REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

ELECTION PETITION NO. 1 OF 2017

IN THE MATTER OF THE ELECTIONS ACT NO. 24 OF 2011 LAWS OF KENYA AND THE ELECTIONS (GENERAL) REGULATIONS, 2012 AND ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITIONS RULES 2017

AND

IN THE MATTER OF THE PARLIAMENTARY (NATIONAL ASSEMBLY) ELECTIONS CONDUCTED ON 8TH AUGUST 2017 IN GATUNDU NORTH CONSTITUENCY

BETWEEN

HON. CLEMENT KUNGU WAIBARA........................PETITIONER

VERSUS

HON. ANNIE WANJIKU KIBEH.......................1ST RESPONDENT

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION...........................2ND RESPONDENT

JUDGMENT

(A) INTRODUCTION

1. At the conclusion of the General Elections held on 08/08/2017, Annie Wanjiku Kibeh ("1st Respondent") was declared by the Returning Officer of Gatundu North Constituency, acting as an agent of the Independent Elections and Boundaries Commission (IEBC) ("2nd Respondent"), as the duly elected member of National Assembly for Gatundu North Constituency.

2. Clement Kung'u Waibara (the "Petitioner") was one of six other contestants for the seat. He contested as an independent candidate. He is aggrieved by the manner in which the elections were conducted and the winner declared and hence filed the present Petition to ventilate his protestations.

3. The results that were declared for each candidate in the election were as follows:

Candidate	Votes
Dominic Kanyi Gicheru	1,999 votes
Patrick Mungai Karigi	545 votes
John Njenga Keziah	78 votes
Annie Wanjiku Kibeh	39,447 votes
Joseph Githuka Kihiu	53 votes
Francis Kigo Njenga	8,124 votes
Clement Kungu Waibara	9,314 votes

4. In his prefactory paragraphs, the Petitioner lists eight heads whence he hoped to pivot his election Petition thus:

i. That the election for Gatundu North constituency was not free, fair and transparent.

ii. The tallying of votes was marred with violence, intimidation, improper influence from the 1st Respondent and her supporters.

iii. The tallying and collation were not administered in an impartial, neutral, efficient, accurate and accountable manner.

iv. The collation of votes did not meet the legal requirements.

v. The method used to tally the votes was not accurate, verifiable, secure and accountable.

vi. The counting and tabulation of results was not done in accordance with the law in the following polling stations: Gikundu, Mwea and Kawira among others.

vii. The petitioner avers that his votes were deliberately and/or erroneously allocated to the first respondent.

viii. The conduct of the Returning Officer violated Article 73 of Constitution as read with Article 10 of the Constitution by behaving in a dis-honourable manner.

5. After elaborating on the various allegations and grounds relied on, the Petitioner sought the following orders:

a) A declaration that the 1st Respondent was not validly elected.

b) A declaration that the Petitioner was the validly elected representative for Gatundu North Constituency.

c) An order for scrutiny and recount and/or re-tallying of all the votes cast to ascertain the actual winner.

d) A declaration that the election for Gatundu North Constituency held on 8th August, 2017 and the subsequent tallying and declaration of results and certificate issued to the 1st Respondent was invalid, null and void for not being free, fair, credible, verifiable and transparent and for lacking credibility.

e) A declaration by the court whether an electoral malpractice of a criminal nature occurred.

f) That the declaration of results for Gatundu North Constituency made on 10th August, 2017 and the certificate issued pursuant thereto and the subsequent special Issue Gazette Notice No. Vol. CXIX – No. 121 of 22nd August, 2017 housed in Gazette Notice No. 8239 declaring the 1st Respondent as Member of National Assembly for Gatundu North Constituency be quashed and nullified.

g) In the alternative to (ii) above, an order that a fresh election for Gatundu North Constituency in Kiambu County be held.

h) The Respondents bear the cost of this petition.

i) Such other orders and consequential directions as the Honourable Court shall deem fit taking all the circumstances of this case into account.

6. I entertained various interlocutory applications by the three parties and issued certain orders before conducting a full hearing of the Petition. I heard all the interlocutory applications filed in the Petition on 12/10/2017 as scheduled during the pre-trial conference. I gave a consolidated ruling on 30/10/2017. Among the consequential orders that I gave were the following:

i. An order striking out certain paragraphs and Grounds in the Petition and certain paragraphs in the Supporting Affidavit of the Petitioner.

ii. A limited order of scrutiny restricted to only ten “stations” (which ended up being twenty-nine Polling Stations in total) which was to be carried out in accordance with certain paramaters set by the Court.

iii. Certain orders related to KIEMS kit, SD Cards, print-out of all the information in the KIEMS kit SD Cards; at least one KIEM’s card reader and access rights for the Petitioner and his representatives with with respect to the following polling stations: Kawira, Ihiga-ini, Muirigo and Njathaini.

iv. I granted leave to 2nd Respondent’s to file two further affidavits by Joseph Chege Ndung’u and John Thia Njui out of time.

v. I declined all the other orders and prayers by the parties.

7. On the first day the Petition was scheduled for hearing, the Respondents learnt, for the first time, that the Petitioner had filed ten other affidavits subsequent to the filing of the Petition. The Petitioner intended to rely on those affidavits during the hearing of the Petition even

though he had not served the Respondents. The explanation given was that the information contained in the affidavits was "sensitive" and that the Petitioner had made a "strategic" decision not to serve the Respondents too well in advance.

8. The Respondents made an application *in limine* to strike out those affidavits and not to permit the ten deponents to testify.

9. I gave an *ex tempore* ruling in which I held that "*for the combined reason that the ten affidavits were filed after the Petition and without the leave of the Court as contemplated in Rule 12(4) [of the Elections Petitions Rules] and that the affidavits were not served on the Respondents as demanded by the law, the ten affidavits will be expunged from the Court record. The Petitioner shall not rely on them or the evidence they exhibit at all during the hearing of [the] Petition*."

10. The result was that only the Petitioner ended up testifying in support of the Petition and the Court only considered his affidavit. Additionally, however, the Court had directed the 2nd Respondent to deposit all Polling Station Diaries as well as Forms 35As and 35B used in Gatundu North elections in Court for use in the Election Petition. The Court also, of course, relied on the Report on scrutiny prepared by the Deputy Registrar pursuant to the orders of 30/10/2017.

11. The Petition is based on the claim that certain constitutional provisions, statutory principles and rules, and subsidiary regulations were violated in the conduct of the elections for the Member of Parliament for Gatundu North sufficient to warrant the nullification of the election. The Petitioner made many factual allegations in support of his Petition. I will analyze these allegations against the evidence presented shortly. First, it is important to outline the applicable legal principles.

(B) APPLICABLE LEGAL PRINCIPLES AND STANDARDS

12. The Petitioner has complained that the 2nd Respondent violated the Constitution in his conduct of the election. In particular, the Petitioner has relied on Articles 81 and 86 of the Constitution and section 83 of the Elections Act.

13. Article 81 of the Constitution provides for the principles that apply to the electoral system, including the principle of free and fair elections which are to be held as follows:

> *a) by secret ballot;*
>
> *b) free from violence, intimidation, improper influence or corruption;*
>
> *c) conducted by an independent body;*
>
> *d) transparent; and*
>
> *e) administered in an impartial, neutral, efficient, accurate and accountable manner*.

14. Under Article 86, the 2nd Respondent is given the strict requirements under which it must elections and referenda, and the voting processes in the following clear commandments:

> *At every election, the Independent Electoral and Boundaries Commission shall ensure that—*
>
> *(a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;*
>
> *(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;*
>
> *(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and*
>
> *(d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials*.

15. Various statutes and regulations have been enacted to ensure these constitutional commandments are adhered to and to provide further guidance to the 2nd Respondent, the Court and various stakeholders on the appropriate constitutional standards to apply in the conduct of elections and resolution of any disputes arising therefrom. The most important statute in this regard is the Elections Act and the Rules and Regulations made thereunder.

16. It is left to the Elections Act to explicitly lay the standard that should be satisfied before an Election Court can declare an election invalid. It does this at section 83. Specifically with respect to the threshold to be met in election petitions, section 83 of the Elections Act provides as follows:

> *No election shall be declared to be void only 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.*

17. The Supreme Court of Kenya in ***Raila Amolo Odinga & Another vs Independent Electoral and Boundaries Commission & 2 Others,***

SC Election Petition No.1 of 2017 (hereinafter, "***Raila Odinga Case 2"***) interpreted the threshold set by section 83 of the Elections Act as follows**:**

> *[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 question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.*

18. The implication of this reading of section 83 of the Elections Act by the Supreme Court is that an election can be nullified under three different thresholds:

> i. Where the electoral system established or the conduct of the election does not meet the clear standards enunciated in Articles 81 and 86 of the Constitution respectively; or
>
> ii. Where the conduct of the election in question substantially violated written law – otherwise known as the "qualitative test" under section 83 of the Elections Act; or
>
> iii. Where there were irregularities or illegalities in the conduct of the impugned election that affected the outcome of the election – otherwise referred to as the "quantitative test" under section 83 of the Elections Act.

19. In my considered view, while much emphasis has been put on section 83 of the Elections Act as the legislative enunciation of the constitutional threshold that must be met in order to void an election, the Constitution itself in Articles 81 and 86 thereof provides the initial *per se* standard for determining the validity of an election. I refer to it as a *per se* standard because, in my view, if a party aggrieved by the outcome of an election proves that any of the principles or values specifically mentioned in Articles 81 and 86 of the Constitution has been violated, the threshold for invalidating the election would have been reached without requiring more – and without the need to test the case against the scheme provided under section 83 of the Constitution.

20. It is important to note that the *per se* constitutional standards in Articles 81 and 86 of the Constitution are both qualitative and quantitative – just like the disjunctive standard provided in section 83 of the Elections Act.

