



IN THE HIGH COURT OF KENYA AT KISUMU

SIAYA ELECTION PETITION NO. 1 OF 2017

IN THE MATTER OF THE MEMBER OF NATIONAL ASSEMBLY FOR

UGENYA CONSTITUENCY

BETWEEN

DAVID OUMA OCHIENG.....PETITIONER

AND

THE INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION.....1ST RESPONDENT

ISAIAH NABWAYO, (THE RETURNING OFFICER UGENYA

CONSTITUENCY).....2ND RESPONDENT

CHRISTOPHER ODHIAMBO KARANI.....3RD RESPONDENT

J U D G M E N T

Introduction and background

1. Following the general election held on 8th August 2017, 2nd Respondent declared the 3rd Respondent, **CHRISTOPHER ODHIAMBO KARANI**, as duly elected Member of National Assembly for Ugenya Constituency and was subsequently gazetted as such.

2. The results of the election as declared by the 2nd respondent on 9th August, 2017 were as follows:-

CANDIDATE	PARTY	VOTES
CHRISTOPHER ODHIAMBO KARANI	ODM	23765
DAVID OUMA OCHIENG	MDG	23418
ODUOR PHILLIP ONYANGO	ANC	84
ADEYA ALEX OBONYO	JUBILEE	62
ODUOR JARIM ELLY OMOGI	FORD	59

3. The petitioner was aggrieved by the conduct of the election and the declaration of the results. He filed this petition on 4th September 2017 seeking the following reliefs: **THAT**

1. The election for the Member of National Assembly for Ugenya Constituency was not conducted substantially in accordance with the Constitution and the relevant electoral laws and the results returned therefrom be declared invalid, null and void

2. The returning of the 3rd respondent as the elected Member of National Assembly for Ugenya Constituency by the 2nd respondent be declared null and void

3. An order be issued directing the 1st respondent to conduct a fresh election for the Member of National Assembly for Ugenya Constituency in conformity with the Constitution and the Elections Act, 2016

4. The costs of the petition be borne by the respondents

4. The petition is based on the following four (4) main grounds:-

1. MALPRACTICES DURING THE CAMPAIGN PERIOD

These include that:-

i. The 3rd respondent and his campaigners, agents, supporters and party officials engaged in smear and dirty campaign by falsely, maliciously and abusively linking the petitioner to the Jubilee Party with the intention of inciting voters against voting for the petitioner

ii. The 3rd respondent and his campaigners, agents, supporters and party officials engaged in smear and dirty campaign by falsely, maliciously and abusively linking the petitioner to the Jubilee Party's presidential candidate Uhuru Muigai Kenyatta with the intention of inciting voters against voting for the petitioner

iii. The 3rd respondent and his campaigners, agents, supporters and party officials violated the Electoral Code of Conduct as to free and fair elections by engaging in smear and dirty campaign in misleading voters that voting for the petitioner was tantamount to voting for Uhuru Kenyatta with the intention of inciting voters against voting for the petitioner

iv. The 3rd respondent and his campaigners, agents, supporters and party officials violated the Electoral Code of Conduct as to free and fair elections by scare mongering and threatening voters that if they voted for the petitioner they would be committing a sin and they could be seen from NASA offices in Nairobi and followed to their homes thereby undermining the secrecy and integrity of the ballot with the intention of discouraging voters from voting for the petitioner

v. The 3rd respondent and his campaigners, agents, supporters and party officials violated the Electoral Code of Conduct as to free and fair elections by scare mongering and threatening voters that the petitioner would impeach Raila Odinga as soon as he is elected

vi. The 3rd respondent and his campaigners, agents, supporters and party officials violated the Electoral Code of Conduct as to free and fair elections by scare mongering and threatening voters that the petitioner was a Jubilee candidate, sponsored by the Jubilee Party under the guise of MDG and always voted with Jubilee Members in Parliament

vii. The 3rd respondent and his campaigners, agents, supporters and party officials and more particularly through Hon. James Orengo violated the provisions of the Elections Act, 2016 by holding a rally at his home located a Nyawara village, Ramunge Sub-location, East Ugenya Ward, Ugenya Constituency specifically to give voters reasons not to vote for the petitioner

well aware that the campaign period had closed

viii. The 3rd respondent and his campaigners, agents, supporters and party officials violated the Electoral Code of Conduct by alleging that the petitioner and Uhuru Kenyatta, the Jubilee presidential candidate had connived to murder the Independent Electoral and Boundaries Commission Ag. Director for Information and Technology, Chris Musando in order to rig the presidential elections against Raila Amolo Odinga, with the aim of whipping emotion, creating fear among and inciting voters against voting for the petitioner

