

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

ELECTION PETITION NO. 7 OF 2017

IN THE MATTER OF: THE ELECTIONS ACT NO. 24 OF 2011 AND THE ELECTIONS (GENERAL) REGULATIONS MADE THEREUNDER AND THE POLITICAL PARTIES ACT NO. 11 OF 2011

AND

IN THE MATTER OF: ELECTION OF MEMBER OF NATIONAL ASSEMBLY, DADAAB CONSTITUENCY

AND

IN THE MATTER OF: THE PETITION OF ABDIKHEIR ABDULLAHI DUBOW

BETWEEN

ABDIKHEIR ABDULLAHI DUBOW.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

ISAACK MUHUMED MOHAMUD, RETURNING OFFICER

DADAAB CONSTITUENCY.....2ND RESPONDENT

MOHAMED DAHIR DUALE.....3RD RESPONDENT

JUDGMENT

INTRODUCTION

1. Parliamentary elections in Dadaab Constituency in Garissa County were held on **8th August, 2017** to elect a representative in the National Assembly. **Mohamed Dahir Duale** hereinafter referred to as the 3rd Respondent emerged the successful candidate. On the 6th September 2017 **Abdikheir Abdullahi Dubow** the petitioner, hereinafter referred to as the petitioner, a registered voter in Dadaab constituency who vied as a candidate for the Member of National Assembly for Jubilee Party of Kenya for Dadaab Constituency filed this petition challenging the election of the 3rd Respondent.

2. The 1st Respondent is the **Independent Electoral and Boundaries Commission (IEBC)**, a body corporate established under Article 88 of the Constitution of Kenya whose constitutional functions are, inter alia, to direct and supervise Presidential, Gubernatorial, Parliamentary and County Assembly Elections. Pursuant to those powers the 1st Respondent appointed the 2nd Respondent as a Returning Officer for the Constituency and appointed Presiding Officers for all the polling stations in the constituency for the General Election held on 8th August 2017.

3. The petitioner avers that after a purported tallying of votes from all the polling stations in the Constituency, the 2nd Respondent announced the number of alleged valid votes cast in favor of each candidate as follows:

- a) **Mohamed Dahir Duale - 9,515**
- b) **Abdikheir Abdullahi Dubow - 5,977**
- c) **Muhsin Mohamed Khalif - 222**
- d) **Abdullahi Salan Mould - 2,238**

4. That the 3rd Respondent was subsequently gazetted under **Gazette Notice Number 8239** published on **22nd August, 2017** as the Member of Parliament for Dadaab Constituency. In the said Gazette Notice, different results were published from those announced by the 2nd

Respondent at the constituency tallying centre and the result as published in the said Gazette notice shows the 3rd Respondent obtained 9,359 votes contrary to the 9,515 announced at the constituency polling tallying centre.

5. Relief's Sought

- i. A declaration that the duplication and double entry of votes in the final tally sheet, the differences in votes cast in forms 35As with those with the final tally sheet, the deliberate omission of the Petitioner's votes in some polling centres in the final tally sheet contravenes Article 86 of the Constitution.
- ii. An order that there be a scrutiny and recount of votes in the areas affected.
- iii. The immediate scrutiny of the Electronic voter identification system device and or the Kenya Integrated Election Management system used in all polling stations within Dadaab Constituency.
- iv. A declaration that denying some people the right to vote amounted to the violation and/infringement of their constitutional right to vote as entrenched in Articles 38 of the Constitution.
- v. A declaration that the deliberate refusal by the presiding officers and the 1st Respondent to allow the Petitioner's agents to record the serial numbers of the remaining un-used ballot papers and not to supply them with Forms 35 was wrong, illegal and malicious.
- vi. A declaration that the whole election process was marred with electoral mismanagement, massive irregularities and malpractice, including interference and mishandling of electoral materials by IEBC officials and therefore the whole process is null and void.
- vii. A declaration that the 1st Respondent deliberately mismanaged the election process, manipulated the final results, colluded with the 3rd respondent by giving him undue advantage over other candidates, was partisan and partial contrary to Articles 10 (2) c, 81 (e) and 86 of the Constitution. An order that there be a repeat of elections of member of National Assembly for Dadaab Constituency.
- viii. Cost of the suit be awarded to the petitioner.

6. The Respondents filed responses denying the allegations of electoral offences, irregularities and malpractices. It was the response of each Respondent that the elections of Member of Parliament for Dadaab Constituency were done in accordance with the Constitution and the Elections Act and the Regulations. That the election was conducted in a transparent, impartial, free and fair manner. They urged the Court to dismiss the petition with costs.

