



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ELECTION PETITION NO. 4 OF 2017

ABDIRAHMAN IBRAHIM MOHAMUD.....PETITIONER

VS.

MOHAMED AHMED KOLOSH.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

YASSIN ABDIKARIM HIREY.....3RD RESPONDENT

JUDGEMENT

1. The battle as to the validity of the Declaration of Mohamed Ahmed Kolosh (The 1st Respondent) as the winner of the Election for Member of National Assembly for Wajir West Constituency held on 8th August 2017, has come down to issues in two Polling stations namely, Qara Polling Station 1 of 1 and Korich Polling station 1 of 1.

2. Although Abdirahman Ibrahim Mohamud (The Petitioner) had raised complaints in respect to the Elections in 11 other Polling stations, it was all clear that by the time the hearing of the Petition had reached the tail-end, he would be preoccupied with two Polling stations only. Indeed at the submissions stage, the Petitioner makes no mention of the other 11 Polling stations. The Dispute has therefore been narrowed considerably.

3. The Petitioner was a candidate in the disputed Election alongside Dahiye Yakub Mumin, Elmi Mohamed Yussuf, Khalif Mohamed Ahmed, Shihaw Abass Nunow and the 3rd Respondent. After the Counting and Tallying of the Votes cast in the Election, Yassin Abdikarim Hirey (**the 3rd Respondent**) declared the following Results:-

Item No.	Candidate	Votes
1	Abdirahiman Ibrahim Mohamud	6,224
2	Dahiye Yakub Mumin	3,501

3	Elmi Mohamed Ahmed	3,906
4	Khalif Mohamed Ahmed	44
5	Mohamed Ahmed Kolosh	6,701
6	Shihaw Abass Nunow	140

4. The Petitioner was the runners up to the 1st Respondent with a vote difference of 477.

The Pleadings

5. In respect to Qara and Korich, it was pleaded that the Results announced by the Presiding Officer at the respective Polling stations differed with the Results declared by the Returning Officer at the Constituency Tallying Centre as in the tables below:-

Qara

Item No.	Candidate	Votes at Polling station	Votes at Tallying Centre
1	Abdirahiman Ibrahim Mohamud	2	0
2	Dahiye Yakub Mumin	20	10
3	Elmi Mohamed Ahmed	117	40
4	Khalif Mohamed Ahmed	00	00
5	Mohamed Ahmed Kolosh	319	540
6	Shihaw Abass Nunow	04	00

Korich

Item No.	Candidate	Votes at Polling station	Votes at Tallying Centre
1	Abdirahiman Ibrahim Mohamud	6	6
2	Dahiye Yakub Mumin	362	110
3	Elmi Mohamed Ahmed	10	40
4	Khalif Mohamed Ahmed	00	00
5	Mohamed Ahmed Kolosh	110	362
6	Shihaw Abass Nunow	04	00

6. It was pleaded that it was erroneous for the 3rd Respondent to alter and/or falsify the Results which were announced at the Polling stations it being averred that the Results announced at the Polling station were final and could not be altered by the 3rd Respondent.

7. In respect thereof, the Petitioner asked for a Recount of the Ballot papers cast so as to establish the total number of votes received by the Petitioner and the 1st Respondent. To verify this, the electronically transmitted Results as well as the Declaration made at the Polling stations and at the Constituency Tallying Centre were sought to be examined.

8. It was further averred that the voting process was marred by violence and intimidation at Qara and Griftu Pastoralist Training Centre and the voting, counting and declaration of Results was not administered in an impartial, neutral, efficient, accurate and accountable manner.

9. In paragraphs 15 and 16 the Petitioner pleads:-

“15. At Griftu Pastoral Training Center, the anomalies in the entries made in Form 35As for Qara Polling station, Koricha Polling station, Shandarwa Polling station and Barmish Center were brought to the attention of the 3rd Respondent by the Petitioner’s tallying center Agent, Mr. Mohamud Osman Abdirahman but the same was not rectified.

16. At Qara Polling station, the Petitioner’s agent Mr. Ahmed Mohamed Diis raised the anomaly with the Presiding Officer. Mr. Ahmed Mohamed Diis was chased by the 1st Respondent’s supporters who were armed with axes and machetes. The 1st Respondent’s agents threatened to burn the Ballot papers with petrol. The declaration of Results in the Polling station should be discounted due to numerous anomalies”.

10. It is also stated that the counting, announcement, transmission and Declaration of Results was done without the Petitioner’s Agents and the 2nd and 3rd Respondent by themselves and/or through their Officers and agents committed the following Election offences:-

- a) Failing to serve impartially and independently and perform their duties in good faith.
- b) Performed their duties under the influence of the 1st Respondent.
- c) Failing to openly and accurately count and tabulate the votes and promptly announce the Results.
- d) Making false entries in Form 35A for Qara Polling station.
- e) Failing to put in place appropriate structures and mechanisms to eliminate Electoral malpractices.

11. It was further pleaded that there was no proper counting, announcement, transmission and declaration of Votes cast in some 13 Polling stations which included Qara and Korich in so far as the same purported to declare the 1st Respondent as winner in terms of the Forms 35A, 35B and issuing Form 35C.

12. Ultimately in respect to Qara and Korich the Petitioner prayed for the following orders:-

- a. The 3rd Respondent be directed to provide Transmission logs used to transmit the Results for the four (4) Polling stations, the original diaries for the four (4) Polling stations and the original Forms 35As for the four (4) Polling stations pleaded in paragraph 7 above.
- c. There be a Recount of the Ballot papers cast for the Election of the Member of National Assembly for Wajir West in the 13 (thirteen) Polling stations pleaded in 7 and 10 above.

d. The Results for Qara Polling station be nullified.

e. IN THE ALTERNATIVE TO PRAYER D ABOVE, the results declared by the 2nd and 3rd Respondent for Qara Polling station be discounted by 221 votes.

f. An order be made to the effect that the Declaration made that the 1st Respondent is the winner of the Wajir West National Assembly election held on 8th

g. As a consequence of the Recount, the Petitioner be declared the winner for the election of the Member of National Assembly for Wajir West Constituency in the Election held on 8th August 2017.

h. The Respondents be condemned to pay your Petitioner's costs of and incidental to this Petition.

i. Such further, other and consequential orders as this Honorable Court may lawfully make.

13. The Court turns to set out the responses of the Respondents focusing on issues raised regarding Qara and Korich.

14. The 1st Respondent states that the Results that were announced by the 3rd Respondent were fairly and accurately collated, counted, tabulated and announced as required by Law. The 1st Respondent further avers that:-

a) The Presiding Officer in each Polling station recorded the Results garnered by each candidate in Form 35A upon the completion of counting of the votes validly cast.

b) The 3rd Respondent tallied the Results contained in Form 35A from all 75 Polling stations, recorded the first Results in Form 35B, announced the Results and declared the Results.

Any discrepancy in the Results announced by the Presiding Officers and those declared by the Returning Officer was denied.

15. The 1st Respondent asserted that the Petitioner had not established any basis for an order for Recount and that there was no need for a Recount of the votes or the necessity to obtain the electronically transmitted Results.

16. It was pleaded that the Results declared for all the candidates in the Forms 35A for the 13 Polling stations which include Qara and Korich were declared in an open and transparent process as required by Law.

17. It was also stated, on behalf of the 1st Respondent, that there was no violence and intimidation of Agents at Qara Polling Station and the Constituency Tallying Centre at Griftu Pastoralists Training Centre. It was further asserted that the voting, counting, and declaration of Results was conducted in an impartial, neutral, efficient, accurate and accountable manner.

18. It was reiterated that there were no anomalies in Form 35A for Qara and Korich.

19. In respect to Qara, it was averred that the supporters of the 1st Respondent were not armed with axes and machetes, did not chase away the Petitioner's Agent one Ahmed Mohamed Ali, because neither he nor other agents of the Petitioner were present.

20. The 1st Respondent denies committing any Electoral offence or that he benefitted from any Election offences as alleged or at all.

21. The 1st Respondent maintains that the Elections in Wajir West Constituency were free, fair, verifiable, accurate and accountable and that he received the highest number of votes cast which was a true expression of the sovereign Will of the Voters.

22. A Response dated 14th September 2017 and filed on even date, reveals that the 2nd and 3rd Respondents substantially share the position taken by the 1st Respondent. It is emphasized that all Results were an outcome of careful counting of votes by the Presiding Officers in all the Polling stations in the Constituency and subsequent tallying of all the votes by the 3rd Respondent.

23. Specifically referring to Qara and Korich, the 2nd and 3rd Respondents stated that, although the entries in the Forms 35A did not seem clear, the Presiding Officers explained why the entries were done in that manner.

24. This Court has set out the pleadings as they delineate the scope of the inquiry that this Court is invited to make. It is from pleadings that issues for the Court's determination arise and settled and are a guide of the relevance of the evidence laid before it.

25. It has been submitted by the Respondents that the Petitioner has sought to change the character of the Petition and it has mutated from the matters pleaded therein. It is useful to consider this protest at this early stage of the Decision because a determination of the extent of the Petitioner's case will keep the Court focused on issues it must resolve and the evidence it will appraise.

26. It is argued by the 1st Respondent that a fair trial in the context of an Election Petition is to restrict the Petition to the case pleaded. In this regard in Raila Amolo Odinga & another vs. Independent Electoral and Boundaries Commission & 2 others sck Presidential Petition NO.1 of 2017 (2017) eKLR, the Supreme Court approved the following passage in the Decision of the Supreme Court of India in Arikala Narasa Reddy vs. Venkata Ram Reddy Reddygari & Another:-

“In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the Court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a Court to frame an issue not arising on the Pleadings.

27. The Supreme Court was reaffirming an already held view that parties are bound by their pleadings and that Election disputes are not exempted from this settled proposition. The reaffirmation by the Supreme Court rejects the notion that an Election Petition is an open ended inquiry in which an Election Court picks up for interrogation any issues which arise in the course of the hearing, and which though not pleaded, question the credibility of the outcome of an Election or its compliance with the Constitution and other Electoral Laws. A notion that was advocated in the Decision of Justus Mongumbu Omiti vs. Walter Enock Nyambati Usebe & 2 others (2011) eKLR.

28. But there is another proposition accepted by the Court of Appeal in Richard Nchapi Leiyagu vs. Independent Electoral & Boundaries Commission & 2 others (2014)eKLR, when it held,

“It is clear to us too, that there was equally many clear judicial authorities for the proposition that where the parties have raised an issue and left it for the decision of the Court, the Court can determine the issue even though it was not pleaded. Thus in Odd Jobs vs. Mubia (1970) EA 476, the predecessor of this Court held that:-

“A Court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the Court for decision”.

