



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

(CORAM: KANYI KIMONDO J)

ELECTION PETITION NO. 1 OF 2017

BERNARD KIBOR KITUR.....PETITIONER

VERSUS

ALFRED KIPTOO KETER.....1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....2ND RESPONDENT

JUDGMENT

1. This petition has a rich history. The petition was first presented to court on 5th September 2017 by *Robert Kibet Kemei*. On 23rd November 2017, and for considered reasons, the original petitioner was granted leave to *withdraw* from the petition. The current petitioner, *Bernard Kibor Kitur*, was *substituted* as the petitioner.

2. By dint of Rule 24 (5) of the Elections (Parliamentary and County Elections) Petition Rules 2017, the court directed that the substituted petitioner *shall stand in the same position, to the extent possible, and shall be subject to the same liabilities as the original petitioner*.

3. Only *one* affidavit that was filed *with* the petition. That is the supporting affidavit of *Robert Kibet Kemei* sworn on 5th September 2017. Four *witness affidavits* sworn by Bernard Kibor Kitur, Richard Sitienei, Gilbert Kemboi and Henry Kipkurui Yegon were filed on 8th September 2017. Granted that the results were *announced* on 9th August 2017, the four affidavits were undoubtedly filed *out* of time. In *Ruling No. 2* of 19th December 2017, the offending affidavits were all *struck out*.

4. In the interests of justice however, the court granted *leave* to the substituted petitioner to file a *supplementary affidavit* on terms: Save for his name and particulars, the affidavit was to the greatest *extent* possible to be *word for word*, without any additional *facts or evidence*, as the affidavit of the original petitioner sworn on 5th September 2017. The rationale was to ring-fence the fresh deposition; and, to ensure that it did not permeate the *borders* of the original petition or *alter* its character to the *prejudice* of the respondents.

5. At the hearing, the substituted petitioner relied on the *supplementary affidavit* sworn on 22nd December 2017. There were only three candidates in the election: the 1st respondent sponsored by the Jubilee Party; Isaac Kirwa Leting on the ticket of the Orange Democratic Movement; and, the petitioner who vied as an *independent candidate*.

6. On 24th April 2017, the petitioner participated in the Jubilee Party primaries. He lost to the 1st respondent by a wide margin: 19,389 votes to 152 votes. He was thus constrained to run as an independent candidate.

7. He said that the candidates presented their campaign schedules to the IEBC which issued a harmonized timetable. The rationale was to avoid conflicts during the campaigns. He said that the Returning Officer cautioned them that no candidate should campaign outside the schedule without his authority.

8. The witness testified that the 1st respondent abandoned the campaigns for the general election until 2nd August 2017 when he toured a place known as Choimim.

9. The witness referred to Legal Notice number 2693 published by the IEBC in the *Kenya Gazette* of 17th March 2017 (annexture *BKK1*). The official campaign period was to run from 1st June 2017 to 5th August 2017. The time was stipulated to be between 7:00 a.m. and 6:00 p.m. daily.

10. The petitioner claimed that the 1st respondent continued with his campaigns beyond the *gazetted* period. He claimed that the 1st respondent campaigned until 8th August 2017. The witness said he learnt from Robert Kibet Kemei, the original petitioner, that on 6th August 2017, the 1st respondent held meetings at Ainapng'etuny Centre, Labuiywo Trading Centre, View Point Trading Centre and Kapkoros Primary School in Kapchorwa Ward. He told the Court that the rally at Kapkoros "*was a mega rally*".
11. He also claimed that the 1st respondent, on the same date, at around 5:00 p.m., held another meeting at Stima Primary School in Ol'lessos Ward. On 7th August 2017 he held yet another rally at Simatwet Trading Centre in Tartar Sub-Location, Chepkunyuk Ward.
12. He said that on 6th August 2017, the original petitioner had visited the home of Reuben Terer. A few minutes later, a white Land Rover registration number KAV 010X passed outside the homestead. It was trailed by motorcycles. The vehicle belonged to the 1st respondent. The 1st respondent addressed a gathering at Labuiywo Trading Centre behind the market. The original petitioner claimed he attended the meeting. There were about 200 people. The original petitioner took a photograph of the 1st respondent addressing the meeting (exhibit BKK 4[a]).
13. The petitioner alleged that at the meeting at Labuiywo, the 1st respondent bribed voters. Members of the public were grouped into tens; and, given Kshs. 1,000 each. At the hearing, the petitioner said that upon receipt of the information, he called the Returning Officer, Mr. Resa (DW4). The latter advised him to report the matter to the police.
14. He reported the matter at Nandi Hills Police Station on 7th August 2017 at 3:00 p.m. under O.B. No. 26/7/8/2017. When cross examined, he said his affidavit had a typographical error showing "7" instead of "8". He claimed that the police solicited for money; he did not have any. He formed the impression that the police were beholden to the status of the 1st respondent.
15. At paragraphs 19 and 20 of his affidavit, the petitioner deposed that the 1st respondent and his agents visited tea estates and *treated* voters with bar soaps, sugar and other household goods. He was informed by Mr. Robert Kemei that those who opposed the activities were harassed; beaten; and, their phones destroyed or confiscated. When cross examined by *Mr. Nyaburi*, he said the treating occurred on 7th August 2017; on the eve of the election. He said the details were in affidavits struck out earlier by the court.
16. The petitioner also alleged that the declared results did not marry with the aggregated results in Forms 35A. He referred to the results at Ng'ame Nursery School. They show the polling centre had 469 registered voters. He garnered 238 votes at the station; Isaac Kirwa got 2 votes; and, the 1st respondent 234. There was 1 spoilt vote. The total votes cast were 475 and exceeded the number of registered voters. When cross examined on the matter, he admitted that the complaint was not specifically pleaded in the petition.
17. The petitioner also blamed the 2nd respondent for failing to enforce the harmonized campaign schedules; failing to conduct the election in compliance with the Act and Regulations; declaration of wrong results in Form 35B; and, condoning electoral offences by the 1st respondent. He said that as a result, he was prejudiced. Granted the circumstances, the outcome did not reflect the will of the people of Nandi Hills Constituency.
18. Under cross examination, he conceded that he did not know the original petitioner until 6th August 2017; and, that he obtained his telephone number from *WhatsApp*. The witness said he is the one who paid Kshs 500,000 as security deposit for the petition. He admitted that he did not produce a copy of the harmonized campaign schedule. He said that although the margin of votes between him and the 1st respondent was 10,051 votes, the illegal campaigns swayed voters to his opponent. He said that the four centres he referred to had 2,251 voters.
19. Regarding bribery, he said he "*never witnessed it [him]self...I was wearing the shoes of the original petitioner.*" He said he informed the Returning Officer of the transgressions through a *WhatsApp* group created by the Returning Officer. He said he wrote the message on 7th August 2017. He conceded that he did not lodge a formal complaint to the IEBC. He sent Mr. Resa the photograph. He then followed it up with a message. He said Mr. Resa called back at 11:00 a.m. and advised him to take up the matter with the police.
20. Under further cross examination, he said he got the information from Robert Kemei; and, the witnesses whose affidavits were struck out by the court. He could not tell the number of voters who attended the "illegal" campaigns.
21. He said by having *boda boda* outriders, the 1st respondent was attracting public attention. He said there was nothing wrong with the 1st respondent moving in the constituency or greeting people: the transgression was in holding *public meetings*. He admitted that the photograph (exhibit *BKK4a*) had no date or time on *its* face. He said the photograph was taken by the original petitioner from a *Huawei* phone. He did not have the phone's *mem card*.
22. The witness said the meetings at the four market centres on 6th August 2017 attracted voters from nearby polling centres. He said the "*late campaign had a big impact*". He testified that he had steadily closed the gap between him and the 1st respondent. He opined that were it not for the illegal campaigns, he would have been triumphant. That marked the close of the petitioner's case.
23. The 1st respondent relied on the replying affidavit dated 18th September 2017. At paragraph 9, he deposed that his campaigns were conducted in accordance with the law. He deposed further that he had constitutional rights to move around the constituency even after the lapse of the official campaigns. He denied that he campaigned on 6th and 7th August 2017 at Ainabng'etuny and Labuiywo centers. However, when he took the witness stand, he admitted that he visited the two centres and Stima School.
24. He testified that on 6th August 2017 he departed from his house at Ol'lessos at about 9:00 a.m. or 9:30 a.m. He went to Ainapng'etuny in Kapchoro ward. His mission was to visit a family friend, *Mzee Maiyo*. He said the *Mzee* had helped him "*in various community projects*".

