REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

ELECTION PETITION NO. 14 OF 2017

IN THE MATTER OF THE ELECTION FOR MEMBER OF PARLIAMENT FOR RABAI CONSTITUENCY

AND

IN THE MATTER OF THE ELECTIONS ACT NO. 24 OF 2011

AND

IN THE MATTER OF THE ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITIONS RULES, 2017

AND

IN THE MATTER OF THE ELECTIONS (GENERAL) REGULATIONS, 2012

BETWEEN

EMANUEL BARAKA ARON.....PETITIONER

AND

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

JUMAA MUSA JUMAA.....2ND RESPONDENT

MWAMKALE WILLIAM KAMOTI.....3RD RESPONDENT

JUDGEMENT

A. INTRODUCTION

1. At the conclusion of the general election held on 8th August, 2017, the 2nd Respondent, Jumaa Musa Jumaa, the Returning Officer for Rabai Constituency and an agent of the 1st Respondent, the Independent Electoral and Boundaries Commission (IEBC) declared the 3rd Respondent, William Kamoti Mwamkale as the candidate elected to represent the people of Rabai Constituency in the National Assembly. The Petitioner, Emmanuel Baraka Aron, a voter registered in Rabai Constituency, through his Petition dated 5th September, 2017 and filed on 6th September, 2017 seeks to overturn the 3rd Respondent's election.

B. THE PLEADINGS

i. The Petitioner's case

2. The Petitioner averred that the election of the 3rd Respondent was not clean in that it violated the principles of a free and fair election and electoral process; that it resulted from a compromised relay and transmission of results; that it violated the constitutional and legal threshold of a free and fair election; that the voting, counting and tabulation of results was marred by irregularities; and that there was inefficiency,

inaccuracy and lack of accountability by the 1st and 2nd respondents.

3. The Petitioner stated that he was the Chief Agent of Anthony Kenga Mupe who contested the seat for the representative of Rabai Constituency in the National Assembly on a Jubilee party ticket. According to him, there were massive malpractices and irregularities experienced during and after the voting and the respondents were well aware of the offences, malpractices and irregularities as the Petitioner and other candidates had raised complaints on those issues. The Petitioner opined that the election was so badly conducted and marred with irregularities that it does not matter who won or was declared the winner of the said election. He asserted that the nature and extent of the flaws and irregularities significantly affected the results to the extent that the 2nd Respondent could not accurately and verifiably determine what results any of the candidates received.

4. The Petitioner contended that Section 83 of the Elections Act, 2011 contemplates that where an election is not conducted in accordance with the Constitution and the written law, then the election must be invalidated notwithstanding the fact that the result may not be affected.

5. The Petitioner asserted that before, during and after the election date there were massive electoral malpractices perpetrated by a number of presiding officers and deputy presiding officers with the cognizance of the respondents.

6. The Petitioner referred to the frustrations of one Shenga Chome Ndune, a resident of Ruvuma Ward, who witnessed a lady dishing out money to voters at Boyani polling station of Kisivutini Ward while urging them to vote six piece for the Orange Democratic Movement (ODM) Party candidates. The Petitioner averred that this happened in the presence of security officers and polling clerks who did nothing to stop the election malpractice.

7. Further, the Petitioner stated that the 2nd Respondent was in constant communication with the 3rd Respondent during the entire voting period and personally committed, aided and/or abetted some of the serious offences and malpractices witnessed in Rabai Constituency during and after the election.

8. The Petitioner posited that the election contravened the principles of a free and fair election under Article 81(e) of the Constitution as read together with Section 39 of the Elections Act and the regulations made thereunder.

9. On relay and transmission of results from the polling stations to the constituency tallying centre, the Petitioner asserted that the process was not simple, accurate, verifiable, secure, accountable, transparent, open and prompt thus substantially compromising and affecting the principles underlining a free and fair election as stipulated by Article 81(e)(iv) and (v) of the Constitution.

10. According to the Petitioner, the transmission and relay of results was compromised in that the data and information recorded in forms 35A at the individual polling stations was not accurately and transparently entered into the KIEMS kits in those stations; that the information in forms 35A was not consistent with the information recorded in form 35B as required and legitimately expected; and that the purported results in the 2nd Respondent's form 35B was materially different from what the 2nd Respondent publicly relayed.

11. The Petitioner asserted that the election was not administered in a neutral, efficient, accurate, accountable and impartial manner as required by Article 81(e)(v) of the Constitution as read together with sections 39, 44 and 44A of the Elections Act and the regulations made thereunder and Section 25 of the Independent Electoral and Boundaries Commission Act. It was the Petitioner's averment that in numerous instances, the 1st and 2nd respondents selectively manipulated, engineered and/or deliberately distorted the votes cast and counted in favour of the 3rd Respondent thereby affecting the final results. According to the Petitioner, in a substantial and significant number of instances the 2nd Respondent grossly inflated the votes cast in favour of the 3rd Respondent thereby affecting the final results tallied.

12. On the allegation of irregularities in the voting, counting and tabulation of votes, the Petitioner postulated that the votes cast in a significant number of polling stations were not counted, tabulated and accurately collated as required under Article 86(b) and (c) of the Constitution as read together with the Elections Act. The Petitioner also stated that in a significant number of polling stations the votes cast as captured in forms 35A differed from the results as captured in form 35B. His view was that the results tabulated in form 35B were not accurate thus rendering the election and the electoral process fundamentally flawed and invalid.

13. The Petitioner finally asserted that the election was fundamentally flawed owing to irregularities and improprieties and non-compliance with constitutional and legal provisions governing elections.

14. He therefore urged this court to issue declarations and orders as follows:

> **"a. A declaration that the [election of] the Rabai Constituency Member of National Assembly held on [the] 8th day of August 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void;**
>
> **b. A declaration that the 3rd Respondent was not validly declared as the Member of National Assembly for Rabai Constituency and that the declaration is invalid, null and void;**
>
> **c. An order directing the 1st Respondent to organize and conduct a fresh Rabai Constituency Member of National Assembly Election in strict conformity with the Constitution and Elections Act, 2011;**
>
> **d. A declaration do issue that the degree and extent of electoral offences and malpractices perpetrated by, and/or attributable to the agents of the Respondents in the Rabai Constituency Member of National Assembly [election] conducted on the 8th day of August, 2017 invalidated the said election;**

e. A declaration do issue that the decree and extent of electoral offences and malpractices perpetrated by, and/or attributable to the agents of [the] Respondents in the conduct of the Rabai Constituency Member of National Assembly [election] of the 8th August, 2017 were in breach of, and violated Article 86 of the Constitution.

f. A declaration that each and all of the Respondents jointly and severally committed election offences, malpractices and/or irregularities;

g. Costs of the Petition, and

h. Any other orders that the Honourable Court may deem just and fit to grant."

15. The Petitioner swore an affidavit on 5th September, 2017 in support of the Petition. In it, he reaffirmed the contents of the Petition. He then went ahead to disclose the malpractices and offences allegedly committed during the election.

16. In summary, the Petitioner averred about mishandling, rejection, ejection, misleading and disenfranchisement of assisted voters; failure by the presiding officers to prepare and record in the polling station registers names of assisted voters and the reasons for the assistance; the permitting of party agents, particularly those of ODM, by presiding officers to assist voters; some voters not identified by the electronic voter identification devices being allowed to vote while others were disenfranchised by being turned away; the marking of ballot papers for assisted voters by ODM agents; bribery and treating of voters; intimidation, rejection and ejection of Jubilee agents from polling stations; campaigns past the legal deadline; campaigns by the provincial administration for ODM candidates; suppression, intimidation and threatening of voters; and mishandling of the voting materials and the voting process.

ii. <u>The 1st and 2nd respondents' response</u>

17. The 1st and 2nd respondents' answer to the Petition was supported by the affidavit of the 2nd Respondent. They opposed the Petition and asserted that the election was held in accordance with the spirit and intention of Article 81 of the Constitution, the Elections Act, the Independent Electoral and Boundaries Commission Act and all other provisions of the law which promote the holding of free, fair and transparent elections.

18. According to the 1st and 2nd respondents, the election was free, fair and transparent thus enabling citizens and voters to exercise their political rights in accordance with Article 38 of the Constitution; that the election was by secret ballot, free from violence, intimidation, improper influence or corruption; and that they administered the election in an impartial, neutral, efficient, accurate and accountable manner.