In such instances the Court will not be embarking on a rudderless journey, as the parties will have reset the route in the course of the proceedings. As an aside, I note that in Richard Nchapi Kiyaju (*Supra*) the client of Issa Mansur (who appears for the 1st Respondent here) benefited from that holding.

29. The Supreme Court in Raila Amollo Odinga & Another [2017] eKLR (*supra*) was not considering a situation where, although it is not pleaded, an issue is raised by the parties, embraced by all and left to the Court to determine. I do not understand the Supreme Court decision to be excluding such situations.

30. In the case of Jackton Nyanungo Ranguma vs. Independent Electoral and Boundaries Commission & 2 others (2018) eKLR, Majanja J. made useful remarks about the underpinning principle of an Election Dispute Resolution, the Judge observed,

“Since an election is the ultimate expression of sovereignty of the people, the electoral system is designed to ascertain and implement the Will of the people. Thus the bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect to the fullest extent while upholding the principles that underlie a free and fair election”.

An Election Court will seek to ascertain the intent of the Voters, not in an unbounded inquiry, but within the context of the pleadings before it.

31. What is the metamorphosis that the Respondents allude to? Mr. Issa, Counsel for the 1st Respondent, argues that the nub of the Petitioner’s case is pleaded in paragraph 8 of the Petition as follows:-

“The Petitioner pleads that it was erroneous for the 3rd Respondent to alter and/or falsify the Results which were announced at the Polling station. The Petitioner pleads that the Results announced at the Polling station were final and could not be altered by the 3rd Respondent”

It is therefore emphasized for the 1st Respondent, that the complaint is against the 3rd Respondent for altering the Results at the Constituency Tallying Centre and that there is no complaint against any Presiding Officer. Mr. Mukele appearing for the 2nd and 3rd Respondents added his voice of support and stressed that the Petitioner could not use the outcome of the Scrutiny which had been ordered by this Court to chance at new evidence and advance a case outside his pleadings.

32. Another issue raised by Mr. Issa was that the Petitioner’s case mutated even within his own pleading and that some averments therein are contradictory. Those paragraphs were cited. It was argued that paragraph 15 which reads as follows:-

“At Griftu Pastoral Training Centre, the anomalies in the entries made in Form 35As for Qara Polling Station, Koricha Polling station, Shandarwa Polling station and Barmish Centre were brought to the attention of the 3rd Respondent by the Petitioner’s tallying centre agent, Mr. Mohamud Osman Abdirahim but the same were not rectified” is a different case from the centerpiece of the Petitioner’s case which was the issue of alteration of Results at the Constituency Tallying Centre by the Constituency Returning Officer (CRO). Paragraph 16 is also cited as now raising issues of anomalies at the Polling station.

33. Mr. Ngatia’s response was three pronged. First, that at the point of drafting the Petition, the Petitioner would suffer the disability of only pleading what was known to him and his agents. But a Scrutiny exercise may bring to the fore misdeeds that are unknown to the Petitioner at the time of filing the Petition and the Court should not be deprived of considering this information.

34. The Petitioner argued that Qara was always on the spotlight in respect to announcement at the Polling station, declaration of Results at the Tallying Centre and ascertainment of votes at Scrutiny. Counsel submitted that, what came out of Scrutiny could not have been pleaded and that the only way one could

have had the information about voter turnout was by way of accessing the SD Card. It was contended that the pleadings were not insufficient and that on the contrary it stated the entire case and that the latter paragraphs of the Petition (eg. paragraphs 17(d) and (e)) reveal alternative or additional causes.

35. Lastly, that looking at the Defences of the Respondents, it is clear that they understood the case and joined in the issues and were not disadvantaged.

36. This Court has understood the Respondents as protesting that the Petitioner's case has mutated from a simple one of complaining about alteration or falsification of Results by the 3rd Respondent at the Constituency Tallying Centre to:-

a) A complaint about the Results announced at the Polling stations by the Presiding Officer.

b) A Complaint, atleast in respect to Qara, about Voter turnout *vis a vis* the Results announced.

37. As a starting point, I would agree with Mr. Mukele that a Petition cannot be speculative or a fishing expedition and must not be premised on conjecture. In other words a Petitioner ought to know his/her case at the time of presenting it. A Petition to question the validity of an Election such as this is to be filed within 28 days after the date of the Declaration of the Results of the Election (Section 76(1) of The Elections Act) and it would be expected that a Petitioner has, during the pre-election day, the Election day and the period preceding the presentation of the Election marshalled sufficient evidence that forms the basis of the Petition.

38. The information of Voter turnout is not, in my view, a matter that should await Scrutiny. Candidates or Political parties are entitled to appoint an agent (Regulation 62) who is allowed admission to the Polling station. An agent is the eye and ear of his candidate or political party. An agent is expected to be vigilant. The issue of voter turnout is one that should concern any agent. If Voter turnout is not monitored, then there is opportunity for Ballot stuffing or multiple voting. And a typical arrangement of a Polling station allows Agents to observe Voters as they come in and cast their votes. An Agent who does not surveil Voter turnout does a great disservice to his candidate or party. Short of a plausible explanation a candidate or party that does not have information of Voter turnout can only have himself/itself to blame. But I return to this issue of Voter turnout shortly.

39. What is to be said about the alleged shift of the locus of the complaint from the Constituency Tallying Centre to the Polling stations, and related to that, the alleged shift of the attention from the CRO to the P.Os.

40. Without a doubt in paragraphs 7, 8, and 9 of the Petition, the Petitioner's grievance is that the 3rd Respondent erroneously and unlawfully altered and/or falsified the Results which were announced at the Polling station. In respect to Qara a further issue is raised in paragraph 14 (which may be unrelated to the complaint), that the voting process was marred by violence and intimidation.

41. In paragraph 15, the Petitioner pleads:-

“15. At Griftu Pastoral Training Centre, the anomalies in the entries made in Form 35A for Qara Polling station, Koricha Polling station, Shandarwa polling station and Barmish Centre were brought to the attention of the 3rd Respondent by the Petitioner's Tallying Centre Agent, Mr. Mohamud Osman Abdirahman but the same were not rectified”.

42. Here there is an allegation that there were anomalies in the entries made in Forms 35A and although it is averred that the anomalies were brought to the attention of the 3rd Respondent, the person responsible for making the entries is not identified.

43. Then there is paragraph 16 which reads:-

“16. At Qara Polling station, the Petitioner’s agent Mr. Ahmed Mohamed Diis raised the anomaly with the Presiding Officer. Mr. Ahmed Mohamed Diis was chased by the 1st Respondent’s supporters who were armed with axes and machetes. The 1st Respondents agents threatened to burn the Ballot papers with petrol. The declaration of Results in this Polling station should be discounted due to numerous anomalies”

44. Here the Petitioner states that the anomalies were raised in respect to Qara, with the Presiding officer at the Polling station. The locus is the Polling station. As to whether there was any complaint against the Presiding Officer specifically, there is need for reading of the Petition as a whole.

45. A plain reading of paragraph 19 of the Petition reveals that issue is taken with the counting, announcing, transmitting, tallying and declaration of votes cast in all the 13 Polling stations named in the Petition (Qara and Koricha are amongst the 13). It would be common knowledge to the parties who all participated in the Election and as a matter of Law (Regulation 5 of the Elections (General) Regulations 2012), that it is the function of the Presiding Officer to Tally, Count and announce Results at the Polling station. Can it therefore be fairly said, that no complaint was raised against the persons responsible for counting the votes at Qara and Korich?

46. This Court comes to a decision that in addition to the issues raised about alteration of Results at the Tallying Centre, the Petition is also about the proper counting of votes cast at the two Polling stations.

47. While the 1st Respondent says that the two causes of actions are contradictory, this Court would rather hold that the two are pleaded as alternatives. While it may have been more suave for the Petitioner to expressly state that they are alternative pleas, a wholesum construction of the Petition reveals that they are two distinct issues taken up in one pleading. The prayers sought in respect to Qara would fortify the view taken by Court. When the Petitioner prays for nullification of the Result, he would be taking issue with Results declared at the Polling Station and when as an alternative, he seeks discounting by 221 votes he is challenging the Results of Qara as declared at the Tallying Centre.

48. The Petitioner’s pleadings could have been more elegant and should have been more specific. But so as to understand it, the Court does not construe it in a technical way. The Court is interested in substantive justice and if construing a pleading by dissection and separation in a retail fashion would lead to contrary outcome then it should be avoided. Where a pleading appears to have facts and law that on the face of it are contradictory and are not pleaded in the alternative, then, a Court should ordinarily take a wholistic approach and find the pleas as alternatives as opposed to conflicting. But there is a caveat! In doing so, the Court must not permit an inelegant or imprecise pleading to prejudice or disadvantage a party who is to answer to it.

49. This Court must therefore examine whether the Respondents were under any illusion as to the nature and extent of the case they were to meet or were otherwise prejudiced.

50. In paragraph 10 of his Response, the 1st Respondent pleads:-

“The 1st Respondent states that the counting, tallying and declaration of the results was in accord with the provisions of the Constitution, Elections Act and Election General Regulations. In further answer, the 1st Respondent states that;-

a) The Presiding Officer in each Polling station recorded the Results garnered by each candidate contesting for the position of the member of National Assembly for Wajir West Constituency in Form 35A upon the completion of counting of the votes validly cast for the member of National Assembly in Wajir West Constituency.

b) The 3rd Respondent thereafter tallied the results contained in the Form 35As from all the seventy five (75) Polling stations in Wajir West Constituency, recorded the final results in Form 35B, announced the results and publicly declared the Result of the Election for the

member of National Assembly.

c) **The 3rd Respondent then issued the 1st Respondent who was duly elected as the Member of National Assembly for Wajir West Constituency with the Certificate of Elected of Member National Assembly on 10th August 2017”.**

Paragraph 10(a) is an assertion that there was accurate counting of votes validly cast by the Presiding Officers in each Polling stations in the Constituency. This would include Korich and Qara.

51. In paragraph 22, he pleads:-

“The 1st Respondent denies the contents of paragraph 15 of the Petition and puts the Petitioner to strict proof thereof. The 1st Respondent further states that there were no anomalies in the Form 35As for Qara, Koricha, Shandarwa and Barmish Polling stations. The Results declared at the Polling station are final and could not be altered or varied as sought by the Petitioner’s agents”

52. AS to the Commission and the CRO, they pleads as follows in paragraph 4 of their response:-

“The contents of paragraph 5 and of the Petition are correct in so far as they correctly describes the Results as were tallied and announced by the 3rd Respondent. The 2nd and 3rd Respondents wish to add that these Results were as a result of careful counting of votes by the Presiding Officers in all the Polling stations in the Constituency and subsequent tallying of all the votes by the 3rd Respondent. The results were announced in the presence of all the candidates and or their agents as well as members of the Public.”