21. Qualitative requirements evaluate whether the environment in which the election was conducted was free and fair within the meaning of Article 81 of the Constitution. Where a Court reaches the conclusion that there was substantial non-compliance with the qualitative requirements the entire results will be rendered void. Justice Kimaru in ***William Kabogo Gitau -v- George Thuo & 2 Others [2010] eKLR*,** set out the principles on which qualitative approach operates. He opined that the court should look more into the effect of malpractices upon the systems and processes employed in the conduct of the elections. The number of votes by which the candidate won will not be the issue, for it is the integrity of the process which has been fundamentally dented by the electoral malpractices. Any malpractices which seriously impeach the process so also impeach the results coming from that process.

22. Making the same observation, Lenaola, J. (as he then was) in ***Masaka -v- Khalwale & 2 Others(2011) 1 KLR 390 at 392*** expressed that "*…where there was no way of authenticating an election by use of statutory documents, the results were irrelevant because the whole process was as crucial as the final results*". In a qualitative context, the election results are as good as the process that led to those results.

23. The quantitative requirements deal with the mathematical or arithmetic calculations of results of the election. Quantitative aspects relate to the counting, tallying, accuracy, verifiability and transmission of results. It also deals with whether a vote cast was rightfully labelled as valid, invalid, rejected or stray. In this context, the paper trail of the votes cast is critical in determining quantitative aspects of the electoral process. The quantitative requirement deals with numbers and figures. In the Uganda case of ***Winnie Babihuga -v- MasikoWinnie Komuhamhia & OthersHCT-OO-CV-EP-004-2001***, Justice Musoke Kibuka expressed as follows:

> *The quantitative test was said to be most relevant where numbers and figures are in question whereas the qualitative test is most suitable where the quality of the entire election process is questioned and the court has to determine whether or not the election was free and fair.*

24. In the present case, therefore, the Court will test the evidence presented by the Petitioners against each of the three thresholds in determining the validity of the election for Member of Parliament for Gatundu North Constituency.

25. The Petitioner bears the burden of proof to establish factors that would lead to the annulment of the election. This is no different than the ordinary run-off-the-mill civil claim in our jurisdiction. Indeed, section 107 of the Evidence Act, Cap 80 of the Laws of Kenya, legislates this principle in the words: "*Whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."*

26. The Petitioner seeking the nullification of an election, bears the burden of proving one of the three thresholds stated above has been met: the *per se* constitutional violation standard; the qualitative standard; or the quantitative standard.

27. Finally, regarding legal standards applicable, it is imperative to point out that our decisional law has now firmly established that the standard of proof where no allegations of a criminal or quasi-criminal nature are made in an election petition, is an 'intermediate standard of proof'. As the Supreme Court explained in ***Raila Odinga Case 2,*** this standard is one beyond the ordinary civil litigation standard of proof on a 'balance of probabilities', but below the criminal standard of 'beyond reasonable doubt'.

28. In ***Raila Odinga Case 2,*** the Court also reiterated that the rationale for this higher standard of proof is based on the notion that an election petition is not an ordinary suit concerning the two or more parties to it, but involves the entire electorate in a ward, constituency, county or, in the case of a presidential petition, the entire nation.

(C) THE CLAIMS, THE RESPONSES AND THE COURT'S FINDINGS

29. I will now proceed to apply the law and the applicable standards to the facts of this case. I have found it unnecessary to rehash the allegations of the Petitioner; the responses by the Respondents and the submissions of the parties in this decision as that would needlessly increase the length of the judgment. One reason for the unconventional style of the judgment (at least for election Petitions in Kenya) is the nature of the case presented by the Petitioner – and the style and strategy of lawyering adopted by the Petitioner.

30. It is fair to say that the Petitioner presented what I can only describe as a mélange of multitudinous allegations and claims. They range from the most mundane and routine electoral malpractice claims (for example, the Petition teemed with claims of voter intimidation and claimed irregularities) to the esoterically juristic (for example, the questions about the quantum of venial irregularities that would satisfy the legal standard for substantial compliance) to the irksomely ludicrous (for example, general claims of witchcraft to garnish the Petition and probably make it a tad more viscid).

31. Consequently, I elected to enumerate all the allegations made by the Petitioner and then reviewed the evidence presented by the Petitioner in support of the allegation as well as the responses provided by the Respondents. For each allegation, I then made a determination using the applicable legal standards on standard of proof whether the allegation was proved or not. At the end, I then must make a determination if any proven claims have risen to one of the three standards for invalidation of the impugned election.

32. The Petitioner made at least thirty allegations in his Petition even after bundling some that are simply duplicated versions of other allegations. Without further ado, I will begin the analysis and determination.

33. The first salvo in the Petition is that the KIEMS Kit contains different results than those in the hard copies because the hard copies had been tampered with. In a bid to collect evidence in this regard, the Petitioner requested the Court that he be permitted access to the KIEMS kit for certain polling stations and a KIEMS reader. He got the orders. However, it would seem that, in the end, the Petitioner found no evidence of such disparity between the results or information in the KIEMS SD card and those in the hard copies. I say so because at the hearing of the Petition, the Petitioner presented no evidence in this regard and it must be assumed that he abandoned this claim. The claim is, therefore, without merit.

34. Second, the Petitioner alleged that tallying of votes was marred by violence, intimidation, and improper influence from the 1st Respondent and her supporters. In particular, the Petitioner claimed under oath that his agents were violently chased away in Gatunguru and Nyamathumbi in order to facilitate the transfer of his votes to the 1st Respondent. Further, the Petitioner testified that in Mataara Primary School, his voters were chased away and were not allowed to vote. These allegations were flatly denied by both Respondents. The Petitioner testified that he was not at any of these polling stations and that he was merely reporting what he had been told by his Chief Agent. The Chief Agent neither swore an affidavit admitted in the Petition nor testified in the proceedings. The Court finds, on balance, these allegations to be unproven. In particular, the Court notes that the Polling Station Diaries (PSDs) of these stations which were made available to the Court do not contain these allegations. Further, it is noteworthy that these allegations were not reported to the Police in the aftermath of the election but only emerged for the first time in the Petition.

35. Third, the Petitioner complained that his votes were deliberately allocated to the 1st Respondent during the counting and tallying exercise. The Petitioner swore an affidavit making this allegation and repeated it under oath. During cross-examination, the Petitioner claimed in particular that at the various streams at Mutuma Primary School and Ndekei Primary School, his agents were chased away during tallying of the votes, and his votes taken and counted in favour of the 1st Respondent. During the examination-in-chief, the Petitioner had also mentioned Maatara Primary School as a station where the same malpractice allegedly happened. Unfortunately for the Petitioner, the Court had only his word for that claim – and that word was not good enough for three reasons. Firstly, the Petitioner was not present at any of the Polling Stations he says this mis-allocation of his votes in favour of the 1st Respondent happened. No witness who was present was called to testify about the occurrences. Hence, in the end, all we had was the Petitioner reporting what he had been told – the classic definition of hearsay evidence.

36. Secondly, the Petitioner was granted his wish for scrutiny and was granted his further wish for scrutiny to be conducted for all the three streams at Mutuma Primary School and the three streams in Ndekei Primary School. By his testimony, this is where the Petitioner's votes were taken from him and allocated to the 1st Respondent. We would have expected to find evidence of this mis-allocation during scrutiny and recounting. Suffice to say that in none of the six streams in these two locations was any such mis-allocation found.

37. Thirdly, the Court ordered scrutiny of roughly 23% of all the Polling Stations (29 Polling Stations out of a total of 126 Polling Stations in the constituency). If the Petitioner's claim that there was a scheme to take votes from his column and count them in favour of the 1st Respondent is correct, we would have expected to see that trend during the scrutiny. In fact, no such evidence was discernible. Instead, the scrutiny found only three instances where votes marked in favour of the Petitioner had been counted for the 1st Respondent. Moreover, scrutiny and recount also revealed one vote that had been marked in favour of the 1st Respondent but was counted for the Petitioner. There is hardly any statistical significance in these numbers to keep alive the Petitioner's claim that a plan was afoot to take votes away from him in favour of the 1st Respondent. No such pattern was revealed by the evidence from scrutiny.

38. The Petitioner's fourth allegation in favour of nullification of the Petition was that his agents were denied entry at the following polling stations: Mangu Primary School (streams 1 and 2) and Nyamatumbi Primary School (Stream 1). The reason allegedly given by the 2nd Respondent for the refusal was that there were other independent agents at the polling stations yet there were only two independent agents against six independent candidates. The 2nd Respondent denied any such refusals and pointed out that none of the agents had made a formal

complaint and neither did the Petitioner do so prior to filing the present Petition. As in the previous allegation, the Petitioner was unable to prove this allegation beyond his affidavit and his own testimony. The fact that there is no independent affidavit or evidence from any of the agents who were allegedly denied entry weakens this allegation considerably. Indeed, to the extent that the Petitioner deposed and testified that the agents told him so, his evidence meant to prove the veracity of that allegation is prototypal hearsay. Finally, for an allegation of such weight, one would expect to have some evidence of a "trail" of the complaint – including early complaints to the Returning Officer or to the Police about such incidences. In the present case, we see no such early indicators that this was a real issue on the date of the voting. This allegation was not proved to the required standard.

39. The Supreme Court has given guidance on how to approach such allegations in ***Dickson Mwenda Kithinji v Gatirau Peter Munya & 2 Others*** thus:

> *[T]he Appellant did not lead any evidence as to the particulars of the agents who had been denied access and whether they had been authorized to be present at any polling station or tallying centre. Further, the Court noted that the Appellant's party County Chief Agent failed to give particulars of the agents who had allegedly been denied access to polling stations. The Court of Appeal thus found no fault with the trial judges finding that the appellant had failed to prove that his agents had been denied access*.