19. The 1st and 2nd respondents asserted that if indeed the alleged offences, malpractices and irregularities occurred, the Petitioner, his agents or witnesses ought to have reported them to the police and recorded appropriate statements. Further, that reports, backed up with substantial and credible material evidence including electronic recordings, ought to have been made to the 1st Respondent.

20. The 1st and 2nd respondents therefore posited that the allegations by the Petitioner are bad in law for lack of material particulars and as such unfounded, speculative, malicious and ill-intentioned.

21. The 1st and 2nd respondents asserted that the voting, the counting and the tallying of votes, and the transmission of results proceeded in the manner required by the law and was simple, accurate, verifiable, secure, open and prompt. Further, that the allegation of mismatch between the results in forms 35A, form 35B and what was publicly displayed is not based on any evidence and that the polling stations in which these anomalies were allegedly noted have not been identified.

22. The 1st and 2nd respondents also denied various allegations not contained in the Petition. This action is explained by looking at paragraph 19 of the response which shows that the 1st and 2nd respondents imported to this Petition their defence to a petition touching on the election of the Member of National Assembly for Turkana East Constituency. This error did not, however, affect the 1st and 2nd respondents' case since their response fully covered the issues raised in this Petition.

23. The 1st and 2nd respondents therefore urged this court to find and hold that:

"(a) The 3rd Respondent was validly elected as the Member of National Assembly, Rabai Constituency;

(b) The people of Rabai Constituency exercised their sovereign power of the vote and their decision should be respected;

(c) The Petition lacks merit and should be dismissed; and

(d) The Petitioner should bear the costs of the Petition."

iii. <u>The 3rd Respondent's response</u>

24. In his response dated 22nd September, 2017 the 3rd Respondent denied the Petitioner's allegations and asserted that the election was held in compliance with the Constitution and the laws governing elections. His averment was that there was no selective manipulation, interference, engineering or deliberate distortion of the votes cast or counted in favour of any candidate in the election. Further, that the votes were counted and recorded in forms 35A which forms were signed by the agents of all candidates who were present. He therefore urged this

court to determine that his election was valid and dismiss the Petition with costs.

25. In the affidavit he sworn in support of his response, the 3rd Respondent reiterated the contents of his response. He stressed that if indeed there were any irregularities or illegalities, such incidents were not of such magnitude as to affect the result of the election.

C. THE PETITIONER'S TWO MOTIONS DATED 2ND OCTOBER, 2017

26. On 19th December, 2017 I dismissed the Petitioner's Notice of Motion No. 1 (Application No. 1) and the Notice of Motion No. 2 (Application No. 2) both dated 2nd October, 2017 and promised to give the reasons for my decisions in this judgement. Here we go.

27. In Application No. 1 which was brought under various provisions of the Constitution and the laws, regulations and rules governing elections, the Petitioner's substantive prayer was that:

> **"This Honourable Court do order the 1st Respondent to avail to this court the following materials, items and or information in its custody for purposes of assisting this court in hearing and determination of the application for scrutiny and recount of votes filed herein and or the petition herein.**
>
> **i. The Polling Station Diaries for all Polling Stations in Rabai Constituency.**
>
> **ii. Both the electronic and hard copy of the Register of Voters as contains the biometric and alpha numerical details of the voters entitled to vote at all the Polling Stations in Rabai Constituency.**
>
> **iii.The Kenya Integrated Electronic Management System (KIEMS) used in Rabai Constituency for purposes of accessing the information stored therein.**
>
> **iv. All declaration of Results Forms 35As and B used in the declaration of results for the election of the Member of National Assembly in Rabai Constituency."**

28. The application was supported by the grounds on its face and the supporting affidavit of the Petitioner sworn on the date of the application.

29. In brief, the Petitioner's case was that the polling station diaries had the records of the presiding officers in respect of the voters who requested assistance and the reasons for the assistance. Further, that the polling station diaries contained information on the number of ballot papers issued to presiding officers and the spoilt and unused ballot papers and those issued to voters. According to the Petitioner, the information in the polling station diaries would assist the court to ascertain how many voters required assistance. The diaries would also disclose rejected, spoilt and valid votes.

30. As for the request for the electronic and hard copy register of voters, it was the Petitioner's position that the same would assist the court to verify the names and the number of those who voted as against the votes cast and the votes contained in the results declaration forms.

31. The Petitioner concluded by asserting that the information required would assist the court in correctly, accurately and effectively carrying out a proper scrutiny and recount of votes. In his affidavit in support of the application, the Petitioner cited some incidents which he said evidenced the need to allow the application for information.

32. It is important to state at this point that prayers (i) and (iv) of prayer No. 2 of Application No. 1 were allowed by consent on 6th October, 2017 so that the submissions made on 19th December, 2017 were in respect to prayers No. 2(ii) and 2(iii) only.

33. As for Application No. 2, the Petitioner sought two substantive orders:

> **"1. ….**
>
> **2. This Honourable Court do order a scrutiny and recount of votes in all Polling Stations in Rabai Constituency in respect of the election for the Member of National Assembly of Rabai held on 8th August, 2017.**
>
> **3. This Honourable Court upon granting of prayer 2 to direct that the scrutiny do include the examination of the following: -**
>
> **a) The written statements made by the Returning Officers,**
>
> **b) The examination of the written statements made by the Presiding Officers in the Polling Station Diaries.**
>
> **c) Both the electronic and hard copy of the Register of Voters as contains the biometric data and alpha numerical details of the voters entitled to vote at the Polling Stations.**
>
> **d) The Kenya Integrated Election Management System (KIEMS) and the information stored by it.**

e) The Declaration of Results Forms 35As stored in the ballot boxes of all the Polling Stations.

f) The packets of spoilt ballots.

g) The marked copy registers.

h) The packets of counterfoils of used ballot papers.

i) The packets of counted ballot papers.

j) The packets of rejected ballot papers."

34. The application was supported by the grounds on its face as follows:

"1. There were no Declaration of Results Forms 35As in all Polling Stations [in] Rabai Constituency hence the alleged results in respect of these Polling Stations are either non-existent and or were illegally, wrongly and or fraudulently made after the event and in any of either case, the results are null and void.

2. In addition to the aforesaid, none of the Jubilee agents or candidate for the Member of National Assembly of Rabai in all Polling Stations in Rabai Constituency were issued with the Declaration of Results Forms 35As which is a clear indication of manipulation and or interference with the Results in all Polling Stations in Rabai Constituency.

3. The electronic evidence if provided to this court will clearly demonstrate that the elections in Rabai Constituency were shambolic and not conducted in accordance with the Constitution and the law."

35. In a supporting affidavit sworn in support of this particular application, the Petitioner averred that he had noted that the form 35B used to declare the results for Rabai Constituency was materially different from the prescribed form in that the form contains a column in which the names of the wards in the constituency are inserted. Further, that the form had no IEBC watermark and there was no security mark. According to the Petitioner, there was therefore no valid declaration of results for the election of the Member of the National Assembly for Rabai Constituency and the 3rd Respondent was thus not validly declared the winner.

36. The Petitioner averred that the presiding officers had failed to hand over forms 35A to the agents thus justifying his claim that the results were manipulated in favour of the 3rd Respondent.

37. The Petitioner listed various incidents in support of the application for scrutiny. He averred that Ndune Munga, a Jubilee agent, was kicked out of Kinyakani Nursery School polling station and voting went on without a Jubilee agent for six hours. He also averred that at Buni Nursery School polling station, Mwanajuma Tsuma Chigumba witnessed the polling clerks giving voters two ballot papers for each candidate. The Petitioner deposed that Matano Ali Mnyambo was prevented by the 1st and 2nd respondents from entering Makobeni polling station to work as an agent for Jubilee.

38. The Petitioner's view was that only an order for scrutiny and recount of the votes cast in Rabai Constituency could verify the illegalities, irregularities and the malpractices deposed to.

39. The 1st and 2nd respondents opposed both applications through a replying affidavit sworn on 5th October, 2017 by the 2nd Respondent. It was the 2nd Respondent's averment that the Kenya Integrated Election Management System (KIEMS) kits that were used in the elections held on 8th August, 2017 had been reconfigured for the purposes of the presidential election that was scheduled for 26th October, 2017 following the nullification of the presidential election of 8th August, 2017 by the Supreme Court. He went ahead and averred that the information required by the Petitioner had been preserved in SD cards and could be availed to the court to be read using a KIEMS kit. It was also the 2nd Respondent's averment that the Petitioner had not established any reasonable grounds as to why the KIEMS kit should be availed hence the need to dismiss this prayer. He denied all the alleged irregularities and illegalities averred to by the Petitioner in support of the two applications.