7. The petitioner was represented by three (3) advocates, **Mr. Githinji Mwangi**, **Mr. Noor** and **Mr. Kibet**. The 1st Respondent was represented by **Mr. Olaha** and the 3rd Respondent by **Mr. Issa** and **M/s Lipwop**. The petitioner called two witnesses **Abdirazak Osman Ibrahim** an agent for Jubilee party at **Abakaile Centre Stream1** and **Shafi Sheikh Abdiraham** an agent for Jubilee party at **Harahara Post Office Liboi Ward, Dadaab Constituency**. The 1st and 2nd respondents called three (3) presiding Officer's **RW-1, Isaack Muhumed Mohamud** Returning officer **Daabad Constituency**, **RW-2 Mohamed Mohamud Gurhan** Presiding officer at **Abakaile Primary School Dadaab2 of 2**, **RW-3, Hassan Bari Barrow** Presiding Officer at **Abakaile Centre Stream** and **RW-4, Fatuma Yussuf Ali** presiding officer of **Saretho Primary School**. The 3rd Respondent testified in person. The witnesses adopted their affidavits as their evidence.

8. The petitioner filed an application for scrutiny simultaneously with the petition. On hearing the said application, the petitioner was granted an order for supply of certified photocopies of the original forms 35A prepared and obtained from the polling stations and presiding officers at Dadaab Constituency and access and supply of certified photo copies of form 35B prepared and obtained at the Talling Centre and Returning Officer at **Dadaab Constituency**.

9. The parties filed detailed written submissions setting out the Constitutional provisions and Election Laws governing the election petition which I shall refer to whilst dealing with the petitioner's alleged election offences.

The general principles of law applicable in election disputes are well set out set out in the Constitution of Kenya and Electoral laws;

Article 10 provides that the national values and principles of governance enumerated therein, that is patriotism, national unity, sharing and devolution of power, the rule of law, democracy, human dignity, equity, non-discrimination, integrity and transparency, amongst others bind state organs, state officers, public officers and all persons.

Article 38(2) provides that every citizen has the right to free, fair and regular election based on universal suffrage and the free expression of the will of the electorate.

Article 81 (e) recognizes that in order for the citizenry to realize their rights under Article 38 the electoral system should operate, inter alia, within the principles of free and fair elections, which are by secret ballot; free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner.

Article 86 requires IEBC to ensure that every election method is simple, accurate, verifiable, secure, accountable and transparent. It also requires that votes are counted, tabulated and results announced promptly at each polling station. That the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

Article 88 (5) requires IEBC to conduct elections in accordance with the constitution and national legislation.

Section 83 of the Elections Act 2011 provides instances when an election can be nullified. It provides that no election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election. **The Supreme Court in Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and 2 Others, Presidential Election Petition No. 1 of 2017 [2017] eKLR** while reiterating its earlier findings in **Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others SCK Petition No. 2B of 2014[2014] eKLR**, essentially prescribed the following guidelines: -

“An election should be conducted in accordance with the principles of the Constitution, as set out in Article 81(e). Voting is to be conducted in accordance with the principles set out in Article 86. The Elections Act, and the Regulations there under, constitute the substantive and procedural law for the conduct of elections. If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Elections Act, then such election is not to be invalidated only on ground of irregularities. Where it is shown that the irregularities are of such magnitude that affects the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfections are not enough by and of themselves, to vitiate an election.

Parties filed separate issues for determination consolidated as follows;

10. ISSUES FOR DETERMINATION

- i. Whether there were any irregularities, electoral mismanagement, malpractice and illegalities in the conduct of elections for Member of National Assembly, Dadaab Constituency. If so, whether the irregularities, affected the outcome of the election and the result declared.
- ii. Whether the election of the Member of National Assembly, Dadaab Constituency was conducted in accordance with the Constitution and Elections Act and Regulations.
- iii. Whether the 3rd Respondent was duly and/or validly elected as Member of National Assembly Dadaab Constituency in the elections of 8th August 2017.
- iv. Who should bear the costs of the petition?

Before considering the issues raised in the petition I find it is necessary to define the general principles governing election petitions.

BURDEN OF PROOF

11. The burden of establishing allegations of non-compliance with the Constitution and the law, electoral malpractice and misconduct, which would result in the election being invalidated, rests on the petitioner. The court will not interfere with the results of an election unless it is established to the required standard of proof that such non-compliance with the Constitution and the law, the irregularities and electoral malpractices complained of render the said election invalid. This is the position that was held by the Supreme Court of Kenya, in **Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 Others SCK Petition No. 5 of 2013 [2013] eKLR**, the court stated that *“the petitioner bears the burden of proof, as he who asserts must prove that those facts exist and the burden of proof lies on the Petitioner who would fail if no evidence at all were given on either side.”*

STANDARD OF PROOF

12. The standard of proof in an election petition should be above the balance of probability but not beyond-reasonable doubt as required in criminal matters. To meet this threshold, the petitioner is required to adduce credible evidence to meet this standard. The petitioner must ensure that their affidavits and testimony are consistent in support of their case. In the case of **John Kiarie Waweru vs Beth Wambui Mugo & 2 others [2008] eKLR** the Court held as follows; *“As regards the standard of proof which ought to be discharged by the Petitioner in establishing allegations of electoral malpractices, there is consensus by electoral courts that generally the standard of proof in electoral petition cases is higher than that applicable in ordinary civil cases i.e. that proof on a balance of probabilities.”*

i. Whether there were any irregularities, electoral mismanagement, malpractice and illegalities in the conduct of elections for Member of National Assembly, Dadaab Constituency. If so, whether the irregularities affected the outcome of the election and the result declared.