He stayed there for 30 minutes. He then went to “see [his] school; there is a church, S.D.A, which [he] visited.” He said the day was a Saturday.

25. Under cross examination, he said he arrived at Mzee Maiyo’s house at 11:00 a.m. He was put to task why he used a longer route to get there. He said he opted for it because it was tarmacked. He believed the residents who saw his car crossing the river at Malaba were the ones who blocked the road on his way back.

26. He conceded that he met some people at Ainapngetyuny. They blocked the road and started waving. They were saying “*Mheshimiwa*”. He alighted from the vehicle. He said he told them that the campaign had stopped, but they insisted that he addresses them. He claimed he declined but told them: “*You may remain peaceful.*” He said he was concerned about tensions at the border of Kupele.

27. He said he was standing next to his car when he addressed the people. When cross examined further, he said that Thomas Kiyeng and Joseph Kirui were “*among the 10 people*”. He said there “*were two or three boda bodas*”.

28. He said he then proceeded to Labuiywo; a few kilometers away. The same thing happened. Some youths blocked the road and wanted him to address them. He said there were a few people because it was a Sunday. He said he told them to wait for Election Day; and to remain peaceful. He said he addressed them adjacent to his car.

29. He admitted that he was the one in the picture, exhibit *BKK4a*; but he denied that it was taken on 6th August 2017. He said the background in the picture shows a different setting. He denied that he had *boda boda* outriders. He then proceeded to his home through Kapkoros road; a shortcut that runs through tea estates.

30. He said he was only accompanied by his driver; and, that he did not have any campaign materials. When cross examined by counsel for the petitioner, he denied that he was in the company of Emanuel Ruto, his Personal Assistant; or, Abraham Kipkemboi, his constituency manager. He admitted that on 5th August 2017 he went to Narok to prop up support for another candidate in Emurua Dikir constituency. He said he returned to Eldoret in the evening. He denied that he concentrated on such campaigns and neglected his own campaign; or, that he campaigned outside the stipulated time because “the ground had shifted”.

31. He said that View Point and Kapkoros are along the road. He did not stop at the two areas. He said it was a Sunday; and, and “*there were no people*”.

32. He said that thereafter, he went to Stima School. He is the patron of the school. He testified that there were “*very few people there, 3 or 4, who live next to the school.*” They said hello to him. He said it was not a political event. He then proceeded to his brother’s house. He stayed there until 8:30 p.m. when he returned back to his residence.

33. But when cross examined further, he said he left Labuiywo “*towards one O’clock*”; and, that he reached his brother’s house at 5:00 p.m. in time for dinner. Pressed further on his inspection of Stima School, he said “*there were 10 or 15 people there.*” He then said “*It is my project through KPLC. The people there were 9 or 10. I found the people – I did not call them. They asked about the school*”

34. The 1st respondent said that he was in Eldoret on 7th August 2017. He claimed that he was busy with logistics; and, did not campaign in the three areas listed in the petition. He said he adhered to the campaign schedule and the *Electoral Code of Conduct*. The witness denied that his margins increased in the four centres that he visited on 6th August 2017. He said that at Stima School, it is in fact the petitioner who won.