40. As to why the application for scrutiny and recount ought not to be granted, the 2nd Respondent's averment was that the Petitioner had neither pleaded nor prayed for scrutiny or recount in the Petition.

41. It was the 2nd Respondent's disposition that the Petitioner had not offered any grounds in support of the application for scrutiny or recount.

42. Finally, the 2nd Respondent averred that the Petitioner had not specified the polling stations in which he desired to have the scrutiny or recount carried out thus failing the test for the issuance of the orders sought.

43. The 3rd Respondent opposed the applications through the grounds of opposition dated 6th October, 2017 for the following reasons.

"1. THAT the Petitioner's application seeking both scrutiny and recount of votes is misconceived and an abuse of the process of the court.

2. THAT the Petitioner has not disclosed sufficient reasons to warrant the grant of an order for recount or scrutiny of the votes.

3. THE Petitioner has failed to give particulars of the polling stations whose results are disputed and require scrutiny."

44. The advocates for the parties filed submissions, supported by authorities, in respect to the two applications. I do not find it necessary to restate them but I will refer to them in stating my reasons for my decision to dismiss the Petitioner's applications.

45. The foundation of the law governing scrutiny in electoral disputes is traced to the Constitution, which at Article 86(a) requires the IEBC to ensure that **"whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent."** In short, the method used in an election should be capable of being audited.

46. Section 82(1) of the Elections Act empowers an election court to order scrutiny by stating that:

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

47. The court's power is replicated in the Elections (Parliamentary and County Elections) Petitions Rules, 2017. Rule 28 provides for recount by stating that:

"A petitioner may apply to an elections court for an order to-

(a) recount the votes; or

(b) examine the tallying, if the only issue for determination in the petition is the count or tallying of votes received by the candidates."

48. On scrutiny, the relevant part of Rule 29 provides that:

"(1) The parties to the proceedings may apply for scrutiny of the votes for purposes of establishing the validity of the votes cast.

(2) On an application under sub-rule (1), an election court may, if it is satisfied that there is sufficient reason, order for scrutiny or recount of the votes."

49.It is not a farfetched statement to assert that the law on scrutiny and recount is now settled. Writing on this subject, the authors of the **Judiciary Bench Book on Electoral Disputes Resolution, 2017** state at page 78 paragraph 4.6.5.1 that:

"Although the terms '*scrutiny*' and '*recount*' are often used together and interchangeably, and petitioners often pray for '*scrutiny and recount*' of the votes cast at an election, the two remedies are conceptually different. A recount is limited to establishing number of votes garnered by the candidates and the tallying of such votes…. Scrutiny, on the other hand, goes beyond the simple question of the number of votes garnered by the candidates and extends to the validity of such votes….There is no room for examination of electoral misconduct in a recount…. Although scrutiny and recount are conceptually different, the conduct of a scrutiny inevitably entails the conduct of a recount. The converse, however, is not true."

50. In a ruling delivered on 28th August, 2017 in the case of **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR**, (hereinafter simply referred to as **Presidential Petition No. 1 of 2017**), the Supreme Court considered at length the law on recount and scrutiny. At paragraph 45 the Court reiterated the guiding principles with respect to scrutiny and recount of votes in election petitions as follows:

"In the case of Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others (supra), this Court set out the following guiding principles with respect to scrutiny and recount of votes in an election petition. At paragraph 153, the Court pronounced itself as follows:

a. The right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.

b. The trial Court is vested with discretion under Section 82(1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes as it may specify, <u>if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both.</u> It is appropriate that the Court should record the reasons for the order for scrutiny or recount.

c. The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.

d. Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules. [Emphasis added.]"

51. Going back to its decision in **Raila Odinga and 5 others v Independent Electoral Boundaries Commission & 3 others, Petitions No. 3, 4 and 5 of 2013 (consolidated)** (hereinafter simply referred to as **Raila Odinga 2013**), the Court noted that a scrutiny of the results and the tallying forms used in an election would help in establishing the accuracy of the total tallies, the number of registered voters, the number of valid votes cast and the number of rejected votes.

52. The Court went ahead and cited with approval the decision of the Supreme Court of India in **Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & Anr, Civil Appeal Nos. 5710 – 5711 of 2013; [2014]2 S.C.R**. wherein that Court stressed the conditions that have to be met before orders can issue thus:

"Before the Court permits the recounting, the following conditions must be satisfied:

(i) The court must be satisfied that a prima facie case is established;

(ii) The material facts and full particulars have been pleaded stating the irregularities in counting of votes;

(iii) A roving and fishing inquiry should not be directed by way of an order to re-count the votes;

(iv) An opportunity should be given to file objection; and

(v) Secrecy of the ballot should be guarded."

53. The agreement by the advocates for the parties to have the application for scrutiny heard after the witnesses had testified, was indeed in line with the holding by Kimaru, J in **Rishad H.A. Amana v IEBC & 2 others [2013] eKLR** and Lesiit, J in **Jacob Mwirigi Muthuri v John Mbabu Murithi & 2 others [2013] eKLR)** that an application for scrutiny and/or recount can only be adequately and properly considered after the witnesses have testified. It is only then that the court can decide, based on tested evidence whether to allow the application.

54. An application like the one made by the Petitioner in Application No. 1 is not only an application for information but also an application for preservation of evidence. In my view, such an application should be dispensed with at the pre-trial stage of an election petition. The outcome of such an application should not in any way affect the application for scrutiny which should come later and which ordinarily will have been made before the application for information is considered.

55. Why then did I disallow the Petitioner's Application No. 2? The application for scrutiny was not founded on the Petition. There was no specific prayer for scrutiny or recount. Although the body of the Petition is full of allegations of variance in votes and manipulation of the same allegedly in favour of the 3rd Respondent, there was no particularization of these allegations. The polling stations in which the alleged vote manipulation took place were never identified.

56. In respect of the issue of scrutiny and or recount, I therefore found that the allegations that would have guided the court to order scrutiny or recount were too generalized and unfocused and no order for scrutiny and or recount would have emanated from such pleadings. This state of affairs was not helped by the fact that none of the witnesses called by the Petitioner gave any evidence that would have made scrutiny and or recount a useful exercise.

57. The Petitioner's Application No. 2 having failed, allowing the undetermined prayers in Application No. 1 would not have served any useful purpose. That explains why both applications were dismissed.

D. THE 3RD RESPONDENT'S PRELIMINARY OBJECTION DATED 17TH NOVEMBER, 2017

58. This is the appropriate stage to address the 3rd Respondent's Preliminary Objection dated 17th November, 2017. The advocates for the parties reached an agreement that the said objection be addressed in this judgement.

59. Through the Preliminary Objection, the 3rd Respondent sought the striking out of the Petition on the ground that it did not disclose the respective number of votes cast for each candidate and the correct date of the declaration of the results thereby making it fatally defective by offending the provisions of Rule 8 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017.

60. The 3rd Respondent's counsel cited the decisions in **Mombasa HC Election Petition No. 9 of 2017, Jimmy Mkala Kazungu v IEBC and 2 others;** and **Mombasa HC Eleciton Petition No. 5 of 2017, Mwamlole Ichappu Mbwana v IEBC and 4 others** in support of his submission that failure to state the total votes received by each candidate renders the petition defective and fit for striking out.

61. The Petitioner's counsel did not file any papers in response to the Preliminary Objection. However, he submitted on the matter and stated

that the Petition was not defective and the cited provision was not breached. He pointed out that in paragraph 5 of the Petition it had been disclosed that the 3rd Respondent had won by 18,025 votes. Further, that form 35B had been annexed to the affidavit sworn by the Petitioner in support of the Petition.

62. I have perused the decisions cited by counsel for the 3rd Respondent in support of the Preliminary Objection. With respect to counsel, I must state that those decisions are not applicable to the circumstances of the case.

63. On the issue of the date of the declaration of the results, counsel for the 3rd Respondent submitted that although the results were declared on 10th August, 2017, the Petition stated that the results were declared on 11th August, 2017. Rule 8(1)(d) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 requires that a petition states the date of the declaration of the results of the impugned election. The 3rd Respondent admits that there is a date of the declaration of the results but the date is erroneous. In my view, so long as a petition is filed within the constitutional timeline, an error in the date of the declaration of the results should not be fatal. The evidence to be adduced will always disclose the correct date of the declaration of the results.