13. At paragraphs 10 to 33 of the petition the petitioner pleads the **Electoral Offences, Irregularities and Mal-Practices** and claims that the parliamentary member election for the constituency was not conducted in a free, fair and transparent manner by the 1st and 2nd Respondents as required by the Constitution and Election Laws.

ANALYSIS OF THE EVIDENCE

Failure to provide adequate polling clerks, sufficient voting materials and adequate lightning materials to facilitate the elections.

14. The petitioner at paragraphs 11 and 12 of the petition claims that the 1st Respondent failed to provide adequate staff and sufficient voting materials (ballot papers) to facilitate a free, fair and transparent election. In particular, there was a lack of adequate polling clerks in various polling stations and inadequate lighting materials. That the lack of proper lighting materials forced the presiding officers to use light from various gadgets that belonged to the agents and supporters of the 3rd Respondent during voting in several polling stations which proceeded past 5.00 pm. This state of affairs affected the transparency of the voting process.

Inadequate voting materials and lack of adequate polling clerks.

15. The Petitioner has identified the following polling stations **Abakaile Centre, Saretho Primary School, Dadaab Primary School, Kumahumato Centre, Ali-Kune Primary School, Damajale Primary School, Daryoley Dam, Damajale water pan, Madhagisi Primary** and **Labasigale** as polling stations which he visited. He did not testify that the said stations had inadequate voting materials or polling clerks. There is an allegation by his agent **Shafii Sheikh** that a ballot booklet disappeared but it was later found. This agent never explained how this affected the results in the said polling station. On polling clerks, he admitted that he was not aware of any regulation that regulates the number of officials but he was informed a minimum of **six (6)** officials would be provided. He never mentioned the polling stations which had inadequate polling clerks. **Hassan Bari Barrow, RW - 4**, the 1st Respondent's Presiding Officer at **Abakaile Centre Stream One** Dadaab testified that he had sufficient electoral material as well as lighting during the counting process and that they did not resort to use of mobile phones or agents' gadgets as alleged. This was a general allegation with no evidence to support it.

Inadequate lightning materials and voting beyond prescribed time

16. The petitioner averred that he received information from his agents and he was also able to personally confirm as he went around the polling stations including **Abakaile Centre, Saretho primary school, Dadaab Primary School, Kumahumato Centre** and **Alikune Primary School polling stations** within **Abakaile ward, Damajale Primary School, Daryoley Dam, Damajale Abak Water Pan** polling stations, **Madahgesi Wells** within **Damajale ward, Labasigale** polling station within **Labasigale ward** that voting in all these polling stations went on well past 5:00pm. He claims that in some of these polling stations, lights were switched off and voting was conducted in very poor lighting conditions. During cross-examination the petitioner testified that when he visited the said polling stations his complaint was that the voting was slow and that his witness would testify on the lighting. **Abdirizak Osman Ibrahim (PW2)** his agent in cross-examination stated that there was adequate lighting in **Abakaile Centre stream 1** and that at no time were lights switched off. That the counting process continued without any interruption attributed to poor lighting. This evidence contradicts the petitioner's evidence. **Shafii Sheik Abdirahman (Pw3)** testified that voting started at 6am and by 7.30pm voting had ended. According to him voting went on and the voters on the queue were allowed to vote. **Fatuma Yussuf Ali, RW-3**, the Presiding Officer at **Saretho Primary School polling station** confirmed that the polling stations at Dadaab were solar powered. She testified that although there was a black out before counting commenced, she made a call to the **IEBC** tallying warehouse requesting for lanterns. The lanterns were delivered after midnight when the counting began. That as they waited for the lanterns to be delivered, the polling station remained locked and no one had access to the ballot boxes.

17. On this allegation the petitioner's agent **PW2** confirmed that there was adequate lighting. There was no evidence adduced that the presiding officers used lights and various gadgets that belonged to the agents and supporters of the 3rd Respondent during the voting in several polling stations which proceeded past 5.00pm. **Regulation 66 of the Elections (General) Regulations, 2012** provides that voting shall commence at 6 o'clock and end at 5 o'clock. Further in sub-rule (2) a person who is on the queue for the purposes of voting before 5 o'clock shall be allowed to vote despite the fact that the voting time may extend after 5 o'clock. A presiding officer had the discretion to extend the voting hours so long as a voter or voters were on the queue. This allegation was not proved.