40. The fifth claim by the Petitioner is similar to the fourth one – but alleges a more brazen violation of his rights to have agents at every polling station. The Petitioner alleges that his agents were denied entry in the following three polling stations for no reason at all:

i. Nyamathumbi Primary School

ii. Gatunguru Primary School

iii. James Njenga Primary School

41. The sixth complaint is similar: that at the following Polling Stations, the Petitioner's agents were not allowed entry and only agents of the 1st Respondent were allowed entry:

i. Kangaita primary school – Stream 1

ii. Ihiga-ini Primary School - Stream 1

iii. Kamwangi Primary School - Stream 1

iv. Kanjabi Primary School

v. Ndiko Primary School

42. The response by the 2nd Respondent to these two sets of allegations is exactly as in the previous allegation and so is the Court's finding and conclusion on the allegation.

43. The same fate befalls the seventh allegation by the Petitioner. The allegation is that at Nyamatumbi Primary School, the Petitioner's agent was not allowed to observe the sealing of the ballot boxes. The agent was, allegedly also not allowed to confirm the emptiness of the boxes before the voting process began. I should further note, perhaps to accentuate the incredulity of the allegation, that in his fifth allegation, the Petitioner has claimed that his agents were not even allowed into Nyamathumbi Primary School!

44. The Petitioner's eighth allegation fared better in terms of evidence. The allegation was that KIEMS kit malfunctioned at Gikindu Primary School "rendering the voting process impossible." This, the Petitioner claimed, denied many voters an opportunity to vote. The 2nd Respondent candidly admitted that there was a technical hitch with the KIEMs kit at Gikindu Primary School. Indeed, Form 35A for the Polling Station states as much. However, the 2nd Respondent insists that the problem was eventually fixed and all voters who turned up to vote ended up voting.

45. On my part, while accepting, as admitted by the 2nd Respondent that there was a technical hitch with the KIEMS kit at Gikindu Primary School, available evidence does not suggest that this technological failure thwarted the attempts by many voters to vote in order for it to be a serious enough stand-alone issue. Indeed, Form 35A shows that there are 581 registered voters for the Polling Station and 489 of them cast valid votes while one cast a rejected vote for the election of Member of Parliament. That is a voter turnout of 84%. This turnout figure is consistent with the other Polling Stations in the constituency. The overall turnout for the whole constituency stood at 87%. The KIEMS technological failure, therefore, does not appear to have affected voting at Gikindu Primary School.

46. The Petitioner's ninth allegation was also about KIEMS Kits as well: that they malfunctioned in Kawira, Ihiga-ini; Muirigo; and Njatha-ini Polling Stations. However, other than the assertion in his Petition and averment in his affidavit, the Petitioner did not place any other evidence to prove this allegation. The Respondents rejected the claim. My view is that the allegation is not proved because the evidence offered does not rise to the level required. Further, like in the case of Gikindu, the turnout numbers for these four Polling Stations do not show any anomalous drops compared to the other Polling Stations.

47. The tenth allegation by the Petitioner is that The Petitioner's agents were forced to take a 30-minutes break before the tallying and tabulation of the votes cast "hence interfering with the credibility of the whole process." Other than these statements appearing in the Petition and Petitioner's Affidavit, no further evidence was adduced to show that this happened. None of the Polling Station Diaries in the

126 Polling Stations show this happened and none of the agents caused this objection to be recorded by the Presiding Officers. In any event, there does not appear to be a logical link between a 30-minute break between the end of voting and beginning of vote counting and lack of credibility of the elections. This claim fails.

48. In his eleventh allegation, the Petitioner complains that at Mwea Primary school, the Presiding Officer influenced the assisted voters' choice by not reading out all of the candidates' names on the ballot paper. This allegation appears in the Petition and in the Petitioner's Affidavit. The Petitioner does not disclose the source of this information – but what is clear is that he did not witness the alleged malpractice himself. Hence, the Petitioner was merely reporting what he had been told by others who did not themselves testify or file affidavits to that effect. In any event, this kind of allegation needed further corroboration or other indicators of veracity for it to be taken as established. It is noted that no agent protested, reported or recorded any such incident during the voting.

49. The twelfth allegation related to counting and tallying of votes at Gatunguru Polling Station. The Petitioner claimed that during the tallying of votes, non-officials who include the area Assistant Chief were tasked with the duty to count votes. If true, this would be against the law as only IEBC officials are permitted to count votes. However, no evidence was placed before the Court to substantiate this claim – and the Petitioner did not claim to be present when this happened. Like earlier allegations of malpractices, no report or protest was registered at the time the alleged infraction happened which is powerful indicator that the allegation is not credible.

50. The same fate befalls the thirteenth allegation which is to the effect that tallying and tabulation of votes at Gatunguru Polling Station began 10 hours after the close of voting. Absolutely no independent evidence was placed before the Court beyond the Petitioner repeating what he says he was told.

51. The fourteenth allegation would be a weighty one if proved: That in all polling stations, the Petitioner's agents were denied copies of Forms 35A which bore the official results recorded by the Presiding Officers. Though a serious claim, the Petitioner produced no single agent who swore any affidavit or testified that they were denied copies of Forms 35A. Further, the claim is impugned by the fact that the Petition contains quite a good number of Forms 35As attached to the affidavit of the Petitioner. This is an indication that the Petitioner had copies of these Forms.

52. Similarly, there was no cogent evidence whatsoever that was presented by the Petitioner for his fourteenth and fifteenth claims: That Forms 35A were not displayed on the door at the polling stations as required by law; and that several ballot boxes were open upon arrival at the tallying station. No shred of evidence was brought before the Court to substantiate these claims beyond the bald assertions by the Petitioner.

53. The fifteenth claim was a potent one. The claim is that the 1st Respondents conspired with the 2nd Respondents to use illegal and fake ballot papers in favour of the 1st Respondent and that there was "was discovery of counterfeit ballot papers which were all pre- marked in favour of the 1st Respondent." The 2nd Respondent firmly rejected these claims. The Returning Officer, Patrick Muthee, testified in detail how to determine a fake ballot paper. He testified that one would need to look at the ballot issuance form and the Polling Station Diaries. A Returning Officer, before issuing ballot papers is expected to prepare a ballot issuance form, which indicates the serial number of the ballot paper issued.

54. In the scrutiny of representative twenty-nine Polling Stations which the Court ordered, one of the issues the Deputy Registrar had to establish was the authenticity of the ballot papers. The Deputy Registrar returned a verdict that all the ballot papers scrutinized from the twenty-nine Polling Stations were genuine. The Petitioner presented no further evidence to press his point that fake ballot papers were used. Without more, and given the results of the scrutiny, the Court must conclude that this allegation was not established.

55. It must be recalled that using fake ballot papers is a serious electoral offence. Our decisional law has determined that when allegations made are of criminal or quasi-criminal nature, the standard of proof is actually "beyond reasonable doubt" – a much higher standard. This legal position was affirmed and restated by the Supreme Court in ***Raila Odinga Case 2*** in the following words:

> *[152] We maintain that, in electoral disputes, the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt. Consequently, we dismiss the petitioners' submissions that the Court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities.*
>
> *[153] We recognize that some have criticized this higher standard of proof as unreasonable, however, as we have stated, electoral disputes are not ordinary civil proceedings hence reference to them as sui generis. It must be ascertainable, based on the evidence on record, that the allegations made are more probable to have occurred than not."*

56. For a claim as serious as using fake ballot papers which is an election offence under section 13(e) of the Election Offences Act (attracting a maximum sentence of a fine of Kshs. 500,000 or imprisonment for five (5) years or both), the evidence presented by the Petitioner did not come close to meeting the required standard of proof.

57. No evidence whatsoever was presented to support the Petitioner's sixteenth and seventeenth allegations. The sixteenth claim was that at Huruma Kieni Primary School, the Presiding Officer intentionally spoilt votes. The seventeenth claim was that the 1st and 2nd Respondents promoted several electoral malpractices that affected the final outcome of the results particularly creating non-Gazetted polling stations and centers. No witness was called to prove either claims and no affidavits were filed deposing the same. The paucity of evidentiary proof that has dogged the previous allegations effetes this one as well: the only available evidence is that of the Petitioner claiming that he was told by persons who were not available to testify and who did not provide admissible affidavits. The two claims similarly fail.

58. The eighteenth claim was that the Petitioner has been alerted by members of the public on 20/08/2017 that members of the public had discovered ballot papers which were used in the general elections held on 08/08/17 that were found scattered in Gakoe shopping centre,

Gituamba shopping centre; Mataara Shopping Centre; Mangu Primary School and Mangu town among others. The allegation here was that the 2nd Respondent had not properly secured ballot materials and that somehow some unscrupulous people had been able to get hold of electoral materials. If proved, this would be a potent and troubling finding.

59. The Petitioner did exhibit copies of some of the ballot papers allegedly found. He testified that he made a report to the Police and that, indeed, when he called the OCPD he was told that the Police were aware of these materials which had been found. The Petitioner was unable to call any independent witnesses who saw these materials and made a call to him. However, on balance, I would say that this claim was established. I say so for two reasons.

60. First, the 2nd Respondent did not dispute that the copies of ballot papers annexed to the Petition were genuine ballot papers. Instead, the 2nd Respondent sought to pin the blame on the Petitioner: that since the scrutiny had unearthed some ballot papers missing from the ballot boxes and since copies of some of these missing ballot papers were annexed to the Petition, it meant, by implication that the Petitioner must have been involved in the disappearance of the ballot papers and their appearance in the public places where they were found. The 2nd Respondent's witness testified that all the ballot papers were present at the point of announcing the results and that the ballot papers must have gone missing afterwards after the declaration of results.

61. The 2nd Respondent vehemently argued that "*by dint that the missing ballot papers are contained in the Petitioner's Petition…the Petitioner was in breach of Section 5(e), 5(g), 5(h) and 5(i) of the Election Offences Act and, as such, needs to be investigated by the DPP*."

62. The 1st Respondent associated herself with this line of reasoning as well asking the Court to inquire how the Petitioner had come to be in possession of the electoral materials. The point is that both Respondents admit that the annexed ballot papers were genuine.