64. As for the submission by counsel for the 3rd Respondent that the results of the election means the votes garnered by each candidate, I find that the Petitioner exhibited form 35B which has the total votes obtained by each candidate in the election. It would be neat if a petitioner would state in the petition the votes received by each candidate. Nevertheless, it would be too drastic for an election court to strike out a petition in which the results have been annexed to the affidavit on the ground that the results of the election have not been stated. It is also noted that in paragraph 5 of the Petition the Petitioner averred that the 3rd Respondent was returned the elected Member of National Assembly for Rabai by 18,025. The Petition therefore discloses the winner of the impugned election.

65. My opinion on this issue was placed in the public domain in a ruling delivered on 31st October, 2017 in **Malindi HC Election Petition No. 4 of 2017, Samuel Kazungu Kambi & another v IEBC & 3 others** wherein I stated that:

> **"46. My take is that whereas there is need for strict compliance with the laws and rules governing the resolution of election disputes, the courts should always be mindful of the fact that the current constitutional dispensation requires substantive justice to be done. Unless an election petition is so hopelessly defective and cannot communicate at all the complaints and prayers of the petitioner, the court should ensure that the petition is heard and determined on merit.**
>
> **47. I do not buy into submission by Mr. Khagram that compliance with the Elections Petitions Rules, 2017 should be 100% and nothing less. In my view, substantial compliance is good enough. Failure to disclose the results would indeed render an election petition untriable as the respondents will not be able to discern the petitioner's complaint so as to respond appropriately. However, where the respondents are in a position to understand the petitioner's case, such a petition should not be dismissed even if there are slight omissions and deviations from the rules.**
>
> **48. In my view, requiring parties in election disputes to strictly comply with electoral law whereas other litigants are treated with kid gloves will result in double standards that may not augur well for our judicial system. I hold the view that Article 159(2)(d) of the Constitution is available to a litigant in an electoral dispute in the same manner that the provision comes to the aid of a litigant in any other ordinary litigation. In invoking the said constitutional provision, the court in an electoral dispute only needs to be conscious of the impact of any leeway extended to a party on the limited time availed for hearing and determining an election petition."**

66. The purpose of the courts is to do justice. Strict adherence to the rules at the expense of substantive justice is likely to result in injustice.

67. In light of what I have stated above, it follows that the 3rd Respondent's Preliminary Objection dated 17th November, 2017 is without merit. The same is dismissed. Orders on costs shall abide the outcome of the judgement.

E. THE 1ST AND 2ND RESPONDENTS' NOTICE OF MOTION DATED 8TH DECEMBER, 2017 AND THE 3RD RESPONDENT'S NOTICE OF MOTION DATED 11TH DECEMBER, 2017

68. After the 3rd Respondent closed his case, the 1st and 2nd respondents filed a notice of motion dated 8th December, 2017 which was followed by the 3rd Respondent's notice of motion dated 11th December, 2017. Each of the applications seek to strike out the Petition.

69. The 1st and 2nd respondents' application is supported by grounds on its face and an affidavit sworn by the 2nd Respondent. The 3rd Respondent's application is supported by grounds on its face and an affidavit sworn by the 3rd Respondent.

70. The two applications rely on the same grounds namely that the Petitioner filed two petitions but later "withdrew" one of them thus compromising the integrity of the court record.

71. The Petitioner opposed the applications through the grounds dated 19th December, 2017 as follows:

> **"1. The said applications are incurably defective and or bad in law on the following reasons: -**
>
> **a. The 3rd Respondent's application is not dated and or signed by the advocates who prepared it.**
>
> **b. The said applications are made in violation of the purport and intent of article 87, 50, 27, 159(2)(b) and 259 of the**

Constitution of Kenya 2010 as read together with section 75 and 80(1)(d) of the Elections Act, 2011 and Rules 4, 5 and 15 of the Elections (Parliamentary and County Elections) Petition Rules, 2017 as it is made after the Petition has been heard and all parties have closed their case.

c. The applications are an attempt to introduce new issues that were not introduced in the Responses to the Petition or the affidavits in support of the responses contrary to section 75 of the Elections Act, 2011.

2. The said applications are in the alternative without merit for the following reasons: -

a. The same are based on a fishing expedition as no evidence has been adduced in support of the allegation made herein.

b. The annexures to the Supporting Affidavit of the applicant ought to be expunged as having violated the Oaths and Statutory Declaration Act, Chapter 15 of the Laws of Kenya and Rules made thereunder.

c. The applications are not based on the pleadings and seek to introduce new issues or evidence contrary to the requirements of the law.

d. The applicants are by virtue of section 120 of the Evidence Act, Chapter 80 of the Laws of Kenya estopped from raising the issue at the stage of the proceedings."

72. In brief the respondents' case is that two petitions were filed by the Petitioner in this case. One Petition was dated at Kilifi on 5th September, 2017 and the other one was dated at Malindi on the same date. The contents of the two petitions were different.

73. According to the respondents, the Petition that was served on them and which this court has been hearing is the one dated at Malindi. However, the court fee was paid for the one dated at Kilifi. They assert that the Petition dated at Kilifi was not served on them and having not been served, the court has no Petition before it.

74. As matters stand now, there is a Petition before this court which has been heard to conclusion. The respondents concede that this is the Petition they have responded to. The witnesses that were called by the Petitioner are the ones whose affidavits were annexed to the Petition before the court. Although there is evidence that a Petition dated at Kilifi was indeed filed in court, the circumstances leading to its removal from the court file are unknown. The material placed before the court is not sufficient to conclude that there was any impropriety committed as alleged by the respondents. In view of the material placed before the court by the respondents, I find that striking out the Petition would be drastic and unjust to the Petitioner.

75. There is also another reason why the respondents' applications should not be considered at all. Rule 15(2) of the Elections (Parliamentary and County) Petitions Rules, 2017 clearly provides that:

"An election court shall not allow any interlocutory application to be made on conclusion of the pre-trial conference, if the interlocutory application could have, by its nature, been brought before the commencement of the hearing of the petition."

76. It is the averment of the 3rd Respondent that the application could not have been filed prior to or at the pre-trial conference as the material facts were not in his possession at the material time. The 1st and 2nd respondents have not offered any reason as to why the application could not have been filed before the trial conference.

77. By virtue of Rule 15(2), any party in an election petition who desires to file any application should do so before the pre-trial conference. However, where by the nature of the application the same could not be filed before the pre-trial conference, the application can be filed after the pre-trial conference.

78. The question therefore is whether the applications could have been filed prior to the pre-trial conference. The 3rd Respondent says he could not do so because he did not have the material facts at that time. He has, however, failed to disclose when he received the material facts and the source of the information. In any case, the incidences referred to occurred on 6th September, 2017 when the Petition was filed. Had any of the respondents exercised due diligence they could have accessed the information they have used to file their applications.

79. Looking at the material placed before the court, and considering the applications before me, I find that they offend Rule 15(2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017. Having been filed in contravention of the said rule, the applications must fail. The applications are therefore dismissed. The order on costs shall abide the outcome of this Petition.

F. A SYNOPSIS OF THE APPLICABLE LAW

80. The parties are in agreement that by virtue of Article 81 of the Constitution, free and fair elections should be conducted through a secret ballot; be free from violence, intimidation, improper influence or corruption; be conducted by an independent body; be transparent; and be administered in a neutral, efficient, accurate, accountable and impartial manner.

81. Article 86 of the Constitution requires the 1st Respondent to ensure that in an election the voting method is simple, accurate, verifiable, secure, accountable and transparent; the votes are counted, tabulated and the results announced promptly by the presiding officer at the polling station; the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and

appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials.

82. The Elections Act, 2011 and the Elections (General) Regulations, 2012 as amended by Legal Notice No. 72 of 2017-the Elections (General) (Amendment) Regulations, 2017 (hereinafter simply referred to as the Regulations) give flesh to the constitutional provisions.

83. In any election petition, two issues will regularly arise: the burden and standard of proof; and the interpretation of Section 83 of the Elections Act. It should be clear that here, reference is being made to Section 83 as it read on 8th August, 2017 and not the subsequent amendment made to that Section.