53. And then specifically in respect to Qara and Korich, the following explanation is made:-

“In response to paragraph 15 of the Petition, the 2nd and 3rd Respondents aver that the entries in Forms 35A in the mentioned Polling stations were accurately made. There were only two Polling stations, that is Qara and Korich where the entries in Forms 35A did not seem clear. However the Presiding Officers explained why the entries were done in that manner”.

54. It seems to the Court that all the three Respondents understood that the Petitioner’s case, in respect to Qara and Korich, was not just about whether the CRO altered the Results from these two Polling stations at the point of collation and tallying, but also whether the Results declared by the Presiding Officers at the two Polling stations was an accurate and true reflection of the outcome of the Elections in those two stations.

55. Again, an evaluation of the evidence reveals that the Respondents robustly took up the issue of the Results declared by the Presiding Officers at these Polling stations. Indeed the 2nd and 3rd Respondent availed the Presiding Officers for the two Stations to defend the Results they announced.

56. The second issue would be whether it is within the scope of this Petition to discuss the issue of Voter turnout at Qara and whether this needed to be specifically pleaded. As a starting point, it is reiterated that the function of an Election Court in resolving an Election dispute is, as far is possible, to ascertain the Will or intent of the Voters in the context of the Pleadings before it.

57. In a Ruling dated 5th January 2018, this Court ordered for Scrutiny in respect to 4 Polling stations one of which was Qara. The scope of the Scrutiny included an examination of Election materials that would establish the total number of Voters who turned out to vote. The position of the Respondents is that the Petitioner is now harping on the issue of Voter turnout when it was not pleaded and was merely chanced at the Scrutiny.

58. This Court has found that one issue that Petitioner pleads is that the Result announced at Qara by the Presiding Officer was an accurate count of the Votes cast at that Polling station. A determination of the issue may have to be made with the view of possibly ascertaining the Will or intent of the Voters at Qara. At paragraph 7(a) of the Petition is set out the Result said to have been announced by the Presiding Officer as opposed to that declared by the Returning Officer. The Court will have to determine which of the two Results, if any, reflects the true count and crucially which, if any, of the two speaks to the Will of the Voters. A tally of the Votes garnered by the candidates said to have been declared by the Presiding Officer is 462 as opposed to a total of 590 declared at the Tallying Centre. There is a difference of 128 votes. In determining which count, if any, accurately reflects the Will of the Voters it may be necessary to understand this difference. An examination of Voter turnout is possibly one way of resolving the apparent riddle.

59. The Court is attempting to demonstrate that in the Pleadings as set out and the evidence led, the issue of Voter turnout is not remotely connected with understanding the Result of Qara. While the Petition does not expressly plead Voter turnout at Qara it is incidental to what has been pleaded and has arisen at the hearing.

60. The Court reaches this decision notwithstanding that one of the Prayers in the Petition is simply that there be a Recount of the Ballot papers cast for the 13 pleaded stations. It might therefore be asked why a Scrutiny for Qara would extend to an examination of Voter turnout when all that the Petitioner would be interested in is a Recount?

61. It is not the Law, as I understand it, that if the Petitioner was desirous of a Scrutiny that went beyond a Vote Recount then he should have expressly pleaded it. In this regard Supreme Court Decision in Nathif Jama Adam VS. Abdikhaim Osman Mohamed & 3 Others (2014) eKLR is relevant. The Court held,

“We agree with the Court of Appeal, that the learned trial Judge was in error in holding that an order for Scrutiny cannot be granted where it is not pleaded. But it is crucial that the polling stations which are the subject of a possible scrutiny, would have been already signaled in the pleadings, as having contested results. This the import of the wording of Rule 33(1) of the Elections Petition Rules, that an application for scrutiny can be applied for at any stage. A foreshadowing of such an application should have been embodied in the main lines of pleading, which mark out the terrain of any legitimate electoral contest”. my emphasis.

62. In the Ruling on Scrutiny, this Court held that the matters pleaded and which were further embraced at the hearing signaled that a Scrutiny that included an examination of Voter turnout was inevitable.

Issues for determination and the Evidence.

63. Having now settled the contours of the dispute, this Court is able to set out the issues for determination. And in doing so the Court has given regard to the issues proposed by the parties. These are the issues the Court will determine:-

- a) Whether the results announced at Qara polling station and Korich Polling station were verifiable, accurate and accountable?
- b) Whether the Results declared by the 3rd Respondent in respect to Qara Polling Station and Korich were verifiable, accurate and accountable?
- c) Whether the 1st Respondent was validly declared as a Member of National Assembly for Wajir West Constituency.
- d) Costs

QARA

64. Ahmed Muhamed Diis (PW5) was an agent for KANU at Qara Polling station. His evidence was that after the close of polling, counting of votes of the various Elections commenced. Counting for the Member of National Assembly began on 9th August 2017 at around 12.00m pm. He says the outcome was as follows:-

Item No.	Candidate	
1	Abdirahiman Ibrahim Mohamud	2
2	Dahiye Yakub Mumin	20
3	Elmi Mohamed Ahmed	117
4	Khalif Mohamed Ahmed	00
5	Mohamed Ahmed Kolosh	319
6	Shihaw Abass Nunow	04

65. He told Court that after the Presiding Officer completed Form 35A, the agent of the 1st Respondent objected to signing it and a commotion ensued. He says that he was able to take a photo of the Form 35A (Petition page 61) which had been filled when it had been posted on the wall outside the Polling room. He was put under pressure in cross-examination to explain how he developed (printed) the photo. Secondly, why the Form did not have certain features said to be on Forms 35A used to declare other Elections. This would include lack of a code number or the Commission's stamp.

66. On the issue of the alleged commotion, the evidence of PW5 was supported by that of PC. Ronald Bwire Egesa (PW6). He is a Police Officer with service number 106005. During the Elections of 8th August 2017, he was deployed as the Officer in charge of security at Qara Polling station. His evidence was that at about 1200 noon the Presiding Officer announced the Results in respect of the position of Member of Parliament in which the 1st Respondent garnered 319 votes and a copy of the Results pinned at the Notice Board.

67. That as they were preparing to head to the Constituency Tallying Centre, supporters of the 1st Respondent armed with pangas, axes and petrol bombs entered in the polling room and threatened to beat up the Presiding Officer and burn the Ballot boxes on the allegation that the Results announced were not the Votes which the 1st Respondent garnered. He however managed to contain the situation by repulsing the rowdy mob.

68. At the request of the Presiding Officer he allowed two agents into the room. They would be of ODM and another party he could not recall. The other agents including one of Kanu had fled in the wake of the violence. There was a discussion between the P.O and the two agents, whose contents he did not get. After a few minutes the P.O indicated that he was ready to leave for the Constituency Tallying Centre.

69. The Petitioner testified as PW9. It was his evidence that he protested the Results announced by the 3rd Respondent in respect to Qara because it was different from that announced at the Polling station.

70. In the face of that protest, the 3rd Respondent said that he would consult and make an announcement as to whether or not he would nullify the Results of Qara. That, on 10th August 2017, the 3rd Respondent indeed announced that he had decided to nullify the Results due to the irregularities and upon him doing so the Supporters of the 1st Respondent stormed into the Tallying Centre.

71. Separately, the Petitioner's evidence was that the P.O for Qara was charged with an Election Offence

under Section 6(a) of The Elections Act in Criminal Case No. 350 of 2017, Republic vs. Abdihakim Sharmake Abdi (the charge sheet and some proceedings in that matter are found on P Exhibit page 38 to 41).

72. The Petitioner also made reference to a Polling station Diary (PSD) said to be for Qara Polling station. Under cross-examination he said that he asked for a copy of the PSD on 10th August 2017 and the CRO gave him. He however conceded that the document he presented was not certified as being a true copy of the original. He was not aware whether or not it was complete.

73. The Presiding Officer for Qara Polling station for the Election of 8th August 2017 was Abdihakim Sharmake Abdi (RW2). His evidence was that the voting and tallying process was peaceful and no incidence of violence was brought to his attention or even reported to the police. He defended the Result he had returned and denied falsifying any documents. His testimony was that he was charged on the basis of unverified rumors peddled by the Petitioner's supporters and Agents.

74. On the Copy of a Polling Station Diary produced by the Petitioner, his reaction was that it was not the PSD used on that day for Qara. The PSD was incomplete and was similar to one used at the training of P.Os.

75. He was also asked questions in respect to the count of valid votes cast and rejected votes for the 5 levels of Election. His answer was tabulated as below:-

Valid votes cast Rejected votes

Presidential 459 0

Governor 462 0

Senator 454 2

Woman Representative 461 0

MCA 463 0

He then stated the mean was for valid votes cast was 460 and rejected votes 1.

76. It was also his testimony that,

“All voters were identified using the KIEMS KIT. The KIEMS KIT would help us verify the voter turnout”.

77. He sought to explain how variances in votes cast between different levels of Election could arise. That this would be caused by stray Ballots and Voters choosing not to take part in some Elections.

78. The 3rd Respondent denied announcing or declaring Results which differ from the Results received from the Polling stations. He announced his Results on the basis of the Forms 35A given to him by his Presiding Officers. That the Petitioner's group protested when he announced the Results of Qara. He explained to them that he was making the announcement of the Results in the basis of what was brought by the P.O but he could not alter them.

79. That rumors started to mill that he would not declare the Results and supporters of the 1st Respondent confronted him. He however assured them that he had not authority to cancel the Results and that he would declare the Results as was. He was emphatic that the 1st Respondent did not attack him. He was to later declare the Results.

80. On the copy of PSD appearing on page 18 of the Petition, the evidence of the 3rd Respondent was that he authorized one of his Deputies (by the name Halima) to give a copy of the PSD for Qara to the Petitioner. He was categorical that he never personally gave a copy of it to the Petitioner. His testimony was that the Petitioner never requested him to certify the document.

81. As to whether the copy of PSD appearing on the Petition was indeed a copy of the PSD for Qara, the 3rd Respondent remarked as follows in re-examination:-

“The PSD attached to the Petition is a photocopy and needs to be authenticated by looking at the original”.

82. When shown the Form 35A in respect to Qara (page 9 of IEBC Results), the witness observed,

“Votes for Kolosh is cancelled for Yussuf and Mumin is overwritten”.