Manipulation of election process through Facebook

18. This allegation was not in the petition but in the petitioner's supporting affidavit at paragraph 13. He claims that the manipulation of the election process was confirmed from the print out from the Facebook account of **Abdullahi Mohammed Ollow** who in the social media platform was calling himself as **Abdullahi Somane** who had been recruited. The 3rd Respondent confirmed that he knew **Abdullahi Mohammed** and they belong to the same sub-clan to which the Petitioner also belongs, and that he was aware he was a presiding officer **Kumahumato polling station**. The petitioner attached Facebook print outs, however he did not name the device used for generating the evidence nor was there a certificate which described how the same was generated, stored and communicated and how the integrity of the same was maintained. As correctly submitted by Mr. Olaha Section 106B of the Evidence Act provides that, electronic records can only be admissible by a certificate accompanying the same, which certificate has not been given by the Petitioner. Further by merely looking at the annexed Facebook print outs one cannot tell what was taking place on the ground. Without verification, the certificate and cogent evidence this court cannot rely on the annexed Facebook print outs.

Failure to recruit Electoral Officials in a fair and transparent manner.

19. The petitioner claims at **paragraph 14** of the petition that the 1st Respondent failed to recruit electoral officials in the Constituency in a fair and transparent manner. That the 1st Respondent hired 100 presiding officers from the 3rd Respondent's immediate sub-clan, a move meant to give the 3rd Respondent undue advantage over the other contestants. It was the petitioner's evidence that before the elections he had lodged a complaint by a letter dated the 7th of July 2017 on recruitment of presiding officers from the incumbent's immediate family members and relatives. He received no reply and made a follow up with his letter dated 2nd August 2017 where he listed 7 names, **Yussuf Mohamed Maalim, Abdullahi Kheir Yussuf, Aden Hassan Omar, Daud Ahmed Bakari, Abdullahi Mohammed Ollow, Sayat Salat Ali and Ibrahim Mohammed Affey**. When taken to task over this allegation he testified that he did not know where **Yussuf Maalim** was deployed. That **Abdullahi Kheir Yussuf** was posted at **Dadaab in Daydey Primary School** as presiding officer. Aden Omar was at **Dertu Village Centre 2 of 2**. Daud Ahmed was not posted. That **Abdullahi Ollow** was at Kumahumato Centre Polling 1 of 2. He could not recall where **Sayat Salat Ali** was posted. That **Ibrahim Affey** was in Logistics. That **Abdullahi Kheir**, was a presiding officer at **Daydey Primary School** though he had no complaint with respect to that polling station. **Mohammed Mohamud (RW1)** who was involved in the recruitment stated that no presiding officer was appointed on the basis of their sub clan. The 3rd Respondent admitted that he knew

Abdullahi Mohammed, that they belong to the same sub-clan to which the petitioner also belongs, and that he was aware he was a Presiding Officer **Kumahumato polling station**. He also admitted that he knew the father to **Shirko Affey**, and that he belongs to the Petitioner's clan (Afgab), he confirmed that **Affey** was neither a Deputy Presiding Officer, Presiding Officer nor a member of staff employed by the 1st Respondent. He stated that **Shirko Affey** was not involved in his campaigns and was not part of his campaign team. He denied being related to **Daud Garad Hudle**. He explained that the Somalis have an elaborate clan system. One of the major clans in Garissa was Ogaden, with Aulihyaan sub-clan, Mumin Hassan a sub-clan of Aulihyaan. He confirmed that he belonged to the same sub-clan with the Petitioner and that they only depart after Afgab clan. One would have expected the petitioner to adduce cogent evidence by producing a list of the named persons and the places they were posted during the election period. He failed to show how the said persons were engaged in partisan campaigns and how the non-response to his two letters by the 2nd Respondent affected the process before election. The petitioner did not name nor tender the list of the 100 presiding officers he alleged were recruited from the 3rd respondent's sub-clan. This allegation was satisfactorily responded to by the Respondents. The allegation is not proved.

Assisted voters

20. At paragraphs 15 and 16 of the petition the petitioner claims that the process of assisting illiterate voters at various polling stations was marred with malpractices and was in contravention of the law taking into account that the assisted voters constituted over 90% of the total voters. That the presiding officers were assisting the assisted voters who are the majority in the constituency yet the majority of the said presiding officers were affiliated to the 3rd Respondent. The petitioner did not witness this process nor did he name the affected polling stations. PW2 was his witness as regards this allegation. PW2 claimed he could see what was happening in the booths and that the Presiding Officer would pause after reading the names and that he did not see what the Presiding Officer marked for the voter. It was his evidence that he complained to the chief gent yet the said chief agent was not called to testify to corroborate his evidence. He could not explain the law the presiding officer violated nor could he explain how pausing when calling names was a manipulation of the process. What the petitioner is alleging here is the non-compliance with Regulation 72 with respect to assisted voters. Regulation 72 (5) of the Elections (General Regulations) 2012 provides as follows:

“The following shall apply with respect to a person who assists a voter under this regulation