84. Fortunately, the Supreme Court has clearly illuminated the law on these issues. On the burden of proof the Court in the **Raila Odinga 2013** held that:

> **"[195] There is, apparently, a common thread in the foregoing comparative jurisprudence on *burden of proof* in election cases. Its essence is that an 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 *unanswered* case has been made."**

85. As for the standard of proof, the Court enunciated it at paragraph 203 thus:

> **"The threshold of proof should, in principle, be *above the balance of probability*, though not as high as beyond-reasonable-doubt - save that this would not affect the normal standards where criminal charges linked to an election, are in question. In the case of *data-specific electoral requirements* (such as those specified in Article 38(4) of the Constitution, for an outright win in the Presidential election), the party bearing the legal burden of proof must discharge it beyond any reasonable doubt."**

86. The law applicable to the burden of proof in electoral disputes was again restated by the Supreme Court in **Presidential Petition No. 1 of 2017** thus:

> **"[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. In this case therefore, it is common ground that it is the petitioners who bear the burden of proving to the required standard that, on account of non-conformity with the law or on the basis of commission of irregularities which affected the result of this election, the 3rd respondent's election as President of Kenya should be nullified.**
>
> **[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant throughout a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting" and "its position at any time is determined by answering the question as to who would lose if no further evidence were introduced."**
>
> **[133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law."** [Citations omitted].

87. As for the standard of proof the Court outlined the law by stating at paragraphs 152 and 153 that:

> **"[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."**

88. The Court then turned its spotlight on the meaning and application of Section 83 of the Elections Act to election disputes and concluded that:

> **"[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."**

89. Earlier on, the Supreme Court had in the case of **Gatirau Peter Munya** (supra) interpreted Section 83 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. [218] Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election…**
>
> **[219]…**
>
> **[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."**

90. The meaning of "illegalities" and "irregularities" was elucidated by the Supreme Court at paragraph 304 of **Presidential Petition No. 1 of 2017** thus:

> **"Illegalities refer to breach of the substance of specific law while irregularities denote violation of specific regulations and administrative arrangements put in place."**

91. The Court then went ahead and explained under what circumstances illegalities and irregularities can lead to the nullification of an election. The Court stated that:

> **"[371] It is our view however, that elections, are all these things. None of the factors highlighted by the parties can be viewed in isolation. For by doing so, we run the risk of cannibalizing a sovereign process. Elections are the surest way through which the people express their sovereignty. Our Constitution is founded upon the immutable principle of the sovereign will of the people. The fact that, it is the people, and they alone, in whom all power resides; be it moral, political, or legal. And so they exercise such power, either directly, or through the representatives whom they democratically elect in free, fair, transparent, and credible elections. Therefore, whether it be about numbers, whether it be about laws, whether it be about processes, an election must at the end of the day, be a true reflection of the will of the people, as decreed by the Constitution, through its hallowed principles of transparency, credibility, verifiability, accountability, accuracy and efficiency.**
>
> **[372] It is in this spirit, that one must read Article 38 of the Constitution, for it provides inter alia, that every citizen is free to make political choices, which include the right to "free, fair, and regular elections, based on universal suffrage and the free expression of the will of the electors…". This "mother principle" must be read and applied together with Articles 81 and 86 of the Constitution, for to read Article 38 in a vacuum and disregard other enabling principles, laws and practices attendant to elections, is to nurture a mirage, an illusion of "free will", hence a still-born democracy. Of such an enterprise, this Court must be wary.**
>
> **[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.**
>
> **[374] In view of the interpretation of Section 83 of the Elections Act that we have rendered, this inquiry about the effect of electoral irregularities and other malpractices, becomes only necessary where an election court has concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in the Constitution or in that law. But even where a Court has concluded that the election was not conducted in accordance with the principles laid down in the Constitution and the applicable electoral laws, it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice."**

92. In **John Harun Mwau & 2 others v Independent Electoral and Boundaries Commission & 2 others [2017] eKLR; Petitions Nos. 2 and 4 of 2017** (hereinafter simply referred to as **Presidential Petition No. 2 of 2017**) the Supreme Court at paragraph 373 restated the law on the effect of illegalities and irregularities on an election as follows:

> **"This Court has already pronounced itself in unequivocal terms, on the effect of irregularities upon an election. The legal position remains as stated in the majority decision of the Court in Raila 2017… This may be simply restated: not every irregularity or procedural infraction is enough to invalidate an election. The irregularities must be of such a profound nature as to affect the actual result, or the integrity of an election, for a Court of law to nullify the same."**

93. The law as briefly outlined hereinabove shall be applied in the determination of the instant Petition.

G. ANALYSIS & DETERMINATION

94. A perusal of the pleadings, the evidence and the submissions placed before this court in this matter shows that the general issue for the determination of the court is whether the election of the Member of the National Assembly for Rabai Constituency was attended by illegalities and irregularities so substantive thereby necessitating the issuance of an order annulling the election.

95. The Petitioner averred to several illegalities and irregularities but when questioned by the advocates for the respondents, he disclosed that the only incident he attended to was that of the ejection of the Jubilee agent at Boyani Primary School polling centre. Asked whether Amina Kadoti whom he had named as the agent allegedly ejected from the polling station would be a witness, he stated that she would not. He denied knowing Sammy Mbwaka and Saidi Mwansio who had signed electoral forms for Jubilee in the polling stations at Boyani Primary School.

96. The evidence of this witness did not amount to much. He claimed that his party's agent had been ejected from Boyani Primary School but never specified from which of the two polling stations in the school the agent was ejected from. He also stated that when he asked the presiding officer about the ejection of the agent, the presiding officer feigned ignorance of such an incident. The witness confirmed that the agent was eventually allowed back to the polling station.

97. The allegation by the Petitioner is unbelievable. How could the agent be ejected without the presiding officer's knowledge? If indeed the agent was readmitted, why was no reason given for this change of decision. The evidence of the Petitioner is further discredited by the fact that the polling forms were signed by Jubilee agents by the names Sammy Mbwaka and Saidi Mwansio. I thus find the evidence of the Petitioner on the alleged ejection of a Jubilee agent from any of the polling stations at Boyani Primary School unbelievable and unreliable.

98. The Petitioner's claim that ballot boxes from polling stations near the constituency tallying centre arrived at the tallying centre late does not by itself disclose any irregularity or illegality. There was no claim that the results as announced at polling stations had changed between the polling stations and the tallying centre.

99. PW2 talked of seeing Mama Rehema and Bakari Mtangi who were ODM aspirants dishing out money to voters at Kajiwe Primary School polling station. He stressed that the incident happened outside the polling station and several people witnessed the incident. Further, that a police officer was alerted about the incident.

100. Allegation of voter bribery is a serious accusation which must be backed by plausible evidence. Since the allegation connotes the commission of a criminal offence the standard of proof should be beyond reasonable doubt-see **Raila Odinga 2013.** Ruth who was allegedly asked by the witness to inform a security officer about the alleged bribery was never called to testify. Not even the police force number of the officer to whom the incident was reported was disclosed. Above all, the witness did not establish any nexus between the alleged bribe givers and the 3rd Respondent. He named them as ODM aspirants. Could they have been candidates for other posts? It was not clear from the evidence of PW2. If indeed they were giving out bribes, were they treating the voters on behalf of the candidates for the other five elective posts on offer in the general election? The logical conclusion is that the evidence of PW2 cannot be relied upon to reach the conclusion that the 3rd Respondent bribed voters as alleged in the Petition.

101. On PW2's averment that ODM supporters stopped Jubilee supporters from accessing Boyani Primary School polling station, it is noted that upon cross-examination, the witness told the court that the aggressors were not adorned in ODM colours and neither were those being blocked from going to the polling station dressed in clothes with colours of any particular political party. Re-examined he changed his evidence and stated that he knew the people who were being denied access to the polling station were Jubilee voters as they came from his home area.

102. The inconsistency and unreliability of PW2 was highlighted by his claim that he was an agent at Kajiwe Primary School polling station before swiftly stating he was supervising agents. He could not produce any document to show he was indeed accredited by the 1st Respondent as an agent. Re-examined he said his name was in the list of agents submitted to the 1st Respondent. In short, the testimony of PW2 is unbelievable.

103. PW3 Reuben Gandani Mwalaulo testified that although initially he was not identified by the KIEMS kit, he later went back to Kajiwe Primary School polling station and voted after he was identified by the KIEMS kit.

104. His averment was that as he was leaving the polling station he saw **"campaigners from the opposition talking to voters"** but when he raised the matter with the police he was instead pushed out of the polling station. As he exited the polling station area he saw Abdallah Chalako and David Chibule giving money to about fifteen women but on seeing him they rode away on a motorbike. While at home, he continued receiving reports of bribery of voters from almost every polling station.

105. When cross-examined about the allegation of bribery, he stated that the campaigners were bribing voters. He conceded that he never named the people who continuously gave him reports about the bribery of voters.