35. Regarding the allegations of bribery and voter intimidation, he dismissed them as hearsay. He refuted that his agents dished out money. He was unaware of treating of voters; or, confiscation of items by police from a *Probox* motor vehicle.

36. He denied that he intimidated the police or witnesses. He also denied that he met the original petitioner or some witnesses at Boma Inn, Eldoret. Upon further cross examination he conceded that he first met Robert Kemei (the original petitioner) back in 2013. He said he did not know why he withdrew the petition. He denied that he paid him a bribe of Kshs 300,000 to do so.

37. His parting shot was that the elections were conducted in accordance with the law; and, the results reflected the will of the people of Nandi Hills constituency.

38. DW2 was Lilckon Ng’etich. He relied largely on his deposition sworn on 18th September 2017. He testified that on 6th August 2017, he was shopping at Labuiywo. He said no one had summoned him there. The 1st respondent’s vehicle passed by. He said that people blocked the road. The vehicle stopped. DW2 went there. The 1st respondent told the people: “*sitwahunubia kwa sababu muda wa campaign umeisha*”. He said that the 1st respondent never solicited for votes. DW2 said that he never witnessed any bribery or intimidation.

39. Under cross examination, he said that the petitioner had sent out a text message on 7th August 2018 asking for votes. Pressed on the matter, he conceded he received the message from a source styled *Uchaguzi* but the body of the message referred to Bernard Kitur (the petitioner). He said the 1st respondent arrived at Labuiywo at “*lunchtime and stopped at Grama Hotel next to the road.*” He said the 1st respondent was accompanied by his driver.

40. He admitted that between 1st June 2017 and 5th August 2017 he was only aware of two campaign meetings by the 1st respondent: at Nandi Hills Town during a presidential rally in July; and, at a place known as Cherobon. Regarding claims of bribery, he denied that he received Kshs 1,000 from agents of the 1st respondent on 6th August 2017.

41. When he was shown the photograph marked *BKK4a*, he said he could not recognize the setting. He said he could not recall how the 1st respondent was dressed on that day. But he admitted that Robert Kemei (the original petitioner) was at Labuiywo before the 1st respondent arrived. He said the 1st respondent stopped at Labuiywo for only ten minutes. He also disputed that the 1st respondent supported him when he ran for the seat of Member of the County Assembly.
42. DW3 was Thomas Kiyeng. On 6th August 2017, he was at Ainapng'etuny Centre. At about 12:00 p.m., he saw the 1st respondent's car approaching. The 1st respondent came out and said "*Nafasi ya siasa hainiruhusu; naomba mkae kwa amani*". He said the 1st respondent was accompanied by his driver; and, that the address took only 3 minutes. He said no handouts were given.
43. Upon cross examination he said he is a village elder; and, that his home is 50 metres from the centre. He said that young people blocked the 1st respondent's car. The car emerged from the direction of Tinderet; a place called *Kwa Fredrick*. He denied that he organized the meeting at Mzee Maiyo's home or at Ainapng'etuny Centre. He denied seeing any *boda boda* riders. He denied receiving Kshs 5,000 from Keter; or, a similar sum from Abraham Kemboi on 7th August 2017.
44. He said he only witnessed the 1st respondent campaigning in July 2017 at Ainapng'etuny. He denied receiving Kshs 10,000 from the 1st respondent. He said he did not know of any other route from Ainapng'etuny to Ol'lessos except the main tarmac road. He insisted that he was not accompanied by another person when he swore the affidavit in this matter. He also said that he did not attend a meeting at Boma Inn with the 1st respondent.
45. Towards the end of his testimony, the witness claimed he had received threatening phone messages in the course of the trial. He reported the matter at Eldoret Police Station under OB No. 102/17/1/2018. The court issued a warning that threats to a witness constitute serious offences against the administration of justice.
46. That marked the close of the 1st respondent's case.
47. DW4 was Peter Resa. He was the Returning Officer for the impugned election. In his evidence in chief, he relied on the affidavit sworn on 14th September 2017. He said that the elections were conducted in accordance with the Constitution, the Independent Electoral and Boundaries Commission Act, the Elections Act and the Regulations thereunder.
48. He said that all the candidates executed the Code of Conduct; and, undertook to follow IEBC's harmonized campaign schedule. He said that none of the agents at the 121 polling stations contested the accuracy of the results. He said the averments by the petitioner at paragraph 40 were "wholly unfounded and deliberately misleading." Furthermore, all the candidates were present at the tallying centre. He claimed that both Mr. Leting and Mr. Kitur (the petitioner) publicly conceded defeat.
49. Under cross examination, he conceded there were some irregularities in the forms. For example, what appears in form 35B for *Ng'ame Nursey School* is meant to be for another station, *Lelwak Primary School*. He said that it explains the excess number of votes cast *vis-à-vis* the registered voters. He said that the duplication gave the petitioner an extra 121 votes while 1st respondent lost 36. He explained that the Presiding Officer at Lelwak got Forms 35As for Nandi. But Ng'ame's Presiding Officer also got a similar batch. One Form 35A contains a handwritten name.
50. He became aware of the anomaly. He advised that a fresh form 35B be prepared. But due to public pressure, the Chief Agents agreed that he declares the results as they were. He denied that the votes cast exceeded the number of the registered voters. He disputed the claim that he was biased against any candidate. He said elections are not 100% perfect. He added that the error at Ng'ame Nursery in fact favoured the petitioner; and, did not affect the overall results.
51. The witness however conceded that the results for Nduruto Primary School (polling Station 054) were omitted in the print out. However, the results for that station were 197 votes for the 1st respondent; 174 votes for the petitioner; and, 1 vote for Letting. There were 3 rejected votes. Valid votes cast at Nduruto were 372 out of 445 registered voters.
52. DW4 said that the totals agree with the petitioner's analysis. However, he said the complaint did not form part of the petition. In cross examination, he said the complaint in the petition is general; and, did not expressly mention Ng'ame or Lelwak polling stations.
53. He conceded that he had set up a *WhatsApp* group for the candidates to ease communication. But he insisted that it remained a *social media*; and, not an *official* channel of communication. Candidates were supposed to write formal letters of complaint as per the *Electoral Code of Conduct*. There were also established *ad hoc* peace committees. In particular, he denied receiving any official complaint or findings relating to the allegations in paragraphs 8 to 38 of the petition.
54. Pressed by Mr. Magut, he conceded that he used the *WhatsApp* to remind the candidates to follow the notice from IEBC requiring removal of posters after the elections.
55. The witness admitted that he received a telephone call from the petitioner on 7th August 2017 informing him that the 1st respondent was campaigning out of time. The petitioner had also posted the message on *WhatsApp*. He advised him to report the matter to the police; and, to write a complaint to his office. He said he never received the letter.
56. Under cross examination, by Mr. Lang'at, he said that on 6th, 7th and 8th August 2017 he had civic educators in Ainapng'etuny and Labuiywo. They never notified him of any complaint. On further examination by Mr. Magut he said that campaigning closed at 6:00 p.m. on 5th August 2017. In his opinion, "campaign" means "requesting for votes".

