared. In every other case where the agents had proof that were duly authorised to represent the candidates, they signed the forms if they wished to. Where for any reason the agents were present but refused to sign, the 3rd respondent's officers would record on the form the reason for the refusal.

The 2nd and 3rd respondents contended, however, that even in instances where agents refuse to sign the form, that in itself, does not invalidate the results or raise doubts about the authenticity of the results.

[38] As far as Hiriga Primary school polling station is concerned, the respondents refuted the petitioner's allegation that form 35A of that station was not signed by the presiding officer. As for Kiangoma primary school and Old Kiaruhiu polling stations, the vote counts were properly filled in forms 35A contrary to the petitioner's allegations that they weren't.

[39] On the discrepancy between the results posted in form 35A and Form 35B in respect of Gitangaruri tea buying center polling station, the respondents admitted that it was an error but which arose during the transfer of data from form 35A to form 35B and only affected one of the candidates, Thuku Phenasio Wangombe, who was awarded 60 votes yet he did not get any vote at all in that particular polling station. This error, according to the respondents, did not affect the result of the election.

The respondents further contended that the number of the total valid votes cast was 378 while the number of registered voters in that polling station is 402; it is obvious that contrary to the petitioner's allegations, the number of votes cast was lower than the number of the registered voters.

[40] The respondents denied the allegation that the results were manipulated in favour of the 1st respondent through the KIEMS kit. According to them, the constituency returning officer does not feed any results into the kits; that is a task reserved for the presiding officers.

They also denied that the counting of votes was conducted in a shambolic and in a manner that was not verifiable. On the contrary, all the ballots were shown to agents present at the time of counting.

[41] As far as the security of the statutory forms is concerned, the respondents contended that these forms were authentic and embedded with the necessary security features. They denied the petitioner's allegation that the ballot papers and boxes were not genuine or did not have the security features.

On similarity of the results cast for the candidates in various polling stations, the respondent simply denied there was such similarity and in any event the petitioner had not pointed out any particular polling station or stations where this had occurred.

[42] The respondents also reiterated that the entire process of relaying and transmission of results from the polling stations to the constituency tallying centre was simple, accurate, verifiable, secure, accountable, transparent, open and prompt. They also contended that the election was administered in an impartial, neutral and accountable manner and that all the data entered in the KIEMS kits correlated with all the data in forms 35A as transmitted and there was no delay or inaccuracy experienced in any polling station as alleged by the petitioner.

The KIEMS kits were all in order and captured all the duly filled forms 35A which were relayed to the constituency returning officer and to the national tallying centre. However, the completion of transmission of the image of forms 35A was dependent on the availability of 3G and 4G network coverage.

[43] The respondents denied that any violence could have been visited upon the petitioner's agents

because he was not a candidate and therefore could not have had agents in the constituency. In any case, no such incident of violence or voter intimidation or bribery was reported.

As for the recount or re-tallying of the votes, no request whatsoever was made for these exercises to be done in any of the polling stations within the constituency.

[44] The respondents concluded that the petitioner has not met the threshold required by law to grant any of the orders prayed for in the petition because it is lacking in substance and on merits. They reiterated that the results announced and declared by the 2nd respondent are a true reflection of the will of the majority of the electorate of Mathira constituency; accordingly, the petitioner's petition ought to be dismissed.

3. Agreed issues:

[45] In the face of these rival pleadings, it was necessary that the parties agree on issues for determination by this honourable Court; in this regard, they agreed on two issues which they framed and read to court as follows:

“1. Whether the 1st respondent was validly elected and declared as a Member of Parliament for Mathira Constituency in the elections held on 8th August, 2017.

2. Whether the Member of National Assembly elections for Mathira Constituency held on 8th August, 2017 was conducted in a free, fair, transparent and credible manner in compliance with the provisions of the Constitution and all relevant provisions of the law.

3. What orders should be made with regard to costs?”

It is obvious that the first two issues are framed in fairly broad terms and therefore it is likely that other secondary issues will branch from these main ones. If and when that happens, they will be disposed of within the broad framework of the agreed issues; for now, it is logical that the court considers the evidence before it.

4. The evidence:

(a) The Petitioner's evidence:

[46] **Rule 12(1) and (3) of the Election Petitions Rules** requires an election petition to be accompanied by an affidavit sworn by the petitioner and affidavits of persons whom the petitioner intends to call as witnesses. In the same breath, a response to a petition must also be accompanied by an affidavit sworn by the respondent. Similarly, if the respondent intends to call any witnesses, such witnesses must file their affidavits at the same time that the response is filed.

It follows that the petition and the response are filed simultaneously with affidavit evidence in support of or in opposition to the petition as the case may be.

[47] In compliance with this rule, the petitioner filed an affidavit in support of the petition together with affidavits of his witnesses. The respondents, on the other hand, also filed their respective affidavits. The 1st respondent filed the affidavits of his witnesses as well.

When the petition came up for trial, the parties and their witnesses adopted the evidence in their respective affidavits as their evidence-in-chief and therefore the oral testimony in court was, by and large, the answers to the questions put to them in cross-examination on their affidavits and the clarifications sought during their re-examination.

[48] One other thing worth of note is that the depositions in the affidavits of the parties and their

witnesses largely mirrored the averments in the pleadings. A casual perusal of the petitioner's petition and the respondents' responses reveals that the pleadings are, to a considerable extent, a replica of the depositions made in the respective affidavits in its support of and in opposition to the petition. Indeed, one may very well argue that the parties pleaded evidence rather than facts perhaps because they had difficulties in disentangling the two. Whatever the reason, I do not intend to take it on any of the parties for this apparent misstep, particularly because it is non-issue; suffice it to say, it will not be necessary to reproduce the contents of their affidavits in so far as they are repetitive of the averments in the pleadings to which reference has already been made in this judgment.

[49] In his evidence, the petitioner described himself as "an administrator" of Phyllis Christabel Wambura Maranga at the time she vied as an independent candidate for election of Member of National Assembly for Mathira Constituency in the 8th August, 2017 general elections. He acknowledged that on 10th August, 2017, the 1st respondent was declared the duly elected member of this seat after he secured 52,757 votes; he was subsequently issued with the requisite certificate by the 2nd respondent.

He admitted that the margin of votes between the 1st respondent and his employer was 23,864. However, based on the information received as "an administrator" he could not accept that the counting of the votes cast and the subsequent tallying was accurate and credible.

[50] It was his evidence that reports from the agents of Phyllis Maranga indicated that the presiding officers were enquiring loudly from the voters for whom they wished to cast their votes, in instances where voters wanted assistance. Such loud enquiries, according to the petitioner, compromised the free will of the voters and also contravened the constitutional principle of secrecy of the vote contrary to **Articles 38 and 81 of the Constitution**. And even after such loud consultations, the petitioner's agents were not allowed to accompany the voters who required assistance and that when they complained to the presiding officers, the latter ejected them from the polling stations. This is alleged to have happened at Kamunyu-ini polling station.

[51] Apart from Gitangaruri tea buying centre where it was alleged in the petition that there was inconsistency between the number of valid votes posted on forms 35A and 35B, the petitioner swore that there was a similar irregularity in Unjiru primary school polling station. In this station, the 1st respondent was indicated in form 35A to have received 262 votes while the petitioner got 105 votes yet in form 35B the 1st respondent's tally was increased by 100 votes while that of the petitioner remained constant.

The petitioner also alleged that at least one voter was issued with a pre-marked ballot paper.

[52] The petitioner reiterated in his evidence that voters who were handicapped in one way or the other and who for that reason could not vote on their own were not only intimidated at Kamunyuini polling station but that they were also not accompanied by the candidates' agents when they voted.

When he was put to task during cross-examination that 'Kamunyuini' polling station did not exist, he testified that the station he was referring to was Kamunyuini Youth Polytechnic polling station. Even then, Form 35A in respect of that station showed that an agent for Phyllis 'Wamaranga' signed the declaration of results. The petitioner, however, disputed that this agent could have been his employer's agent since the name of the candidate whom he purported to represent was different from his employer's. He admitted, though, that there was no evidence that any of the agents present refused to sign the form and neither were there any comments by the presiding officer to that effect.