63. Second, I have closely looked at the copies of ballot papers exhibited at pages 83, 89, 103, 104, 106 and 107. It is true, as the Respondents claim that these ballot papers are copies of ballot papers that were found missing in the ballot boxes during the scrutiny exercise:

> i. The Ballot paper exhibited at page 83 bears serial number NA00063571 which means it a copy of one of the missing ballot papers marked for the Petitioner issued to Mutuma Stream 1 of 3.
>
> ii. The Ballot Paper exhibited at page 89 bears serial number NA00033018 which means it is a copy of one of the missing ballot papers marked for Dominic Gicheru issued to Mungai Primary School Stream 2 of 2.
>
> iii. The cover to the Ballot booklet exhibited at page 103 says on the cover that it was it contained ballot papers running between NA00033201 and NA00033018. The 2nd Respondent submitted that this was the booklet that was missing when the ballot box for Mungai Primary School Stream 2 of 2 was opened.
>
> iv. Additionally, the ballot paper exhibited at page 104 of the Petition bears serial number NA00033201 – which would be the first ballot paper in the missing booklet from Mungai Primary School Stream 2 of 2.

64. The question that emerges, then, is what is the implication, if any, of these convergences? It is imperative to note that the 2nd Respondent does not deny the authenticity of the ballot papers exhibited in the Petition. It only questions how the Petitioner came to be in possession of the electoral materials yet, according to the Returning Officer, the materials were in sealed ballot boxes at the time of declaration of results. The Respondents make loud innuendos that the Petitioner must have had something to do with the disappearance of the ballot papers for purposes of manufacturing an "irregularity" for Petition purposes.

65. This may well be so. The Petitioner did not explain how he came to be in possession of original electoral materials. Perhaps he has a good explanation. Perhaps not. The point, though, is that electoral materials that were supposed to be in the safe custody of the 2nd Respondent were not in its custody. The fact that scrutiny did reveal that indeed some ballot papers were missing gives credence to the Petitioner's claim that electoral materials were found thrown in public places in Gakoe shopping centre, Gituamba shopping centre; Mataara Shopping Centre; Mangu Primary School and Mangu town among others were, in fact, genuine electoral materials. As the Petitioner suggests, this begs the question about the integrity of the electoral process. The question remains whether the ballot papers went missing post-elections, how serious and widespread this irregularity was, and whether it can be a sufficient ground for nullifying elections. Additionally, there is the question whether the Petitioner's complicity in the disappearance of the ballot papers should be a factor to be considered in answering the question how strong a ground for invalidating an election this claim presents. I will say more about this a little later.

66. For now, I will consider the twentieth allegation contained in the Petition. This one, I will quote verbatim: "*The Presiding Officer was not displaying Form 35 A properly for all agents to verify and he refused to allow us to cross-check and verify the results*." In my ruling dated 30/10/2017, at the behest of the 1st Respondent, I struck out this allegation as "*being embarrassingly generalized and fanciful…[and for being] cast in such general terms that it invites the sense that the Paragraph was merely trifling with the Court…*"

67. I struck out the twenty-first claim at the interlocutory stage for exactly the same reason. That claim read thus: "*Some polling stations voting were peaceful and democratic but things changed when tallying commenced yet there was no sufficient lighting since agents were using cell phone lighting*."

68. The twenty-second allegation did not fare any better. It read as follows: "*The elections were marred by bad influence, violence, threats and intimidation by the I.E.B.C officials and this affected the final outcome, by asking the voters to vote for the Jubilee candidate*." I struck it out at the interlocutory stage as being embarrassingly vague.

69. The twenty-third allegation was even more nebulous and met the same fate at the interlocutory stage. It was couched thus: "*Agents were threatened and intimidated and this affected the outcome of the results.*"

70. Then came the vexatious as the twenty-fourth allegation. It was framed thus: "*The Petitioner avers that the party leader of Jubilee and presidential candidate urged voters to vote as a block for Jubilee therefore disadvantaging the other candidates*." The Court struck out the paragraph containing this allegation as vexatious: it does not go to establishing the Petitioner's cause of action or does not advance any claim known in law.

71. The twenty-fifth allegation by the Petitioner is that the rejected votes numbering 203 largely contains votes cast in the Petitioner's favour but wrongly counted as rejected votes. No evidence other than the Petitioner's say-so was adduced to substantiate this claim. In fact, the scrutiny exercise tended to disprove the claim.

72. For his twenty-sixth claim, the Petitioner Complained that there were "*cases of violence, threats and intimidation against his supporters which was at Gikindu, Njathai-ini, Muirigo Kawira among others the petitioners supporters were scared away*." The Petitioner presented no evidence to substantiate this claim during the hearing. No affidavit was presented and no witness testified to seeing, hearing or experiencing the intimidation. The Petitioner testified that he was told about the violence and intimidation by this agent. This makes the testimony inadmissible hearsay which is incapable of proving such a serious allegation.

73. In any event, Courts have used high voter turnout which is consistent with other Polling Stations in the region as proxy to conclude that absent cogent proof, allegations of violence and intimidation are unfounded. *See* ***Philip Osore Ogutu v Michael Onyura Aringo & 2 others [2013] eKLR*****;** at para 48, ***Henry Okello Nadimo v Independent Electoral And Boundaries Commission & 2 others [2013] eKLR***; at para 73). In the four Polling Stations cited by the Petitioner, the turnout was: 81% for Gikindu; 91% for Njatha-ini; 89% for Muirigi and 87% for Kawira. These turnouts are consistent with the turnout numbers in other Polling Stations. The conclusion that the Court came to was that these allegations are unproven.

74. The twenty-seventh claim by the Petitioner was that there were Polling Stations where there were overcast votes indicating a lack of integrity in the whole electoral process. Regarding this issue, the Petition claims that:

> *The Petitioner avers that the data from the biometric system at Kawira polling station the total number of registered voters was exceeded by the total number of votes cast. The matter was reported at Kamwangi Police Station. This phenomenon of overcast votes manifested itself in several polling stations.*

75. However, in his written submissions, noting that Kawira Polling Station was one of the Stations which was included in the scrutiny and no evidence of overcast votes was noted, the Petitioner submitted about overcast votes in Ndekei and Mukurwe. He sought to rely on "admissions" by Respondent's witnesses (Patrick Muthee) to establish this.

76. The 2nd Respondent vehemently opposed this line of questioning during the hearing and repeated the opposition in its Written Submissions. The complaint is that the only Polling Station cited in the Petition is Kawira Polling Station. The 2nd Respondent argued that since parties are bound by their pleadings and it is impermissible for the Petitioner to expand his Petition through cross-examination or Written Submissions, the Petitioner could not purport to prove and argue the issue of overcast votes when it was not specifically pleaded in the Petition.

77. The 2nd Respondent is right on this one. The only issue of overcast votes specifically pleaded by the Petitioner was for Kawira Polling Station. His evidence and submissions on overcast votes should only be limited to that Polling Station and no others – otherwise he would have achieved the unpermitted objective of stealthily ambushing the Respondents which is impermissible under our jurisprudence and rules. As the Supreme Court stated in ***Raila Odinga Case 2***:

> ***[332]*** *The rule of the thumb has always been that parties must be bound by their pleadings and especially in a case such as this where the petitioner is asking the Court to address its mind to the possible unconstitutionality of a legal provision. For proper consideration therefore, and especially in order to do justice to both the parties and the greater public interest, we cannot afford to lock our eyes to the disadvantage placed upon the 3rd respondent especially who had no benefit to bring his thoughts into this cause*.

78. In his twenty-eighth claim, the Petitioner alleged that the 1st Respondent used witchcraft to scare voters to vote her. While this allegation barely survived the motion to strike out for being vexatious or too generalized, at the hearing not an iota of evidence was presented by the Petitioner in this regard. Indeed, the word "witchcraft" was not uttered at all during the proceedings. That claim fails.

79. The twenty-ninth claim by the Petitioner was largely a legal one. It was that the allegation that the 1st Respondent violated the law, the constitution, regulations and good practice by continuing to draw salaries and privilege as nominated Member of the County Assembly of Kiambu until 8th August 2017. The Petitioner insisted that the 1st Petitioner had failed to produce any evidence that she had resigned; and that answers to questions put to her in cross-examination tended to show, through prevarication, that she, in fact, continued to draw a salary as an MCA.

80. This was an issue before me at the interlocutory stage. The Petitioner had requested the Court to order the County Secretary to provide payroll information with the aim of establishing that the 1st Respondent had not resigned her position as Nominated MCA prior to the elections date. In declining that request, I said this:

> *The Respondents have also urged me to disallow the prayer for the 1st Respondent's employment and salary information based on the fact that the claim the information seeks to establish is time-barred and in the wrong forum anyway. The argument is that any disputes related to nominations ought to have been filed at the 2nd Respondent's Dispute Resolution Tribunal established under*

Article 88(4)(e) of the Constitution.

I find this argument to be persuasive: it is too late for the Petitioner to raise this argument now – long after nominations and elections were held. The Court would, as a prudential matter, refuse to take jurisdiction to deal with this question at this time. In any event, I note that any information supplied by the County Secretary on the employment and salary of the 1st Respondent would not support any specific ground for annulment of the Petition. As such, any production and admission of evidence in this regard would impermissibly expand the Petition beyond the constitutional timelines.

81. My position has not changed. Where the Constitution or a statute creates an alternative forum for resolving disputes, a party is bound to use it before coming to Court. Such a party must demonstrate to the Court that he has exhausted the other forum before the Court agrees to seize jurisdiction. This is a doctrine of vintage judicial ancestry in Kenya (see ***Speaker of National Assembly v Karume [1992] KLR 21***) from which I do not intend to depart. In the ***Karume Case***, the Court held thus:

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

82. Many cases decided in the post-2010 period have found this reasoning to be sound even in under the 2010 Constitutional dispensation. For example, a three-judge bench of the High Court remarked in the ***In the Matter of the Mui Coal Basin Local Community [2015] eKLR,*** the rationale is thus:

The reasoning is based on the sound Constitutional policy embodied in Article 159 of the Constitution: that of a matrix dispute resolution system in the country. Our Constitution creates a policy that requires that courts respect the principle of fitting the fuss to the forum even while creating what Supreme Court Justice J.B. Ojwang' has felicitously called an "Ascendant Judiciary." The Constitution does not create an Imperial Judiciary zealously fuelled by tenets of legal-centrism and a need to legally cognize every social, economic or financial problem in spite of the availability of better-suited mechanisms for comprehending and dealing with the issues entailed. Instead, the Constitution creates a Constitutional preference for other mechanisms for dispute resolution – including statutory regimes – in certain cases. It expressly envisages that some of these regimes will be mainstreamed (and, hence, at certain prudential points intersect with the Judicial system) while some will remain parallel to the Judicial system.