He clarified under cross-examination that he could not tell with certainty what was struck out from the entries.

83. It was on the basis of the evidence of PW5, PW6, RW2 and the 3rd Respondent which I have considerably abridged here that in a Ruling of 5th January 2018, this Court found that sufficient cause had been established for a Scrutiny to be undertaken in respect of Qara with 3 other Polling stations.

84. Before turning to evaluate the evidence in respect of Qara and the findings that emerge from the Scrutiny Report that was returned by The Deputy Registrar, this Court takes a moment to deal with an issue that came up at Scrutiny.

85. One of documents that needed to be scrutinized was the PSD used in the Election of 8th August 2017 for Qara. On 12th January 2018, in the presence of Mr. Ngatia for the Petitioner, Miss Mugo for the 1st Respondent and Mr. Mukele for IEBC and the CRO, a Police Officer who introduced himself as PC Chris Macharia with service No.86257 appeared before the Hon. Deputy Registrar Elizabeth Tanui who had conduct of the Scrutiny ordered by Court.

86. PC. Chris Macharia told the Deputy Registrar as follows:-

“I have been given a booklet named ‘Polling Station Diary’ by the DCIO Mr. Ochoka to hand the same over to the Investigating Officer called Mr. Kilonzi. I have not been able to get the said Investigating Officer. The Investigating Office was to hand over the document to the Court. I am seeking direction as to whether I should give the Court”.

What the good Police Officer was bringing to Court was the supposed PSD for Qara.

87. As is now common ground that some pages of the PSD were missing. Although 6 pages (1,2,7,8,21 and 22) were noted as missing by the Deputy Registrar, it may turn out that what was to be pages 1 and 2 may not be missing.

88. There was a pose to the process before the Deputy Registrar and the parties referred the issue back to me. On 16th January 2018 the Court gave the following directions in respect to the Polling station Diary;-

“Whether or not the Petitioner wants the recall of any witnesses or calling of new witnesses in respect to the state of the Polling station Diary for Qara Polling Station submitted by PC. Chris Macharia shall be made by way of a formal Application after the Deputy Registrar has submitted her Report to Court”.

89. Vide a Notice of Motion dated 1st February 2018, the Petitioner filed a Notice of Motion seeking that the 3rd Respondent be recalled to adduce evidence regarding the Polling station Diary for Qara Polling

station which was submitted to the Deputy Registrar. Although the application was opposed, this Court allowed it. In addition, the Court granted leave to the Respondents to call Abdirahim Sharmake (RW2) if they so wished.

90. This Court now as promised gives the reasons for that Ruling.

91. It is common ground that the PSD presented for Scrutiny was incomplete. An issue arose as to whether the remainder of the PSD was indeed genuine but with missing pages.

92. Under the interpretation Section of The Election Regulations, a Polling Station Diary, is defined as a Record of all the activities at a Polling station on the Polling Day. Upon the completion of a Count, the PSD is one of the Election material to be delivered to the Returning Officer (Regulation 81 (2)).

93. Upon receiving the PSDs the CRO is required by Regulation 86(2) to put the PSD in a separate Ballot box, seal and label the Box, and alongside other material relating to the Election, keep them in safe custody for such period as is required by the Regulations and the Act.

94. Regulation 93 requires all Documents relating to an Election to be retained in safe custody by the Returning Officer for a period of 3 years after the Results of the Election have been declared. Regulation 93 is as follows:-

“(1) All documents relating to an election shall be retained in safe custody by the returning officer for a period of three years after the results of the elections have been declared and shall then, unless the Commission or the court otherwise directs, be disposed of in accordance with procedures prescribed by the Commission subject to the Public Archives and Documentation Service Act (Cap. 19).

(2) Any person may apply to the High Court with notice to all candidates in the election concerned for authority to inspect documents retained under these Regulations, other than ballot papers and their counterfoils.

(3) For the purpose of an inspection under subregulation (2), the returning officer shall unseal the documents concerned in the presence of candidates or agents and the returning officer and candidates or their agents shall keep the documents under their scrutiny until they are resealed by the returning officer after the inspection is completed.

(4) The provisions of this Regulation shall not apply to documents that concern a pending election petition unless there is a court order granting such authority”.

95. Once a Petition is filed, an Election Court may, under the provisions of Rule 16(3) of The Elections (Parliamentary and County Elections) Petitions Rules, 2017, direct that the Commission maintains the custody of all Election materials in relation to a Disputed Election. When the Commission does so, it would be undertaking its Constitutional and Statutory function and also a duty on behalf of the Election Court.

96. This undoubted duty of the Commission to safe keep Election material does infact have a Constitutional underpinning in Article 86(a) which stipulates that the Commission shall ensure that:-

“appropriate structures and mechanisms to eliminate Electoral malpractices ae put in place including safe keeping of Election materials”.

97. In the Decision of William Odhiambo Oduol vs. Independent Electoral and Boundaries Commission & 2 others (2013) eKLR, the High Court said as follows about that duty,

“Having looked at all these decisions, the jurisprudence that emerges from them is that, the votes in the ballot boxes following an election contain the best, primary and controlling

evidence of the votes cast by the electorate. The Commission has, therefore, the responsibility to safeguard those votes by making sure that the ballot boxes in which they are contained are scrupulously secured until any litigation on them is concluded. The results as declared in the election forms should agree with the votes in the ballot boxes, and when they don't agree the Commission has to explain the discrepancy. When the Commission is handing over the ballot boxes to court it should reasonably anticipate that scrutiny and recount may be ordered, at which time the handling of all election materials may be inquired into. It is the responsibility of the Commission at the earliest possible opportunity to indicate to the Court hearing the petition any instance of interference or tampering, so that appropriate action of inquiry can be undertaken. All the time, the Commission should bear in mind that it is the custodian of the results as declared in the forms and as evidenced by the votes in the ballot boxes. Indeed Article 86(d) of the Constitution commands the Commission to put in place structures and mechanisms to eliminate electoral malpractices, including the safe keeping of electoral materials. The Commission cannot see to denounce the contents of the Forms or the ballot boxes and seek that the court should not rely on any of them, without leading evidence to show that they did their best to safeguard them but that a third party tampered with them”

98. It is not disputed that the PSD that was brought before the Deputy Registrar was not in a Ballot Box as expected by provisions of Regulations 86(2) and had been tampered with. The Court took the view that the recall gave the Commission an opportunity of explaining the apparent infraction of the Law and dereliction of Duty. The person who the Petitioner sought to recall, the CRO, is the person expressly given the duty of retention and safe keeping of the PSD by the Regulations (see Regulation 86(2) and (93) and would be the right person to offer the explanation on behalf of the Commission.

99. But there is yet another issue, one of the reasons that Election material must be kept safely and not interfered with is that, once an Election Dispute has been presented to Court, then it can be reasonably anticipated that the Election Court may call in the material for Scrutiny. The efficacy of Scrutiny of a material can be all but lost if it has been tampered with. On occasion the interference will be so extensive that any meaningful Scrutiny will not be possible and it would be needless for an Election Court to order a Scrutiny (see for example William Odhiambo Oduol (*Supra*)).

100. Flowing from this, the Court allowed the recall of the witness so as to understand whether:-

a) The PSD presented to the Deputy Registrar with its missing pages was a genuine part of the PSD that was used by Qara.

b) And if so, whether what remained was so debased as to be completely worthless for purposes of the Scrutiny this Court had ordered.

So that all parties would have a fair opportunity to participate in the mini inquiry, I granted liberty to the Respondents to recall the Presiding Officer (RW2). This is the other one person who had, through earlier testimony, who had interacted with the genuine PSD for Qara Polling station.

101. I must mention that notwithstanding the punishing timelines within which an Election Court is expected to hear and determine the Petition, this Court was fortunate that the time left allowed it to carry out the mini inquiry without jeopardizing its ability to conclude the matter timeously. This luxury may not always be available and a Court faced with similar circumstances may deal with the matter differently.

102. On this matter it was always clear to the Court that admissibility and/or probative value to be attached to the impugned document would have to be made after the further hearing.

103. So what did the recall of the 3rd Respondent yield?

104. On 7th August 2017, the witness distributed Election material to P.Os serving under him. To Mr. Abdihakim Sharmake Abdi (RW2), he gave Election material in respect to Qara which included an

unfilled PSD. He could not remember whether the PSD he gave to Mr. Sharmake had the words “*for training*” on its cover. As to whether he gave a “for training” PSD to other POs, the witness said,

“I looked at the PSDs I gave each to the 75 P.Os but I cannot remember any written “*for training*”.

The witness had explained that the “*for training*” PSD were given by him to POs during training and were for training purposes. That none were returned to him after training.

105. On 9th August 2017 he received a PSD from Sharmake. He remembers vividly that on the cover of the PSD were the words ‘*for training*’. He had custody of the PSD from 9th August to 10th August 2017.

106. On 10th August 2017, at the request of the Petitioner, he authorized his Deputy to give a copy of the PSD to the Petitioner. He did not make the copy himself but it was done at the Tallying Centre.

107. He was later, on the same day, to give the PSD to a Police Officer called Kilonzi from the Directorate of Criminal Investigation who was conducting an investigation in respect to Qara. At the time of collecting the PSD, Kilonzi neither served him with a Warrant or Order of Court. He says that Kilonzi made an inventory of materials collected from his office and he signed a copy of it.

108. The 3rd Respondent conceded that he neither made any comments nor signed page 26 of the PSD as required of him. Nor did his Deputy sign. That issues such as of alteration of the PSD and that the PSD returned was a “*for training*” should have been recorded in this page but he did not do so.

109. He was however emphatic that the PSD that was before Court was the one given to him by the P.O for Qara. Shown some pages which had been filled in, the witness stated that the pages filled were all written and completed when given to him by the P.O.

110. As to the pages allegedly missing, the witness said that after the cover of the PSD, the next page is marked page 3. Presumably one side of the cover is page 1 and the other is 2. However pages 7,8,21 and 22 were missing. It was his testimony that when he gave the Document to P.C Kilonzi it was intact and that PC Kilonzi confirmed as much.

11. The 1st Respondent objects to the admission of the Document as part of a genuine PSD submitted to the CRO by RW2 on two fronts. That the release of the Document to the Kilonzi was done in a manner that contravened the Law and secondly, perhaps related, that the chain of custody of the Document and the allegedly mutilation in the hands of the police raises the possibility that the pages in the Document had been tempered with an eye to the Petition.

112. If the R.O had paid heed to the provisions of Regulation 86(2), then after the final tally and announcement of Results, he would have put the PSD in a separate Ballot Box, sealed and labelled it. Sub regulation 2b then requires the Returning Officer to keep the sealed Ballot boxes and all material relating to the Election in safe custody.