[53] Although the petitioner alleged that the presiding officer and the agents did not sign form 35A for Kieni primary school, it emerged during his cross-examination that this particular school was a centre for two polling stations in which the forms were signed by not only the presiding officers but also their deputies; the candidates' agents who were present in the two stations also signed the declaration of the results. As a matter of fact, there were two agents for respective independent candidates in each of the two stations who signed the declarations.

[54] It also emerged during the cross-examination of the petitioner that of the 29 polling stations whose forms 35A are alleged not to have been stamped, 11 stations had their forms stamped. These stations are Gitangaruri, Gathogorero, Rititi Primary School (1 of 2), Gikumbo primary school (2 of 2), Ngurumo primary school (1 of 1), Gitugi Primary School (1 of 3), Karura (2 of 2), Gathirathiru (2 of 2), Hiriga primary school (1 of 1, and 2 of 2), Chehe Primary School. In the face of these facts, the petitioner conceded that the allegation in his affidavit concerning the omission to stamp some forms was incorrect. He also admitted that the regulations did not require stamping of the forms in any event.

[55] As far as Old Kiaruhiu polling station is concerned, the witness admitted that a copy of form 35A for this particular station which he exhibited on his affidavit did not contain any entries at all. The same case applied to the form in respect of Hiriga Primary school.

[56] And on his allegations about the irregularities or illegalities at Gitangaruri tea buying, the petitioner also admitted that he did not have any agent at that particular polling station and therefore he did not have any proof that any agent was denied the opportunity to sign the declaration of the results.

In any event, when he had the opportunity to compare the entries made in form 35A and 35B in respect of this particular station he confirmed that the entries of the number of votes cast in both forms were similar.

[57] Regarding Kiangoma primary school, the petitioner admitted that he did not specify which of the two polling stations at this center did not enter the counts in form 35A. Contrary to the petitioner's allegations, it emerged at his cross-examination that forms 35A for both the stations had all the necessary entries.

Again, although it was the petitioner's evidence that the anomalies in forms 35A affected the counting and the tallying of 25,160 votes, he admitted that he could not prove how he arrived at this particular figure.

[58] As far as the entering of data in the KIEMS kits is concerned, the petitioner admitted that he was not aware that returning officers could not key in any data in these kits. He, however, testified that his allegations were based on the information he received from one of his witnesses, Kimu Nyamu, though he could not point out anywhere in Kimu Nyamu's affidavit where he had deposed to any allegations regarding these kits. He also admitted that he had not pointed out any single polling station where the KIEMS kits failed and neither did he have any affidavit from any agent alluding to this fact.

[59] On the allegation that the counting of votes was conducted in a 'shambolic and unverifiable manner' and that the ballots were not shown to the agents prior to their counting and tallying, the petitioner conceded that he had neither disclosed the source of his information nor obtained any affidavit from any of his agents showing that such irregularity was witnessed anywhere in the 190 polling stations within Mathira constituency.

Similarly, he could not provide any proof of any polling station where the ballot papers used did not have security features and neither did he provide the name of any single voter who had been issued with a ballot paper without security features. Again, he also admitted that he had not singled out any polling station where anti-photocopy features or barcodes were missing from forms 35A.

[60] As far as electronic transmission of results is concerned, the petitioner admitted that he was not aware that under the Elections Regulations, it was not a legal requirement that the results for election of a Member of National Assembly were to be transmitted electronically. He also admitted that the returning officer used form 35B to declare the results after receiving forms 35A from the presiding officers and thus he did not have to rely on electronic transmission of results.

[61] On the issue of violence and intimidation having been visited upon his 'agents', the petitioner admitted that he did not have any agent but that he testified that one of his witnesses, Duncan Mugo, was better placed to answer that question. However, when he was referred to Duncan Mugo's affidavit, he admitted that there was nowhere in that affidavit where Duncan Mugo had sworn that violence had been visited against him. He also admitted that none of the agents, including the agents for his employer, ever

swore any affidavit to the effect that violence had been visited against them or that there was any violence in any polling station for that matter.

[62] Regarding the question of bribery, the petitioner admitted that he had not provided such particulars as to when the alleged bribery of voters by the 1st respondent occurred and who, in particular had been bribed. He also testified that as much as he is aware that bribery is an offence, he had not made any report to any agency for investigation or prosecution of this offence.

[63] When cross-examined by the counsel for the 2nd and 3rd respondents, the petitioner admitted that he was aware that any irregularity occurring during the election in any polling station ought to be reported to the presiding officer; however, despite his allegations of irregularities or illegalities at polling stations, no such report had been made to any presiding officer. He testified that his witness John Gichuru had made such a report though not to the presiding officer but to his chief agent. However, he confirmed that there was no suggestion in John Gichuru's affidavit that he had made a report of any irregularity to the chief agent.

[64] Concerning his allegation of pre-marked ballot papers, he admitted that he had not pleaded this allegation in his petition or deposed to it in his affidavit. He also admitted that he had not singled out any official of the 3rd respondent for misconduct or responsible for the irregularities or illegalities alleged or even indicated any polling station where these officers were stationed.

At his re-examination, the petitioner admitted that his version of forms were different from the original forms supplied by the 3rd respondent. He testified that he got copies of the forms from 'his agents' though as noted, he was not a candidate.

[65] **Kimu Nyamu**, whom the petitioner referred to in his testimony, testified as his witness. It was his evidence that he was the chief agent for Maranga Phyllis Christabel during the general elections in issue. By virtue of his position, he was in charge of 190 agents and that he was stationed at the constituency tallying centre at Karatina girls' high school.

His agents, according to his evidence, reported that they were being harassed by the 3rd respondent's officials and had been denied access to the polling stations despite the fact that their names had been forwarded to the 3rd respondent and that they had produced their identification documents to the presiding officers. Consequently, he alleged that the agents were not able to witness the commencement of the process of voting and, in particular, the opening of ballot boxes to ensure that they were not stuffed with the ballots. He did not, however, mention any polling stations in his affidavit where his agents were denied access.

[66] He also swore that he was informed by his agents that the counting of the ballots was not transparent because the presiding officers did not show them the ballots before counting and at the time of tallying the votes. The results were then entered, apparently in the declaration forms, without the participation of the agents of the petitioner.

In other polling stations, so he swore, his agents were not allowed to accompany or assist the voters as required by law. In the circumstances, he believed that the voting was manipulated in favour of the 1st respondent and to the detriment of Phyllis Maranga.

[67] Although the witness claimed he had 190 agents across Mathira constituency, he did not provide their names and in particular, the names of those agents who are alleged to have been harassed by the presiding officers or the names of the polling stations where they were stationed.

Again, though he swore that there were pre-marked ballot papers at Kiriku polling station, he admitted that such a station did not exist and did not have an agent from that particular polling station to confirm the allegations of the existence of pre-marked ballot papers.

[68] The witness could also not tell the number of votes that his candidate got at Karatina girls high school despite the fact that that's where he was stationed. It was his evidence that he did not have the final tally of votes between his candidate and the 1st respondent at this particular station.

He testified that he got formal complaints from his agents but that none filed any affidavit or was to testify in court. He also testified that some cases were reported to the police although he did not have any evidence of such reports having been made. He also admitted that he did not have any evidence of any communication to the returning officer on the allegations made.

[69] One other witness for the petitioner was **Duncan Mugo**; he swore an affidavit to the effect that he was the petitioner's agent despite the fact that the petitioner was not a candidate. He also deposed that on the August, 2017 at Pork City in Mathira, the 1st respondent's emissaries whom he identified as 'Ciru' and 'Pastor' offered him Kshs 50,000/= so as to vote for the 1st respondent but he declined the offer.