(2) MALPRACTICES DURING VOTING PROCESS

These include that:-

i. The 1st and 2nd respondents conducted the elections in a manner substantially inconsistent with the provisions of the Constitution and the written laws thereto particularly Articles 1, 3, 38, 81 and 86

ii. The 1st and 2nd respondents conducted the elections in a manner that substantially violated the constitutional, statutory and regulatory requirements relating to assisted voters who accounted for more than 50% of all voters who turned up to vote on 8th August, 2017

iii. The 1st and 2nd respondents campaigned for, acquiesced to, promoted and permitted “*six piece*” “*six oranges*” and “*Raila gi Lange*”(Raila and his people) voting, well aware that there was no candidate in the ballot known by these names

iv. The 3rd respondent and his campaigners, agents and supporters misled, coerced, intimidated, bullied and compelled Presiding Officers and their deputies to allow and condone the “*six piece*” , “*six oranges*” and “*Raila gi Lange*” (Raila and his people) voting call

v. The 3rd respondent and his campaigners, agents and supporters misled, misinformed and deluded the voters that the petitioner was part of the “*six piece*”, “*six oranges*” and “*Raila gi Lange*” (Raila and his people) well aware that these phrases were used to mask the 3rd respondent

vi. The 1st and 2nd respondents denied the agents, particularly those of the petitioner the right to participate in the elections and to witness the assisted voters contrary to express provisions of the Elections Act 2011 and the Elections (General) Regulations 2012 as amended by the Elections (General) Regulations 2017 and in a concerted bid to tilt the elections in favor of the 3rd respondent

vii. The 1st and 2nd respondents illegally and maliciously rotated agents in witnessing the assisted voters, well aware that the petitioner had only one agent per polling station and thereby violating the express provisions of the Elections Act 2011 and the Elections (General) Regulations 2012 as amended by the Elections (General) Regulations 2017

viii. The 1st and 2nd respondents were complicit in harassment of the petitioner’s agents and conducted the elections in a partisan and biased manner by misleading illiterate and incapacitated voters in favor of the 3rd respondent

ix. The 1st and 2nd respondents through the Presiding Officers marked “*six piece*” voting for assisted voters in favor of the 3rd respondent without reading out the names of all those contesting the position of Member of National Assembly in contravention of the principles of transparency and fairness and the express provisions of the Elections Act 2011 and the Elections (General) Regulations 2012 as amended by the Elections (General) Regulations 2017

x. The 1st and 2nd respondents through the Presiding Officers, in contravention of the principles of transparency and fairness and in violation of the express provisions of the Elections Act 2011 and the Elections (General) Regulations 2012 as amended by the Elections (General) Regulations 2017 marked ballot papers in favor of the 3rd respondent even after being told that a voter wanted “six piece” and the petitioner

xi. The 1st and 2nd respondents through the Presiding Officers, in contravention of the principles of transparency and fairness and in violation of the express provisions of the Elections Act 2011 and the Elections (General) Regulations 2012 as amended by the Elections (General) Regulations 2017 allowed clerks and other unqualified persons to assist voters

xii. The 1st and 2nd respondents through the Presiding Officers, in contravention of the principles of transparency and fairness and in violation of the express provisions of the Elections Act 2011 and the Elections (General) Regulations 2012 as amended by the Elections (General) Regulations 2017 had Presiding Officers and Deputy Presiding Officers assisting voters simultaneously thus defeating the statutory requirement of witnessing all the assisted voters by against

xiii. As a result of the malpractices by the 1st and 2nd respondents, most assisted voters left the polling stations without knowing whom they had voted for in contravention of Article 38(2) of the Constitution

(3) CAMPAIGNS IN THE POLLING STATIONS ON THE VOTING DAY

These include that:-

i. The 1st and 2nd respondents through the Presiding Officers and Deputy Presiding Officers violated the provisions of Article 81(e) of the Constitution by openly campaigning for “six piece” voting to voters queuing to vote

ii. The 3rd respondent and his campaigners, agents, supporters openly campaigned for six piece voting for the 3rd respondent in the polling stations on the polling day in contravention of the law

iii. The 1st and 2nd respondents allowed the agents of the 3rd respondent to wear badges bearing the 3rd respondent’s name in contravention of the law

(4) HARASSMENT AND INTIMIDATION OF THE PRESIDING OFFICERS AND RETURNING OFFICERS

These include that:-

i. The 3rd respondent harassment and intimidated the Presiding Officers in the polling stations to allow six piece voting and to mark all six piece votes in favor of the 3rd respondent without reading out the names of the candidates

ii. The 3rd respondent harassed, assaulted and insulted the Presiding Officers and the Returning Officer at the Tallying Centre to declare him as the winners well aware the tallying and verification process in the polling stations had not yet been completed

iii. The arbitrary, opaque and confusing manner in which the identified Presiding Officers enforced the law and regulations regarding voter assistance decidedly affects the final results of the elections