113. The evidence available is that the PSD was not handled in the manner contemplated by Regulation 86 and instead given to the police. As it now turns out the Document that may have been given to the police has missing pages.

114. The 3rd Respondent concedes that he handed over the Document to the police on the basis of a verbal request and there was no Court Order or Warrant bespeaking it. To compound the matters, the handing over was not done in the presence of the candidates or agents of the Elections or with notice to them. Again, the CRO did not make a copy of what he had handed over to PC. Kilonzi, or if he did, he never produced it for purposes of comparing it with the mutilated original.

115. At the time (10th August 2017), the CRO released the Document to the Police, this Petition had yet to be filed and so Regulation 93 would govern the manner of retention and inspection of the said PSD.

The Regulation provides:-

(1) All documents relating to an election shall be retained in safe custody by the returning officer for a period of three years after the results of the elections have been declared

and shall then, unless the Commission or the court otherwise directs, be disposed of in accordance with procedures prescribed by the Commission subject to the Public Archives and Documentation Service Act (Cap. 19).

(2) Any person may apply to the High Court with notice to all candidates in the election concerned for authority to inspect documents retained under these Regulations, other than ballot papers and their counterfoils.

(3) For the purpose of an inspection under subregulation (2), the returning officer shall unseal the documents concerned in the presence of candidates or agents and the returning officer and candidates or their agents shall keep the documents under their scrutiny until they are resealed by the returning officer after the inspection is completed.

(4) The provisions of this Regulation shall not apply to documents that concern a pending election petition unless there is a court order granting such authority”.

116. Although the Regulation is in respect to retention and inspection of Documents, it would guide on the manner in which the actual Document can be released to a person who is not a candidate in the Election. Notice to and the presence of the candidates or their representations is of importance because they are stakeholders to the process. Further, it would seem that the release needs the sanction of Court.

117. This Court must come to a conclusion that this crucial Document was not released to the Police in a manner that is compatible to the ethos of maintaining the Integrity and safe keeping of an Election material. And was certainly in contravention of the edict of Article 86(d) of the Constitution that requires the Commission to maintain Structures and mechanisms to ensure the safekeeping of Election materials.

118. Granted, there was an investigation that was ongoing and the PSD may have been required to complete that investigation but on the other hand, the architecture of our Electoral Laws contemplates that an Election may be disputed and a Petition filed in respect thereof. For this reason the manner in which Election materials are handled, even prior to the presentation of an Election, must be designed towards ensuring the Integrity and purity of the materials. Had the 3rd Respondent released the Document in a procedure that resembled what Regulation 93 sets out, then the issues now arising would have been avoided.

119. And for the worse, the Document said to have been released to the Police is now mutilated. This Court finds that although it had admitted the said Document as an exhibit, it was simply accepted by Court as the Document that PC Chris Macharia submitted to the Deputy Registrar on 12th January 2018. However, because of the difficulties discussed above it is given little probative value in evaluating the Scrutiny in respect to Qara.

Analysis of the Court and findings.

120. Upon receiving the Ballot Box, the Deputy Registrar inspected its status and the seals on it. Ordinarily, the seals would be compared with the seals placed by the P.O on the Ballot after counting (Regulation 81). The record of the seals would be entered in the PSD. In this regard, even if the probity of the PSD was not in question it would have been of little help as the page where this important information was to be entered is one of the missing pages.

121. For this reason it would be difficult to establish whether or not the Ballot box had been tempered with because neither of the parties produced other evidence as to what seals were placed on it after counting.

122. I note however that from the submissions by the respective parties the Petitioner and the 2nd and 3rd Respondents were silent as to whether the Ballot Box had been tempered with, while the 1st Respondent took the stance,

“The Ballot box on arrival on inspection did not reveal any tempering contrary to the allegation by the Petitioner”.

Although, I was unable to readily find where the Petitioner had raised the issue that the Ballot Box had been tempered with, the Court notes the position taken by the 1st Respondent.

123. Other than scrutinizing the contents of the Ballot boxes, the Deputy Registrar examined the contents of the SD Card. The Scrutiny of the SD Card revealed that Qara Polling station has 628 Registered Voters out of whom 458 turned out on 8th August 2017. All the Voters were identified biometrically. On the latter issue, it is consistent with the evidence of the P.O (RW2) when he said,

“All Voters were identified using the KIEMS KIT. The KIEMS KIT would help us verify the Voter turnout”.

124. But on the SD Card, the 1st Respondent submitted,

“The Scrutiny of the SD Card was of little assistance. The Petitioner objected to the Deputy Registrar verifying the Results that were transmitted electronically through the KIEMS KIT”.

That there was an objection of this nature raised before the Deputy Registrar, was not noted in the Report. To the contrary the outcome of Form G prepared by the Deputy Registrar which captured the result of the Scrutiny of the SD was signed by Representatives of all the parties.

125. This Court finds as a fact, both from the evidence and the Scrutiny, that the number of Voters who turned out to vote were 458.

126. From the Inspection of the Ballot box, and on comparison with Form 35A used to declare the Result, the Deputy Registrar returned the following outcome:-

No. of Registered Voters – 628

Form 35A on Scrutiny

Spoilt Ballot papers 0 0

Total Number or votes cast 590 592

Rejected Votes 0 0

Disputed Votes 0 0

Total valid Votes cast 590 0

On votes garnered by each candidate;-

Candidate Form 35A on Scrutiny

Ibrahim Mohamud Abdirahaman 0 0

Yakub Mumin Dahiye 10 10

Mohamed Ahmed Khalif Elmi 40 42

Ahmed Kolosh Mohamed 538 538

Abass Nunow Shihah 0 0

127. Of interest is that the vote count in the Ballot Box is very substantially the same as in Form 35A that was used to declare the Result for Qara.

128. On cross-examining the Presiding Officer (RW2) on 27.11.2017, Mr. Ngatia appearing for the Petitioner requested for a short break in the proceedings to enable him establish Voter turnout at Qara in respect to the other 5 levels of Elections. On 30th November, 2017 Mr. Mukele Counsel for the IEBC addressed Court as follows:-

“Upon request from Mr. Ngatia my clerk furnished him with copies of Forms 34A, 36A, 37A, 38A and 39A in respect to Qara Polling station. As to whether those can be relied on in evidence is a different issue”.

Mr. Ngatia retorted:-

“I will be using the Forms for cross-examination and will then consider if and when to introduce them”.

Mugo for the 1st Respondent stated,

“The issue of cross-examination can be dealt with but we shall be objecting to their introduction in evidence”

129. The Presiding Officer(RW2)was cross-examined on the basis of the Forms and on reading the contents of the Forms he stated,

“ Valid votes cast Rejected Votes

Presidential 459 0

Governor 462 0

Senator 454 2

Women Rep. 461 0

MCA 463 0

The mean is 460 1 ”

130. An observation to be made is that valid votes cast in respect to the Disputed Result being 590 is out of stride with the average for the other Elections being 460. This justifies the argument by the Petitioner that, for the Disputed Election, the return of total number of votes said to have been votes cast exceeds the Voter turnout.

131. These findings are made without the need of commenting on the serial numbers of the Ballot papers found in the Ballot box. A meaningfully appraisal would require a comparison of these with the Ballot papers allegedly issued by the CRO to the P.O as found in the PSD and which comparison would have been impossible to undertake as the probative value of the Document is doubted.

KORICH

132. The Court's attention now focuses on Korich. The evidence of Isaack Gulled Abdullahi (PW1) who was the Agent for KANU in the station is that the Result that was announced at the close of counting by the Presiding Officer was as follows:-

- i. Abdirahman Ibrahim Mohamud 06
- ii. Dahiye Yakub Mumin 362
- iii. Elmi Mohamed Yussuf 10
- iv. Khalif Mohamed Ahmed 01
- v. Mohamed Ahmed Kolosh 110
- vi. Shihaw Abass Nunow 01

And this was the Result he relayed to his party's Constituency Tallying Agent Mohamed Osman Abdirahiman (PW8).

133. The grievance of PW8 and the Petitioner is that, at the Tallying Centre, the Results declared on 10th August 2017 were different from those announced on 9th August 2017.

134. It was explained and it is common ground that, at the Tallying Centre, the 3rd Respondent would announce Results of the Polling stations in the Constituency as he received them from the Presiding Officer. Upon receipt the Results from all Polling stations, the 3rd Respondent tallies the final results from each Polling station, completes Form 35B and signs and dates the Form and declares the Results of the Member of National Assembly. This would be in compliance with Regulation 83 1(a), (b), (c), (d), (e) and (f).

135. The evidence of the Petitioner and PW8 was that in respect to Korich, the CRO announced the Results received from the P.O which were the same as those received from their Agent (PW1). But on declaration of the final Results, on 10th August 2017, the C.R.O declared the following:-

- i. Abdirahman Ibrahim Mohamud 06**
- ii. Dahiye Yakub Mumin 110**
- iii. Elmi Mohamed Yussuf 40**
- iv. Khalif Mohamed Ahmed 00**
- v. Mohamed Ahmed Kolosh 362**
- vi. Shihaw Abass Nunow 04**

136. This was denied by Ismail Hujale Omar (RW1) the Presiding Officer for Korich and the 3rd Respondent.

137. The complaint by the Petitioner is that at the Declaration, the count for Mumin and 1st Respondent were swapped with the effect that the 1st Respondent was added 252 votes. A Scrutiny of the votes at Korich was ordered to ascertain this assertion by the Petitioner.

138. On examination of the Ballot Box it was noted that its serial number was 117682 being the same

serial number as the record for the Ballot Box used at the end of counting and captured on page 27 of the PSD to the station. This would appear to differ with serial number (113682) of the Ballot box which contained the Ballots after polling (see pages 10 and 17 of the PSD). In respect to the seals on the Ballot Box, the serial number of seal to the aperture after Polling was 1517057 (see page 17 of PSD). The serial number of the seal to the Aperture on receipt of the Box by the Deputy Registrar was IEBC 37778. Otherwise the other serial numbers of the IEBC seals found on the Box (before opening) by the Deputy Registrar corresponded with those entered in the PSD (page 22) as used at the end of counting.

139. Scrutiny of the contents of the Box showed as following:-

Registered Votes – 630

Form 35A on Scrutiny

Spoilt votes 1 00

Total number of votes cast 490 481

Rejected votes 01 01

Disputed votes 0 0

Valid votes cast 489 490

Votes garnered by each candidate

Form 35A on Scrutiny

Abdirahman Ibrahim Mohamud 06 04

Dahiye Yakub Mumin 110 104

Elmi Mohamed Yussuf 10 10

Khalif Mohamed Ahmed 01 00

Mohamed Ahmed Kolosh 362 362

Shihaw Abass Nunow 00 00

140. The Petitioner makes heavy whether about what he sees as irregularities and illegalities in respect to the Ballot Box and its contents which it is, proffered, makes the votes therein unverifiable.