57. DW4 said he was not an expert on the culture of the people of Nandi. He opined that “greeting people” is not campaigning; and, that the lives of the candidates must go on. He however admitted that the mere absence of a public address system does not mean there can be no campaign. He denied that any of the three candidates had a special relationship with him. He said the poll was free, fair and credible.

58. That marked the close of the 2nd respondent’s case.

59. All the parties have filed written submissions. Those by the petitioner were filed on 25th January 2018 together with a list of authorities. The 1st respondents’ submissions were also filed on 25th January 2018 together with a list and digest of cases. The 3rd respondent filed submissions on the same date. A list and digest of authorities was annexed.

60. On 31st January 2018, all learned counsel for the parties addressed the court on those submissions. I am greatly indebted to all the learned counsel for their elaborate submissions; diligence; and, courtesy to the Court. If I do not make direct reference to all the cited cases and materials, it is not for their lack of relevance.

61. I have considered the pleadings, depositions, witness statements, materials and oral evidence. Regard has also been had to the written and oral submissions.

62. At the pre-trial conference, the following broad *five* issues were framed for determination:

i. *Whether the 2nd respondent conducted the election for Nandi Hills Constituency on 8th August 2017 in accordance with the Constitution; the Elections Act; and, Regulations.*

ii. *Whether the 1st respondent committed election offences that warrant the prayers in the petition.*

iii. *Whether the 1st respondent was validly elected as the Member of the National Assembly for Nandi Hills Constituency.*

iv. *Whether the petitioner is entitled to the reliefs pleaded in the petition.*

v. *Who will bear the costs of the petition?*

63. Issues (i) to (iv) are generally subsumed under the *third* one: In a synopsis, the court is being invited to determine whether the 1st respondent was *validly* returned as the Member of National Assembly for Nandi Hills Constituency.

64. I will commence with an abstract of the *relevant* legal regime. In the context of this petition the constitutional design of a *free and fair* election looms large. An auxiliary issue touches on *election offences*; and, the meaning of a *campaign*. In particular, what is the legal effect of campaigning *outside* the period *gazetted* by the IEBC? Does it prejudice a *fair election* as decreed by Articles 81 and 86 of the Constitution?

65. Recent amendments to the Elections Act repealed Part VI (sections 56 to 73) of the Act. In its place, the National Assembly enacted the Election Offences Act 2016. It took effect on 4th October 2016.

66. An *election court* is no longer required to determine with finality the *culpability* of an offending party. Section 87 of the Elections Act provides that where the court finds that an election offence *may* have been committed, it shall transmit an *order* to the Director of Public Prosecutions for investigation and prosecution.

67. An election is a *continuum* that starts *before* polling day; spills over into management of the election by the IEBC; and, may end up in the *election court*. Along that journey, various institutions have been granted certain statutory powers. See generally *International Centre for Policy & Conflict and 4 others v Uhuru Kenyatta and others*, Nairobi, High Court Consolidated Petition 552 of 2012 [2013] eKLR, *George Wanjohi v Steven Kariuki & others*, Supreme Court, Petition 2A of 2014 [2014] eKLR.

68. The IEBC, for example, *superintends* over the conduct of parties and candidates during the election. It is empowered to enforce certain aspects of the *Electoral Code of Conduct*. The Commission is bestowed with enormous powers of criminal and civil nature. For instance, under section 107 of the Elections Act a member of the Commission or an officer designated by the commission can *order* for the *arrest* of a person who commits an election offence. The section also donates power to the commission to prosecute offences under the Act. Besides, the Commission can bar a candidate from participating in the ensuing poll.

69. Article 1 of our Constitution stridently proclaims the *sovereignty of the people*. See generally *Raila Odinga & another v IEBC & 2 others* Nairobi, Supreme Court, Presidential Election Petition 5 of 2013 [2013] e KLR, *Kakuta Maimai Hamisi v Peris Pesi Tobiko and others* Nairobi High Court, E.P. 5 of 2013 [2013] eKLR, *Gideon Mwangangi Wambua vs Independent Electoral and Boundaries Commission and others* Mombasa, High Court E.P. 4 of 2013 [2013] eKLR.

70. Articles 81 and 82 on the other hand demand for free, fair, transparent and credible polls.

71. These principles were explained well by Majanja J in *Richard Kalembe Ndile and another Vs Patrick Musimba Musau et al*, Machakos, High Court E.P. 1 of 2013 (consolidated with E.P. 7 of 2013) [2013] eKLR-

“The golden thread running through the Constitution is one of the sovereignty of the people of Kenya articulated in Article 1 of the constitution. The exercise of this sovereignty of the people is anchored by other rights and fundamental freedoms such as the freedom of expression, association and freedom of access to information which are to be found in Articles 33, 36, and 35 respectively of our constitution. In addition, Article 38 articulates political rights which are given effect through the electoral system set out in chapter seven titled ‘Representation of the people’.