ISSUES FOR DETERMINATION

5. The issues for determination are as follows:

- a. **Whether the election for the Member of National Assembly for Ugenya Constituency was conducted in accordance with the principles laid down in the Constitution and Electoral Laws**
- b. **Whether there were electoral malpractices, irregularities and illegalities committed in the conduct of the election for the Member of National Assembly for Ugenya Constituency**
- c. **If there were electoral malpractices, irregularities and illegalities, what was their impact if any, on the integrity of the election and the results therefrom**
- d. **Whether the 3rd respondent was validly elected as the Member of National Assembly for Ugenya Constituency**
- e. **Who is to bear the costs of this petition**

6. In order to support their respective cases, the petitioner called 40 witnesses while the 1st and 2nd respondents called 8 witnesses. The 3rd respondent's response to the petitioner was struck out by a ruling delivered on 16th November, 2017 and he did therefore not participate in these proceedings. The parties also filed written submissions at the conclusion of the case.

7. Before I embark on determination of the issues, I will consider some of the general principles applicable to election petitions.

GENERAL PRINCIPLES APPLICABLE

8. The general principles governing elections and election disputes are contained in Constitution, the Elections Act, 2016 (*The Act*) and the Subsidiary Regulations thereto. **Article 1** of the Constitution pledges the Sovereignty of the will of the people which may be exercised through their democratically elected representatives. Article 2 declares the Constitution to be the supreme law of the Republic while Article 3 obligates every person to respect, uphold and defend this Constitution.

9. Political rights protected by **Article 38** are realized through the electoral system set out in **Chapter Seven** of the Constitution.

10. According **Article 81(e)**, elections are free and fair when they are by secret ballot, free from violence and intimidation, improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner.

11. Tied to this, the Electoral Code of Conduct whose object is to promote conditions conducive to the conduct of free and fair elections and a climate of tolerance in which political activity may take place without fear, coercion, intimidation or reprisals provides under **Section 5(x)** that free electoral campaigns be promoted by all means.

12. On the other hand **Section 109 (cc) and (dd)** of *the Act*, empowers the 1st respondent to provide for the manner of enforcing the electoral code of conduct and to provide for the conduct of campaigns during referendum and elections. From the marginal note of **Section 74(1) the Act**, the 1st respondent can only settle "certain disputes." A dispute relating to campaigns is an electoral dispute that in my considered view can only be handled by the election court.

13. What happens during campaign is therefore legitimate business of a court hearing a petition concerning that election. (See **William Odhiambo Oduol v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR**).

14. Concerning assisted voters, **Regulation 72 of the General Regulations, 2012** provides:

“(1) On the application of a voter who is, by reason of disability or being unable to read or write, and therefore unable to vote in the manner prescribed in these regulations, the presiding officer shall permit the voter to be assisted or supported by a person of the voter’s own free choice, and who shall not be a candidate or an agent.

(2) Where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such voter, in the presence of the agents.

(3) ...

(4)

(5)

(6) Where a presiding officer grants the request of a voter under this regulation, the presiding officer shall record in the polling station register against the name of the voter the fact that the voter was assisted and the reason for the assistance.”

15. From the foregoing, there is no doubt that Elections emphatically demonstrate the sovereign will of the people, which merits safeguarding by the process of the law. An Election Petition is a special dispute which calls upon an Election Court to determine whether the political rights of citizens under *Article 38* have been upheld. For that reason, it’s now trite law that the standard of proof in an election petition is beyond the balance of probability but lower than beyond reasonable doubt that is applicable in criminal cases.

16. The Supreme Court of Kenya re-affirmed this position in the case of *Raila Odinga and Another v. The Independent Electoral and Boundaries Commission and Others [2017] eKLR* wherein it held:-

“In many other jurisdictions including ours, where no allegations of criminal or quasi-criminal nature are made in an election petition, an “intermediate standard of proof”, one beyond the ordinary civil litigation standard of proof on a “balance of probabilities”, but below the criminal standard of beyond reasonable doubt”, is applied. In such cases, this court stated in 2013 Raila Odinga case that the threshold of proof should in principle be above the balance of probability, though not as high as beyond reasonable doubt ...”.

17. Having established the standard of proof, Section 107 of the Evidence Act, places the burden of proof on the person who alleges in the following terms:

(1) 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.

18. The burden is therefore on the petitioner, to prove to the satisfaction of the court, that there was not only non-compliance with the Constitution and other electoral laws, but also that the said non-compliance affected the outcome of the election.