141. The Serial number (113682) of the Ballot box which contained the votes after the Polling differed from that used at the end of counting (117682) and which was presented for Scrutiny. Although both sides did not advance an argument in respect hereof, the Court has read Regulations 67, 73(1), 76 and 81 together and does not find any provision therein which contemplates that there will be a change of Ballot Box between the time it is sealed before the commencement of the Poll and after the counting. A reading of the Regulation suggest that at each level of Election one Ballot Box will be used throughout.

142. In this entire process the Ballot box is emptied only once to facilitate counting (Regulation 76). Once the exercise is completed, Regulation 81(1) provides as follows:-

“upon completion of a count, including a recount, the Presiding Officer shall seal in each respective ballot box

(a) **Valid votes**

(b)

(f)

(my emphasis)

This Court reads reference to the respective Ballot Box to mean reference to the Ballot Box from which the contents were emptied. This in my view safeguards the integrity of the contents of the Ballot Box as it minimizes the possibility of placing, either deliberately or otherwise, the contents of the Election in a different Ballot box after the counting exercise.

143. The seal to the Aperture after Polling was 1517057. When the Ballot Box submitted to the Deputy Registrar it had a seal to the aperture which was 377778.

144. The Aperture is the opening through which a Ballot paper is inserted into a Ballot Box. In respect to how and when it is sealed, Regulation 67(3) provides:-

“(3) On the adjournment of the poll in a polling station to another day, or on the close of the poll at one station with a view to transferring a ballot box to another station, and at

any other time when a ballot box is not in use for the purpose of receiving ballot papers, the presiding officer shall close up the aperture used for the insertion of the ballot papers into

the box and place his or her seal on it in such a manner as to prevent the insertion of ballot papers without breaking the seal”.

Presumably, the aperture is unsealed at Polling.

145. Counting of votes commences after close of polling. Since counting may not begin immediately thereafter, there will be need to seal the Aperture hence a seal such as No.1517057 so as to prevent insertion of further Ballots or any other thing into the Ballot box. So as to facilitate counting, Regulation 76(1) requires that the Ballot Box be opened and its contents emptied. What is not clear from the Regulation and in respect of which no evidence was led is whether at the opening of the Ballot Box which precedes the counting, the seal to the Aperture is also to be broken. It is therefore unclear why the Ballot Box for Korich would be having a different seal after counting from that used after Polling.

146. This Court has familiarized itself with the PSD for Korich, and, as is for other PSDs this Court has seen in this Dispute, there is no space to record the number of the Aperture at the end of counting. Perhaps an indication that once placed after polling then the seal to the Aperture should not be broken for purposes of emptying the Box for counting.

147. Whatever the case, this Court takes a view that a seal placed on a Ballot box should only be broken in the presence of Observers and candidates or their Agents and any new seal placed should be done in a similar way and recorded somewhere in the Polling station Diary. This serves to minimize suspicion and enhances confidence in the Electoral process.

148. Elsewhere, it is common ground that no counterfoil of used Ballots was found in the Ballot Box. But Mr. Issa asks the Court not to make much of this because there is an apparent contradiction in the law as to how the counterfoils of used Ballots should be kept.

149. Regulation 73 provides:-

(1) At the end of voting, the presiding officer shall declare the polling station closed and shall proceed to seal the ballot boxes in the presence of the candidates or agents and observers at

his or her polling station.

(2) Immediately after the close of the polling at his or her polling station, the presiding officer shall make in the polling station diary a written statement of—

- (a) the number of ballot papers issued to him or her under regulation 61;**
- (b) the number of ballot papers, other than spoilt ballot papers, issued to voters;**
- (c) the number of spoilt ballot papers; and**
- (d) the number of ballot papers remaining unused**

(3) Immediately after the completion of the statement under sub regulation (2), the presiding officer, in the presence of the candidates or agents shall seal in separate tamper proof envelopes—

- (a) the spoilt ballot papers, if any;**
- (b) the marked copy register, where necessary;**
- (c) the counterfoils of the used ballot papers; and**
- (d) the statement specified in sub regulations,**

and shall seal each of the envelopes with his or her own seal and the seal of the Commission and shall allow any candidate or agent who may wish to do so, to affix his seal to the envelope and any statement recorded under these regulations.

(4) After complying with the provisions of this regulation, the presiding officer shall, as soon as practicable, deliver the ballot boxes, and the tamper proof sealed envelopes to the returning officer who shall take charge thereof”

150. This provision is on the process at the end of voting. It directs the P.O that in the presence of candidates of agents, to place the counterfoils in a separate tamper proof envelope and deliver it to the Returning Officer.

151. But look at what Regulation 81 directs on sealing of Ballot papers by the Presiding Officer after the completion of a count:-

“(1) Upon completion of a count, including a recount, the presiding officer shall seal in each respective ballot box—

- (a) valid votes;**
- (b) rejected ballots sealed in a tamperproof envelope;**
- (c) unused ballot papers sealed in a tamperproof envelope;**
- (d) counterfoils of used ballot papers sealed in a tamperproof envelope;**
- (e) copy of election results declaration forms; and**
- (f) stray ballot papers in a tamperproof envelope.**

(2) The presiding officer shall deliver, to the returning officer—

- (a) the sealed ballot boxes;**
- (b) the statements made under regulations 78 and 79;**
- (c) copy of the Register of Voters; and**
- (d) Polling station diary”.**

Here, sub-regulation (1) requires the P.O to place the counterfoils of used Ballot papers sealed in a tamper proof envelope in the Ballot Box. This may explain the Petitioner’s expectation that he would find the counterfoils in the Ballot Box surrendered for Scrutiny.

152. I understood Mr. Issa to be arguing that the Commission was not in breach of any law because it may have decided to deal with the counterfoils in conformity to Regulation 73. I did not hear Mr. Ngatia respond to this.

153. This is my perspective of the matter. Through an amendment in Legal Notice No. 72/2017 the provisions of Regulation 81 were replaced with the current provisions. Previously Regulations 81 read as follows:-

“(1) upon completion of a count (including a recount), the Presiding Officer shall seal in separate tamper proof envelopes –

- (a) the counted Ballot papers which are not disputed;**
- (b) the rejected Ballot papers together with the statement relating thereto;**
- (c) the disputed Ballot papers; and**
- (d) the “rejected objected to” Ballot papers;**

(2) The Presiding Officer shall, after demonstrating to the candidates or agents as the case may be, that the Ballot Box to be used to carry the election results is empty, put into that box-

- (a) the packets specified in sub regulation (1) and**
- (b) the statements made under regulations 78 and 79**

(3) After the procedure in sub regulation (2), the presiding officer shall seal the ballot box with the seal of the Commission and allow the candidates or agents to affix their own seals on the Ballot Box, if they so wish”.

154. Prior to the amendment there was no conflict between Regulation 81 and Rule 73(3) and the Court of Appeal had in IEBC & Another vs. Stephen Mutinda Mule & 3 Others (2014) eKLR correctly held as follows:-

“With tremendous respect to the learned Judge, she overstated that case in making such a sweeping statement. Worse, the learned judge applied a judicial decision that was based on a statutory regime that had since significantly changed so that in so far as her decision on the point did not pay due regard to the changed state of the Regulations, she acted *per incuram* and applied a legal position that was bad for obsolescence.

As we have already stated, the learned Judge correctly read that under Regulation 73(3) (c) the presiding officer is required to seal the counterfoils of the used ballot papers. Under sub-regulation (4) he is required to deliver the ballot boxes and the tamper proof sealed envelopes to the returning officer who shall take charge thereof. It is quite clear to us that the ballot

boxes are separate and apart from the sealed tamper proof envelopes. The two items are required to be delivered separately to the returning officer. There is no requirement that one be in the other.

The matter is put beyond argument, we think, by the provision of Regulation 81(2) which lists the items or documents that are to be placed in the ballot box that should convey election results. It provides:-

“the presiding officer shall, after demonstrating to the candidates or agents as the case may be, that the ballot box to be used to carry the election results is empty, put into that box:-

a. The packets specified in sub-regulation (1)

b. The statements under regulations 78 and 79”

The packets in sub-regulation (1) are separate tamper proof envelopes containing:-

a. The counted ballot boxes which are not disputed

b. The rejected ballot papers together with the statement relating thereto

c. The disputed ballot papers

d. The “rejected objected to “ballot papers

Quite clearly, the ballot box is meant to contain the sealed tamper proof envelopes containing the various classes or categories of ballot papers only. The counterfoils of the used ballot papers are not required to be in the ballot box.

That being the case, it matters not that other ballot boxes, save the eight, did contain the counterfoils. Their having the counterfoils was a fortuitous happening, not an act in obedience to any legal requirement. They could not form a basis for placing upon the appellant a burden the law did not impose and it is a clear error for the learned Judge to have come to the conclusion that a grave irregularity had occurred. On this account too, the appeal succeeds. (my emphasis).

155. The intention of current Regulation 81 must have been that documents which are crucial and central in verifying a vote, such as the counterfoil of used ballot papers, be kept in one Ballot Box with the votes cast in an Election. It may well be an improvement from the past.

156. While the P.O for Korich may not have flouted the law, having chosen the route of Regulation 73, it is not lost on the Court, that the Presiding Officers of Arbajahan Primary Polling Station (2) and Mathow Primary (whose polling stations were also subjected to Scrutiny) choose to place the counterfoils of used Ballot papers in their Ballot boxes. (See pages 20 and 26 of the Scrutiny Report). On the other hand, no counterfoils were found in the Ballot Box to Qara (page 11 of The Scrutiny Report).

157. But what must put paid to any excuse that the Commission may had for failing to avail the counterfoils for Scrutiny is the Court’s Order of Scrutiny made on 5th January 2018! The Court had directed that amongst other material, the packets of counterfoils of used Ballot papers in respect of the 4 polling station (including Korich) be scrutinized.

158. Now, what is the significance of a counterfoil of a used Ballot paper in a Scrutiny exercise? Under Regulation 68(4),

“Every Ballot paper for use at an Election shall:-

a. ,,,,,,,

b. ,,,,,,,

c. ,,,,,,,

d. ,,,,,,,

e. have attached a counterfoil with the same number or combination printed.”