83. For the reason that the Petitioner did not fulfill his obligations under the doctrine of exhaustion to utilize the mechanisms accorded to him by the Constitution to raise this issue and because the Petitioner did not demonstrate that the case fell within the narrow class of cases where an exception to the exhaustion doctrine applies, this claim also fails.

84. Finally, I turn to the thirtieth and final allegation. In it, the Petitioner claims that the tallying and collation of votes was not done in an impartial, neutral, efficient, accurate or accountable manner and did not meet the legal requirements including:

- Lack of official IEBC stamps on Forms 35As in several polling stations
- Forms 35A from some polling stations were signed and dated the following day after elections
- That at Mataara, the valid votes cast was 477 yet in Form 35A, the votes were recorded as 478
- Tabulation of results at all polling stations was not prompt and accurate
- Lack of required signatures on statutory forms;
- Lack of required seals on ballot papers; and
- Results from Gikindu Primary School Polling Station 01; as displayed in the Forms 35A were not indicated in the Form 35B; the Declaration form containing results from the Polling stations in Gatundu North Constituency.

85. The Petitioner's position was that the counting, tallying and tabulation of the votes was done so irregularly and contained so many errors that it cannot truthfully be said that the results of the elections were verifiable. He further argued that owing to these myriad mistakes, it cannot be said that the elections for Gatundu North constituency substantially complied with the law.

86. During re-examination, the Petitioner took the Court through various Forms 35As and Polling Station Diaries (PSDs) and pointed out the missing information or the errors in each. It will unnecessarily lengthen this judgment to repeat here all such instances. Suffice it to say that the Court undertook an analysis of all the Forms 35As; PSDs and Form 35B of the Constituency and made its findings and conclusions. The Court also relied on the results from the scrutiny exercise.

87. The Respondents concede that there were some errors and omissions in the electoral process. Their general position, however, is that any such errors were so minor that they did not affect the results of the elections. Similarly, they argue that the errors were so minor and infrequent that they do not rise to the level of "substantial non-compliance with the law."

88. **The Petitioner begins by reminding the Court what the Supreme Court stated in *Raila Odinga Case 2*:**

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

89. The 2nd Respondent submitted that the evidence on the allegations of irregularities in the counting, tallying and tabulation of votes which is the anchor argument on substantial non-compliance with the law "is weak, speculative and sensational" and that the Petitioner has failed to discharge the burden of proof as is required. It insists that although scrutiny revealed some irregularities in the count and tabulation of the vote, these irregularities were so minor that they could not and did not substantially affect the numerical results of the election to substantially impact on the will of the people of Gatundu North Constituency.

90. The 2nd Respondent cited several authorities for the proposition that any administrative and / or procedural errors ought to be substantial to affect the result of the election. In ***Joseph Amisi Omukanda v Independent Electoral and Boundaries Commission (Iebc) & 2 others [2013] eKLR,*** for example**,** Justice Chitembwe in dismissing the Petitioner's suit was guided by the finding in the case of ***Marshall Vs Gibson (1995)*** by Justice Colman who held *inter alia*:

….. There cannot be a declaration of invalidity unless it appears either that the election was so conducted that there was substantial non-compliance with the law as to elections or that there was a breach of official duty or of the Rules which affected the result. It is clear now that the result means the question which person or persons are elected as distinct from the number of votes cast for each person….Thus if the consequence of a breach of the Rules is that one or more of the candidates would have polled more or less votes than were recorded at the count, but the same candidate or candidates would still have been elected, the result will not have been affected and the election can only be declared invalid if it appears to the court that the election was not so conducted as to be substantially in accordance with the law as to elections.

91. The 2nd Respondent also cited ***Election Petition No. 1 Of 2013, Richard Kalembe Ndile & another v Patrick Musimba Mweu & 2 others [2013]eKLR*** where Justice Majanja held thus;

In cases of allegations of electoral malpractices and other irregularities, the petitioner is not only required to establish that such electoral malpractices and irregularities actually occurred but that they were of such magnitude that they substantially and materially affected the results of the election. The petitioner, should, for instance establish that the number of votes affected by the irregularities was sufficient to change the results of the election or that there were substantial violations of the requirements of the statute that rendered the reliability of the result of the election seriously in doubt. The primary consideration in an election contest is whether the will of the electorate has been affected by the irregularities."

92. The 1st Respondent similarly argues that the Petitioner did not prove that there were substantial irregularities in the counting, tallying, or tabulation of votes in Gatundu North Constituency. She, too, concedes that there were minor errors which may have occurred in the counting and tallying process but that these errors were not intentional and did not affect the results of the election. She insists that the declared margin of 30,133 votes would not be considerably reduced if the results from stations that had errors (like Gikindu Polling Station) were included. The 1st Respondent's position is that the inadvertent omission of results from Gikindu Primary Polling Station cannot be said to have affected the results substantially. She relied ***Paul Gitenyi Mochorwa v Timothy Moseti E. Bosire & 2 others [2013] eKLR***.

93. The 1st Respondent argued forcefully that the electoral process is susceptible to human error. She cited ***Joho V Nyange & Another (EP No.4 of 2008) 3 KLR 500***, where Hon. Maraga J. (*as he then was*) stated that: "*Some errors in elections are nothing more than what is likely in the conduct of human activity. If the errors are not fundamental, they should be excused or ignored. But where deliberate irregularities or forgeries are committed, different considerations should be given."* She also relied on ***Wavinya Ndeti v Independent Electoral and Boundaries Commission (Iebc) & 4 others [2013] eKLR)***

94. The 1st Respondent argued that the errors proved in the elections for Member of Parliament for Gatundu North Constituency were so minor and non-fundamental and do not affect the results. They, therefore, should not result in the nullification of an election, they insisted.

95. The 1st Respondent cited ***Rishad Hamid Ahmed Amana –vs- Independent Electoral and Boundaries Commission & 2 others [2013] eKLR***, where Hon. Kimaru J. held that:

A Petitioner is not only required to establish that there were irregularities which were committed during the elections, he must also establish that such irregularities (non-compliance with the law) were of such magnitude that it affected the outcome of the results. This is what is referred to as the material test…

96. They further cited ***Ferdinand Ndung'u Waititu v Independent Electoral & Boundaries Commission (IEBC) & 8 others [2013] eKLR***, where Hon. R. Mwongo J. stated that in order to void an election on account of non-compliance with the law, the evidence of irregularities and discrepancies in the election must be of such nature as to disclose through clear and weighty evidence any one or more of the following:

a. "An attempt to establish a winner otherwise than in compliance with the Constitution; and or

b. An attempt to suppress, alter or undermine the will of the voters exercising their rights under Article 38 in such a manner as to affect the overall outcome of an election; and or

c. A failure by or of the electoral system, or in the processes used therein, such as to constitute non-compliance with the general

principles of the electoral system under Article 81 of the Constitution; and or

d. Such clear and glaring flaws in the conduct of the elections as substantially render any of the aspirations of Article 86 (a),(b),(c) or (d) to be meaningless; and or

e. *That the non-compliance with the electoral law or regulations was substantial enough to, and did in fact, affect the result of the election*."

97. The 1st Respondent insists that the Petitioner has not satisfied any of the five tests set out by Mwongo J. She further argued that any minor errors that may have occurred did not affect the result of the elections since the declared margin of 30,133 votes was too wide to be affected by minor, clerical and arithmetic errors; errors that affected each and every candidate in the Elections.

98. I have carefully considered the parties' submissions and the cases they have cited. In the early part of this judgment, I set out what the applicable legal principles and standards for annulling an election are. The question that I must answer here is whether there is enough evidence in this case to meet one or more of the three thresholds required to invalidate an election.

99. The Petitioner has insisted that the Scrutiny Report filed by the Deputy Registrar was not complete in listing down all the irregularities noted. However, there are observations of errors or irregularities made by the Honourable Deputy Registrar during the scrutiny exercise which all the parties agree on. The key ones, in my view are the following:

i. One unused booklet of 50 ballot papers from Mungai Primary School (Stream 2 of 2) was missing.

ii. One unused booklet of 50 ballot papers from Kawira Primary School (Stream 2 of 2) was missing.

iii. Two unused ballot papers from Mangu Primary School (Stream 5 of 6) and one from Stream 4 of 6 were missing.

iv. All the 114 votes which, according to Form 35A, were cast for the Petitioner were missing from the Ballot Box for Mutuma Primary School (Stream 1 of 3). The Tallying Sheet was also missing from the Ballot Box. Additionally, the Ballot Box had been broken.

v. All the 115 votes which, according to Form 35A, were cast for Francis Kigo Njenga were missing from the Ballot Box for Ndekei Primary School (Stream 1 of 3).

vi. Three (3) votes cast in favour of Dominic Kanyi Gicheru at Mungai Primary School (Stream 2 of 2) were missing from the Ballot Box.

vii. Of the 29 Polling Stations scrutinized, at least 12 copies of Form 35As were missing inside the Ballot Box. The Election Regulations require Presiding Officers to affix one copy of Form 35A to the side of the Ballot Box and put one copy inside the Ballot Box. However, in 12 out of 29 Polling Stations (41.4%), no copy of Form 35A was found inside the Ballot Box.

viii. Each Ballot Box is supposed to have five seals. There should be at least two IEBC seals among these. However, during scrutiny, it was discovered that:

a) 26 out of the expected 145 seals (18%) of the seals were missing;

b) In some Polling Stations – for example, Kawira Primary School (Stream 2 of 2) and Mungai Primary School (Stream 2 of 2) – the Ballot Boxes had only Political Party seals and no IEBC seals; and

c) In some Polling Stations, the official seal used was not an IEBC seal but an ECK seal.

ix. The following were also missing from various Ballot Boxes:

a) At Kiangunu Primary School (Stream 3 of 3), 3 counterfoils were missing.

b) At Mangu Primary School (Stream 3 of 6), the 2 rejected votes were missing.