19. An Election Court will therefore not easily upset an election by substituting its decision, conviction or will to that of the electorate. An Election Court has to be satisfied that the alleged electoral malpractices, irregularities and illegalities affected the will of the electorate. In *Raila Amolo Odinga v. IEBC and 3 Others [2013] eKLR*, the Supreme Court of Kenya held that:-

“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long standing common Law approach in respect of alleged irregularity in the acts of public bodies, *Omnia praesumuntur rite et solemniter esse*

ecta; all acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authority's departures from the prescriptions of the law."

20. In the recent case of **Raila 2017 (Supra)**, the Supreme Court underscored the burden of proof in electoral disputes and held inter alia, that:

[131] Thus a petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds "to the satisfaction of the court. That is fixed at the onset of the trial and unless circumstances change, it remains unchanged.

ANALYSIS AND DETERMINATION

21. I have considered the pleadings on record, testimony of witnesses and written submissions by Learned Counsels.

22. From the outset, the petitioner was categorical that he was not challenging the returned results but the process that gave rise to the impugned results. On the issue on numbers, the Supreme Court in the case of **Raila 2017 (Supra)**, emphasized inter alia, that:

[224] ".....elections are not only about numbers as many, surprisingly even prominent lawyers, would like the country to believe. Even in numbers, we used to be told in school that to arrive at a mathematical solution, there is always a computational path one has to take, as proof that the process indeed gives rise to the stated solution."

23. In addressing the issues in question, this court will be guided by the principle under section 83 of *the Act* which provides in respect of challenges to an election as follows:

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

24. Section 83 of *the Act* undoubtedly creates a rebuttable presumption that elections are generally conducted in accordance with the provisions laid down in the Constitution and other electoral laws. A petitioner seeking to nullify an election should therefore clearly and decisively discharge the burden of proof by demonstrating that the conduct of the election was so devoid of merits and so distorted as not to reflect the expression of the people's electoral intent and the evidence should also disclose profound irregularities in the management of the electoral process. (See **Raila Odinga 2013 (Supra)** and **George Mike Wanjohi v Steven Kariuki & 2 Others, Supreme Court Petition No. 2A of 2014)**.

25. The Supreme Court in the recent case of **Raila 2017(Supra)** reaffirmed the logic under Section 86 and stated thus:

[209] Therefore, while we agree with the two Lord Justices in the Morgan v. Simpson case that the two limbs should be applied disjunctively, we would, on our part, not take Lord Stephenson's route that even trivial breaches of the law should void an election. That is not realistic. It is a global truism that no conduct of any election can be perfect. We will also go a step further and add that even though the word "substantially" is not in our section, we would infer it in the words "if it appears" in that section. That expression in our view requires that, before vitiating it, the court should, looking at the conduct of the whole election, be satisfied that it substantially breached the principles in the Constitution, the Act and other electoral laws. To be voided under the first limb, the election should be what Lord Stephenson called "a sham or travesty of an election" or what Prof. Ekirikubinza refers to as "a spurious imitation of what elections should be.

26. The wheels upon which the allegations of electoral malpractices, irregularities and illegalities turn is therefore whether in the conduct of elections, breaches, if any, had been such that it could not be said that the elections had been conducted as to be substantially in accordance with the law and whether the electoral malpractices, irregularities and illegalities, if any, had affected the results.

27. The detailed grounds upon which the petition is premised are to be found in the petition, the petitioner's affidavit in support of the petition as well as witnesses' affidavits.

28. In the first ground, the Petitioner contends that there were malpractices during the campaign period preceding the impugned election which in summary included a smear and dirty campaign linking him to the Jubilee presidential candidate Hon. Uhuru Muigai Kenyatta with the intention of inciting voters against voting for him; misleading voters that voting for him was tantamount to voting for Hon. Uhuru Kenyatta; scare mongering and threatening voters that the petitioner would impeach Hon. Raila Odinga if he was elected president and that petitioner was a Jubilee candidate sponsored by the Jubilee Party under the guise of MDG and always voted with Jubilee Members in Parliament, further that the petitioner and the Jubilee presidential candidate, Hon. Uhuru Kenyatta, had connived to murder the Independent Electoral and Boundaries Commission Ag. Director for Information and Technology, Chris Musando with a view of rigging the presidential elections against Hon. Raila Amolo Odinga, and that all these false and malicious allegations were intended to whip emotions, create fear among, and inciting voters against voting for the him.

29. PW2 Bernard Ouma Ohwenya and PW3 Rosemary Odinga stated that they attended an ODM campaign rally at Nyalenda on 24/7/17 which was addressed by the 3rd respondent, Cornel Rasanga and Christine Ombaka among others who urged voters to vote six piece as voting for the petitioner who they said was a Jubilee mole was synonymous to voting for Hon. Uhuru Kenyatta.