- (a) the person shall, before assisting or supporting the voter, make a declaration of secrecy before the presiding officer in Form 32 set out in the Schedule; ?*
- (b) a person who breaches his or her declaration commits an offence under the Act; ?*
- (c) the person shall assist or support only one voter at that election and have a mark as proof of assisting or supporting a voter”. ?*

21. **Fatuma Yusuf Ali** the Presiding officer at **Saretho Primary school** gave a detailed account on how the voters were assisted in line with the provisions of Regulation 72. She stated that whilst assisting in voting she read out the aspirants in each elective position loud enough for the respective party agents and the voter to hear and once they chose an aspirant she ticked against the name of the aspirant ensuring that the party agents would see that she was ticking against the chosen aspirant. Once the said ballot was ticked she gave the folded paper to the voter and guided him to the last clerk who was positioned next to the ballot boxes and would then assist the voter in placing the ballot paper in their respective ballot boxes. The voter would then be marked with indelible ink to confirm that he/she had voted. That no voter was influenced to vote for the 3rd respondent. The Petitioner also contends that the 1st Respondent and its officials ought to have filled Form 32A for any voter assisted. I agree with the 3rd Respondent's submissions that a reading of Regulation 72(5) confirms that the Form 32A is filled when a voter is assisted by a person who is not the Presiding Officer pursuant to an application made under Regulation 72(1). The form is filled before the Presiding Officer and the assistance is also witnessed by the Presiding Officer. The burden of proof did not shift to the Respondents to prove this allegation. The Presiding Officer's evidence was not controverted by that of any voter. I find that the 1st Respondent's officers complied with the provisions of Regulation 72(5). This allegation has not been proved.

KIEMs Kits and BVR

22. The petitioner alleged at paragraph 17 of the petition that the 1st Respondent failed to use the Kenya Integrated Electoral Management Systems (KIEMs) and other electronic mechanisms to eliminate alleged uncertainties and difficulties in the manual system. That owing to the said failure several voters were denied a chance to vote as their names did not appear in the manual register, which manual register was not up to date. That the 1st and 2nd Respondents used manual voting instead of Electronic voting despite having procured Biometric Voter Registration (BVR) for voter registration, prepared Electronic Voter Registers and mounted a Mock Voting exercise and trained Election officials. That they failed to use the said technology. The petitioner confirmed he was identified through the KIEMs kit prior to being given ballot papers to cast his vote. The petitioner confirmed that the KIEMs kit in his polling station was functional. PW2 and PW3 did not testify of any failure of KIEMs kit in the stations where they were agents. The petitioner did not call any voter to testify on either being denied a chance to vote on account of failure of KIEMs kits or being allowed to vote through a manual identification process.

23. RW1's evidence was that all the KIEMs kits worked and that there was no manual voting. Further the 2nd Respondent confirmed in cross-examination that voters who were not identified biometrically were identified by an alphanumeric search using the KIEMs kit. He testified that in the elections held on 8th August 2017 there was no resort to manual identification, voters were identified either biometrically or by the alphanumeric search. I find that the petitioner has failed to show there was the use of manual voter identification at any polling station. None of the Petitioner's agents testified in support of this serious allegation. Consequently, this allegation is baseless and without any merit.

Double voting

24. At paragraph 17 of the petitioner's supporting affidavit, the petitioner claims that as he was approaching **Dadaab Primary School**

polling station in Dadaab ward he was informed by a voter that a person who was known to be a registered voter in Garissa town and who had already voted there was being allowed to vote again in **Dadaab Primary School**. That he went into the polling station and confirmed that indeed the said person was in the process of voting manually. This allegation was not proved as the petitioner did not name the voter nor did he identify the specific stream out of the four in the said polling station he alleged a voter voted twice.

Petitioner's Agents were chased and locked out of polling stations and tallying centres

25. The Petitioner at paragraph 16 of the petition claims that the agents of Jubilee Party were chased away from polling stations for no apparent reason. In support of this allegation he states that he received complaints from his agents that they were chased from **Malaylay Primary School within Damajale ward** and other polling stations. On cross-examination however he testified that he could not recall the name of the agent locked out in **Malaylay Primary School** and did not have any other evidence to support the allegation. He called two (2) agents **Abdirizak Osman Ibrahim, PW-2** and **Shafii Sheikh Abdirahman PW-3**, stationed at **Abakaile Centre Stream 1 polling station** and **Liboi Primary School polling station** respectively. PW-2 confirmed he was present in the polling station and fully observed the voting process but claimed that he was persistently threatened of being thrown out of the polling and tallying station. During cross examination he could not substantiate the threats issued but claimed that though threatened he still signed the form 35A

26. Hassan Bari Barrow the Presiding Officer at **Abakaile Centre Stream 2** testified that the only issue that arose was on the agents sitting arrangement during the process of helping assisted voters. The matter was discussed and parties reached a consensus. He denied threatening any of the agents. **Fatuma Yussuf Ali**, the Presiding Officer at **Saretho Primary School** testified that she did not lock out or chase any agent from the polling station but requested the petitioner to leave politely. I find that the petitioner has failed to discharge the evidentiary burden of proving that his agents were chased or locked out of any polling station as alleged in the petition.