159. By comparing the serial number on used counterfoils with the Ballot papers found in a Ballot box, it is possible to ascertain whether the Ballot papers found in the Ballot box are those issued to Voters who cast their vote in the Disputed Election. It is an invaluable tool for Scrutiny.

160. In this regard the Court of Appeal in Dickson Mwenda Githinji vs. Gatirau Peter Munya & 2 others (2014) eKLR affirmed, the High Court’s decision in Manson Oyongo Nyamweya vs. James Omingo Magara & 2 others, Kisii Election Petition NO. 3 of 2008 which stated as follows:-

“Without the ballot paper counterfoil, the ballots in a box are unverifiable. If scrutiny showed that the documents in the ballot boxes were substantially non-compliant or that certain statutory documents were not contained therein, a recount of the ballots per se cannot cure the inherent defect. The presence of a ballot paper in a ballot box is validated by the counterfoil thereof and the marked voter’s register. Without the two, there is no telling how it found its way into the ballot box. This mean that the principle of transparent, free and fair election was compromised”.

161. The issues which this Court has set out, taken in isolation may not mean much but are of significance when read together. Is it a coincidence that an important tool such as counterfoil of used Ballots was not availed? That, the Ballot Box brought for Scrutiny may have been different from that used after polling? That, there is an unaccounted change in the seals to the Aperture? Curious as well is that the P.O failed to make a record of the Ballot paper count after Polling (See page 19 of the PSD) and so there was no record of serial Numbers of the Ballot papers issued to Voters.

162. It is fair to find that the manner in which the Commission conducted itself at the Election of Korich and at the Scrutiny made it impossible for the Court to ascertain the Petitioner’s complaint about vote swapping. Those complaint of vote swapping may not have been an afterthought or frivolous because there is evidence by no less than the 3rd Respondent that,

“I declared for Korich on 10th August, 2017 KANU complained that the Results were different from those announced on 9th August. A complain of interchange between two candidates”.

KANU is the party for Petitioner. The explanation by the Petitioner for not raising the issue on 9th August 2017, being that the issue would not arise as the Results announced on that day were the true Results.

Court’s Determination

163. It is beyond reasonable doubt that the Results declared for Qara were not credible. The declaration was fraudulent because the Results showed that the total number of votes cast was 590. It did not help matters that the Ballots found as cast in the Ballot Box affirmed this number of 590. This exceeded the number of Voters who turned out to vote by 162. The Result is illegal and it matters not whether it was attained by Ballot stuffing, double voting or simply by falsification of Form 35A.

164. The Petitioner sought two prayers, in the alternative, in respect to :-

(i) Nullification of the entire Results or

(ii) That the court discounts the votes declared for the 3rd Respondent by 221 votes.

165. There was however, argument by the 1st Respondent that the jurisdiction of an Election Court to strike off, cancel or disregard votes is limited and circumscribed by law. It was the view of 1st Respondent that striking out of the votes or nullifying the entire Result of Qara would be inimical to Section 82 of The Elections Act which reads:-

“(1) An election court may, on its own motion or on application by any party to the petition, during the hearing of an election petition, order for a scrutiny of votes to be carried out in such manner as the election court may determine.

(2) Where the votes at the trial of an election petition are scrutinized, only the following votes shall be struck off—

(a) the vote of a person whose name was not on the register or list of voters assigned to the polling station at which the vote was recorded or who had not been authorized to vote at that station;

(b) the vote of a person whose vote was procured by bribery, treating or undue influence;

(c) the vote of a person who committed or procured the commission of personation at the election;

(d) the vote of a person proved to have voted in more than one constituency;

(e) the vote of a person, who by reason of conviction for an election offence or by reason of the report of the election court, was disqualified from voting at the election; or

(f) the vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification or when the facts causing it were notorious.

(3) The vote of a voter shall not, except in the case specified in subsection (1) (e), be struck off under subsection (1) by reason only of the voter not having been or not being qualified to have the voter’s name entered on the register of voters”.

166. It was further argued that the Petitioner has not laid a basis for striking off of any votes cast in Qara Polling station. On this I have no difficulty in agreeing that in respect to the criteria of striking out set under Section 82, the Petitioner may have not been able to identify with precision any persons who fall under the category in Section 82 or who cast illegal votes. But the Court will return to this.

167. In terms of disregarding the entire Result, because the total votes exceeded the total number of Voters who turned out to vote in that Polling station, the premise of this proposal by the Petitioner is that the entire Result is contaminated because the Result is a mixture of legal and illegal Votes which may not be distinguished.

168. This may very well be the policy consideration in the Provision of Regulation 83(1) which empowers the CRO to disregard the Results of the count of a Polling station where the total valid votes exceeds the number of Registered votes in a Polling station or where, like here, the total Votes exceeds the Voter turnout. Regulation 83 reads:-

“(1) Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of

candidates or agents and observers, if present—

(a) tally the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly;

(b) disregard the results of the count of a polling station where the total valid votes exceeds the number of registered voters in that polling station;

(c) disregard the results of the count of a polling station where the total votes exceeds the total number of voters who turned out to vote in that polling station;

(d) collate and publicly announce to the persons present the results from each polling station in the constituency for the election of the President, county Governor, Senator and county women representative to the National Assembly;

(e) complete the relevant Form 35B and 36B for the respective elective position set out in the Schedule in which the returning officer shall declare, as the case may be, the—

(i) name of the respective electoral area;

(ii) total number of registered voters;

(iii) votes cast for each candidate or referendum side in each polling station;

(iv) number of rejected votes in each polling station;

(v) aggregate number of votes cast in the respective electoral area; and

(vi) aggregate number of rejected votes;

(f) sign and date the relevant forms and publicly declare the results for the position of—

(i) member of County Assembly;

(ii) member of National Assembly; and

(g) issue certificates to persons elected in the county assembly and National Assembly elections in Forms 36C and 35C respectively set out in the Schedule;

(h) deliver to the county returning officer the collated results for the election of the county Governor, Senator and county women representative to the National Assembly; and

(i) deliver to the Chairperson of the Commission the collated results for the election of the president to the national tallying centre.

(2) The Chairperson of the Commission shall tally and verify the results received at the national tallying centre.

That said this Court takes the view that this power should be exercised by an Election Court and not the CRO and will presently give its reasons.

169. This Court does not see any conflict between its power to disregard the Results of a count of a Polling station and the restricted power of the Court to strike off in Section 82. A Court exercises its power to strike off a Vote which it identifies as illegal in the Ballot Box under the category set out in Section 82. In doing so it saves the legal votes so that they are not effected by any impurity that is in the

Ballot box. In this way the Will of a person who has cast a lawful vote is protected. This may however not be possible where the legal and illegal vote cannot be differentiated. Votes that exceed the voter turnout and of the registered voters will often fall in this list.

170. Which leads this Court to the next question? Should it be an inflexible rule that the Results of the count in a Polling station where the total valid votes exceeds the Vote turnout should be routinely disregarded? The answer to this question may well be the same to the situation where votes exceed the number of registered Voters.

171. As much as is possible a legal vote of a Voter should be respected. For this reason this Court takes the view that if a Scrutiny can distinguish the illegal vote from the legal vote, then the Court should only strike out the bad vote. Before resorting to nullification of the entire Result, a Court should consider whether an Order of Scrutiny can separate the votes and save the good ones. This Court can think of an instance where this is possible. The law has evolved (Regulation 68) to require that each Ballot paper is attached with a counterfoil of the same serial number. If all the illegal votes are of Ballot papers which were not lawfully issued to the Voters, then the counterfoil may be used to track the legal Ballots.

172. The process may be painstaking but is worthwhile if it protects the right of Voters. The process will require the opening of the Ballot Box and an inspection of its contents. This would be one reason (there may be others) why the power to disregard Results under Regulation 83 should be the preserve of an Election Court hearing a Disputed Election.

173. In the instance case the Scrutiny could not pick out which votes were illegal and which were not. Just like Korich, the counterfoils of the Ballots cast for Qara were not availed for Scrutiny. The Result being that any lawfully cast votes would be comingled with those unlawfully inserted in the Ballot so that the good would be lost in the bad and vice versa. And for that reason it would be impossible to ascertain the true Will of the Voters for the station.

174. As a consequence the Order that endears itself to the Court is to disregard the entire Result at Qara. The Court is well aware that the outcome of such an Order is drastic as it has the effect of wiping out the margin of 477 votes that gave the 1st Respondent his victory and this Court has therefore approached the matter with some anxiety and circumspection.

175. The evidence on record is that PW5, the Agent for the Petitioner at Qara was contented with what he says was the first Result announced. This was the result which he claimed gave the following outcome:-

Item No.	Candidate	
1	Abdirahiman Ibrahim Mohamud	2
2	Dahiye Yakub Mumin	20
3	Elmi Mohamed Ahmed	117
4	Khalif Mohamed Ahmed	00
5	Mohamed Ahmed Kolosh	319
6	Shihaw Abass Nunow	04

But due to threats by a mob of people he left the Polling station. This evidence was supported by that of PW6.

176. There is also further evidence that one Dakame Abey captured as an ODM Agent signed the Form

35A which had the now discredited Results. The testimony in chief of RW8 was that:-

“I received a call from the 1st Respondent’s Agent Mr. Dakarme Abey Yussuf who informed me that the counting, tallying and declaration of Results at Qara Polling station had been finalized and the Results recorded in Form 35A as required”.

He further disposed,

“Mr. Yussuf informed me that the Presiding Officer announced the following Results at the Polling stations;-

a) Abdirahman Ibrahim Mohamud 00

b) Dahiye Yakub Mumin 00

c) Elmi Mohamed Yussuf 40

d) Khalif Mohamed Ahmed 00

e) Mohamed Ahmed Kolosh 540

f) Shihaw Abass Nunow 00

177. It is therefore clear that the 1st Respondents Agent endorsed a result which could never have been legal and was certainly inaccurate. An agent of a candidate is expected to be keen about Voter turnout. The Agent knew or ought to have been aware of the Voter turnout and that the Result announced was not feasible. And if the agent was somehow under a honest belief that the Result was legitimate then the 1st Respondent did not bother to call him to tell the Court as much. The only inference to be drawn is that the 1st Respondent was happy to embrace it and Petitioner did not orchestrate the false Result so as to benefit from it being annulled.