30. PW4 Maurice Juma Ogutu, PW5 Nelson Ochieng Odhiambo and PW6 Martin Ouma Owour stated that they attended an ODM Rally at Sihayi where the 3rd respondent, Hon. James Orengo, Hon. Gladys Wanga among other speakers accused the petitioner of being rebellious to Hon. Raila Odinga and being a Jubilee supporter who would not vote with ODM in parliament but would team up with Jubilee Party to impeach Hon. Raila Odinga once elected president.

31. PW9 Dismas Okumu Agwanda, PW10 Mary Awino Amolo, PW11 Otieno Julius Odhiambo, PW 12 Onyango Michael Otieno and PW16 Kennedy Omondi all testified that they attended rallies at Hon. Orengo's home on 3rd and 7th August, 2017 where Hon. Orengo claimed that petitioner was in Jubilee party and that voting for him was tantamount to voting for Hon. Uhuru Kenyatta.

32. PW13 Jacinta Achieng Nyang'ori recalled that she attended an ODM Rally at Got Nanga Centre which was addressed by among others the 3rd respondent who claimed that the petitioner was a Jubilee mole.

33. PW 14 Lucy Awuor Owino stated that she attended a rally on Sunday 23/7/17 at Nyaharua in which Hon. Orengo stated that MDG was a Jubilee party and had no place in Luo Nyanza politics.

34. PW 15 Rebecca Anyango Okoth stated that she attended 2 rallies in Aboke in July 2017, one on a date she could not recall and another on 22/7/17 where the 3rd respondent, Caren Ayika, Stephen Odhiambo, and Hon. James Orengo claimed that the petitioner and his MDG party were part of Jubilee party and that voting for him was the same as voting for Hon. Uhuru Kenyatta.

35. PW 28 Edwin Omondi Onyango recalled that he attended an ODM Rally at Nyaholo Market which was addressed the 3rd respondent and Hon. James Orengo who claimed that the petitioner was a Jubilee mole and was not supporting Hon. Raila Odinga and further that the developments he had brought were Jubilee projects. In cross-examination, the witness stated that the petitioner was prejudiced because the people of Ugenya associate themselves with Hon. Raila and not Hon. Uhuru Kenyatta.

36. Further to the foregoing, there is evidence from PW13 Jacinta Achieng Nyang'ori that at an ODM

Rally at Got Nanga Centre which was attended by among others the 3rd respondent, one Stephen Juma claimed that petitioner was a sorcerer and had killed his daughter and therefore was not fit to be elected as Member of Parliament. There is evidence that arising from that incident; petitioner filed **Principal Magistrate's Court Siaya Case. No. 87 of 2017** against the said Stephen Juma as shown by a plaint annexed to the affidavit in support of the petition, which case the petitioner said is still pending.

37. The petitioner has made various allegations against named persons that were not enjoined to this petition as respondents. In the case of In the **Raila Case [2013] (Supra)**, the Supreme Court echoed the principle that:

[195] [A]n electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswerable case has been made.

38. The respondent faults the petitioner for not enjoining to this petition the other persons that participated in the alleged dirty campaign against him. A perusal of the petition shows that it clearly provided the respondents with adequate notice that evidence was to be called against these personalities. In accordance with **Section 12** of *the Act*, they had an opportunity to file affidavits in response, which they failed to do. Under **Section 12 (9)** they could have sought leave of the court to file affidavits, which they again failed to do.

39. In my considered view, the burden of proof shifted to the named personalities to defend themselves against allegations made by the petitioner and his witnesses. Having failed to file responses in accordance with the law, these personalities cannot be said to have been denied an opportunity to be heard. (See **Cornel Rasanga Amoth v William Odhiambo Oduol & 2 others [2014] eKLR**).

40. I have considered the provision of **Section 2** of the **Elections (Parliamentary and County Elections) Petitions Rules, 2017** which defines who a respondent in an election petition is and I am not persuaded that failure to include as respondents, all persons alleged to have participated in the dirty campaign against the petitioner is fatal to the petition.

41. The 1st and 2nd respondent fault the petitioner for not reporting the electoral malpractices, irregularities and illegalities to the Electoral Code of Conduct Enforcement Committee and in support thereof have relied on **Wilson Mbithi Munguti Kabuti & 5 others v Patrick Makau King'ola & another [2013] eKLR**. I have considered the holding in that decision where the court emphasized the need for concrete proof of malpractices before they can be remedied by the court.

42. In the case of **Karanja Kabage v Joseph Kiuna Kariambegu Nganga & 2 others [2013] eKLR** the court addressed the role of the IEBC in dispute resolution and held as follows:

"...in a case where there was a clear breach of the law by contravention of the code of conduct or by failure to disqualify a candidate under section 72 of the Elections Act as a result of which the election was compromised, then the Court had to consider these proceedings in determining the validity of election of the candidate..."