27. At paragraphs 27, 28 and 31 of the petition, the petitioner alleges failure to display ballot papers when counting of votes and failure to publicly display results in the polling stations. Further, that the agents were not to accompany ballot boxes to the tallying centres. The petitioner did not call any agent as a witness to confirm these allegations. These were generalised allegations which the petitioner ought to have adduced cogent evidence to support them. None were proved.

Form 35A

28. At paragraph 25 of the petitioner's supporting affidavit he claims that the results declared at polling stations were fundamentally different from those announced at the tallying centre in several polling stations. That his results had been drastically reduced as compared to the results announced at the polling station. That the 1st and 2nd Respondents refused, failed or neglected to issue him with copies of Forms 35As and B despite repeated requests. At paragraph 28, he claims that his agents were not given an opportunity to sign the Form 35A's nor did the forms contain reasons for such failure as required by law.

29. After being supplied with certified copies of Forms 35A and 35B the petitioner filed a supplementary affidavit filed on 16th November 2017. He claims at paragraph 2 of the said affidavit that the forms are in violation of the provisions under Rule 79(2) (b) of the Elections (General) Regulations and the Elections Act No. 24 2011. That the Gazetted register per Polling Station, 2017, Dadaab Constituency is comprised of 56 Polling Stations with a total number of 25, 762 registered voters. That contrary to the Ruling of this Honourable Court that the 1st Respondent provides certified copies of all Forms 35A and 35B, that the 1st Respondent provided only 54 certified copies of forms 35A instead of the required 56 Forms and the supplied forms 35A in respect of 10 polling stations were illegible. The analysis is as below;

No.	Polling Station	Issue
1	Dertu Village Centre 1 of 2	<ul style="list-style-type: none"> a. The figures contained in the form are faint. b. The designated columns for valid votes obtained against each candidate are indistinct c. The Form does not contain the IEBC stamp d. The form is not signed by party agents e. No explanation is indicated
2.	Dertu Village Centre 2 of 2	<ul style="list-style-type: none"> a. There appears to be an alteration of valid votes obtained for the 3rd Candidate, Khalif Muhsin Mohamed b. The form does not contain the IEBC stamp
3.	FafKalala Dam	<ul style="list-style-type: none"> a. The form is signed by one NASA agent.
4.	Bahuri Primary School 1 of 1	<ul style="list-style-type: none"> a. The form does not contain the IEBC stamp
5.	Alango Arba Post Office 1 of 1	<ul style="list-style-type: none"> a. The form does not contain the IEBC stamp
6.	Boransis 1 of 1	<ul style="list-style-type: none"> a. The form does not contain the IEBC stamp b. The Form is not signed by any party agent c. Reasons indicated for refusal to sign are that “There is a duplicate of this form which is filled by agents”
7.	Dadaab Primary School 1 of 4	<ul style="list-style-type: none"> a. The form is signed by one KANU agent. b. No reason is indicated for refusal to sign by other party agents.
8.	Dadaab Primary School Dadaab2 of 4	<ul style="list-style-type: none"> a. The form appears to be a certified copy of a carbon-copy and not the original copy. b. The Form does not contain the IEBC stamp.
9.	Dadaab Primary School Dadaab3 of 4	<ul style="list-style-type: none"> a. The form does not contain the IEBC stamp.
10.	Dadaab Primary School Dadaab4 of 4	<ul style="list-style-type: none"> a. The form does not contain the IEBC stamp.
11.	Ifo Borehole Dadaab1 of 1	<ul style="list-style-type: none"> a. The form does not contain the IEBC stamp b. The form is not signed by the party agents c. No reason is indicated for refusal to sign
12.	Dadaab Secondary School Dadaab	<ul style="list-style-type: none"> a. The form does not contain the IEBC stamp b. There is an alteration of the figure of the total number of valid votes cast c. There is a discrepancy in the Total Number of Votes Cast between the figures cumulative of the votes for each candidate indicated as 224 and the Dadaabcounts indicated as 228
13.	Lebisigale Centre Polling Station	<ul style="list-style-type: none"> a. The form does not contain the IEBC stamp
14.	Lander Wells Polling Station	<ul style="list-style-type: none"> b. The form does not contain the IEBC stamp
15.	Borehole (Lebisigale)Polling Station 5	<ul style="list-style-type: none"> a. The total number of valid votes cast is not indicated on the designated column