178. In respect to Korich this Court has held that the issue raised by the Petitioner in respect to Voter swapping was not frivolous. Yet it was impossible to ascertain this concern because the 2nd and 3rd Respondent did not avail some Election material notwithstanding the express Order of the Court and crucial information was missing from the PSD for the Station. At the Scrutiny the Petitioner or his representative and the 1st Respondent or his Representatives made certain remarks. These remarks are reproduced below:-

1st Respondent’s Remarks about the PSD

- **The agents signed page 23 of the PSD on affirmation of record of seals by agents at the closure of counting**
- **Page 25 on declaration by the presiding officer is signed by the PO**
- **The Constituency returning officer has signed page 26 of the PSD**
- **There were no challenges and incidences as page 24 is blank.**
- **Page 16 indicates that 60 voters were on the queue after 1700hrs.**

Petitioner’s Remarks

- **In absence of a reference point of serial numbers of ballot papers issued to the PO by the RO, no useful comment on the question of ballot papers can be made. This is because there is deliberate omission of information concerning the serial numbers of ballot papers issued in the PSD (page 19 is unfilled). We are unable to state categorically where the ballot paper used came from. This compounded by lack of counterfoils and unused ballot papers. This a verification exercise and not a counting**

exercise.

It is important to note that in the handwritten sheet (Form E of the Scrutiny Report), the representatives signed the Form in affirmation that the above record accurately reflected the remarks made.

179. My deduction is that the Petitioner, unlike the Respondents, was bothered of lack of important documents that would have shed light on the controversy raised by him. This Court cannot therefore hold that the Petitioner is responsible for the failure that the Result of Korich cannot be verified. Consequently I find that a doubt has been created as whether the Results declared represent the true Will of the Voters at Korich. The Doubt involves 252 extra votes allegedly recorded in favour of the 1st Respondent. It is not verifiable that he was deserving of those votes.

180. It is evident that the vote declared in Form 35A in respect to Qara was a false Return and did not reflect the Will of the Voters. As a result of that fraudulent Return this Court has reached a Decision to disregard the Votes in that Polling station. The disregarded Results is as follows:-

- (a) Abdirahman Ibrahim Mohamud 00
- (b) Dahiye Yakub Mumin 10
- (c) Elmi Mohamed Yussuf 40
- (d) Khalif Mohamed Ahmed 00
- (e) Mohamed Ahmed Kolosh 540
- (f) Shihaw Abass Nunow 00

The mathematical difference between the 1st Respondent who was the Winner and the Petitioner who was the Runners up is 540.

181. Once these vote is discounted from the 1st Respondents tally, his votes are reduced to 6,161 against a vote of 6,224 in favour of the Petitioner. The effect is that his victory is upset.

182. At the time of the Election, Section 83 of The Act provided:-

“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”.

This Section has since been amended by the Election laws (Amendment) Act 2017 (Act No. 34 of 2017).

183. In Raila Amolo Odinga & another vs. Independent Electoral and Boundaries Commission & 2 others, Presidential Election Petition No. 1 of 2017 (2017) eKLR, settled on the following interpretation to the then Section 83 test;

“(209) therefore, while we agree with the two Lord Justices in the Morgan v. Simpson case that the two limbs should be applied disjunctively, we would, on our part, not take Lord Stephenson’s route that even trivial breaches of the Law should void an election. That is not realistic. It is a global truism that no conduct of any election can be perfect. We will also go a step further and add that even though the word “substantially” is not in our section, we would infer if in the words “if it appears” in that section. That expression in our view requires that, before vitiating it, the Court should, looking at the conduct of the whole election be satisfied that it substantially breached the principles in the Constitution, the Elections Act and other electoral law. To be voided under the

first limb, the Election should be what Lord Stephenson called “a sham or travesty of an election” or what Prof. Ekirikubinza refers to as “*a spurious imitation of what elections should be.....*”

211. In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a Petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a Petitioner who is able to prove that the conduct of the election in questions 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.

This is the approach this Court will be taking.

184. Construing Section 83 as then existing, this Court finds that the non-compliance of the Constitutional and other Electoral laws in the conduct and count of the election and declaration of the Results in Qara affects the Result of the Election of Member of National Assembly for Wajir West Constituency. That is sufficient to void the Election.

185. In addition a doubt has been created about the veracity of the Result at Korich. Standing alone, the non-variability of that Result may not amount to a substantial non-compliance with the Constitution and other Election laws and would certainly not affect the Result of the Election. Yet it compounds the events in Qara and makes the victory of the 1st Respondent even the more undependable.

The Reliefs

189. The Petitioner has pitched to be declared the winner of the Election. Section 80(4) of The Election Act reads,

“An Election Court may by Order direct the Commission to issue a Certificate of Election to a President, a Member of Parliament or a Member of a County Assembly if;-

a) Upon recount of the Ballots cast, the winner is apparent; and

b) The winner is found not to have committed an Election offence.

187. But in Kisumu Civil Appeal NO. 44 of 2013 Zebedo John Opore vs. John Oroo Oyioko & 3 others (unreported) the Court of Appeal cautioned about the hasty use of this power. The Court opined,

“Under that Section, for a person to be so declared, upon recount of the ballots cast, the winner must be apparent and should not have committed an Election offence. What is the meaning of the word apparent? Black’s law Dictionary defines the word “as visible; manifest, obvious”. The Concise Oxford English Dictionary defines ‘apparent’ as “readily perceived or understood, obvious, seeming real or true”

188. The Election of the 1st Respondent has been voided substantially because the Court has disregarded the Results at Qara and in addition that the Results at Korich are unverifiable. It is not possible to attribute or assign the disregarded votes to the Petitioner. The very reason for disregarding the votes is that they are not an accurate reflection of the Voters who turned up and cast their votes at Qara. Put differently the Will of the Voters could not be ascertained. It is therefore not readily manifest to this Court that the common Will of the people of Wajir West expressed on 8th August 2017 was that the Petitioner should be their Member of National Assembly. Let them have another opportunity.

Electoral malpractices

189. The Return declared at Qara was the work of a Criminal hand. The Result declared in Form 35A was false, dishonest and illegal. Section 87(1) & (2) of The Election Act provides:-

(1) An election court may, at the conclusion of the hearing of a petition, in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature may have occurred.

(2) Where the election court determines that an electoral malpractice of a criminal nature may have occurred, the court shall direct that the order be transmitted to the Director of Public Prosecutions”.

190. It would be needless for the order contemplated under the provisions of Section 87 to be transmitted to the Director of Public Prosecution because, on this occasion, the Police were ahead of us. Abdihakim Sharmake Abdi (RW2) is already facing charges of making a false Return contrary to Section 6(a) of The Elections Act.

191. Although the agent of the 1st Respondent endorsed the fraudulent Result, I found no evidence that the Return was made at the personal or direct instigation of the 1st Respondent or his agent.

Costs

192. A debate is now with us as to the basis of the varied award of Costs that are being made by Election Courts.

193. Just two days ago, before meeting his untimely and shocking death, Hon. Onguto J. reflected on the factors that should inform on Election Court when awarding costs. In his trademark sagacity, the Good Judge remarked,

“Ideally, when considering the amount of costs payable one ought to be concerned not to make any order on costs which has disproportionate consequences on any unsuccessful petitioner. The costs if awarded should not be punitive. In my view, an analogy ought to be made with the courts’ concerns to limit the costs consequences in public law claims and public interest litigation. Public law principles on award of costs are an appropriate guideline in the case of a legitimate and serious challenge to an election. It would appear irrational, if not oxymoronic, for the election court during trial to insist that an election dispute has a full public aspect in that it is concerned more with the right of a constituency to be represented by a particular candidate, yet turn around at the conclusion of the trial and then hold that the *lis* was only between the parties to the petition and almost punitively award costs. The highway of access to justice may be blocked to ordinary voters who are also allowed to file petitions and at times even to take over the prosecution of the petition in the original petitioner’s stead. An award of costs should thus not be intended to deter but rather to indemnify and encourage genuine and bona fide challenges to this exercise of elections”

194. A successful Petitioner would have expended money and time in prosecuting a Petition. Ideally, the Court should award costs that enables the Petitioner recoup reasonable costs incurred in his effort at the Petition. Yet the award must not seem punitive because just like for the Petitioner, there is a Public interest element in defending the outcome of an Election.

195. The Petitioner proposes Instruction fees of Khs.4 million as he argues that the matter was complex and time consuming. The 2nd and 3rd Respondents make no suggestions on costs. The 1st Respondent had sought certification of 2 Counsels and was of the view that an all- inclusive sum of Khs.4,500,000/= was reasonable.

196. This Court is in a good position to cap the costs on Instructions fees because it has studied the pleadings herein, heard witnesses, listened to and read arguments in submission. The Court would be aware about the complexity, if any, of the matter and the time and effort expended on hearing.

197. The issues in this Election Dispute would have been old hat were it not that recent developments in

the Election Laws was under discussion. So, while some issues may have been novel they were certainly not complex.

198. Counsel spent about 9 days (of about 5 hours each day) at hearing, scrutiny and submissions. These are long hours but the Advocates Remuneration Order has a scale for fees on attendance. The Court leaves the task of assessing that fees to the Taxing Officer.

199. So as to gauge what is reasonable Instruction fees, the starting point would be what the Advocates Remuneration Order says of it. The minimum fees for presenting or opposing an Election Petition is Khs.500,000/=. While the Petitioner urges for Khs.4million, he has not specified the complex issues that he had to confront or other reasons why fees that is eight times the minimum fees is justified.

200. On my own assessment, because of the issues involved, the time spent and the intensity of the Trial, this Petitioner certainly deserves more than the minimum fees that is prescribed and in my view three times that amount is reasonable.

201. On another aspect, the costs of the Petitioner shall be borne by IEBC, (the 2nd Respondent) who are to blame for irregularities and illegalities that led to the invalidation of the Election. As to the 1st Respondent this Court shall be proposing that he bears his own costs.

202. These are my final orders:-

a) The Petition is allowed in the following terms;-

(1) The Results for Qara Polling station declared in Form 35A dated 9th August 2017 is hereby nullified.

(2) The Declaration made on 10th August 2017 by the 2nd and 3rd Respondent that the 1st Respondent is the winner of the Wajir West National Assembly Election held on 8th August 2017 is invalid, Null and Void.

(3) A Certificate of this Determination shall be made under and in accordance with Section 86(1) of The Elections Act, and shall issue upon the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly.

(4) Costs to the Petitioner shall be borne by the 2nd Respondent and is capped at Kshs.1,500,000/= as Instruction fees.

(5) The 1st Respondent shall bear his own costs.

Dated, Signed and Delivered in Court at Nairobi this 2nd Day of March, 2018.

F. TUIYOTT

JUDGE

PRESENT;

Ngania h/b Ngatia for Petitioner

Issa & Mugo for 1st Respondent

Mukele& Abdullahi for 2nd & 3rd Respondent

Dennis - Court Clerk