43. Consequently, I find and hold that where concrete evidence to proof electoral malpractices has been tendered, failure to report the said malpractices would in my considered view not be fatal to the petition. In any case, it would not be expected that the petitioner would abandon his campaign and pitch camp at IEBC offices or the police station to continually report any offensive conduct committed against him.

44. Having said that, I find that evidence as tendered by the petitioner and his witnesses regarding the smear and dirty campaign perpetrated against the petitioner is not controverted.

45. Concerning the death of Chris Musando, PW7John Odhiambo Ochieng, PW8 Jackson Odhiambo Odour and PW17 Michael Ouma Ouma stated that he heard the 3rd respondent's supporters talking in

low tones that the petitioner and Hon. Uhuru Kenyatta had conspired to kill Chris Musando so that presidential elections could be rigged against Hon. Raila Oding and that this created a hostile environment against the petitioner because the petitioner was depicted as a murderer. The witnesses did not however identify the persons that linked the petitioner to the death of Chris Musando and I therefore find the claim not proven.

46. In the second main ground, Petitioner contends that there were malpractices during voting process which in summary included non-compliance with the laws and regulations relating to assisted voters, who could not read, write or were disabled. It was stated that where assisted voters asked for “*six piece*”; the presiding officers and their deputies did not read out the names of candidates to give assisted voters a chance to elect candidates of their choice but instead marked the ballots in favor of ODM candidates only. It was also alleged that presiding officers and their deputies unprocedurally allowed clerks to assist voters and rotated agents thereby denying the petitioner’s agents an opportunity to witness voting by assisted voters.

47. The petitioner and his witnesses did not identify the clerks that allegedly assisted voters. On the issue of *six piece*, DW6 Peter Mwandho Opondo a presiding officer at Sigweny Karuoth Polling Station 01 conceded that there was pressure on him from the 3rd respondent and agents of ODM presidential candidate who wanted him to mark for all ODM candidates when a voter asked to vote *six piece*. He identified the reverse of page 56 of the Polling Station Diary where he recorded that the 3rd respondent and ODM agents stormed the room and demanded that he allows voters that asked to vote *six piece* to vote for 6 ODM candidates only.

48. There is no doubt that *six piece*, *six oranges* and *Raila gi lange* were campaign slogans for ODM Party. ODM had every right to identify its candidates in ODM rallies and to ask that only ODM candidates be elected. (See William Odhiambo Oduol v Independent Electoral and Boundaries Commission & 2 others [2013] eKLR and Fatuma Zainabu Mohamed v Ghati Dennitah & 10 others [2013] eKLR). However, to intimidate a presiding officer to allow voters that asked to vote *six piece* to vote for 6 ODM candidates only without letting the voters pick a candidate of their choice as happened at Sigweny Karuoth Polling Station 01 among other polling stations was an irregularity that this court cannot disregard since it goes to the reliability of the election. Secondly, it is a fact that there were two registers in the 8th August, 2017 elections, electronic and a hard copy. The requirement in **Regulation 72** that Form 32 be filled and that the Presiding Officer does mark the register in respect of an assisted voter whom he assists is for good reason. It is meant to comply with the constitutional requirement that an election should be transparent, accountable, verifiable and credible. In the absence of Forms 32 and marked register, I find and hold that the 1st and 2nd respondents have failed to account for the assisted voters and the reasons for which they were assisted and this creates a doubt in the mind of the Court as to whether the election was free and fair.

49. As regards witnessing of assisted voters by agents, the presiding officers and their deputies that testified conceded that they randomly rotated agents so that only two agents witnessed voting by assisted voters. It was also conceded that the petitioner’s agents did not witness the voting of all assisted voters since there were more ODM agents at the polling stations.

50. Regulation 72 of the General Regulations, 2012 provides:

2. Where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such voter, in the presence of the agents.

51. By randomly rotating agents to witness voting by assisted voters, the 1st and 2nd respondent breached **Regulation 72 of the General Regulations, 2012** which requires that such voting be witnessed by **all agents.**

52. The 2nd respondent’s contention that the rotation of the agents was a management tool is unacceptable since it denied the petitioner’s agents an equal chance with the ODM agents that included

those of the 3rd respondent to witness the voting by assisted voters.

53. As regards the third main ground that there were campaigns in the polling stations on the voting day, PW 20 Lucas Opondo Odongo and PW 21 Lilian Atieno Oduor who were agents at Nyaharua Polling Station Stream 2 and PW 22 Emmah Akinyi Opondo an agent of the petitioner at Magombe Primary School told court that the third respondent campaigned for *six piece* voting on the queues.