“Under our democratic form of government, an election is the ultimate expression of sovereignty of the people and the electoral system is designed to ascertain and implement the will of the people. The bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect whenever possible.”

72. Article 81(e) of the Constitution decrees as follows:

“The electoral system shall comply with the following principles-

(e) free and fair elections, which are-

(i) by secret ballot;

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

(iii) conducted by an independent body;

(iv) transparent;

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

73. The Elections Act 2011 (as amended from time to time); and, the Regulations thereunder are the legislation contemplated by Article 82.

74. Prior to its amendment, section 83 of the Elections Act provided as follows-

“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”.

75. I am alive that the Act was amended after the conduct of the impugned election. The amendment is thus *irrelevant* to the present dispute. I concur with Majanja J in Jackton Ranguma v IEBC & 2 others, Kisumu High Court E.P. 3 of 2017 [2018] eKLR, that the amendments had no *retroactive* effect.

76. I will thus apply the law as it existed on the date of the impugned election. Section 83 is couched in *negative* language to emphasize the *caveat* placed on the election court. There is in it a *rebuttable presumption* in favour of the respondents that the election was conducted properly and in accordance with the law. It is also implied by that provision that elections are not always perfect. See Steven Kariuki v George Mike Wanjohi and others Nairobi, High Court Petition No 2 of 2013 [2013] e KLR.

77. Consequently, *not* all malpractices will lead to nullification of the result. See the dissenting opinion of Njoki SCJ in Raila Odinga & another v IEBC & 2 others, Supreme Court of Kenya, Presidential Petition 1 of 2017 [2017] eKLR, Morgan and others v Simpson and another [1974] 3 ALL ER 722.

78. The court must carefully *weigh* the impact of the alleged irregularities or malpractices on the *outcome* of the election. See James Omingo Magara v Manson Nyamweya and others Kisumu, Court of Appeal, Civil Appeal 8 of 2010 [2010] eKLR; Kakuta Maimai Hamisi v Peris Pesi Tobiko and others Nairobi High Court, E.P. 5 of 2013 [2013] eKLR.

79. The parties to the petition are also *bound* by their pleadings. See Mahamud Sirat Ali Hassan Abdirahman & 2 others, Nairobi High Court, E.P. 15 of 2008, Steven Kariuki v George Mike Wanjohi and others Nairobi, High Court Petition No 2 of 2013 [2013] e KLR Jackton Ranguma v IEBC & 2 others, Kisumu High Court E.P. 3 of 2017 [2018] eKLR.

80. The formal responses to the petition by the 1st and 2nd respondents *join issues* on all the allegations in the petition. The respondents have thus put the petitioner to strict proof. The *legal burden of proof* remains firmly on the shoulders of the petitioner: the petitioner must lead cogent evidence to impeach the poll. The cardinal precept of the law of evidence is that he who alleges must prove; and to the required standard of proof. See section 107 of the Evidence Act. See generally Onalo v Ludeki and another [2008] 3 KLR (E.P) 614.

81. The burden of proof was explained well by our Supreme Court in Raila Odinga and others v Independent Electoral and Boundaries Commission et al (supra):

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary. This emerges from a long standing common law approach in respect of

alleged irregularity in the acts of public bodies. Omnia praesumuntur rite et solemniter essa acta: all acts are presumed to be done rightly and regularly. So the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law".

82. The Supreme Court's propositions were not entirely novel. The Court was merely restating a view long held by the High Court in election dispute settlement. See Munyao v Munuve et al (2008) KLR (E.P) 20. In Ole Lempaka v Komen and others (2008) 2 KLR (E.P.) 83, the learned judges stated that each paragraph of the petition alleging breach of law, rule or regulation or which complains of any malpractice must be proved by evidence. See also Halsbury's Laws of England 4th Ed. Vol. 15 para 670, Hawkins v Powell [1911] 1 KB 988.

83. An election petition must succeed or fail on its pleadings and evidence. All that is meant by that *onus probandi* is that first, the petitioner must proffer adequate or sufficient evidence. Secondly, the evidence must be of a persuasive quality. It is then that the respondents are called to rebut it. In the end, the petitioner must show that the preponderance of evidence inures in his favour. If he fails to rise to that standard, the petition must be dismissed.

84. I remain alive that the *evidential burden* keeps shifting in the course of the trial. This was succinctly captured by the Supreme Court in Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others, Nairobi, Supreme Court, election petition 5 of 2013 [2013] e KLR:

"The petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden".

85. The *standard of proof* in election petitions is *higher* than a balance of probabilities in ordinary civil cases but *not* beyond reasonable doubt as required in criminal cases. See Mbowe v Eliufoo [1967] E. A. 240, Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others, Nairobi, Supreme Court, election petition 5 of 2013 [2013] e KLR, Muliro v Musonye (2008) 2 KLR (E.P.) 52, Rishad Amana v Independent Electoral and Boundaries Commission and 2 others, Malindi, High Court election petition 6 of 2013 [2013] eKLR.

86. I will now return to the matter at hand. From the evidence, the election generally proceeded *efficiently* on polling day. However, there were serious anomalies in the *records* of two polling stations. The results in Form 35B for Ng'ame Nursey School are meant to be for another station, Lelwak Primary School. Consequently, the number of valid votes (474 votes) exceeds the number of 469 registered voters. The returning officer conceded that the mix-up gave the petitioner an extra 121 votes while 1st respondent lost 36.

87. The results for Nduruto Primary School (polling Station 054) were *omitted* in the print out of Form 35B. The error affected 197 votes for the 1st respondent; 174 votes for the petitioner; and, 1 vote for Isaac Letting. There were 3 rejected votes. Valid votes cast were 372 out of 445 registered voters.