30. The petitioner filed an application dated 6th October 2017 seeking a recount and scrutiny of votes in various polling stations in **Abakaile Ward, Damajaley Ward, Labasigale Ward, Dertu Ward, Liboi Ward and Dadaab Ward**. He sought to be given access to certified photocopies of the original Forms 35A prepared at and obtained from the polling stations and presiding officers at Dadaab Constituency. He also sought to have the 1st Respondent to be compelled to supply to the court certified photocopies of the original Form 35B prepared and obtained from Dadaab Constituency Tally Centre. In addition, he sought to be provided with the KIEMS report of all the polling stations for Dadaab Constituency. After hearing the application, I declined to give an order for recount but granted the petitioner leave to revisit the said prayer at the close of his case. The court granted his prayer for certified photocopies of original Forms 35A and 35B. The petitioner was thereafter supplied with the said Forms 35A for all the 56 polling stations within Dadaab Constituency and thereafter he filed his supplementary affidavit making an analysis of the said forms. The forms as per the IEBC stamps were all certified as true copies of the original and were used by the petitioner to make an analysis as shown in the table above. It is trite law that a party is bound by their pleadings. In the case of **Independent Electoral and Boundaries Commission and another –vs- Stephen Mutinda Mukle & 3 others**, the court held that *“it is not a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments of the pleadings, or put in another way which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”*

31. In the petitioner’s supplementary affidavit, he analyses stations that were not pleaded in his petition. The specific polling stations pleaded at paragraph 11 of his supporting affidavit are **Abakaile Centre, Saretho Primary School, Dadaab Primary School, Kumahumato Centre, Ali-Kune Primary School, Damajale Primary School, Daryoley Dam, Damajale water pan, Madhagisi Primary and Labasigale** Dadaabas polling stations he visited. The analysis included the following stations that were not pleaded in the petition **Faf Kalala Dam 2 of 2, Bahuri Primary School 1 of 1, Dertu Village Centre 1 of 1, and 2 of 2, Alango Arba Post Office 1 of 1, Ifo Borehole 1 of 1, Dadaab Secondary School 1 of 1, Lander Wells 1 of 1, Borehole 5 (Lebisigale) 1 of 1, Welhar Centre 1 of 1, Dagahley Centre 1 of 2, Kokar Primary School 1 of 1, Hamey Borehole 3 of 3, Kulan Primary School 1 of 2 and 2 of 2, Kadasko Wells 1 of 1 and Libahlow Vilage 1 of 2 and 2 of 2**. The analysis range from Forms 35A not being signed, being faint, not signed by an agent, no IEBC stamp, no reasons indicated for not signing, signed by one agent, total number of valid votes cast not indicated in the designated column, no entry of the polling station counts. I will comment on this later.

32. I now proceed to analyse the stations that are specifically pleaded by the petitioner; Abakaile Centre 2 of 2 the analysis shows that there was no signature of agents or comments indicated or refusal, Saretho Primary 1 of 3 and 2 of 3 the form does not contain IEBC stamp, Dadaab Primary School 1 of 4, 2 of 4, 3 of 4 and 4 of 4 the form was not signed by one KANU agent and appears to be a certified copy of a carbon copy and not original and the form does not contain the IEBC stamp; Kamahumato Centre Dadaab 1 of 2 and 2 of 2 forms did not contain the IEBC stamp, form appears to be a carbon copy, there is no signature of any party agent and no reasons are given; Alikune Primary School 1 of 2 and 2 of 2, the form did not contain the IEBC stamp, there was a visible alteration on the results of Duale Mohamed Dahir from 208 to 213; Damajale Primary School there was no IEBC stamp and no signature of any party agent and no reasons were given; Madahgesi Wells Dadaab 2 of 2 and Damajale Abak Water Pan 1 of 1 there was no signature of any party agent sand no comment indicating

reason for refusal; Lebisigale Centre Dadaab1 of 1 the form does not contain the IEBC stamp.

33. The petitioner by listing polling stations which were not listed in his petition attempted to expand the scope of his petition and therefore I will not consider the polling stations not pleaded. The 1st and 2nd respondent counsel has detailed his findings on each of the polling stations not pleaded. My understanding on the evidence of Forms 35A is that they were issued in booklets of 6 self-carbonating forms with serial numbers which distinguish the forms. The 6 forms were filed by the presiding officers the 1st form was sealed inside the box and submitted to the returning officer to prepare form 35 B this was confirmed by RW1. From a perusal of the forms it is clear that the analysis made by the petitioner are not weighty to nullify the elections. The petitioner did not specify any Dadaab results declared that were different from the ones announced at the tallying Centre. Despite being supplied with the forms, the petitioner failed to adduce evidence by way of comparison to substantiate his claim that his results were drastically reduced. RW1 testified that he did not use the portal to declare the results but the results were declared from the forms 35A which he received. None of the agents swore an affidavit that the results declared at the Dadaab were different from the ones declared at the polling station. Mr. Osman Ibrahim his agent at Abakaile informed the court that he signed Form 35A, his allegation that the petitioner got more results as shown in the portal were not substantiated. According to RW1 all the agents were given the forms this negates the petitioner's allegations. To avoid wastage of time, this court ordered the 1st and 2nd Respondents to supply all Forms 35A and 35B to the petitioner, which was done. Regulation 79(6) of the Elections(General) Regulation, 2012 provides that *"The refusal or failure of a candidate or an agent to sign a declaration form under sub-regulation (4) or to record reasons for refusal to sign as required under this regulation shall not in itself invalidate the results announced."*