100. I should point out, for the record, that the Petitioner submitted at length his comments on the scrutiny exercise. In the most part, the Petitioner quibbles some specific observations made by the Deputy Registrar. I have noted the agent of the Petitioner who was present throughout the scrutiny exercise signed off on the observations of the Deputy Registrar which include some of the impugned observations. As a matter of good order, I requested the Deputy Registrar to respond to the detailed submissions by the Petitioner. What emerged is an intense disagreement over specific details. What is important, however, is that the specific disagreements over what was exactly observed do not change the overall picture or trend presented during the scrutiny. There is no one picayune detail that is dispositive in determining whether the elections were conducted regularly or not but the overall picture presented by the scrutiny exercise.

101. As stated earlier, the 2nd Respondent forthrightly deposited all Forms 35As in Court except for Maria-ini Polling Station. In his Petition, and during the hearing of the Petition, the Petitioner made references to numerous instances of irregularities or errors in the filling of Form 35As which he argued showed a pattern of malpractices and irregularities so systematic and prevalent that it vitiated the election's

validity. The Court performed an independent analysis of the Forms 35As deposited in Court. The Court identified ten parameters over which an error or irregularity could palpably be evinced in a Form 35A and scrutinized each of the 125 Form 35As against these parameters for any errors. The raw data is summarized in a chart which is available in the Court file. The key results are as follows:

i. 26 out of 125 Forms or 20.8% of the Forms lacked the IEBC stamp required.

ii. In 26 out of 125 Forms or 21% of the Forms, the total number of valid votes cast was either not filled or there were un-authenticated alterations (i.e. changes which the Presiding Officer did not sign against).

iii. In 4 out of 125 Forms or 3.2% of the Forms, there were unauthenticated alterations of votes cast for each candidate.

iv. In 5 out of 125 Forms or 4% of the Forms, the polling station counts were not filled or had unauthenticated alterations).

v. In 30 out of 125 Forms or 24% of the Forms, the Decisions on disputed votes were not filled; they were left blank rather than filling as appropriate.

vi. In 3 out of 125 Forms or 2.4% of the Forms, the signature of the Presiding Officer was missing.

vii. In 8 out of 125 Forms or 6.4% of the Forms, the Signature of the Deputy Presiding Officer was missing.

viii. In 3 out of 125 Forms or2. 4% of the Forms, there was not a single signature by any of the agents.

ix. In 64 out of 125 Forms or 51% of the Forms, the reasons for refusal by an agent to sign the form are not indicated or if not applicable, the Presiding Officer has not affirmed as such.

x. In 31 out of 125 Forms or 24.8% of the Forms, the Presiding Officer did not fill out the comments section.

102. The 2nd Respondent did not give an explanation why Form 35A for Maria-ini was missing.

103. Additionally, although Form 35A for Gikindu Primary School Polling Station was availed, it emerged from an analysis of Form 35B that the results from that polling station are not reflected in Form 35B.

104. In his re-examination, the Petitioner also made references to errors in the Polling Station Diaries. The 2nd Respondent deposited all the Polling Station Diaries in Court except for three Polling Stations. These three missing Polling Stations are: Gatei Primary School; Kanyambi Primary School and Maria-ini Primary School.

105. The Court has had an opportunity to analyze all the 123 Polling Station Diaries availed. The Court identified twenty-one (21) parameters for analysis – meaning areas where an error or irregularity could conceivably occur. A chart of raw data on these parameters was prepared and is available in the Court file. The summary is as follows:

i. None of the 123 PSD Forms had errors in the filling of administrative information of the Polling Station.

ii. All the 123 PSD Forms had the appropriate declaration by the Presiding Officer.

iii. Eleven (11) out of the 123 PSD Forms or 8.9% of the Forms did not have the materials checklist properly filled out as required.

iv. All the 123 PSD Forms had the particulars of Polling officials properly filled out.

v. All the 123 PSD Forms had the particulars of the agents properly filled out.

vi. One (1) out of the 123 PSD Forms or 0.8% of the Forms had an error in the filling of particulars for observers.

vii. All the 123 PSD Forms had the particulars of ballot boxes' serial numbers and seals properly entered.

viii. Two (2) out of the 123 PSD Forms or 1.6% of the Forms had an error in the certification by Presiding Officer, Deputy Presiding Officer or the agents.

ix. None of the 123 PSD Forms had any errors in the filling of voter turnout numbers.

x. In twenty-one (21) of out of the 123 PSD Forms or 17% of the Forms, there were errors in filling out the section of the Polling Station Diary regarding any cases where voters were not identified by the KIEMS kit.

xi. In one (1) of out of the 123 PSD Forms or 0.8% of the Forms, there was an error in filling out the aperture seals information.

xii. In seventeen (17) of out of the 123 PSD Forms or 13.8% of the Forms, the Certificate of Closure was not properly filled out.

xiii. In all 123 PSD Forms availed, proper agents affirmation was noted.

xiv. In all 123 PSD Forms availed, information on the used and un-used ballot papers was entered.

xv. In all 123 PSD Forms availed, information on packets sealing record was provided.

xvi. There was confirmation by at least one agent in each of the 123 PSD Forms availed.

xvii. In two (2) of out of the 123 PSD Forms or 1.6% of the Forms, the information about Ballot Box seals after counting was not entered.

xviii. In twenty (20) of out of the 123 PSD Forms or 16% of the Forms, there was lack of affirmation by the Presiding Officer and/or Deputy Presiding Officer.

xix. In all the 123 PSD Forms, there was appropriate affirmation by agents.

xx. In two (2) of out of the 123 PSD Forms or 1.6% of the Forms, the slot for record of incidents was not properly filled out.

xxi. In seven (7) of out of the 123 PSD Forms or 5.6% of the Forms, there was no final declaration by the Presiding Officer, Agents, County Returning Officer or Deputy County Returning Officer.

106. The 2nd Respondent did not give any explanation why the Polling Station Diaries for Gatei Primary School; Kanyambi Primary School and Maria-ini Primary School were missing.

107. The above analysis gives a global, panoramic outlook of the state of regulatory and statutory compliance by the 2nd Respondent in conducting the elections for Gatundu North Constituency.

108. Both Respondents insist that any anomalies, errors or failures to comply with the Statutes or Regulations are minor and should not affect the outcome of the election. They urge the Court, as I presented above, to look at the vast margin of victory in determining this question.

109. The 2nd Respondent says that the anomalies, errors or failures can be explained by human error. They should not, they insist, be categorized as substantial non-compliance with the statute or law. They request the Court to declare these anomalies, errors or failures as minor and to make a finding that the Gatundu North Constituency election was conducted in accordance with the Constitution and the Elections Act and all other relevant statutes and a valid declaration of the outcome of the election made; and that the 1st Respondent was validly elected as the Member of Parliament of Gatundu North Constituency. The 2nd Respondent concludes that the people of Gatundu North Constituency exercised their sovereign power of the vote and their decision should be respected.

110. The 1st Respondent's arguments on this question have, to a large extent, mirrored those of the 2nd Respondent. Her view is that the people of Gatundu North expressed their sovereign will in the elections of 08/08/2017 and the minor errors committed by the 2nd Respondent are not enough to overturn that verdict especially given the wide margin of victory she scored.

111. In ***Morgan v Simpson [1974]3 ALL ER* 722 at 728** Lord Denning set out the inordinate principles upon which the integrity and regularity of elections in the Commonwealth are decided. In fact, what Lord Denning did in that case was to presciently state the position now adopted by our Supreme Court in ***Raila Odinga Case 2*** as the applicable standard in Kenya. I cited those standards above. In might be useful, however, in this section, to go back to the ancestry of the principle as stated by Lord Denning. His timeless words were thus:

> *.....[C]ollating all these cases together, I suggest that the law can be stated in these propositions:-*
>
> i. *If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result is affected, or not* ---
>
> ii. *If the election is so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls* ---
>
> *But, even though the election was conducted substantially in accordance with the law as to elections, nevertheless, if there was a breach of the rules or a mistake at the polls and it did affect the result, then the result is vitiated.*

112. I did suggest earlier in this judgment that our Constitution, in Articles 81 and 86 suggests a third *per se* violation category. However, at this point, it is important to recall that the standards set out in the ***Morgan Case*** and codified in Section 83 of the Elections Act. That principle, ephemerally thought enervated by recent electoral jurisprudence in Kenya and decisional law interpreting section 83 of the Elections Act especially in the aftermath to the 2013 General Elections, was re-vivified by the Supreme Court in ***Raila Odinga Case 2*** in the following words which it bears repeating in this judgment:

> *In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is*

able to prove that although the election was conducted substantially in accordance with the principles laid down in our Constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.

113. I will now apply these standards to the present case given the evidence presented on the last issue identified.

114. Despite many irksome and indubitably unavailable claims in the Petition; many claims verging on the vexatious; and many grounds patently unfounded, at the end of the day this Petition stood on a single hinge: ***whether the IEBC (the 2nd Respondent) conducted the elections in Gatundu North Constituency in such a manner that one could objectively say that it was conducted in accordance with the Constitution, the Statute and other laws***.

115. The Petitioner says it did not – and that the nature, degree, and prevalence of the irregularities, omissions and errors in the conduct of the election especially in the process of counting, tallying and tabulation of votes can only lead to the conclusion that there has been no substantial compliance with the law. In essence, the Petitioner says that the election was carried out in such a manner that one cannot say that true elections in accordance with the Constitution and other laws was conducted.