88. I accept the 1st respondent's submissions that the matter was not pleaded with *precision* in the petition. I stated earlier that the parties are bound by their pleadings. Mahamud Sirat Ali Hassan Abdirahman & 2 others, Nairobi High Court, E.P. 15 of 2008, Steven Kariuki v George Mike Wanjohi and others Nairobi, High Court Petition No 2 of 2013 [2013] e KLR Jackton Ranguma v IEBC & 2 others, Kisumu High Court E.P. 3 of 2017 [2018] eKLR.

89. But to be fair to the petitioner, I have carefully studied paragraph 30 of the petition. In sub-paragraphs (a) and (d) of the heading titled Transgressions of the 2nd respondent, the petitioner cites IEBC's failure to conduct a *proper* election; and, "*declaration of wrong results in Form 35B in the final tally of the aggregate vote.*"

90. To my mind, the irregularity in question was *generally* pleaded in the petition. Considering the *entire* petition and *supporting affidavit*, the respondents cannot be heard to say that they did not know the case they were confronting in this petition. See Sammy Kemboi Kipkeu v IEBC & 2 others, Eldoret High Court E.P. 2 of 2017 (unreported).

91. The point however is that the main *beneficiary* of the *irregularity* at Ng'ame Nursery School was the petitioner. In the end, the anomalies in Forms 35A and 35B in the three polling stations of Ng'ame Nursery School, Lelwak Primary School and Nduruto Primary School did not *materially* affect the final results. There remained a *wide gulf* of votes between the petitioner and the 1st respondent. See generally James Omingo Magara v Manson Nyamweya and others Kisumu, Court of Appeal, Civil Appeal 8 of 2010 [2010] eKLR; Kakuta Maimai Hamisi v Peris Pesi Tobiko and others Nairobi High Court, E.P. 5 of 2013 [2013] eKLR.

92. I will now turn to the alleged *election offences* of bribery and treating of voters. The petitioner alleged that at Labuiywo, the 1st respondent *bribed* voters. The members of the public were clustered into tens; and, given Kshs. 1,000 each. The petitioner also testified that the 1st respondent and his agents visited tea estates and *treated* voters with bar soaps, sugar and other household goods. The 1st respondent and his witnesses denied the accusations.

93. I find there was *no* cogent or credible evidence at the trial to back up the allegations. It was also not lost on me that they were based largely on *hearsay*. Furthermore, the allegations were of a *criminal* nature. The standard of proof required was *beyond reasonable doubt*. See Moses Masika Wetangula v Musikali Nazi Kombo & 2 others, Supreme Court Petition 12 of 2014 [2015] eKLR, Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others, Nairobi, Supreme Court, election petition 5 of 2013 [2013] eKLR, Halsbury's Laws of England 4th Ed. Vol. 15 para 695, Simon Nyaundi Ogari and another v Onyancha and others [2008] KLR.

94. My *partial* answer to issue number ii) framed earlier is that there is *scantiness* of evidence to show that the 1st respondent bribed or treated voters as *pleaded* in the petition.

95. That leaves the elephant in the room: Did the 1st respondent conduct *unlawful* campaigns between the 6th and 8th August 2017? If the answer is in the affirmative, did it *affect* the poll outcome?

96. I will commence by reaffirming some principles of the law of evidence. The petitioner is obligated to discharge the *legal* or initial *burden of proof* before the respondents are invited to bear the *evidential burden*. See *Raila Odinga and others v Independent Electoral and Boundaries Commission and 3 others* [supra]. I remain alive that the *evidential burden* thus keeps shifting in the course of the trial.

97. I am satisfied that the petitioner discharged the initial burden in three ways: First, he produced *Legal Notice* Number 2693 published by the IEBC in the *Kenya Gazette* of 17th March 2017 (exhibit *BKK1*). Under the Legal Notice, the *official* campaign ran from 1st June 2017 to 5th August 2017. The time was stipulated to be between 7:00 a.m. and 6:00 p.m. daily.

98. Secondly, the allegations were pleaded with *precision* at paragraphs 16 to 23 of the petition; and, paragraphs 10 to 21 of the original affidavit of *Robert Kibet Kemei* sworn on 5th September 2017 in support of the petition. It is instructive that although the original petitioner was allowed to *withdraw* from the petition, the petition and its supporting affidavit remained *intact*. That is the petition that was taken over by the present petitioner on terms that I discussed earlier.

99. Thirdly, the present petitioner in his *oral evidence* placed the 1st respondent at the *scenes* of the alleged campaigns in Ainapng'etuny Centre, Labuiyo Trading Centre and Stima School in Ol'lessos.

100. True, the petitioner had received the information from the original petitioner. Learned counsel for the 1st respondent and the IEBC thus submitted it was *hearsay*. I disagree. As I have stated, the sworn affidavit of the initial petitioner *remains* on the *record*. The 1st respondent had responded to it in his response to the petition and in his replying affidavit.

101. In the response to the petition, the petitioner sought to rebut the averments of the original petitioner. At paragraph 4, he responds to four witness affidavits by Bernard Kibor Kitur (the current petitioner), Richard Sitienei, Gilbert Kipngetch Kemboi and Henry Kipkurui Yegon sworn on 6th September 2017 and filed in court on 8th September 2017. As stated earlier, the affidavits were struck out primarily for being filed out of time.

102. The petitioner's supplementary affidavit was built atop the original deposition of the initial petitioner. I accordingly find that the *evidential burden* shifted to the 1st respondent in the course of the trial.

103. So what was the *rebuttal*? The 1st respondent conceded that he visited or passed by those areas. But he claimed that he did not campaign. On 6th August 2017 he departed from his house at Ol'lessos at about 9:00 a.m. or 9:30 a.m. He went to Ainapng'etuny in Kapchoro Ward; ostensibly to visit a family friend, *Mzee Maiyo*. There is a shorter route but he opted to take the *longer* route or the tarmac road. He arrived at Mzee Maiyo's house at 11:00 a.m. He only stayed there for 30 minutes.