[70] When he reported to his designated polling station the following day, he was directed to stand at some corner together with other persons whom he suspected were not agents. They were told not to ask or comment on anything. They were also not allowed to approach the counting table when the ballots were tallied and counted and therefore they could not ascertain whether the votes were assigned to the proper candidates.

[71] The witness could not identify the person who informed him that the 1st respondent's emissaries were looking for him and that he could also not confirm whether they were from the 1st respondent. He simply did not know them. He testified that he was aware that bribery is an offence but was not aware that failure to report an attempt to bribe him was also an offence.

Again he testified that he did not see any money and he couldn't also tell who between the two alleged emissaries attempted to bribe him.

Although he complained that the he was restricted at some corner and that he had no opportunity to participate in the counting and tallying of votes, he admitted that his particulars were in form 35A for Karatina Girls High school (1 of 1); he also admitted that there was a signature against his name though he denied that it was his signature.

[72] The final witness for the petitioner was **John Gichuru Njogu**. He swore that the ballot paper he was given for member of National Assembly was already marked in favour of 'Hon Rigathi Ichugwa'. He believed there could have been other ballot papers marked in his favour.

The witness agreed with the counsel for the 1st respondent that he had not named in his affidavit the polling station in which he had been given a pre-marked ballot. He also admitted that there was no candidate called Rigathi Ichugwa for Mathira constituency parliamentary seat. This witness also admitted that he did not make any report of the irregularity of the pre-marked ballot. And even then, he was not aware whether there was an agent for his preferred candidate.

(b) The Respondents' Evidence:

(i) 1st respondent

[73] The 1st respondent testified that he obtained copies of forms 35A which he exhibited on his affidavit from the 3rd respondent and as far as he was aware, there were no different versions of these forms in court. His versions of the forms, so he testified, were similar to the version filed by the 3rd respondent with respect to all those polling stations which the petitioner had complained about.

It was his evidence that he had to seek copies from the 3rd respondent since he had not received the forms from all of his agents by the time he was required to respond to the petition. He also testified that some of

the forms he received were not legible. The copies he asked for were collected by his chief agent Jackson Murathami.

[74] The 1st respondent also testified that he had agents in all the polling stations in the constituency and that he did not receive any complainant from any of them on the failure of the KIEMS kits. He denied that the returning officers manipulated the data entered in these kits in his favour.

He was aware that the presiding officers entered the data into these kits but such data was not for purposes of transmission of the results. He admitted, however, that he was not aware whether the results from any polling station for election of Member for National Assembly for Mathira constituency were transmitted electronically.

[75] **Jackson Murathami** testified and confirmed that he collected the copies of forms 35A from the 3rd respondent on behalf of the 1st respondent for purposes of responding to the petitioner's petition. It was also his evidence that as the 1st respondent's chief agent, he was aware that all the agents present at the polling stations at the time of declaration of the results signed the forms.

[76] The other agent for the 1st respondent and who testified for him was **Duncan Kabui Michira**. He testified that he was stationed at Karatina girls' high school polling station. He confirmed having signed form 35A in respect of this particular polling station. He also confirmed that Duncan Mugo, the agent for Phyllis Christabel Maranga who was at the same polling station signed the form.

(ii) 2nd and 3rd respondents

[77] The 2nd respondent testified that he was the constituency elections coordinator for Mathira constituency; he was also the returning officer for that constituency. He testified that all forms 35A issued to Mathira constituency were serialised as NA000001 to NA002280. According to his evidence, each polling station was issued with two booklets of these forms and each booklet had 12 forms each of which had a distinct serial number. For instance, the first polling station in the constituency is Sagana Primary School (1 of 3). Its forms were serialised as NA000001 to NA000012; polling station 2 of 3 at the same school had its forms serialised as NA000013 to NA000024; and finally, the last polling station at that centre was polling station 3 of 3 whose forms were serialised as NA000025 to NA000036.

[78] Each form, according to his evidence was printed with the name of the polling station; the station code and the names of the candidates. The presiding officers were required to enter the valid votes cast for each candidate and the number of registered voters in each polling station; the rejected ballot papers; the rejection objected to ballot papers; the disputed votes; and the total number of votes cast.

The presiding officer was required to make a declaration of the accuracy of ballots in his station by writing his name and signing against it. The deputy presiding officer was also required to do the same.

[79] The agents of the candidates who were present were also required to enter their identification particulars and sign against their names. If any of them disputed the results and refused to sign, he was required to inform the presiding officer who would record the reasons for refusal to sign in the space provided. The presiding officer would also make any comments on the conduct of the elections.

[80] The booklet of forms 35A is self-carbonated, meaning that an entry in the first form would automatically be reproduced in the rest of the forms. One of the forms is taken to the returning officer for purposes of making the entries in form 35B. One form is put in a tamper proof envelope and placed inside the ballot box; one other form is pasted on the outside of the ballot box itself and yet another form is displayed at the door of the polling station. The rest of the forms are distributed to the agents present and if they are more than the available forms the second booklet is filled. The unfilled booklets are returned to the returning officers.

[81] The 2nd respondent also testified that as far as form 35B is concerned, it is filled by the returning

officer at the constituency tallying centre. The source of entries in that form is forms 35A. These are usually the valid votes cast for each candidate. It is printed only after it is filled.

[82] As far as the election for member of National Assembly for Mathira constituency is concerned, the witness testified that he was given 20 forms of this kind and were serialised as NA019096-1 to NA019096-20. After printing, he dispatched a copy to the national tallying center; he retained a copy for his officer and forwarded another to the 3rd respondent's county office. He then distributed the rest of the forms to the candidates and agents present at the tallying centre. The forms also had different serial numbers but their content was similar.

[83] On the issue of stamping of forms 35A, the 2nd respondent testified that the presiding officers are not bound to stamp them and that it is only form 35 B that ought to be stamped. He also confirmed not have received any complaint regarding Kamunyuini polling station and that, in any event, the form from that station had been duly signed; as a matter of fact, the first agent to sign was the agent for Phyllis Maranga.

[84] Similarly, he confirmed that the agents signed the form in respect of Kieni Primary School polling station (1 of 2). As far as Gitangaruri tea buying center polling station is concerned, the 2nd respondent testified that where an agent is absent from a particular polling station he cannot possibly sign the form. He also testified in the same station one of the candidates was erroneously given 60 votes yet he did not get any vote in that station. He admitted having posted the wrong figure in form 35B but that this error did not affect any entry in respect of either Phyllis Maranga or the 1st respondent.

[85] As for Hiriga primary school polling station (1 of 2), he could not tell where the petitioner got the version of the copy of form 35A which he exhibited to his affidavit in support of his allegations. It was also his evidence that the forms from Kiangoma primary school center had vote counts. The same applied to Old Kiaruhiu polling station (1of 1).

[86] Concerning the question of transmission of the results, the 2nd respondent testified that he did not get the results from presiding officers electronically and neither did he use the data entered in the KIEMS kits in tallying of results. He also denied the votes cast were strikingly similar as amongst the candidates. The witness disputed allegations of violence or voter bribery as no report was made to him of any of these incidents.

[87] Upon cross-examination, the 2nd respondent testified that while the presiding officers were required to make the entries in forms 35A, the agents were required to write their own names, the candidates they represented, their identification card numbers and their telephone numbers. They were then required to sign the form.

The witness admitted, however, that deputy presiding officers did not sign the forms in respect of Old Ngorano Dispensary, Kahuru Primary School, Gatundu primary school, Gathugu primary school, Wakamata primary school, Karatina Girls high school and Karatina open air Market polling stations. As for Karatina stadium and Kiamabara polling stations, the presiding officer did not sign the forms. At Ihuri tea buying centre, the presiding officer neither wrote his name nor signed the form while at Karindutu Primary school (2 of 3) none of the agents signed and no reason was given for their failure to sign.

[88] He disputed some of the copies of forms exhibited to the petitioner's affidavit and denied that they originated from the 3rd respondent; these included the forms in respect of Hiriga primary school, Old Kiaruhuiu tea buying centre and Kiangoma primary school. He confirmed that he gave the 1st respondent copies of the forms; his position was that being public documents, these forms are accessible to any person who needs them.