34. RW1 testified that he confirmed the results from the presiding officers as indicated in the forms and that any alterations indicated did not in any way affect the results. On the forms being stamped he testified that this was an administrative matter and confirmed that the forms were from IEBC. I take note that the petitioner did to pursue his plea for scrutiny of votes, my understanding of this is that he did not challenge the results as was contained in the forms neither him nor his agents objected to the results announced by RW1 at the tallying centre. The petitioner was not even present at the tallying centre. His allegation that the 3rd Respondent was subsequently gazetted under Gazette Notice Number 8239 published on 22nd August, 2017 as the Member of Parliament for Dadaab Constituency and that in the said Gazette notice, different results were published from those announced by the 2nd Respondent at the constituency tallying centre and the result as published in the said Gazette notice shows the 3rd Respondent obtained 9,359 votes contrary to the 9,515 announced at the constituency polling tallying centre cannot stand.

ii. Whether the election of the Member of National Assembly, Dadaab Constituency was conducted in accordance with the Constitution and Electoral laws.

35. Courts have held that to nullify an election, it has to be shown that an electoral offence has been committed or a provision of the law relating to elections has not been complied with. The errors and irregularities, or the non-compliance with electoral law, must be of such gravity that the integrity of **the election is materially compromised. In Gatirau Peter Munya –v- Dickson Mwenda Kithinji & 2 Others [2014] eKLR**, the Supreme Court acknowledged the practical reality that imperfections in the electoral process are expected; that, therefore, an election court should not lightly overturn the election, especially where neither a candidate nor the voters have engaged in any wrong doing. The court laid down the following principles: -

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

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

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

36. In Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 others & Attorney General & another Presidential Petition no 1 of 2017 at page 43 paragraphs 211 the court observed thus; **"...a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in the Constitution as well as other written laws on elections, it was fraught with irregularities or illegalities that affected the result of the election..."**

37. Having considered the facts, evidence and submissions made by the parties it's my finding that the petitioners made numerous allegations of irregularities and electoral offences. The witnesses called made general statements. I find that the petitioners have failed to discharge their burden of proof to the required standard. The irregularities raised in their petition, are not weighty to substantially affect the results or warrant invalidation of the elections of the National Assembly Dadaab Constituency. Consequently, I find that the election of Member of National Assembly Dadaab Constituency held on 8th August 2017 was conducted in accordance with the Constitution and the applicable Electoral laws.

iii. Whether the 3rd Respondent was validly elected and declared the Member of National assembly by the 2nd Respondent during the general elections held on 8th August 2017.

38. This court has analysed all the allegations raised by the petitioner and made findings on each. None was proved. I therefore find the 3rd Respondent was validly elected and declared the of Member of National Assembly by the 2nd Respondent during the General elections held on 8th August 2017.

iv. Who bears the costs of the Petition?

39. Section 27(1) of the Civil Procedure Act provides that costs must follow the event unless the court for good reason orders otherwise. This is in line with Section 84 of the Elections Act which states; “An election Court shall award the costs of and incidental to a petition and such costs shall follow the cause. Such costs are to follow the event and the court has a broad jurisdiction to determine the costs.”

40. Rule 30 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 gives this Court the discretion to award costs. It provides that, “(1) The Court shall, at the conclusion of an election petition, make an order specifying –

- a) the total amount of costs payable; and
- b) the person by and to whom the costs shall be paid.”

In determining costs, I have taken into account the time taken in court and preparation by the parties and also considered the proposal on cost made by counsel for the 3rd Respondent. The petitioner and 1st and 2nd Respondent did not make any proposals. I order that the petitioner shall pay Kshs. 3,000,000/= to the 1st and 2nd Respondents and Kshs.3,000,000/= to the 3rd Respondent. The total amount shall be Kshs.6,000,000/=.

FINAL ORDERS.

- a) The Petitioner’s petition is dismissed.
- b) The petitioners shall pay Kshs. 3,000,000/= to the 1st and 2nd Respondents and Kshs. 3,000,000/= to the 3rd Respondent.
- c) Under Section 75 (3) (a) of the Elections Act this Court confirms that Mohamed Dahir Duale was validly elected as the Member of National Assembly Dadaab Constituency. The certificate of court as to the validity of the election, pursuant to section 86(1) of the Election Act, shall issue to IEBC and the Speaker of National Assembly.

Dated, Signed and delivered this 2nd day of March 2018.

R. E. OUGO

JUDGE

Mr. Githinji, Mr. Noor and Mr. Kibet.....For the Petitioner

Ms Njagi H/B for Mr. Olaha..... For 1st & 2nd Respondents

Mr. Issa and Ms Lipwop.....For the 3rd Respondent

Ms. Charity Court Clerk