104. The 1st respondent then said he went to "*see [his] school; there is a church, S.D.A, which [he] visited*". He said it was a *Saturday*. I have looked at the calendar. The 6th of August 2017 fell on a *Sunday*. It remains possible but highly improbable that the Seventh Day Adventist Church was in session.

105. The 1st respondent *conceded* that he met some people at Ainapng'etuny. They blocked the road and started waving. They were saying "*Mheshimiwa*". He alighted from his Land Rover. He told them that the campaign had ended but they insisted that he addresses them. He claimed that he declined but told them: "*you may remain peaceful*." He said he was concerned about tensions at the border of Kupele. He said he was standing next to his car.

106. But when cross examined further, he said that Thomas Kiyeng (DW3) and Joseph Kirui were "*among the 10 people*". He said there "*were two or three boda boda*" riders. That was confirmed by DW3. The latter said that the 1st respondent alighted from his vehicle and said "*Nafasi ya siasa hainiruhusu naomba mkae kwa amani*". He said that the address took about 3 minutes; and, that no handouts were given.

107. I found DW3 to be *evasive*. Although he is an old man, a village elder; and, resides only 50 metres from the centre, he feigned complete ignorance of the existence of the shorter route from Ol'lessos to Ainapng'etuny.

108. The 1st respondent then proceeded to Labuiyo trading centre; a few kilometers away. A similar scene unfolded. Some youths blocked the road and demanded that he addresses them. From that evidence, I can only deduce that either the vehicle was moving slowly; or, that the youth saw it in good time to block the road.

109. The 1st respondent said there were a few people at Labuiyo Centre because it was a Sunday. He did not say how many people approached or surrounded his car. He alighted. He said he told them to "*wait for Election Day; and to remain peaceful*".

110. There is then the evidence of DW2, Lilkon Ng'etich. He was shopping at Labuiyo. The witness *admitted* that Robert Kemei (the original petitioner) was at Labuiyo before the 1st respondent arrived. DW2 said that people blocked the road. The vehicle stopped. The 1st respondent told the people: "*sitwahutubia kwa sababu muda wa campaign umeisha*". He said that the 1st respondent never solicited for votes.

111. The evidence of DW2 is *material* because it *confirmed* that Robert Kemei (the original petitioner) was at Labuiyo at the time the 1st respondent got there. The original petitioner had deposed that the 1st respondent addressed a meeting behind the market. He took the disputed

photograph.

112. The 1st respondent then proceeded to his home through Kapkoros road. It was a shortcut through *tea estates*. View Point and Kapkoros are along the road. He did not stop at the two areas. He said it was a Sunday; and, and “*there were no people*”.

113. He then went to Stima School. He is the patron of the school. He testified that there were “*very few people there, 3 or 4, who live next to the school.*” They said hello to him. He said it was not a political event. He then proceeded to his brother’s house. He stayed there until 8:30 p.m. when he retired to his house.

114. Throughout the journey, he was accompanied by his driver. The 1st respondent said he had no campaign materials or a public address system.

115. There was no credible evidence that the 1st respondent continued with campaigns on 7th August 2017 at Simatwet Trading Centre in Tartar Sub-Location, Chepkunyuk Ward. DW2, Lilckon Ng’etich, had also claimed that the petitioner was campaigning through *short text message service*. But he conceded that the message he received on 7th August 2017 was from an unknown source styled *Uchaguzi*. The body of the message referred to Bernard Kitur (the petitioner).

116. The petitioner also told the Court that the 1st respondent had campaigned at View Point Trading Centre and Kapkoros Primary School in Kapchorwa Ward. He alleged that the rally at Kapkoros “*was a mega rally*”. I however find that there was a paucity of evidence about the rally by the 1st respondent at Kapkoros.

117. I am however *satisfied* on a preponderance of the evidence that on 6th August 2017 the 1st respondent *addressed* a gathering of *not less than ten people* at Ainapng’etuny shopping centre. He addressed another gathering at Labuiywo. He also inspected a school project at Stima School in Ol’lessos Ward where he addressed yet another group of between 10 to 15 people.

118. I also find that the 1st respondent was *not* entirely *candid* about the *numbers* of people in the meetings. He deliberately tried to *understate* them. For example, he said that at Stima School there were “*very few people there, 3 or 4, who live next to the school*”. But when pressed by counsel for the petitioner, he conceded that “*there were 10 or 15 people there. It is my project through KPLC. The people were 9 or 10.*”

119. The Returning Officer (DW4) was emphatic that the official campaigns closed on 5th August 2017 at 6:00 p.m. Any campaigns on 6th August 2017 were undoubtedly *unlawful*. It is not clear why the 1st respondent did not do such a tour within the *gazetted* time. It is however not lost on me that on 5th August 2017 (which was well within time) the 1st respondent spent his time in Narok campaigning for another candidate in Emurua Dikir constituency. The 1st respondent denied that he neglected his own campaign; or, that he campaigned out of time because “*the ground had shifted*”.

120. A political campaign is simply an organized and active programme geared towards winning elections. The absence of a public address system or materials did not prevent the 1st respondent from addressing the three gatherings at Ainapng’etuny Centre, Labuiywo Trading Centre and Stima School in Ol’lessos. He did not need to expressly *ask for votes*. By stopping in those centres *less than 48 hours* to the poll; and, *addressing* the public gathered there, he created a *spectacle*; and, he kept his *brand* alive.

121. Mr. Keter was the *sitting* member of the National Assembly. That is why there was a shout of *Mheshimiwa*. He conceded that he *knew* the official time for campaigns had closed. I have reached the inescapable conclusion that this was not Keter as a *private citizen* on a casual visit to see *Mzee Maiyo*: this was *politician* Keter doing a last minute *sweep* of the constituency. It was a brazen one-day tour through key trading centres and a school. It started at 9:00 a.m. through 5:00 p.m. It was a poorly disguised *campaign*. It was a clever strategy contrived to take full advantage of his competitors who had retired from the campaign trail.

122. Whether or not the unlawful campaigns had an *impact* on the number of votes is *academic*. Learned counsel for the 1st and 2nd respondents argued that even if all the votes obtained by the 1st respondent in those areas were disregarded; or, even added to the petitioner, they would make *no* difference. That submission is prosaic and a selfish guess.

123. The Returning Officer confirmed that *all* the candidates had executed the *Electoral Code of Conduct* under the Second Schedule to the Elections Act. The code is binding upon candidates throughout the election period. The 1st respondent conceded he had *signed* the *Electoral Code of Conduct*. The IEBC in the Legal Notice directed that campaigns *shall* cease on 5th August 2017 at 6:00 p.m. That was at least 48 hours before the poll. The use of the word *shall* make it *mandatory*.

124. Under the *Electoral Code of Conduct* paragraph 6 (k) (iii), the candidates were obligated to “*implement the orders and directions of the commission.*” An example of a *direction* is the one in Legal Notice number 2693 published by the IEBC in the *Kenya Gazette* of 17th March 2017. Section 20 (2) of the Election Offences Act provides that *any person who contravenes the Electoral Code of Conduct commits an offence*.

125. I find that an *electoral malpractice* of a criminal nature *may* have occurred. The election court is *not* supposed to make any conclusive findings on the *culpability* of the 1st respondent. The less I say about it the better. Under section 87 (2) and (3) of the Elections Act, I direct that this judgment and order be transmitted to the Director of Public Prosecutions for further *investigations*.

126. For purposes of this petition, I find that the 1st respondent’s conduct tainted the *fairness* and *integrity* of the poll. By campaigning *beyond* the stipulated time, the contest was *no* longer *fair*; the ground became *uneven*; and, the other two candidates were left holding the

short end of the stick.

127. The IEBC was not a virtuous virgin either. The Constituency Returning Officer was notified of the transgressions on the morning of 7th August 2017. The Returning Officer (DW4) admitted that he received a telephone call from the petitioner at about 11:00 a.m. on 7th August 2017. The petitioner informed him that the 1st respondent was campaigning *out of time*. The petitioner also posted the message and a photograph on *WhatsApp*.

128. I find it to be self-serving for the Returning Officer to *downplay* communication on the *WhatsApp* Group that he had created for the candidates. True, the petitioner should have filed a formal complaint. But this was a *day* to the contest; and, the Returning Officer conceded it was hectic. He instead led the petitioner on a goose chase to the police. To be fair to him, he instructed civic educators in Ainapng'etuny and Labuiywa to look into the matter. He said their answer was negative. In a synopsis, the Returning Officer was playing impotent despite his extensive powers under the Act that I mentioned earlier.

129. It follows that my answer to issue number i) framed earlier is in the *negative*: The 2nd respondent did *not* conduct the election for Nandi Hills Constituency in accordance with the Constitution; the Elections Act; and, Regulations.

130. It must follow as a corollary that issue number iii) is also answered in the *negative*. The 1st respondent engaged in *unlawful campaigns* which tainted the *fairness* and *integrity* of the poll.

131. Granted those circumstances, I find that the 1st respondent was *not* validly elected as the Member of the National Assembly for Nandi Hills Constituency. Issue number iii) is thus answered in the *negative*.

132. My answer to issue number iv) is in the *affirmative*: The petitioner has *partially* proved his case to the required *standard of proof*. The petitioner has sufficiently challenged the *integrity* of the poll. The fitting remedy is to *nullify* the poll; and, to grant the people of Nandi Hills Constituency a fresh opportunity to elect their representative to the National Assembly.

133. I thus make the following final orders:

- a. That a *declaration* is hereby issued that the election held on 8th August 2017 for the *Member of National Assembly* for Nandi Hills Constituency was *not* free and fair.
- b. That the 1st respondent, Alfred Kiptoo Keter, was *not* validly elected as the *Member of the National Assembly* for Nandi Hills Constituency.
- c. That the IEBC shall hold a *fresh election* for the *Member of National Assembly* for Nandi Hills Constituency in accordance with the Constitution, the Elections Act and the Regulations thereunder.

134. That leaves issue number v) on costs. Costs ordinarily follow the event. They are also at the discretion of the Court. Section 84 of the Act provides that an *election court shall award the costs of and incidental to a petition and such costs shall follow the cause*. Rule 30 (1) (b) of the Elections (Parliamentary and County Elections) Petition Rules 2017 empowers the court to set *the maximum of costs payable*.

135. If the Court does not determine the costs, then the Registrar of the Court is required by Rule 31 to tax such costs. I grant the *current petitioner* costs. The *original* petitioner is *not* entitled to any costs. Those costs shall be met in equal shares by the *1st and 2nd respondents*.

136. The evidence in this petition was straightforward. The litigation did not raise complex questions of law. The evidence of the *five witnesses* was taken in *three consecutive* days. The maximum costs shall thus be Kshs. 1,000,000. The Deputy Registrar of this Court shall tax the *Bill of Costs* under Rule 31.

137. Lastly, the security deposit of Kshs. 500,000 paid into court shall be refunded to the current petitioner subject to deduction of any unpaid court fees.

138. A certificate of determination of this petition required under section 86 of the Elections Act shall issue forthwith.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 1st day of March 2018.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Mr. Magut for the petitioner instructed by Magut & Company Advocates.

Mr. Lang'at with him Mr. Kibii and Mr. Misoi for the 1st Respondent instructed by Mburu Maina & Company Advocates.

Mr. Misoi holding brief for Mr. Melly for the 2nd Respondent instructed by Iseme, Kamau & Maema Advocates.

Mr. J. Kemboi, Court Clerk.