[89] As for the complaints, the 2nd respondent testified that if there was any at the polling station the agents were required to make their reports to the presiding officers and their chief agents. The reports did not have to be documented and they could be made orally.

On the question of assisting of the voters who were handicapped, the 2nd respondent testified that the poll officials only assisted them in marking the ballots out. And as for security features, he confirmed that both the ballots and the forms had the necessary features to secure them from forgery; for instance, specific serial numbers were assigned to particular polling stations and also the forms were self carbonated.

5. Analysis of Evidence:

[90] My assessment of the petitioner is of a litigant torn between pursuing, what he believes is a justifiable course in his own right and seeking to protect the interest of a third party who, in the circumstances of this case, would have been best suited to drive her own agenda, if at all she reasonably believed that she has a sustainable cause of action against the respondents. My opinion is rooted on the undeniable fact that although the petitioner presented his petition generally as an non-aligned ordinary litigant, independent of any party or candidate, there are yet numerous instances in the petition and the affidavit in its support together with the affidavits of his witnesses where he has held himself out either as one of the candidates who contested to represent the electorate of Mathira constituency in the National Assembly or is representing the interests of Phyllis Christabel Maranga who is presented as having been aggrieved because she thinks she lost the contest unfairly.

[91] This honourable court made it clear to the petitioner, at the earliest possible opportunity, that he was not a candidate and therefore there was no chance that he could represent himself as such; in the same vein, he was reminded that he could not succeed if he purported to approach the court in a representative capacity without first establishing that there indeed exists a law that allows him to lodge an election petition on behalf of another person and that he had complied with such a law. He couldn't surmount this latter hurdle and for this reason parts of his pleadings and depositions in the petition and affidavits respectively were struck out.

[92] But as it will soon be clear, if it is not apparent yet, it turns out that despite the offending parts of the petitioner's pleadings and his evidence having been expunged from the record, their relics lingered on. Their net effect has been, not to help the petitioner's course, but to compromise his position as an independent litigant, in his own right, even in those instances where he has attempted to stand out as such.

The analysis of the evidence will no doubt shed more light on this point.

[93] The allegation that voters who, for one reason or the other, could not vote on their own, were manipulated is, to say the least, bare. In the first place, the petitioner was not certain of the polling station in which this manipulation is alleged to have been perpetrated. It is only at his cross-examination that he revealed the station he had in mind but which, incidentally, was not named in either the petition itself or any of the affidavits sworn by himself and his witnesses. It is also not lost to this court that he named Kamunyuini youth polytechnic as the station in issue only after he was referred to forms 35A filed in court by the 3rd respondent.

[94] It also emerged, that even in this particular station an agent for Phyllis 'Wamaranga' signed the declaration of the results. The petitioner made most of the name 'Wamaranga' arguing that it was not his employer's name and therefore Phyllis Christabel Maranga's agent did not sign the declaration.

Granted, the petitioner may be right that Phyllis Wamaranga and Phyllis Maranga were the names of probably two distinct individuals; however, it is noted that Phyllis Christabel Maranga neither denied that she had an agent at the polling station nor that such agent did not sign the declaration. The petitioner himself admitted that there was no evidence that any of the agents present refused to sign the form 35A.

[95] It must be remembered that since the petitioner was not a candidate, he could not have had an agent at this polling station but since he invoked the name of one of the candidates, he was, at the very least, bound to disclose the source of his information and name who the agent of this particular candidate was and whether he was privy to the allegations made by the petitioner and, most importantly, whether he declined to endorse the results as declared at Kamunyuini youth polytechnic polling station. In the

absence of such contrary evidence, it can be assumed, as suggested by the respondents, that most probably, the candidate whose interests the petitioner appears to protect not only had an agent at the polling station but also that such agent appended his signature to form 35A and thereby endorsed the results as declared in this particular station.

[96] If it his case that his candidate did not have an agent at the polling station to sign the declaration, then none of the respondents should bear the blame for the agent's absence; if anything, a more valid question would be how petitioner knew what transpired if his preferred candidate was not represented.

In the ultimate, irrespective of the angle from which one views the petitioner's allegations of malpractices at Kamunyuini youth polytechnic polling station, only one conclusion can be made: that they are baseless, without any substance at all.

[97] On the question of stamping or not stamping of forms 35A, it emerged that the omission to stamp was not as rampant as the petitioner wanted the court to believe. Of the 29 polling stations which he listed in the petition, only 18 had their forms not stamped. He claimed that the number of votes affected by this irregularity was 19,250; he, however, did not demonstrate how he arrived at this figure. Regardless of how the petitioner came to this figure, it is possible that the number was much less considering that the polling stations alleged to have been affected by the 'irregularity' were not as many as listed in the petition.

[98] The petitioner's position on the forms that were not stamped was that the results which they represented were invalid and unauthenticated and were therefore unreliable. However, this argument is unsustainable for the simple reason that there is nowhere in the Elections Regulations where it is suggested that the forms ought to be stamped; neither is there a provision for such stamping in the forms as prescribed in the schedule to the Act.

In any event, there is ample evidence that the results as declared in those polling stations in which forms 35A were not signed were endorsed by the candidates' agents. There is no evidence that any of the agents in those polling stations, including the agents for Phyllis Christabel Maranga whose interest the petitioner appears to pursue, raised any issue on the validity of the votes cast or complained of any other irregularity during and after the elections.

[99] My conclusion on this question of omission to stamp the forms 35A is that if those forms are valid in every other respect, the omission to stamp them is neither an irregularity nor an illegality and therefore the election results which they portray cannot be nullified or invalidated only because the forms in which they were entered were not stamped.

The petitioner's contention that the candidates' agents did not sign the declaration of results at Kieni primary school was also not supported by evidence. The evidence available is that the school was a centre for two polling stations and the presiding officers, their deputies and the agents present signed the declarations. As a matter of fact, it is apparent from forms 35A in respect of the two polling stations that the agents for two the independent candidates signed the forms.

[100] It is noted that neither the petitioner himself nor his preferred candidate named any agent in particular who may not have signed the declaration; in fact, the petitioner admitted that he could not confirm whether any of the two agents was Maranga's. In the absence of any evidence to the contrary, there is every possibility that any of the two agents who signed for their respective independent candidates could have been for this candidate who, as noted, was the petitioner's candidate of choice. Suffice it to say, the petitioner's preferred candidate did not provide any evidence that her agent did not sign the declaration, for one reason or the other.

[101] Similar allegations of lack of signature by either the candidates' agents or the presiding officers at Gitangaruri tea buying centre and Hiriga primary school polling stations were equally not proved. At Gitangaruri tea buying centre, for instance, there is no evidence that all the agents who were present at the polling station were denied the opportunity to sign the declaration forms; at least there was no evidence to

that effect from any of the agents who might probably have been at either of the stations. In particular, having admitted that his candidate was not represented at this particular station, there was absolutely no basis for questioning the authenticity of form 35A of that station on the basis that only the agents of a particular party signed the declaration.

[102] The anomaly of one of the candidates having been awarded 60 votes when he did not get any votes at this polling station was satisfactorily explained, in my view. In any case, it is an anomaly that did not give any advantage to the 1st respondent or prejudice the petitioner's candidate. All that happened is that the results for one of the candidates identified as Thuku Phenasio was posted in form 35B as 60 votes yet in form 35A he was indicated as having received nil votes entered in that form as '00'. The first '0' was mistakenly entered in form 35B as number 6 hence the error of '60' votes. The effect of this error was to increase the number votes cast in form 35B to 438 when the actual figure of the votes cast was 378.

[103] The claim that the presiding officer at Hiriga Primary school polling station (1of 2) did not sign form 35A or that the voter count was not entered in that form was also contrary to the evidence available. The 3rd respondent produced the form showing that the presiding officer and her deputy signed the form. It also showed that at least three agents signed the form on behalf of their candidates.

[104] As for the alleged missing voter counts in forms 35A for Kiangoma primary school and old Kiaruhiu polling stations, I gathered that only the copies exhibited by the petitioner in support of this allegation were blank; the version of these forms provided by the 3rd respondent contained all the necessary entries, including the vote counts. It is noted that the authenticity of the 3rd respondent's version was not questioned. There was also no evidence that the information entered in those forms was fraudulent. Simply put, the petitioner's allegations with regard to these two stations were unfounded.

[105] The petitioner's allegations that the results for some polling stations were fraudulent in the sense that the counting and the tallying was what he termed as 'shambolic and unverifiable' and also because the 2nd respondent manipulated the results before feeding them into KIEMS kits are also not supported by any proof. In the first place, it is not in dispute, and the petitioner himself admitted, that the returning officers were not accessible to these kits at the polling stations; the kits were, at all material times, in possession of the presiding officers and only they could make the necessary entries in the kits. But even then the petitioner did not name any polling station where the entry of the data in the kits was manipulated.

[106] Similarly, no polling station was named in the petitioner's petition or in any of the affidavits sworn in its support where the votes were counted in a 'shambolic and unverifiable' manner. It is noteworthy that neither the petitioner nor any of witnesses swore any affidavit to the effect that they witnessed this irregularity either as agents or voters in any of the 190 polling stations where this irregularity occurred. Again, none of the candidates' agents deposed to the fact that they were never shown the ballots at the time of counting in any particular polling station.

[107] The petitioner also questioned the authenticity of both the ballot papers and the forms used in Mathira constituency; however, like most of his other allegations in the petition, the allegation that the ballot papers did not have security features or that the statutory forms were not protected from unauthorised copying is also unfounded. There is simply no evidence at all, and the petitioner himself admitted as much, that the ballot papers or the statutory forms did not have the necessary security features. To the contrary, it was demonstrated to the court that indeed these documents were embedded with the necessary protective features.

[108] The allegation by the petitioner that there were striking similarities in the number of votes garnered by each candidate or in the number of rejected votes and the votes cast in several polling stations across Mathira constituency was, to say the least, wild. I need not spend much time on it save to say that neither the petitioner nor any of his witnesses provided a single instance where any of these things occurred.

[109] On the allegation of intimidation and violence allegedly perpetrated by the 1st respondent's agents

against the petitioner's agents, all that can be said is that the petitioner did not, and could not have had agents at the polling station because he was not a candidate. Secondly, none of the agents of the rest of the candidates, including the agents for **Phyllis Christabel Maranga** filed any affidavit in support of the allegations that they were either intimidated or suffered any form of violence in the hands of the 1st respondent's agents. Although Mr. Duncan Mugo testified that he was Ms Maranga's agent and that he was restricted to some corner at the polling station where he represented her, he could not name the presiding officer who is alleged to have curtailed his movement. There was also evidence that he signed the declaration form though he denied that the signature was his. He also did not provide any proof that he lodged a complaint, in whatever form, to the presiding officer or the returning officer about the alleged malpractices.

[110] The allegation of bribery of voters was equally not proved. Although Duncan Mugo who was one of the petitioner's witnesses testified that he was approached by the 1st respondent's emissaries and attempted to entice him with money to drop his support for Ms Maranga, he admitted that these people were strangers to him; he identified them as 'Ciru' and 'Pastor' but he had no evidence that they had been sent to him by the 1st respondent. He also admitted that despite the attempt to bribe him being a criminal offence, he did not report it to the necessary agencies to take appropriate action. With this sort of evidence, I am not satisfied that the offence of bribery or attempted bribery of voters was proved against the 1st respondent.

[111] It was also alleged by the petitioner that a pre-marked ballot was given to one of the voters. The said voter, John Gichuru Njogu, was cross-examined on his affidavit in which he had sworn that the candidate in whose favour the ballot had been marked was one Rigathi Ichungwa; he admitted, however, that this name could not be attributed to any of the candidates who contested for election in Mathira constituency. The witness also did not indicate in which polling station this pre-marked ballot paper was found and neither did he file any complainant or report of this anomaly to anybody.

With this analysis in mind, it is appropriate at this point to consider the relevant electoral law and how it lends itself to the circumstances of this petition.

6. The law:

[112] When I reflect on the parties' pleadings, my analysis on their evidence in support of the positions they have adopted and the submissions of their respective learned counsel on these positions, the legal issues that quickly emerge for consideration are, in my humble view, as follows:

- (a) The proper interpretation and application of **section 83** of the **Elections Act** on nullification of an election for non-compliance with the law.
- (b) The extent to which the decision in the case of **Morgan versus Simpson[1974] 3 All ER 722** on the nature and effect of irregularities in the electoral process applies in our electoral jurisprudence;
- (c) Scrutiny, the effect of irregularities, if any, on an election result;
- (d) The burden and the standard of proof in election petitions; and,
- (e) The application of technology in electoral system and its effect on an election result.

[113] It would have been ideal to discuss each of these issues separately and I will, as much as possible, deal with them as such but it is important to note that some of issues are so intertwined that it is more convenient to discuss them together rather than in seriatim.

I must also state that many of these issues, if not all of them, are not new; they have been raised and determined by the highest court in the land in **Election Petitions Nos. 5, 3, 4 of 2013 Raila Amolo**

Odinga & 5 Others versus Independent Electoral & Boundaries Commission & 3 Others (2013) Eklr and Election Petition No. 1 of 2017 Raila Amolo Odinga & Another versus and IEBC & 2 Others. In these decisions, the Supreme Court has addressed the issues in the context of the proper interpretation and application of those provisions in the Constitution and the Electoral law in determination of electoral disputes before court.

[114] It must not be forgotten that as much as these decisions were in respect of election petitions relating to presidential elections, they are binding on the rest of the courts to the extent that the Supreme Court's interpretation of the law was not just restricted to the presidential elections only; except for certain aspects of the law that are specific to presidential election petitions, the Supreme Court dealt with electoral law that straddles beyond the precincts of presidential election disputes. It is that part of the Court's interpretation of the law that cuts across the resolution of election petitions generally that is of interest in this petition.

[115] It follows that I can do no better than reproduce the Supreme Court's opinion on the legal issues that have been singled out in this petition. I must not be mistaken to have disregarded the rest of the decisions which the respective learned counsel for the contesting parties cited on the same questions that the Supreme Court addressed; they are of course endorsed as long as they are consistent with the Supreme Court's interpretation of those common questions that they sought to answer. In any case, I note that at least one of the two decisions has been cited by the petitioner himself and the 2nd and 3rd respondents. The 1st respondent, though not directly citing it, has made reference to the *Morgan case* whose decision was also in focus in the Supreme Court's decision. In short the Supreme Court decisions shouldn't be seen as alien to the parties and more importantly, to the issues at hand.

(a) Interpretation of Section 83 of the Elections Act and the Decision in Morgan versus Simpson

[116] Section 83 of the Elections Act states as follows:

83. Non-compliance with the law

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

More often than not, whenever the question as to the proper interpretation of this section arises, the decision in *Morgan and Others v. Simpson and Another* [1974] 3 All ER 722 pops up. In that case, Denning MR held as follows:

"... I suggested that the law can be stated in these propositions: (1) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected, or not...(2) If the election was so conducted that it was substantially in accordance with the law as to elections, it is not to be vitiated by breach of the rules or a mistake at the polls-provided that it did not affect the result of the election...(3) but, even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake the polls-and it did affect the result-then the election is vitiated.(see page 728).

[117] This case involved a local government election at which a total of 23,691 votes were cast. 82 ballot papers were properly rejected by the returning officer. 44 of those papers were rejected because they had not been stamped with the official mark as required by the local election rules. The voters to whom the 44 papers had been issued had not noticed that the polling clerks had failed to stamp them. The returning officer himself had not been at fault. If the 44 ballots papers had not been rejected, but had been counted, the petitioner, a candidate at the election, would have won the election by a majority of 7 over the respondent. But in consequence of the rejection of the 44 papers, the respondent had a majority of 11 and so was declared to be the successful candidate. The petitioner sought an order that the election should be

declared invalid under **section 37(1)** of the **Representation of the People Act 1949**, on the ground that it had not been conducted ‘substantially in accordance with the law as to elections’; alternatively that, even if it had been so conducted the omissions of the polling clerks had affected the result.

[118] The court of first instance (Milmo and Bean JJ.) held that the election had been conducted substantially in accordance with the law as to elections within section 37(1), in that the election had not been conducted in a manner contrary to the principle of election by ballot, and, although there had been a modest number of errors which in the event had affected the result, that was not a sufficient reason for declaring the election void.

This decision, as noted from the judgment of Denning MR, was overturned by the Court of Appeal.

[119] The reason why this case is normally mentioned whenever the interpretation of **section 83** of the **Elections Act** is in issue is because that section is comparable, though not in similar terms, to **section 37 (1)** of the **Representation of the Peoples Act, 1949** of the United Kingdom. This latter provision of the law states as follows:

No local government election shall be declared invalid by reason of any act or omission of the returning officer or any other person in breach of his official duty in connection with the election or otherwise of the local elections rules if it appears to the tribunal having cognizance of the question that the election was so conducted as to be substantially in accordance with the law as to elections and that the act or omission did not affect its result.

[120] The Supreme Court did not address section 83 of the Elections Act directly in the 2013 election petition but proceeded to hold that the standard of proof in election petitions, which is the context in which the issue was raised, was one that is above the balance of probability though not as high as beyond reasonable doubt.

[121] The issue re-emerged in the 2017 petition and the argument by the petitioner was that **section 83** of the Elections Act should not be employed to sanctify all manner of illegalities and irregularities which may occur during the electoral process so as to render them immaterial.

The respondents argued, on the other hand, that in their understanding of this provision non-compliance with the law alone, without evidence that the electoral process or the results had been materially or fundamentally affected is not a basis for invalidating an electoral outcome.

[122] In the 2017 petition, the Supreme Court not only addressed this section directly but it also held that it was the pivot on which the petitioner’s petition turned. It acknowledged that it did not render an authoritative interpretation of **Section 83** of the **Elections Act** as read together with the relevant provisions of the Constitution in the 2013 petition.

[123] The court noted that there are two limbs to **section 83**; these are:

- (a) compliance with the law on elections; and,
- (b) irregularities that may affect the result of the election.

The crux of the matter, according to the honourable Court is whether the two limbs are conjunctive or disjunctive, that is, whether each of the two limbs, on its own, is sufficient to annul an election or whether it is necessary that the two of them must be proved before such nullification.

After considering the genesis of the relevant provision in the English law which informed the decision *Morgan case* the court came to the conclusion that the use of the term “and” in the English law renders the two limbs conjunctive. On the contrary, under the Elections Act (Section 83), the term used is “or” instead of “and”. Accordingly, the use of the word “or” makes the two limbs disjunctive under our law meaning that either of the two limbs is a sufficient ground to nullify an election.

[124] Inevitably, the Court came to the conclusion that it could not conjunctively apply the two limbs of that section and require of the petitioner to not only prove that the conduct of the election violated the principles in our Constitution and other written law on elections but that he must also prove that the irregularities or illegalities complained of affected the result of the election. The Court thus drew a fine distinction between the application of section 83 of the **Elections Act** and **section 37(1)** of the **Representation of the People Act** and with that, the extent to which the *Morgan case* is applicable to election disputes in our local courts.

[125] The interpretation which the Court found acceptable is that the two limbs should be applied disjunctively. Therefore, a petitioner who is able to satisfactorily prove *either* of the two limbs of the Section can void an election. Meaning, therefore, that 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.

The court was also categorical that **section 83** of the Act applies to all elections and not just to the presidential elections alone.

(b) The Burden and the Standard of Proof in Election Petitions

[126] Closely related to the proper interpretation of section 83 of the Act, is the question of the burden and the standard of proof in elections petitions which the Supreme Court had occasion to deal with as well.

After reviewing court decisions from different countries in the Commonwealth, the Court in the 2013 petition came to the conclusion that the common thread amongst them is that an electoral cause is established much in the same way as a civil cause; that the legal burden rests on the petitioner though it keeps shifting depending on what the Court referred to as the ‘effectiveness’ with which the petitioner discharges this burden.

[127] The Court went further and held that where a petitioner alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It acknowledged the reality that, more often than not, the electoral process is infringed or can be infringed, especially through incompetence, malpractices or fraud attributable to the electoral body but it behoves the person who alleges, to first produce the necessary evidence and second to demonstrate that such incompetence, malpractice or fraud affected the outcome of the elections. It is only at that point that the respondent is called upon to prove the contrary. The rationale behind this approach, according to the Court, is the common law approach in respect of alleged irregularity in the acts of public bodies: all acts are presumed to have been done rightly and regularly.

[128] On the standard of proof, the Court was of the opinion that such standard must be determined on the basis of the principles of the Constitution, and the need to safeguard electoral rights. While the court acknowledged that, like any other public body, the electoral body is subject to the “national values and principles of governance” declared in Article 10 of the Constitution, judicial practice must not make it burdensome to enforce the principles of properly-conducted elections which give fulfillment to the right to vote.

[129] Taking all these factors into account the Court concluded that the threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt. It put a caveat, however, that this standard will not apply where it is alleged that criminal offences were committed in which case the standard that applies in criminal cases will apply.

[130] The Court adopted the same position in its recent 2017 decision. It endorsed its reasoning in the

2013 decision. In doing so, the court made comparative analysis of decisions on this question in various jurisdictions across the globe. These analyses revealed three different types of standard of proof which are, first, the standard in criminal cases which is the proof of beyond reasonable doubt standard; second, the standard of proof on a balance of probabilities; and last, but not least, the intermediate standard of proof, which it found acceptable in election petitions. The court also endorsed the application criminal standard of proof beyond reasonable doubt when the commission of a criminal or quasi criminal act is made in a petition. It reiterated that:

In many other jurisdictions including ours, where no allegations of a criminal or quasi-criminal nature are made in an election petition, an ‘intermediate standard of proof’, one beyond the ordinary civil litigation standard of proof on a ‘balance of probabilities’, but below the criminal standard of ‘beyond reasonable doubt’, is applied.

[131] The court explained the rationale for adoption of this standard, apparently in addition to the reasons given in the 2013 petition, to be based on the notion that an election petition is not an ordinary suit concerning the two or more parties to it but it also involves the entire electorate in a ward, constituency, county or, in the case of a presidential petition, the entire nation.

(c) Employment of Electronic Technology in the Electoral Process

[132] The Supreme Court acknowledged that it was in the elections of 4th March, 2013 that an electronic system was employed in our electoral processes for the very first time. There were three components to it; these were (i) Biometric Voter Registration (BVR) for voter registration; (ii) Electronic Voter Identification (EVID) for identification of voters on the polling day; and (iii) Results Transmission System (RTS) for transmission and final tally of the results. (See paragraph 4 of the judgment).

[133] One of the major arguments in the 2013 Petition over the electronic system of registration voting and transmission of results was whether it was mandatory or was merely complementary.

The petitioner’s position was that it was; it was their argument that an electronic system that was simple, accurate, verifiable, secure, accountable and transparent was mandatory, indeed a legal constitutional requirement. Their contention was that the one adopted by the IEBC was not only complex but it failed to work anyway. In their view, without electronic transmission there could be no basis for verification. They concluded that failure to transmit provisional results electronically was deliberately designed to manipulate the electoral process in favour of the incumbent, the respondent. So, in the petitioner’s view, the failure of that electronic system put in place by the IEBC and the consequent failure to electronically transmit election results affected the validity of the Presidential elections.

[134] The court dismissed their argument and stated as follows:

From case law, and from Kenya’s electoral history, it is apparent that electronic technology has not provided perfect solutions. Such technology has been inherently undependable, and its adoption and application has been only incremental, over time. It is not surprising that the applicable law has entrusted a discretion to IEBC, on the application of such technology as may be found appropriate. Since such technology has not yet achieved a level of reliability, it cannot as yet be considered a permanent or irreversible foundation for the conduct of the electoral process. This negates the Petitioner’s contention that, in the instant case, injustice, or illegality in the conduct of election would result, if IEBC did not consistently employ electronic technology. It follows that the Petitioner’s case, insofar as it attributes nullity to the Presidential election on grounds of failed technological devices, is not sustainable. (Paragraph 237).

[135] Having embraced the notion that electronic technology was employed for the very first in the 2013 elections, I am not quite certain of the Court’s statement that such technology had been used before and failed, or that it could not be relied upon and for those reasons the IEBC had the sole discretion of whether to use it or not.

[136] However, despite the Supreme Court's opinion on use of technology in electoral process there were amendments to the Elections Act, subsequent to its judgment, to provide for use of technology; these are:

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(a) **Section 44** of the Act that has established an integrated electronic electoral system for biometric voter registration, identification and electronic transmission of results. This is the basis of the Kenya Integrated Elections Management system. **Section 44 (3)** is particular that this system must be simple, accurate, verifiable, secure, accountable and transparent.

(b) **Section 4** which provides for a register of voters which includes one that is electronically compiled; this is the register that Sections 6A and 10 of the Act also make reference to when they talk of a person's biometric data.

(c) **Section 39(1) (C)** that, among other things, enjoins the Commission to electronically transmit Presidential election results all the way from a polling station to the Constituency Tallying Centre and the National Tallying Center and also to publish them on an online portal managed by the IEBC.

[137] As he did in the 2013 elections, the Petitioner raised the question of technology again in 2017 but this time round buoyed by these amendments. He argued that the IEBC failed to properly employ the KIEMS kits to collate, tally and transmit results as required by law and thus defeating the very purpose for which the electronic system was intended which was to insulate the electoral system from malpractices. The results of these violations were that the presidential election was flawed and therefore ought to be annulled.

[138] The Supreme Court agreed with him and faulted the IEBC for misuse or non-use of the KIEMS. In particular, the court zeroed in on **section 39 (1C)** on transmission of presidential elections results and held that the need to transmit results in the prescribed manner is IEBC's statutory obligation and in this case, it could not hide behind the excuse of failure of technology. Failure to transmit the results electronically was held to be a violation of the law. Such failure is not only contrary to **section 39(1C)** of the Act but it is also an affront to **article 81 and 86** of the **Constitution** with particular regard to important aspects of transparency, accountability, simplicity, security, accuracy, efficiency and verifiability of the electoral process. Electronic transmission of results is intended to facilitate the verification process but also to insulate transmission of results from potential electoral fraud caused by human intermeddling. Without this electronic transmission, the Court held that the results were not verified before they were declared. The net result was that since the lack of transmission was held to be in violation of the Constitution and the election law, the purported results couldn't be said to be a free expression of the will of the people as contemplated under **Article 38** of the Constitution and even on that basis alone the Court could nullify and indeed did nullify the elections.

(d) Scrutiny and the effect of irregularities

[139] The court in the 2013 petition moved on its own motion and ordered a scrutiny of all Forms 34 and Forms 36 in all the polling stations because, in its own words, it sought to understand the vital details of the electoral process including its integrity. In that regard, it ordered a re-tallying of the Presidential votes in 22 polling stations, using Forms 34, 36 and the Principal Register, as these stations had featured in the Petitioner's petition. The purpose of the re-tally was to establish whether the number of votes cast in these stations exceeded the number of registered voters as indicated in the Principal Register.

[140] The results of this scrutiny and re-tally were that 5 polling stations, out of the 22, had discrepancies as to the number of votes cast as reflected in Form 34 and Form 36. With respect to the scrutiny of all Forms 34 which were used by the IEBC in tallying the Presidential election votes, from the 33,400 polling stations in the country, only 18,000 polling stations were scrutinized. It was found that Forms 34 were missing in some polling stations. In addition, the aggregate results of Form 36 voters from 75 constituencies were missing.

[141] The Petitioner argued that since the IEBC did not verify the Presidential election results as required under the law, it should not have announced the results without accounting for all electoral areas, particularly when it was established that there were missing Form 34s from several polling stations. In the face of these irregularities, so he contended, the results from IEBC were unreliable.

[142] The respondents, on the other hand, were of the view that the constituencies where there were discrepancies were spread across the entire country and that, in itself, proved that no particular candidate enjoyed any advantage over the other. The IEBC thus conceded that while its officials may have made some errors, which they regarded as clerical, no mischief or advantage was intended.

[143] In the 2017 Petition the Court made a specific order for scrutiny based on the petitioner's application. The foundation upon which this order was made was the applicant's contention that there were numerous discrepancies between the results declared in Forms 34A and 34B from various polling stations across the Country, contrary to Section 39 of the Elections Act, as read with Regulation 82 of the Regulations thus compromising the integrity of the election. In response, the IEBC also admitted that indeed there were discrepancies in the results in Forms 34A and 34B spread across the Country but attributed the discrepancies to human errors and fatigue of its officials. It also contended that the discrepancies in question did not in any event affect the result of the election.

[144] The Court found that the petitioners had laid a strong foundation for the order for scrutiny and ordered that the petitioners be granted access to original forms 34 As, 34Bs and 34Cs from all the polling stations and even allowed the use of appropriate technology to distinguish the genuine forms from fake ones.

[145] It is important to note that the order for scrutiny was based on, first, the affidavit evidence on record; second, the parties' competing arguments that from the evidence available the elections were conducted so badly and marred with such grave irregularities that it did not matter who won or was declared the winner; and third, the application for scrutiny was held to be founded on a strong and firm foundation since the orders for scrutiny were also sought for in the main petition.

[146] It is also noted that the scrutiny was endorsed by all the parties to the petition. The partial scrutiny revealed discrepancies in certain forms 34A, 34B in that some were carbon copies or photocopies while there was no evidence of signature or stamp on the others. There were no security features in other forms.

The court held these discrepancies to be inexplicable irregularities and proceeded to ask vital questions which may also have been relevant in present petition if only similar irregularities had been proved. The courts asked:

[378] Where do all these inexplicable irregularities, that go to the very heart of electoral integrity, leave this election? It is true that where the quantitative difference in numbers is negligible, the Court, as we were urged, should not disturb an election. But what if the numbers are themselves a product, not of the expression of the free and sovereign will of the people, but of the many unanswered questions with which we are faced? In such a critical process as the election of the President, isn't quality just as important as quantity? In the face of all these troubling questions, would this Court, even in the absence of a finding of violations of the Constitution and the law, have confidence to lend legitimacy to this election? Would an election observer, having given a clean bill of health to this election on the basis of what he or she saw on the voting day, stand by his or her verdict when confronted with these imponderables? It is to the Kenyan voter, that man or woman who wakes up at 3 a.m on voting day, carrying with him or her the promise of the Constitution, to brave the vicissitudes of nature in order to cast his/her vote, that we must now leave Judgment.

[147] It might appear from this excerpt that the Court had resigned itself to a state of wait and see and left the judgment on the effects of irregularities in the hands of an ordinary, reasonable man; however, in the passage that followed, the Court went further to suggest the consequences of these failures and stated as follows:

[379] In concluding this aspect of the petition, it is our finding that the illegalities and irregularities committed by the 1st respondent were of such a substantial nature that no Court properly applying its mind to the evidence and the law as well as the administrative arrangements put in place by IEBC can, in good conscience, declare that they do not matter, and that the will of the people was expressed nonetheless. We have shown in this judgment that our electoral law was amended to ensure that in substance and form, the electoral process and results are simple, yet accurate and verifiable. The presidential election of 8th August, 2017, did not meet that simple test and we are unable to validate it, the results notwithstanding.

[148] This court is bound by this answer; I must hasten to state, however, that the court has left it to the discretion of the Election court to decide, based on the evidence before it and on its findings whether the irregularities are of such magnitude as to annul an election. To quote the Court:

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

In view of the interpretation of Section 83 of the Elections Act that we have rendered, this inquiry about the effect of electoral irregularities and other malpractices, becomes only necessary where an election court has concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in the Constitution or in that law. But even where a Court has concluded that the election was not conducted in accordance with the principles laid down in the Constitution and the applicable electoral laws, it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice. (See paragraphs 373, 374).

7. Conclusion:

[149] If the petitioner's petition is considered from the parameters set out by the Supreme Court, it is not difficult to see that it falls below the legal threshold necessary to nullify the election of the 1st respondent as the Member of National Assembly for Mathira Constituency.

In summary, the petition was not supported by sufficient evidence. By way of recapitulation, the allegations in respect of forms 35A were not proved; while it is true that some of the forms were not stamped, the petitioner did not point out any law, either in the parent Act or in the Regulations which specifically required the 2nd and the 3rd respondents to stamp these forms. I am not satisfied that, without any express legal provision, it is open to the petitioner to rely on what his counsel referred to as 'legitimate expectation' to fault the 2nd and 3rd respondents for the omission to stamp the forms.

[150] As far as signing of those forms is concerned, it is true, and the respondents admitted as much, that there were several polling stations in which either the presiding officers or their deputies did not sign the declarations. To be specific, there was evidence that the presiding officers did not sign the declarations in three polling stations while their deputies did not sign the forms in seven stations; where the presiding officers signed their deputies did not sign and vice versa. There was one station where neither the presiding officer nor his deputy signed the declaration.

[151] Regulation 79(1) of the Elections Regulations makes it mandatory for the presiding officers, the candidates or their agents to sign the declarations in respect of the elections and therefore on the face of it where they fail to sign, they contravene this particular provision. The regulation states:

79. (1) The presiding officer, the candidates or agents shall sign the declaration in respect of the

elections.

[152] The regulation is specific that it is the presiding officer, and not the deputy presiding officer who must sign implying that, as much as there is a provision for the deputy presiding officer's signature on the declaration, the declaration is not fatal if it is only signed by the presiding officer unless it can be demonstrated that the deputy presiding officer may have deliberately declined to sign the declaration for one reason or the other. As far as I can gather, there is no evidence of such deliberate refusal to sign by the deputy presiding officers in stations in instances where they did not sign.

[153] I also note that under Regulation 5(4) a deputy presiding officer may perform the function of the presiding officer. The Regulation states:

5. (4) A deputy presiding officer may perform any act, including the asking of any questions, which a presiding officer is required to perform by these regulations.

Read together with regulation 79, this regulation implies that the deputy presiding officer is capable of signing the declaration in place of the presiding officer. By necessary implication, the declaration is not fatal if it is only signed by the deputy presiding officer unless it can be proved that the omission of the presiding officer's signature was a deliberate act on his part perhaps because he does not agree with the entries made or for any other reason. Once again there was no evidence that this was the case in the present petition.

[154] In these circumstances I am unable to agree that the omission of the presiding officer's signature where his deputy signed or vice versa was an irregularity and even if it was, it was an irregularity of such nature that could nullify an election considering the isolated cases involved.

[155] The other irregularity was that of the posting of the wrong figure of the votes cast in form 35B with respect to one polling station. I said I was satisfied with the explanation given for the error and the number of votes involved was not only negligible but it also did not give the 1st respondent any advantage to the detriment of the petitioner's preferred candidate.

[156] As a matter of fact, if the few irregularities that were proved are considered in their entirety, there is no evidence, consistent or otherwise, that these irregularities were deliberately orchestrated to tilt the field in favour of one candidate to the disadvantage of the other. This is so partly because there was no evidence that even if all the votes in the polling stations where the forms 35A have been impugned were given to the petitioner's candidate of choice, she would have won the election.

Looked at differently, there is no evidence that the election of the 1st respondent was marred with irregularities or illegalities of such magnitude that would ordinarily overturn an election.

[157] On the question of technology, there is no doubt that the KIEMS kits were employed in accordance with among other provisions, section 4,39 and 44 of the Elections Act which I have alluded to in this judgment. There was no evidence that these kits were either not used or were misused as was the case in the presidential elections. There was also no evidence that the kits themselves or the entry of the data was manipulated. As for the specific question of whether the kits were also to be used in transmission of the results, **section 39(1C) (a)** of the Elections Act is clear that only presidential results were to be transmitted electronically. That section provides that:

39(1C) (a) For purposes of a presidential election the Commission shall-

(a) electronically transmit, in the prescribed form, the tabulated results of an election for the president from a polling station to the constituency tallying centre.

[158] There is no similar provision for transmission of results for the election of a member of National Assembly. It is only in regulation 82(1) of the Elections Regulations which appears to suggest that electronic transmission of results was also necessary with respect to election of member of National

Assembly. The regulation states:

82. (1) The presiding officer shall before ferrying the actual results of the election to the tallying venue, submit to the returning officer the results in electronic form, in such manner as the Commission may direct.

[159] Although counsel for the petitioner relied on this particular regulation for the submission that the results from the polling stations ought to have been transmitted electronically, it must be noted that this regulation was overtaken by the amendments to **section 39** of the **Elections Act by Act No. 16 of 2016** which, inter alia, introduced section **39(1C) (a)** that I have made reference to. In any case, where there is a conflict between the parent Act and the Regulations, the former prevails as regulations are always subsidiary to the Act.

[160] On scrutiny, the petitioner made an application for it at the end of the hearing but I rejected the application for reasons that I stated in my ruling. For purposes of this judgment, I can only reiterate that before the court makes an order for scrutiny, it must, at the very least, be satisfied that based on the evidence before it and, in order to determine the issues before it conclusively and reach a just determination, it is necessary that the votes or any other election material be scrutinised. This is what would amount to a sufficient cause for the order for scrutiny. It follows that where an applicant beseeches the court to exercise its discretion in his favour, he must have laid a firm basis on which this order can be made.

[161] When the Supreme Court ordered for scrutiny in the Election Petition 1 of 2017 it had noted that there were manifest discrepancies in forms 34A and 34B which even the IEBC itself admitted. In other words the court established that there was a firm basis upon which the order for scrutiny could be made. In the instant petition there was no such basis and I was satisfied there was sufficient material before court upon which a decision could be made without necessarily having to make an order for scrutiny.

[162] In the final analysis, I am not persuaded that the petitioner has discharged the burden of proof to the required standard which, as noted, is the intermediate standard, that the election of the 1st respondent as the Member of National Assembly for Mathira constituency was not in accordance with the Constitution, the Elections Act or the Regulations made there under. As I noted earlier, I am of the humble view that the irregularities that have been pointed out are isolated and are not of such substantial nature as to have any impact on the election result or its integrity. In this regard I echo the words of the Supreme Court in Election Petition No. 1 of 2017 that:

“...not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so, there would hardly be any election in this Country, if not the world, that would withstand judicial scrutiny. (Paragraph 373).

[163] Turning back to the issues for determination the inevitable answer to each of them is as follows:

1. The 1st respondent was validly elected as a Member of Parliament for Mathira Constituency in the elections held on 8th August, 2017.
2. The election for Member of National assembly for Mathira Constituency held on 8th August, 2017 was conducted in a free, fair, transparent and credible manner and in compliance with the provisions of the Constitution and all relevant provisions of the law.

[164] With these answers I have to come to the conclusion that the petitioner's petition has no merit and it is hereby dismissed with costs to the respondents. Pursuant to **section 86(1)** of the **Elections Act**, the certificate to the 3rd respondent and the notification to the Speaker of the National Assembly shall be issued accordingly.

As far as the amount of costs payable is concerned, I invoke **rule 31** of the **Elections Petitions Rules** and

direct the deputy registrar of this Court to assess or tax the costs in accordance with the Advocates' Remuneration Order. It is so ordered.

Dated, signed and delivered in open court this 2nd day of February, 2018

Ngaah Jairus

JUDGE