106. Looking at the evidence of PW3 concerning allegations of campaigns and bribery taking place at Kajiwe Primary School polling station, it emerges that there is no nexus between the 3rd Respondent and the alleged campaigners and bribe distributors. It is even doubtful whether such incidents happened. The claim by PW3 that he received reports of bribery of voters at almost all the polling stations is just but hearsay. Those who allegedly called him with information of bribery were never named and neither were they called to court to testify.

107. In fact, PW3 testified as if he was prosecuting his own petition considering that he had contested the position of the Member of County Assembly for Kisurutini Ward in Rabai Constituency. That PW3 had no confidence in his own evidence was confirmed by the fact that despite all his allegations, he never challenged the outcome of the election he contested.

108. Another incident that PW3 talked of was the turning away of voters from Kajiwe Primary School polling station. When he enquired why this was happening, he was told the voters could not be identified electronically. He suspected that something sinister was going on and concluded that the 1st Respondent's officials and security officers had been compromised.

109. This particular allegation is devoid of any particulars. The witness never named the voters who were allegedly turned away. He never named person(s) who told him that the voters who were being turned away could not be identified by the electronic voter identification device. The witness never stated why he thought something sinister was going on. He never gave the basis for his conclusion that there was collusion between the 1st Respondent's officials and the security officers.

110. PW3 stated that while at the constituency tallying centre at Kombeni Girls Secondary School, he noticed that ballot boxes from polling stations not far from the tallying centre were arriving late. He also noted that the agents of the candidates were not among the people who brought the ballot boxes. In his view, the agents of the candidates had a duty to escort the ballot boxes to the tallying centre.

111. PW3's apprehension about unaccompanied and delayed arrival of the voting materials at the tallying centre is without basis. The law does not require that the agents of the candidates escort the polling materials to the tallying centre. This is because the polling centre is the actual theatre of any election. Once the votes are counted and tallied, the results are supposed to be announced promptly at the polling stations. Each candidate or agent is then given a copy of the results. The results are also displayed at the polling station for public consumption. The possibility of manipulating the results between the polling station and the tallying centre is therefore minimised-see **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2015] eKLR**

112. PW4 Ndune Munga testified that he was kicked out of Kinyakani Nursery School polling station for a period of six hours on the pretext that the station was crowded and agents would be allowed access to the polling station on rotational basis. This left his party without an agent as he was the only agent at the station. He also stated that the ODM agent was the only one allowed to witness whenever assisted voters were voting. The witness testified that he was never given any statutory forms for verification or signing.

113. The evidence of PW4 was dismantled during cross-examination. His averment that he had not signed any document was exposed as a lie when he was confronted with the polling station diary which had his particulars and signature. Despite his vehement assertion that he was the only Jubilee agent at the station, the same polling station diary showed that Saidi Ponda, Athumani Nzaka and Mwaisha Dume were the other Jubilee agents in the two polling stations located at Kinyakani Nursery School.

114. How then can a witness with such a personality be believed when he claims that the presiding officer denied him the opportunity to witness voting by assisted voters? His evidence was that seven voters who required assistance to vote and had indicated their preference for Jubilee candidates were forced to vote for ODM candidates. This contradicts his evidence that he was never allowed to go near the voting booth. In summary, I find PW4 to be an unreliable witness.

115. The testimony of PW5 Mwanajuma Tsuma Chigumba was that at Buni Nursery School, two ballot papers per seat were issued to ODM supporters. When she raised alarm, the presiding officer blamed the polling clerks and assured her that the issue of the extra ballots would be taken care of during the counting and tallying of votes. During the counting of votes, she asked the presiding officer about the extra ballot papers and she was shown spoilt ballot papers and told those were the extra ballot papers that had been issued.

116. The witness would upon cross-examination concede that she was not the only Jubilee agent at the polling station and that Sharlet Kahaso had signed form 35A on behalf of Jubilee party. Further, that the polling station diary indicated that she was an agent for an independent candidate although she had testified that she was the agent of one Reuben, a Jubilee candidate in the race for Member of County Assembly.

117. Tested on her averment that she was at the polling station with one Katana Mwalau, she stated that he was ejected from the polling station and he started visiting other stations.

118. Asked whether she had reported to her bosses the incident of the issuance of double ballot papers per seat, she said she had done so but quickly retracted her evidence and stated she did not inform her party of the incident. The witness also revised her evidence that ODM agents were issued two ballot papers per elective post and stated that all voters were issued two ballot papers per seat.

119. Going through the evidence of PW5, it is easy to reach the conclusion that the same was so contradictory such that it cannot be used to establish any fact in this Petition.

120. PW6 Anthony Kenga Mupe was the Jubilee candidate in the impugned election. He testified that on 9th August, 2017 a lorry was intercepted leaving the county tallying centre at Kilifi with election materials disguised as garbage.

121. Another incident he witnessed was the arrest of officials of the 1st Respondent who had been found manipulating election materials including ballot papers, ballot boxes and results declaration forms at Lagos Bar, Kaloleni.

122. His averment was that as a result of the two incidents, the collation and aggregation of results was suspended at the tallying centre.

123. Upon cross-examination, the witness stated that he never went to the Rabai Constituency tallying centre and any reference in his affidavit to the constituency tallying centre was actually a reference to the county tallying centre. Further, that his averment about the suspension of the collation and aggregation of results was in respect to Kilifi county tallying centre and not Rabai Constituency tallying centre.

124 Questioned about the Lagos Bar incident, he stated that he was not aware that any of the 1st Respondent's officials who were arrested at

the bar located in Kaloleni constituency included those who supervised elections in Rabai Constituency.

125. On his averment that he only learned of the outcome of the impugned election through the Kenya Gazette issued on 22nd August, 2017, the witness stated that he actually learned of the results through form 35B. He admitted that his agents were present at Rabai Constituency tallying centre when the results were declared.

126. PW6 agreed that votes were counted and results announced at every polling station as required by the law.

127. It is apparent that the testimony of PW6 referred to post-election incidents which could not have affected the outcome of the elections. The votes were counted and the results announced at the various polling stations in Rabai Constituency. Everything concerning the election of the Member of the National Assembly for Rabai Constituency was concluded at the constituency tallying centre located at Kombeni Girls Secondary School. The winner was declared at that centre. There is no evidence to show that the incidents that happened at Lagos Bar in Kaloleni and Kilifi county tallying centre affected the results for Rabai Constituency Member of National Assembly in any way. The evidence of PW6 did not therefore support the allegations made by the Petitioner.

128. In **Dickson Mwenda Githinji v Gatirau Peter Munya & 2 others [2014] eKLR,** the Court of Appeal held that:

> **"177. One of the grounds in the Petition was to the effect that the 2nd and 3rd respondents did not take proper care and custody of the ballot boxes whose seals were broken. This allegation raises a post-declaration irregularity... It is our considered view that post-declaration non-compliance with the electoral rules for the proper custody of the election material by election staff is not *per se* one of the grounds for setting aside the election of a returned candidate. However, non-compliance with the electoral rules as to the proper custody of electoral material may be evidence that a pre-declaration irregularity did in fact take place. When the ballot boxes and their seals have been tampered with or there are fewer votes in the ballot boxes, this may be evidence of a pre-declaration irregularity."** [Emphasis supplied].

129. A post-declaration irregularity can only count if it goes to the foundation of the election. A petitioner who relies on post-declaration irregularities in seeking the annulment of an election should demonstrate that the alleged irregularities affected the voting or the counting or the tallying of votes. In the case at hand, the alleged post-declaration incidents have not been linked to the outcome of the election. It is also clear from the evidence of the witness that the incidents had nothing to do with the election of the Member of National Assembly for Rabai Constituency.

130. The testimony of PW7 Matano Ali Mnyambo was to the effect that when he presented his papers appointing him the Jubilee agent at Makobeni polling station, the presiding officer turned him away telling him a Jubilee agent was already in the polling station. He alerted his principal one Morgan who was contesting the Member of County Assembly seat but the presiding officer was adamant that a Jubilee agent was already in the polling station.

131. Cross-examined, PW7 insisted that although the polling station diary and form 35A showed that Jubilee was represented by one Hamisi Mwambire Murau, he knew nothing about the said agent.

Regulation 62(2) provides that the presiding officer shall admit to the polling station not more than one agent for each candidate or political party. Despite the witness' persistence that he was the only Jubilee agent appointed for the polling station in question, the polling day records kept by the 1st Respondent shows that one Hamisi Mwambire Murabu represented Jubilee. No illegality or irregularity was thus committed by the presiding officer. The complaints by PW7 therefore fall by the wayside.