116. The Respondents say the opposite: that the IEBC did conduct the elections in such a manner that an objective tribunal would conclude that it was conducted in accordance with the Constitution, the elections statute and other laws even after accounting for the errors and irregularities revealed.

117. Of all the errors, anomalies, omissions and irregularities that have been revealed during this Petition, the following have stood out for me:

i. A total of 103 un-used ballot papers were missing from the sample Polling Stations with respect to which scrutiny was conducted.

ii. A total of 332 votes for the Petitioner, Francis Kigo and Dominic Kanyi Gicheru were missing from the Ballot Boxes from the 29 Polling Stations where scrutiny was conducted.

iii. The Tallying Sheet for the Petitioner for Mutuma Primary School (Stream 1 of 3) was also missing from the Ballot Box.

iv. Of the 29 Polling Stations scrutinized, at least 12 copies of Form 35As or 41.4% of Form 35As from the Polling Stations where scrutiny was conducted were missing inside the Ballot Boxes.

v. Twenty-six (26) out of 145 (18%) of the seals which were supposed to be in the 29 ballot boxes which underwent scrutiny were missing from the Ballot Boxes.

vi. Twenty-six (26) out of 125 Forms 35A or 20.8% of Forms 35A lacked the IEBC stamp required by law.

vii. In twenty-six (26) out of 125 Forms 35A or 21% of the Forms, the total number of valid votes cast was either not filled or there were un-authenticated alterations (i.e. changes which the Presiding Officer did not sign against).

viii. Form 35A for Maria-ini is missing. The 2nd Respondent did not give an explanation of its whereabouts.

ix. Eleven (11) out of the 123 Polling Station Diaries or 8.9% of the Forms did not have the materials checklist properly filled out as required.

x. In twenty-one (21) of out of the 123 Polling Station Diaries or 17% of the Forms, there were errors in filling out the section of the Polling Station Diary regarding any cases where voters were not identified by the KIEMS kit

xi. In seventeen (17) of out of the 123 Polling Station Diaries or 13.8% of the Forms, the Certificate of Closure was not properly filled out.

xii. In twenty (20) of out of the 123 Polling Station Diaries or 16% of the Forms, there was lack of affirmation by the Presiding Officer and/or Deputy Presiding Officer.

xiii. The 2nd Respondent did not give any explanation why the Polling Station Diaries for Gatei Primary School; Kanyambi Primary School and Maria-ini Primary School were missing.

xiv. Results for Gikindu Primary School were not entered in Form 35B and are entirely missing therefrom.

118. Can a reasonable tribunal, faced with this kind of evidence proceed to make a conclusion that the 2nd Respondent conducted the elections in Gatundu North substantially in accordance with the law as to elections? Can any reasonable tribunal find the explanation that these errors, anomalies, failures and irregularities are simply a product of characteristic human proneness to error which should be excused because it has not been demonstrated to breach the vast statistical chasm between the 1st Respondent who was declared the winner and the Petitioner to be a reasonable answer to these irregularities?

119. Before I answer this question, I propose to take a very brief legal-historical detour to put the answer in context. In applying the electoral standard to judging the integrity of elections provided in the Constitution and statutory law, it is imperative to have the history that produced

the laws and the standard firmly in mind.

120. In the battle for what is, at times, called the “Third Liberation of Kenya” which bequeathed us the 2010 Constitution, electoral justice was a key driver. Having keenly watched the sordid and negative lessons of botched elections and our ability to turn our country into an atavistic bloodbath as happened in 2007-2008 following many years of electoral misconduct by the body charged with the responsibility to conduct elections, Kenyans foregrounded electoral justice reforms in the Constitution. In this regard, Kenyans elected to entrench key values, principles and institutions in the Constitution that would ensure that thenceforwards elections will be carried out in a way that ensures “*that actions and procedures employed in the electoral process are consistent with the national and applicable municipal and international laws in order to prevent electoral disputes.”* ***[1]***

121. After the tragic 2007 General Elections, the Kenya Government established an international commission of inquiry to Inquire into all aspects of the 2007 General elections with particular emphasis on the presidential elections. It was officially known as the Independent Review Commission (IREC) but popularly as the Kriegler Commission. IREC concluded that “*although there is room for honest disagreement as to whether there was rigging of the presidential results announced by the ECK, the answer is irrelevant, as (i) the process was undetectably perverted at the polling stage, and (ii) the recorded and reported results are so inaccurate as to render any reasonably accurate, reliable and convincing conclusion impossible*.”[2]

122. The Commission fingered a “culture of electoral lawlessness” as being largely responsible for the perversion of elections in Kenya and found that the Kenyan society “*has long condoned, if not actively connived at, perversion of the electoral process*.”[3]

123. Hence, aside from the recommendation that the constitutional, institutional and legal framework for elections in Kenya was so weak that it required an overhaul to enable it to address the “culture of electoral lawlessness”, the Kriegler Commission warned that “*the culture of lawlessness…..cannot be reversed without a concerted, non-partisan commitment to electoral integrity….which commitment will need to be sustained and monitored over time*.”[4]

124. This is the history and context we must have in mind in interpreting and applying Articles 81 and 86 of the Constitution as well as section 83 of the Elections Act.

125. The response by the Respondents to the many serious errors, anomalies, irregularities and omissions and the argument that these irregularities yield the conclusion that the election was conducted so badly that it cannot be said to have been in compliance with the law, has been what I have come to call “human imperfection thesis”: Respondents say that elections are a human endeavour, conducted by mortal and error-prone human beings and that, as such, we should expect to find errors in any elections. Such errors, if minor, should not invalidate elections as to do so would be to torpedo the sovereign will of the people due to administrative errors. Many of our Courts have adopted this approach and re-stated it in different words – but, perhaps, it finds its best expression in a Canadian decision cited to me by the 2nd Respondent: ***Opitz v. Wrzesnewskyj, 2012 SCC 55, [2012] 3 S.C.R. 76,*** where the Supreme Court of Canada held that:

> *If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election.*

126. However, given our history and context, one can appreciate that the aspirations of Kenyans in including electoral justice in the Constitution in unusual details was not to produce a formalist liberal legalism doctrine on the correct standard for invalidating elections which would allow the Courts to collaborate with the IEBC to “moderate” elections by permitting the IEBC to promote our self-belief in the impossibility of excellence and strict adherence to the rule of law in our electoral systems and processes which, in turn, leads to the conclusion that absent patent demonstration of massive irregularity, brutal rigging and the like, electoral results announced by the IEBC would pass muster. Under this narrative, all IEBC has to utter in an electoral dispute is the slogan that elections are cannot perfect since they are a product of human endeavour.

127. This history, which this Court is required to take into account as part of heeding the in-built theory of constitutional interpretation contained in Article 259 of the Constitution, calls upon any Election Court to pay particular attention to fidelity to the process and the need to establish and apply doctrines and jurisprudence which continually lead towards improvement of electoral conduct rather than accept the least common denominator under the precept that no election can be perfect since all elections are human endeavours. All elections are human endeavours amenable to human error but it is incumbent upon the Courts to “draw the line in terms of fidelity to the process.”[5]

128. However, by allowing this narrative about the “imperfection” of human beings charged with the task of conducting elections and the impossibility of establishing sound systems manned by competent people with the capacity for excellence and adherence to electoral laws and regulations in running elections, we are dangerously subverting the Constitution rather than drawing the line in terms of fidelity to the process. We permit the IEBC, a ken of excuses; a kit of tools from which it can persist in its seeming imperviousness to become a learning organization. We enable the very culture of electoral lawlessness which the Kriegler Commission found to be a key driver of violence and impunity in Kenya to thrive.

129. While instances of venial inattention and minor administrative mishaps can be excused in the conduct of elections, cases of ballot box tampering, missing votes and seemingly systemic failures by electoral officials to follow election rules and regulations cannot be dismissed with a nonchalant wave of the hand. As a Court in Iowa, US said:

> *….[W]e have said that it must affirmatively appear that the ballots have been preserved with that jealous care which precludes the opportunity of their being tampered with, and, like Caesar's wife, must be shown to be above suspicion…* ***[6]***

130. Or another Court in Mississippi remarked:

*The election process must be kept untainted and unsoiled. It must be like Caesar's wife: 'beyond suspicion.' Breland v. Mallett , 527 So.2d 629, 631 (Miss.1988). That which is at stake is public confidence in our system of government.**[7]***

131. Like Ceasar's wife, our election process is supposed to be beyond suspicion. Untainted. Unsoiled. Indeed, the purpose of constitutionalizing the standards for conducting elections in Kenya was to guarantee the present generation of Kenyans that the election process in this country will be the hallmark of integrity, and that it will be beyond question. Hence the constituents of Gatundu North are entitled to feel confident that the elections for Member of National Assembly were conducted in a proper manner. Like Ceasar's wife, the electoral officials' conduct must be beyond doubt and above suspicion. The people of Gatundu North have a right to demand this standard in the conduct of their elections. Kenyans are entitled to insist on this level of integrity of elections.

132. In my view, giving judicial blessings to an election in which the IEBC officials botched the processes as they did the present one with seemingly systemic carelessness and nonchalant mediocrity would be akin to surrendering Kenyans' erstwhile search for electoral justice to the gods of impunity. It would be paralyzing all efforts at building a sound and excellent electoral justice system in the country; an inanimate nod to the narrative of the normality of our inability to demonstrate fidelity to the rules of the game which we painstakingly write for ourselves.

133. In my view, therefore, after due consideration of the evidence before me about the extent, nature, and prevalence of irregularities, anomalies, failures, errors and omissions propagated by the 2nd Respondent and in its conduct that attended the election for Member of the National Assembly for Gatundu North in the election held on 08/08/2017 as I have reviewed above, and properly applying the correct legal standard in a contextualized manner that takes our history into account, ***I have reached the conclusion that the election for Member of the National Assembly for Gatundu North was conducted so badly that it was not substantially in accordance with the law as to elections, and that, therefore, the election is vitiated, irrespective of whether the result is affected, or not.***

134. This conclusion that the failure by the IEBC to strictly comply with the Constitution and statutory law is consequential is not just a product of formalist deontological analysis. It is informed by our history of electoral (in)justice as a people and its consequences on our nation as well as our aspirations to build a new Kenya using the structural foundations of the 2010 Constitution which include, among other pillars, a call for a strict adherence to electoral justice principles. It is informed by a consuming belief that as a country, we can rise above a culture of electoral lawlessness and non-adherence to rules and laws as long as we get by. It is, finally, informed by faith that our institutions can do better and that they must be held to the high standards of excellence and integrity that is demanded in our Constitution. IEBC, like this Court, is one such institution.

135. Law's ultimate task, is to apportion both goods – material and social – as well as social pains.[8] This is a paraphrased truism from Legal Philosopher, Prof. Louis Wolcher. Today, even as I pronounce myself on this Election Petition, I am acutely aware that the 1st Respondent has been compelled to pay for the price of democracy more than the rest of us. That is why, to quote Justice Apaloo, I reach these conclusions without relish.[9]

136. It is without relish that I find it necessary to nullify the elections for the Member of the National Assembly for Gatundu North held on 08/08/2017.

137. Yet, I say this to the 1st Respondent, Hon. Annie Wanjiku Kibeh: When you walk out of this Court room, do not pose a vituperative gaze at this Court and the Judiciary for being a technical stickler to the law; a gadfly to majoritarian democracy; an alleged conspirator against the sovereign will of the people of Gatundu North. Instead, haul your righteous indignation and virtuous fury at the one institution that was given the legal, financial, operational, and moral wherewithal and authority to conduct elections according to the law – but which, in a spectacular display of arrogant ignorance, brute inattention to details and profound mediocrity conducted an election for Member of the National Assembly for Gatundu North in a manner that cannot be said to have verged on compliance with the law – constitutional and statutory. That institution is the 2nd Respondent; the Independent Boundaries and Elections Commission (IEBC).

138. It is important to record here that that the Court found no evidence whatsoever that the 1st Respondent did anything wrong or participated in any way in the propagation of the irregularities that have led to the nullification of the election. The 1st Respondent simply offered herself for the elections as a candidate and diligently ran her campaign. She is a victim of the 2nd Respondent's failures as much as the people of Gatundu North Constituency are.

139. I will now turn to one last aspect of the case before concluding with the orders.

140. It is fairly obvious from the evidence that has emerged on the missing votes and how they found their way to the Petition, that aside from the moral culpability of the agents and employees of the 2nd Respondent in conducting an election marred by irregularities, a serious election crime was committed. A person or a group of people were able, in blatant and criminal disregard of the law, to break open ballot boxes for at least two Polling Stations in Gatundu North and stole at least 332 votes therefrom. There is no question that this is a serious election offence. The perpetrator(s) need(s) to be found, prosecuted and punished in accordance with the law.

141. Unfortunately, the evidence that emerged before me did not point with precision to a specific perpetrator. It would appear that there are at least seven people who should be investigated: one or more of these seven individuals is responsible for this electoral offence. From the chain of custody of the ballot materials, the alleged appearance of the materials in public places and their eventual appearance in the Petition, it is clear that one or more of these seven people is responsible for the theft or at least conspired to steal the votes. These seven individuals are:

i. *The Presiding Officers of Mutuma Primary School (Stream 2 of 3); Ndekei Primary School (Stream 1 of 3); and Mungai Primary School (Stream 2 of 2)*: These are the three people who counted the votes, tallied them, put them in the Ballot Boxes and sealed the Ballot Boxes. They were expected to deliver the Ballot Boxes untampered to the County Returning Officer. They would be the first persons of interest to the extent that counted votes did not make their way to the County Returning Officer.

ii. *The Constituency Returning Officer, Mr. Patrick Muthee*: This is the person who received the Ballot Boxes, certified himself that they were sealed and un-tampered and reportedly handed them to the Constituency Logistics Officer for temporary safe-keeping at the Tallying Centre. Since the Returning Officer satisfied himself that he had received sealed Ballot Boxes, to the extent that the theft happened after he received the Ballot Boxes, he might be responsible for it.

iii. *The Constituency Logistics Officer, Mr. Patrick Ndung'u*: This is the person who had custody of the Ballot Boxes for seven days before they were taken to the Warehouse for safe-keeping.

iv. *The County Logistics Officer, Mr. Thomas Waweru*: This is the person who took custody of the Ballot Boxes from the Constituency Logistics Officer and kept them until their production in Court.

v. *The Petitioner, Mr. Clement Kung'u Waibara*: This is the person who exhibited the stolen votes in his Election Petition before this Court. He needs to explain how he came to be in contact with election materials and whether the circumstances under which he came into contact with those materials suggest the commission of an election offence.

142. The final issue I will address is about costs. Costs usually follow the event in Election Petitions. However, the Court has the discretion, in appropriate cases, to fashion an order for costs that it meets the justice of the case. In the case at hand, there are four factors that the Court wishes to take into consideration:

i. First, that the 1st Respondent was not found to be culpable in any way of any of the innumerable allegations made against her by the Petitioner. To the contrary, the Court found no evidence backing up any of those allegations and dismissed most allegations outright. On equitable grounds, this counsels against condemning the 1st Respondent to pay any costs.

ii. Second, I noted that the 1st Respondent's counsel, Mr. Oduor conducted the proceedings in a sublimely professional manner hence minimizing costs and delays. He was unfailingly courteous to the Court and his colleagues and avoided taking litigation strategies which would serve to needlessly lengthen the trial.

iii. Third, it was the 2nd Respondent who, at the end of the day, was found to have been responsible for the nullification of the elections. Although Counsel for the 2nd Respondent, Mr. Muchemi, acquitted himself with utmost professionalism, refreshing candour and utter integrity, it is the 2nd Respondent who, ultimately, is responsible for the parties having to litigate this case. It was the 2nd Respondent's agents and employees who failed in their duties hence triggering the Petition. If follows that the 2nd Respondent is the culpable party that should be condemned to pay the costs of this Petition.

iv. Fourth, the litigation strategy of the Petitioner and his Counsel necessitated many applications and delays that led to the trial taking longer than it should have. The sheer number of allegations made some of which no attempt at all was made to offer any evidence whatsoever is a commentary on the chosen strategy. Some of the allegations were, as this judgment has announced, plainly unfounded. The same may be said of some of the applications made by the Petitioner's Counsel in the case.

143. Considering these four factors, I will make the following orders regarding costs.

i. First, while I order that the Petitioner, as the victorious party, should recover costs, I order that the costs recoverable by the Petitioner will be Kshs. 1.5 Million. The costs will be recoverable from the 2nd Respondent only. Using the power donated to this court by Rule 30(1)(a) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, I direct that the costs awarded shall be the total costs payable. The same shall therefore not be subject to taxation by the Deputy Registrar.

ii. Second, I also order that the 2nd Respondent should pay the legal costs of the 1st Respondent in the amount of Kshs. 3 Million. I find it inequitable that the 1st Respondent should be saddled with her own legal costs yet she committed no wrongs whatsoever: she offered herself for a dully declared election; ran a clean and lawful campaign; and was duly declared the winner. She conducted her case at the trial with professionalism and integrity even though the ultimate outcome is against her. It would be cruel and iniquitous for her not to recover her legal costs. Using the power donated to this court by Rule 30(1)(a) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017, I direct that the costs awarded shall be the total costs payable. The same shall therefore not be subject to taxation by the Deputy Registrar.

(E) DISPOSITION AND FINAL ORDERS

144. In the end, given my findings above, the Petition succeeds. The orders that the Court issues shall be as follows:

i. A declaration is hereby issued that the election of the Member of the National Assembly for Gatundu North Constituency held on 8th August, 2017 contravened the constitutional and statutory provisions governing elections.

ii. A declaration is issued that the 1st Respondent, Annie Wanjiku Kibeh, was not validly declared the elected Member of the National Assembly for Gatundu North Constituency and the declaration issued by the 2nd Respondent to that effect is invalid, null and void.

iii. A certificate shall issue to the 2nd Respondent and the Speaker of the National Assembly conveying the determination of the Court.

iv. The determination of the Court shall be transmitted to the Director of Public Prosecutions for investigation and possible action on the criminal aspects of the identified electoral malpractice as per paragraphs 140 -141 of this judgment.

v. An order is issued directing the 2nd Respondent to hold a fresh election in conformity with the Constitution, the Elections Act, 2011 and the regulations made thereunder; and

vi. The Petitioner and the 1st Respondent shall have costs from the 2nd Respondents in the terms already stated in this judgement.

145. Orders accordingly.

Dated and delivered at Kiambu this 1st day of March, 2018.

……………………..

JOEL NGUGI

JUDGE

---

[1] *SADC Principles and Guidelines Governing Democratic Elections*, p. ii.

[2] *Report of the International Review Commission (IREC)*, p. 10.

[3] *Ibid*.

[4] *Ibid*.

[5] Heidi Evelyn & Waikwa Wanyoike, *A New Dawn Postponed: The Constitutional Threshold for Valid Elections in Kenya and Section 83 of the Elections Act*, in **Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 General Elections in Kenya, (Eds. Collins Odote & Linda Musumba), p. 80.**

[6] ***Donlan v. Cooke, 212 Iowa 771, 237 N.W. 496 (1931), Court Opinion (06/20/1931)*.**

[7] ***Pearson v. Parsons, 541 So. 2d 447 (Miss. 1989), Court Opinion (03/08/1989)*.**

[8] Louis Wolcher, Law's Task: The Tragic Circle of Law, Justice and Human Suffering, 2008.

[9] Separate Concurring Opinion of Apaloo JA (as he then was) in ***Gabriel Makokha Wamukota v Sylvester Nyongesa Donati [1987] eKLR***; **Kisumu Civil Appeal No. 6 of 1986**.