54. Campaign on voting day falls outside the campaign period that ends 48 hours before the Election Day and is therefore an irregularity. The petitioner's witnesses told court that they complained to the presiding officers about the campaigns in the polling stations on the voting day among other complaints. Although the presiding officers and their deputies that testified denied receiving any complaints from the petitioner's agents, the 1st and 2nd respondents deliberately filed incomplete Polling Station Diaries purposely omitting the pages where such incidents ought to have been recorded and gave no reasonable explanation for the said omission. The only inference the court can make is that the omission was part of a scheme intended to conceal evidence that was adverse to the 1st and 2nd respondents and this court holds it against them.

55. Concerning the fourth main ground of harassment and intimidation of the Presiding Officers and Returning Officers, the 2nd respondent denied that he had been harassed, intimidated and assaulted by the 3rd respondent at the Tallying Centre. As stated hereinabove however, DW6 Peter Mwandho Opondo, a presiding officer at Sigweny Karuoth Polling Station 01 identified the reverse of page 56 of the Polling Station Diary where he recorded that the 3rd respondent and ODM agents had stormed the room/polling station and demanded that he allows voters that asked to vote six piece to vote for 6 ODM candidates only.

56. There is therefore evidence that there was coercion, intimidation and bullying of presiding officers by the 3rd respondent and ODM agents.

57. Having established that electoral malpractices were indeed perpetrated against the petitioner, it is now upon this court as of necessity to determine, whether they affected the integrity of the election and the results therefrom.

58. Courts have acknowledged that the legal sufficiency that an election was conducted in a free, fair and credible manner would not necessarily mean that the election was devoid of errors, mistakes or irregularities. (*See Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others, Kericho High Court Petition No. 1 of 2013.*)

59. The Supreme Court concisely pronounced itself on this issue in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others SCK Petition No. 2B of 2014[2014] eKLR* and held thus:

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

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

[220] Where an election is conducted in such a manner as demonstrably violates the principles of the Constitution and the law, such an election stands to be invalidated.

60. It is therefore not every non-compliance or every act or omission in breach of the election regulations or procedure that invalidates an election for being non-compliant with the law. This position was upheld by the Supreme Court in *Raila 2017* (Supra) at page 71.

61. In Presidential Election Petition No.102 of 2011 Rtd Col. Kizza Besigye .V. Yoweri Kaguta Museveni & Election Commission Mulenga JSC explained the meaning of the phrase “affected the result of the election in a substantial manner” as follows:

“To my understanding therefore, the expression non-compliance affected the result of the election in a substantial manner as used in section 58(6)(a) can only mean that the votes candidates obtained would have been different in a substantial manner, if it were not for the non-compliance substantially. That means that to succeed, the Petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that the winning majority would have been reduced. Such reduction however would have to be such as would have put the victory in doubt.”

62. In Uganda Presidential Election Petition No.1 of 2001, Rtd Col Dr. Kiiza Besigye v Yoweri Kaguta Museveni and Electoral Commission, ODOKI CJ defined “free and fair elections” in the following terms:

“To ensure that elections are free and fair there should be sufficient time given for all stages of the elections, nominations, campaigns, voting and counting of votes. Candidates should not be deprived of their right to stand for elections, and citizens to vote for candidates of their choice through unfair manipulation of the process by electoral officials.

The entire election process should have an atmosphere free of intimidation, bribery, violence, coercion or anything intended to subvert the will of the people”

63. The meaning of ‘*affected the result*’ was also discussed in Mbowe v Eliufoo [1967] EA 240, 242, where Georges CJ., in the High Court of Tanzania observed that,

“In my view in the phrase “affected the result,” the word “result” means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules.”

64. The margin of votes between the petitioner and the 3rd respondent is 347 votes only.

65. The Jubilee Party’s main opponent was NASA Coalition whose presidential candidate was Hon. Raila Amolo Odinga. Ugenya Constituency is in Siaya County which is one of Hon. Raila's strong political areas. There is evidence that Hon. Raila Odinga has an ardent following in Siaya. To be portrayed as supporting Jubilee Party in Siaya County is something that no doubt affected the petitioner's candidature. Petitioner was contesting on an MDG ticket and not on a Jubilee ticket. By representing that the petitioner and MDG party was part of Jubilee Party, which was not true, the 3rd respondent and the other persons named hereinabove knew, and intended to alienate petitioner from voters in the constituency where both Jubilee Party and its presidential candidate Hon. Uhuru Kenyatta were not viewed favourably.