133. The testimony of PW8 Ismael Shikeli Saidi who was the Jubilee agent at Benyoka Primary School polling station centred on the handling of voters who needed assistance to vote. He stated that he was not allowed to witness voting by such voters. Further, that the presiding officer would pick known ODM supporters from the queue to assist illiterate voters. He named Hamisi Rashid and Mr. Majengo as well-known ODM supporters picked to support assisted voters to vote.

134. Upon cross-examination, the witness told the court that Jubilee and ODM supporters were known. He confirmed that Jubilee agents signed the results declaration forms in all the three polling stations at Benyoka Primary School. Asked why he signed the polling station diary in light of the irregularity he had noted, PW8 stated that he was sleepy.

135. Upon cross-examination, the witness testified that there was nothing wrong in a voter picking a known supporter of a particular party to assist the voter to vote. He stated that Hamisi Rashid had assisted one voter and went and changed clothes and went back to the station to assist another voter. Asked what Mr. Majengo had done, the witness stated that he had named Mr. Majengo in his affidavit by mistake.

136. Regulation 72 provides the procedure to be used in assisting an illiterate person or a person with disability to vote. Where the voter is not accompanied by a person of his or her choice, the presiding officer shall assist the voter in the presence of the agents. Where the person is accompanied by an assistant, the assistant is required to make a declaration of secrecy in form 32.

137. The allegation by PW8 as to mishandling of voters who needed assistance is so generalized that no useful decision can be made based on such evidence. PW8 did not name the voters who needed assistance and he never named the presiding officer of the polling station. When cross-examined he denied knowledge of one Majengo whom he had claimed assisted voters to vote.

138. His evidence was that one Hamisi Rashid assisted two voters. If this is correct, then Regulation 72(5)(c) which provides that a person shall assist or support only one voter in an election was breached. However, the evidence cannot be believed. As per Regulation 72(5)(c) a person who assists or supports a voter should have a mark as proof of assisting or supporting the voter. Claiming that a person assisted more than one voter is the same as claiming that a voter voted more than once. The Petitioner did not apply for the production of forms 32 which

would have assisted the court in knowing whether any person assisted a voter more than once. In the circumstances, I find that the evidence of PW8 does not support the allegation that voters who needed assistance were handled in a manner that contravened the law.

139. The evidence of PW9 Hamisi Ndoro Bora was that he was denied access to Makobeni polling station on the ground that another Jubilee agent was already in the station. Confronted with the polling station diary and form 35A, he admitted that the documents had indeed been signed, on behalf of Jubilee, by Hamisi Murabu, who had reported to the station earlier than him. On re-examination he stated that each candidate was entitled to an agent.

140. The documents produced in court by the 1st and 2nd respondents clearly indicate that Jubilee had an agent at Mkobeni polling station. As required by Regulation 62(2), only one agent for each candidate or political party could be admitted to the polling station. The rejection of PW9 by the presiding officer was therefore lawful. The evidence of this witness does not therefore advance the Petitioner's case that his party's agents were denied access to polling stations.

141. The evidence of PW10 James Fereji was that the handling of voters who needed assistance at Chang'ombe polling station was tilted in favour of the ODM candidates. The witness also averred about the movements of the ODM candidate for the Member of County Assembly seat.

142. The evidence of this witness did not yield much for the Petitioner. He never told the court how the activities of the Member of County Assembly seat influenced the election of the Member of the National assembly.

143. In fact the witness admitted committing an illegality. He testified that he assisted a voter by the name Kanze Kaulu to vote. If this is indeed what happened, then the presiding officer and the witness breached Regulation 72(1) which provides that a candidate or an agent shall not assist or support a person to vote.

144. The witness' allegation that whenever the presiding officer would reach an ODM candidate in the ballot paper he would continuously and emphatically read the name is not of any assistance to the Petitioner's case. PW10 did not state the voters influenced to vote for ODM candidates as a result of such acts by the presiding officer. This Petition concerns the election of the 3rd Respondent. The witness did not say that the name of the 3rd Respondent was emphasized and restated severally.

145. PW11 William Kahindi Mganga gave evidence similar to that of PW6, adding that the election materials found in the lorry that was intercepted at the county tallying centre in Kilifi included ballot boxes with marked ballot papers and results declaration forms for various elections including that of the Member of National Assembly for Rabai Constituency.

146. When PW11 was put under intense cross-examination, his testimony unraveled. The witness told the court that tallying and counting of votes was suspended at Rabai Constituency tallying centre. Asked whether he was present during the suspension, he stated that he was not there. Instead he told the court that PW6 is the one who told him the exercise had been suspended. This evidence clearly contradicted that of PW6 who told the court he never went to Rabai Constituency tallying centre and neither was the counting and tallying exercise suspended at that centre.

147. Cross-examined about the Kaloleni Lagos Bar incident, the witness stated that the polling officials found at the bar conducted elections in Rabai Constituency and not Kaloleni constituency. However, the witness could not name the polling stations in which the officials served in Rabai Constituency. He did not state how he knew that those arrested had conducted elections in Rabai Constituency.

148. On re-examination the witness insisted that one of the three officials arrested was stamping and marking ballot papers for the entire Kilifi County.

156. The evidence for PW11 was populated with untruths. It was not possible that a polls official would still be stamping and marking ballot papers several hours after results had been announced in the polling stations. His attempt to link election materials allegedly found in the lorry at the county tallying centre and the election materials allegedly found at Lagos Bar, Kaloleni with the election of the Member of National Assembly for Rabai Constituency is unbelievable. This is the kind of evidence that is made up in an attempt to assist a litigant but which ends up discrediting the party's case. How could an election whose sole axis was Rabai Constituency be manipulated from outside the constituency? The net result is that the evidence of PW11 added no value to the Petitioner's case. Additionally, I find that the analysis I have done on the evidence of PW6 also applies to the testimony of PW11.

150. Considering the analysis I have done on the evidence of the Petitioner and his witnesses, it is clear that the Petitioner has failed to prove his allegations to the required standard. His Petition should be dismissed at this stage. However, I have a duty to consider the defence case.

151. The 1st and 2nd respondents called two witnesses with 2nd Respondent testifying as DW1. In his affidavit he denied all the allegations made in the Petition and the affidavits of the Petitioner's witnesses. He specifically stated that the yellow canter incident if it did occur did not affect the results of the election of the Member of the National Assembly for Rabai Constituency. Further, that at no time did he suspend the tallying at the constituency tallying centre. He annexed the polling station diaries, forms 35A and Form 35B to his affidavit.

152. Upon cross-examination by counsel for the Petitioner, the 2nd Respondent admitted to discrepancies in the tallies for some polling stations. He accepted that the polling stations diaries were not completed, as required, in some polling stations. The witness also admitted that a few forms 35A were not stamped and or signed. He admitted that the documents he had placed before the court were photocopies.

153. DW2 Simon Dzuya Chivila the presiding officer of Kinyakani Primary School polling station No. 2 of 2 told the court that after the voting and counting was concluded, he electronically transmitted the results of the election for the Member of the National Assembly to the 2nd Respondent. He testified that he erroneously put the original form 35A together with other election materials in the ballot box and sealed

it. On realising this, he consulted the 2nd Respondent who advised him to use a form 35A from another polling station. He obtained form 35A for Isaac Nyundo polling station, opened the KIEMS kit and retrieved the results and entered them in the new form. He averred that the original form 35A was in the ballot box and the same could be accessed by the court. His evidence was confirmed by the 2nd Respondent. Upon cross-examination by counsel for the Petitioner, the witness admitted that he did not capture all the information in the polling station diary.

154. The 3rd Respondent testified as DW3. He denied the Petitioner's allegations. In answer to questions put to him by counsel for the 1st and 2nd respondents, the 3rd Respondent stressed that he did not see any malpractice and neither did he hear any of the other candidates complain of any malpractice. He concluded that this was the best conducted election ever.

155. Referred to form 35B by counsel for the Petitioner, the 3rd Respondent stated that the same was dated 18th August, 2017 but stamped 10th August, 2017 when the results were declared. He denied that the election outcome was not declared insisting that he was declared the winner on 10th August, 2017. Further, that the candidates already knew the results from their agents and the declaration of the results was just a formality as the winner was already known. The 3rd Respondent confirmed that he did not respond directly to the bribery allegation made by the Petitioner's witnesses. He also stated that he did not respond specifically to the allegations of the other witnesses as he was not present when and where the alleged incidences are said to have occurred. Further, that people who were present when the alleged incidents took place would testify. Shown forms 35A for certain polling stations, he said that some were filled using different pens while others were not stamped.