66. In summary, the ODM campaign machine ran a dirty campaign during the election for Member of Parliament for Ugenya Constituency in Siaya County similar to the one that ensued during the gubernatorial campaigns for Siaya County preceding the 2013 elections. I find support in the holding from the decision in William Odhiambo Oduol v Independent Electoral and Boundaries Commission & 2 others (Supra) and hold that everything was done to depict the petitioner as a murderer and a candidate who was running against the grain. The election campaigns were repeatedly bombarded with malicious propaganda against the petitioner. The propaganda was beyond what was ordinarily expected from opponents in an election campaign. From the evidence, the County is basically an ODM and Raila zone. I find that the propaganda that the petitioner was supporting Hon. Uhuru Kenyatta was not only offensive but also a blow below the belt, as it were. Taking together all that has been outlined in the

foregoing, one cannot say that a fair chance was given to the petitioner to campaign, or that the electors were given a fair chance to pick a candidate of their choice. To put it bluntly, the campaign was not free and fair. The campaign was perverted to the extent that it fundamentally subverted the will of the people and compromised the integrity of the election.

67. Secondly and as stated herein above, the 1st and 2nd respondent failed to account for the assisted voters and the reasons for which they were assisted and this creates a doubt in the mind of the Court as to whether the election was free and fair. Thirdly, the petitioner has proved that campaigns were conducted by and on behalf of the 3rd respondent outside the campaign period that ends 48 hours before the Election Day. The petitioner has also established that presiding officers and more specifically DW6 Peter Mwandho Opondo were coerced, intimidated and bullied by the 3rd respondent and ODM agents who demanded that he allows voters that asked to vote *six piece* to vote for 6 ODM candidates only without giving the electors a chance to select a candidate of their choice.

68. Having said that, I find and hold that the electoral malpractices, irregularities and illegalities witnessed in the impugned election were such that it could not be said that the elections had been conducted substantially in accordance with the Constitution and the relevant electoral laws and the results therefrom do not pass the test of being transparent, accountable, verifiable and credible.

Costs

69. An election Court has power under Section 84 of *the Act* and rule 30 of the *Rules* to award the costs of, and incidental to a petition to the successful party. (See *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others [2014] eKLR*). I have considered the holding in the case of and the case of *Martha Wangari Karua & another v Independent Electoral & Boundaries Commission & 3 others [2017] eKLR* cited by both the petitioner and the 1st and 2nd respondents and where the court awarded Kshs. 10 million after striking out the petition on a technicality.

70. I have also considered the case of *Richard Kalembe Ndile & another v Patrick Musimba Mweu & 2 others [2013]eKLR* cited by the 1st and 2nd respondents where the court held that costs awarded should be fairly adequate to compensate for work done but at the same time should not be exorbitant as to unjustly enrich the parties or cause unwarranted dent on the public purse or injure the body politic by undermining the principle of access to justice enshrined in **Article 38** of the Constitution.

71. The parties are in agreement that this petition was complex as manifested by the pleadings and submissions tendered in court and the number of witnesses and the nature of their evidence on record. The petitioner urged the court to award him costs in the sum of Kshs. 7 million while the 1st and 2nd respondents submitted that Kshs. 10 million would adequately compensate them.

72. There is no doubt that fairness and transparency must be adhered to in all stages of the electoral process. Those who commit electoral offences or otherwise subvert the electoral process should, in my view, be subjected to severe sanction.

73. I have taken into account the time spent on research, preparation of pleadings, applications and submission, preparation of witnesses and in court during the actual hearing of the case. In my view, the costs of Kshs. 7 million urged by the petitioner would in the circumstances of this case not be exorbitant.

Final Orders

74. In conclusion, the court makes the following orders:

- 1. In accordance with Article 105 (1)(a) of the Constitution, this court determines and declares that CHRISTOPHER ODHIAMBO KARANI, the 3rd respondent, was not validly elected as Member of National Assembly for Ugenya Constituency in Siaya County**
- 2. I direct that 1st respondent conducts fresh election for Ugenya Constituency National**

Assembly Seat.

3. The total costs to the petitioner are capped at Kshs. 7 million; half of which shall be borne by the 1st and 2nd respondents jointly and severally and the other half by the 3rd respondent.

4. Accordingly, the Certificate of the Court as to the validity of the election, will, pursuant to section 86 of the Elections Act, issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly, forthwith.

DATED AND DELIVERED THIS *1st DAY OF March* 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistants - **Felix and Carolyne**

Petitioner - **Mr. (Rtd). Justice Kwach, Mr. Sagana & Mr. Achach instructed by the firm of Sagana, Biriq & Co. Advocates**

1st & 2nd Respondents – **Mr. Olendo instructed by the firm of Ogejo, Olendo & Co. Advocates**

3rd respondent - **Mr. Wakla and Mr. Mugoye instructed by the firm of Mugoye & Associates Advocates**