156. Re-examined by his counsel, the 3rd Respondent stated that none of the Petitioner's witnesses accused him or his supporters of bribery. He stated that the Petitioner who was the agent of PW6 Anthony Kenga Mupe was present at the tallying centre when the results were declared.

157. Elias Mwasindo Tsuma testified as DW4. He averred that he was an agent for the ODM gubernatorial candidate at Buni Nursery School. His evidence was that before the voting commenced the agents and the polling officials had a meeting in which it was agreed that whenever a voter required assistance, the presiding officer was to assist such a voter in the presence of all the agents. He averred that during the voting a voter would be issued with six ballot papers, one for each of the six posts being contested.

158. On cross-examination by counsel for the Petitioner, the witness admitted that he had not specifically stated in his affidavit that he was responding to allegations by any particular witness. He stated that the Jubilee agent was Sharlet Kahaso and he did not know a person by the name Mwanajuma Chigumba.

159. DW5 Geoffrey Rumba Noah was the agent for the National Super Alliance (NASA) presidential candidate at Boyani polling station. He averred that he never saw any voter being denied access to the polling station and neither did he see a lady dishing out money to voters. When cross-examined by counsel for the Petitioner, the witness stuck to his averments.

160. DW6 Mwaringa Ndenge's testimony was that he was the agent of the 3rd Respondent at Kinyakani Primary School polling station 2 of 2 where Jubilee was represented by three agents. He averred that he never heard or saw an agent being kicked out of the polling station. According to him, due to the big number of agents, it was decided that the agents for the candidates would operate on a rotational basis but at no time would a candidate be unrepresented in the voting hall. He stated that he served with PW4 Ndune Munga in the polling station.

161.His averment was that any voter who required assistance would be assisted by a person of the voter's choice but where the presiding officer was to assist, he would do so in the presence of the agents.

162. When cross-examined by counsel for the Petitioner, the witness stated that they operated on rotational basis. He also stated that many voters were assisted to vote by the presiding officer as the voters who required assistance did not come with anybody to assist them.

163. Based on the testimony of the respondents and their witnesses, counsel for the Petitioner submitted at length on alleged discrepancies in the results captured in the declaration forms. He pointed to the failure by polling officials to fully record the required information in the polling station diaries. He referred the court to contradictions in the information recorded in the polling station diaries. Citing the decisions in **Presidential Petition No. 1 of 2017**, **Maina Kiai** (supra) and **National Super Alliance (NASA) v Independent Electoral & Boundaries Commission & 2 others [2017] eKLR,** counsel submitted that accountability and transparency are crucial to free and fair elections and the only way to achieve transparency and accountability is to ensure proper record keeping for verification purposes. He asserted that the 1st and 2nd respondents had failed to ensure that the ballot papers issued were accounted for.

164. The Petitioner's counsel hammered home the argument that there was no declaration of the winner of the impugned election as required by Section 39 of the Elections Act. He stated that the 3rd Respondent himself confirmed that there was an oral announcement of his win at the tallying centre after which he was given form 35C being the certificate of his election as the Member of National Assembly for Rabai Constituency. Counsel for the Petitioner submitted that there was no declaration made at the tallying centre at all on 10th August, 2017 since the Petitioner who was at the tallying centre never even heard any oral declaration. According to counsel for the Petitioner, the 3rd Respondent was never given form 35B.

165. Referring to the decision of the Supreme Court in **Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others [2014] eKLR,** the Petitioner's counsel stressed that the electoral process in an election of a Member of the National Assembly cannot be complete if there is no proper declaration of results at the polling stations and the tallying centre. His view was that as there was no declaration of results at the tallying centre, the electoral process aborted and the 3rd Respondent cannot be said to have won the election.

166. The Petitioner's counsel went ahead and asserted that the form 35B presented to the court by the 2nd Respondent was forged since it did

not have a serial number or the 1st Respondent's watermark thereby failing to meet the statutory requirements.

167. In conclusion, the Petitioner's counsel urged the court to nullify the election on the ground that the same was not conducted in accordance with the Constitution and the law governing elections.

168. Responding to the Petitioner's submissions, counsel for the 1st and 2nd respondents submitted that the Petitioner had a duty of pleading and proving his case but he failed to do so. Counsel stated that in the first instance the Petition disclosed no case but contained generalised allegations which could not be specifically responded to. She accused the Petitioner of introducing subsequent evidence to prove his allegations.

169. Counsel urged this court to rely on the decision in **Rahim Khursid v Khurshid Ahmed & others (1975) AIR 290** and find that the Petitioner failed to prove his case. In the cited case, the Supreme Court of India held that:

> **"However, we have to remember another factor; an election once held is not to be treated in a light-hearted manner, and defeated candidates or disgruntled electors should not get away with it by filing election petitions on unsubstantiated grounds and irresponsible evidence, thereby introducing serious elements of uncertainty on the verdict already tendered by the electorate."**

170. Counsel for the 1st and 2nd respondents dismissed the Petitioner's claim that there was no declaration of results asserting that the Petitioner's allegation was not backed by any evidence.

171. Countering the Petitioner's assertion that there were irregularities that should result in the vitiation of the outcome of the election, the 3rd Respondent submitted that the Petitioner did not establish that the alleged irregularities affected the results. Further, that the alleged irregularities and illegalities had not been established by the Petitioner.

172. I have already stated the law on the standard of proof and the burden of proof in election petitions. I have also cited the decisions of the Supreme Court to the effect that not every irregularity or illegality is sufficient to warrant the annulment of an election. As was stated by the Supreme Court in **Presidential Petition No. 2 of 2017**, the "**irregularities must be of such a profound nature as to affect the actual result, or the integrity of an election"** in order for an election court to nullify an election.

173. Counsel for the Petitioner leaned heavily on the decision of the Supreme Court in **Presidential Petition No. 1 of 2017** and advanced the argument that the irregularities he had identified through submissions were sufficient to make this court invalidate the election of the 3rd Respondent. With great respect to counsel for the Petitioner, I must state that he was opening a new battle front not delineated in the Petitioner's pleadings. He went out on a scrutiny mission despite this court having rejected the prayer for scrutiny of the materials used in the election. His scrutiny mission was not backed by the pleadings.

174. The allegation that the form 35B used to declare the 3rd Respondent the winner was forged is not found in the pleadings. In any case, PW6 who was the Jubilee candidate conceded that the outcome of the election was declared in the presence of his agents. Submissions are not pleadings and they cannot replace pleadings. The Supreme Court decision cited by the Petitioner's counsel cannot come to the aid of the Petitioner in the circumstances of this case. It should be noted that the decision of the Supreme Court was backed by evidence obtained in a Court sanctioned scrutiny exercise.

175. Parties must live by their pleadings. The Petitioner cannot be allowed to litigate outside his pleadings. In **Presidential Petition No.1 of 2017,** the Supreme Court stated that:

> **"The rule of the thumb has always been that parties must be bound by their pleadings and especially in a case 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."**

176. It is also noted that the majority of forms 35A used to declare the results in the polling stations were signed by the Jubilee agents. The agents were present at the opening of the polling stations and during the verification of the election materials. They witnessed the voting and the counting of votes. The Petitioner cannot ignore the crucial role played by the Jubilee agents in the election and claim that the election did not comply with the Constitution and the electoral laws.

177. I have also carefully looked at the documents submitted to the court by the 1st and 2nd respondents and find that the discrepancies allegedly identified by the Petitioner are minor errors normally found in any election. Perfection is good but attaining it is difficult in the face of fallibility which is attendant to human nature.

178. Considering the evidence placed before the court, I find that the Petitioner's case has no merit. The same is therefore dismissed. The respondents are awarded Kshs. 3 million as costs with Kshs. 1.5 million going to the 1st and 2nd respondents and the balance of Kshs. 1.5 million going to the 3rd Respondent. 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 costs shall not therefore be subject to taxation by the Deputy Registrar.

179. In light of the determination of this court, it is declared that the 3rd Respondent was validly elected the Member of the National

Assembly for Rabai Constituency. A certificate shall issue to the Independent and Electoral Boundaries Commission and the Speaker of the National Assembly under Section 86 of the Elections Act upholding the 2nd Respondent's declaration on 10th August, 2017 that the 3rd Respondent, Mwamkale William Kamoti was validly elected as the Member of the National Assembly for Rabai Constituency in the election held on 8th August, 2017. Costs are awarded to the respondents in the terms already set down in this judgement.

Dated, signed and delivered at Malindi this 2nd day of March, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT