



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARISSA

(HEARD IN HIGH COURT OF KENYA AT NAIROBI)

ELECTION PETITION NO. 6 OF 2017

IN THE MATTER OF PARLIAMENTARY ELECTION FOR TARBAJ CONSTITUENCY (WAJIR COUNTY)

BETWEEN

IDRIS ABDI ABDULLAHI.....PETITIONER

VERSUS

AHMED BASHANE.....1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION (IEBC).....2ND RESPONDENT

SIYAT MAHAT SABUL.....3RD RESPONDENT

JUDGMENT

INTRODUCTION

[1]The Petitioner herein, Idris Abdi Abdullahi, was one of the candidates who contested the Tarbaj Parliamentary seat on 8th August, 2017 General Elections. The other candidates vying for the same office were Fatuma Ibrahim Ali and Siraj Jelle Hillow respectively. On 10th August 2017, the 3rd Respondent after counting and tallying of the votes cast in the said election declared the 1st Respondent Ahmed Bashane Gaal, winner of the Member of Parliament election.

[2]On 5th September 2017, the Petitioner filed the petition within the requisite and prescribed period of 28 days from the date of announcement of the general election on 10th August 2017 as prescribed by **Article 87(2) COK 2010** as read with **Section 78 of the Election Act, No 24 of 2011**; challenging election of the 1st Respondent Ahmed Bashane as Member of Parliament for Tarbaj Constituency.

[3] The Petitioner alleged against the 1st Respondent, 2nd Respondent, Independent Electoral and Boundaries Commission established under **Article 88 of Constitution of Kenya 2010** and 3rd Respondent, Constituency Returning Officer for Tarbaj Constituency election appointed by the 2nd Respondent, grounds of irregularities and improprieties and contested validity of votes cast contrary to **Article 81 of the Constitution**. The Petitioner challenged the counting, tabulation and collation of votes in the election held on 8th August 2017.

PLEADINGS

[4] **1.** In the Petition; the Petitioner sought several orders namely;

- a. This Court orders a scrutiny of the votes cast and recorded, the rejected and spoilt voted, the KIEMS register and counterfoils of all the ballot papers issued at the polling stations.
- b. This Court orders a recount of all votes cast at the Kajaja II, Berjini Dam, Haragal Primary School, Leheley Centre and Gunana Primary School Polling stations.
- c. A declaration that the election for Member of National Assembly for Tarbaj Constituency was not conducted in accordance with the Constitution and the Electoral Laws.

d. A declaration that the 1st respondent, Gaal Ahmed Bashane, was not duly elected as the Member of Parliament for Tarbaj Constituency on 8th August, 2017 and his purported election be and is hereby declared unconstitutional, illegal, null and void.

e. A declaration that the Petitioner, Abdullahi Idris Abdi, was the validly elected Member of National Assembly for Tarbaj Constituency.

f. The Respondents be condemned to pay the Petitioner's costs of this Petition

g. The Court issues an order directing the IEBC to secure the ballot boxes at Tarbaj IEBC offices

h. Such further, other and consequential orders as this Honourable Court may lawfully make.

[5] The Petitioner contested the declaration by the 2nd & 3rd Respondents premised on the petition and the supporting affidavit sworn by the Petitioner on the following grounds;

[5a] KAJAJA 2 POLLING STATION:

The Petitioner deposed that the total votes announced at the polling station were different from those recorded in the Form 35A. He was informed by one Abdullahi Daud, that (he) **Idris Abdullahi had 287 votes, Ahmed Bashane (1st Respondent) had 146 votes while in Form 35 A, Idris Abdullahi had 230 votes and Ahmed Bashane had 186 votes.**

The second issue the Petitioner pleaded was that his agent was denied access to the polling station and the Presiding Officer did not record the absence of his agent in Form 35A. This omission made the vote tallying and vote results flawed as it was contrary to **Regulation 79 of Election (General) Regulations 2012 revised 2016.**

The Petitioner visited the Polling Station on 9th August 2017, found the Polling station was deserted except for the 2nd Respondents agents who informed him the ballot boxes were sealed and they were counting the Presidential votes. He requested and was furnished with a copy of Form 35A and no agent signed. He signed it and took a screen shot of the Form.

[5b] BERJINI DAM POLLING STATION:

The Petitioner deposed that as the Presiding Officer was transporting the ballot boxes from the Berjini Dam Polling Station to Tarbaj Centre for tallying, he allegedly made a detour upon obtaining instructions from the 1st Respondent who thereafter requested for a recount of the votes. He reported the incident to Tarbaj Police Station and the report was booked in the O.B. The recount was carried out without the knowledge and/or presence of the Petitioner and/or his agent. He reported the matter of illegal recount of ballots to the 3rd Respondent through a telephone call. The results that were then announced were as follows; **Idris Abdi Abdullahi 222 votes; Ahmed Bashane Gaal 230 votes.** The ballot boxes were unlawfully opened and sealed in the presence of only 1 party and his alienation and his agents/representatives compromised integrity and transparency of the vote tallying process.

He also reported to Wajir Police Station and the report was booked in OB of 10th August 2017 of the illegal transportation of ballot papers of Forms 34B through use of the 1st Respondent's motor vehicle. The driver was apprehended and was caught in possession of Forms 34B. Given the uncertainty of transportation of ballot papers, the validity of the votes cast in this Polling station are in question.

The Petitioner and his agent Ali Ahmed Osman were unable to reconcile total number of registered voters as shown in Kiems Kit and the voter turnout.

The Petitioner was informed by his agents that the total number of voters identified by Kiems Kit were 474 compared to total number of votes cast being 452.

[5c] HARAGAL PRIMARY SCHOOL POLLING STATION

The Petitioner's agent Issa Ahmed Osman was turned away from the Polling Station. The Presiding Officer was hostile to his agent and intimidated him then purported to have the agent of another Jubilee Party Candidate MCA to represent him without his consent. The voting process continued in the absence of the Petitioner's agent, who had been turned away from the polling station. Due to this, the petitioner herein was unable to verify the validity of the votes and the voting and tallying process in general. The results that were then announced by the Presiding Officer were as follows: **Idris Abdi Abdullahi 139 votes and Ahmed Bashane Gaal 203 votes.**

[5d] LEHELEY POLLING STATION:

The Petitioner deposed in the Supporting affidavit that his agent was denied access to the Polling station by the Presiding Officer and no reasons were given why he was denied access and this enabled the irregular vote tally and announcement of results. There was interference with ballot boxes seals by the 2nd & 3rd Respondents who cancelled the original Ballot box seals recorded as being used at the end of the Vote Counting as shown by copies attached and marked **A-I-A6. Idris Abdi Abdullahi had 2 votes and Ahmed Bashane Gaal had 105 votes.**

[5e] INTERFERENCE OF BALLOT BOXES SEALS

The Petitioner deposed that the election was not administered in impartial, neutral, efficient, accurate and accountable manner contrary to **Article 81 of the Constitution of Kenya 2010 as read together with Sections 39,44 & 44A of Elections Act the Regulations there under and Section 25 of the IEBC Act**. In numerous Polling Stations in Tarbaj Constituency, the 1st Respondent selectively manipulated, engineered and /or deliberately distorted and interfered with ballot boxes seals and cast doubt on the validity of votes cast.

[5f] IRREGULARITY OF FORMS 35A

The Petitioner deposed that a significant number of Forms 35As were not executed by the Presiding Officers of the 2nd Respondent which renders such forms invalid and no reasons were given for lack of the Presiding Officers' signatures. The Forms 35As lacked the 2nd Respondent's stamps and the authenticity and validity of the Forms is questionable. There were numerous Forms that did not bear the agents' particulars as well as their signatures hence invalidating the Forms since no reasons of their absence was recorded as required by **Regulation 79(5) of the Election (General) Regulations 2012**.

GUNANA PRIMARY SCHOOL POLLING STATION1OF 2

There are no reasons given for lack of the Presiding Officers' signature as shown by annexed Form 35A and marked **A-I-A 7**

[5g] ELECTION OFFENCES:

The Petitioner deposed that during the campaign period the 1st Respondent together with the Jubilee candidate for Member of County Assembly MCA for Wajir County campaigned on the false and misleading information that the 1st Respondent was the Jubilee candidate for Member of Parliament MP for Tarbaj Constituency when in fact the 1st Respondent was candidate for PDR Party and competitor of the Petitioner contrary to **Section 20 of the Elections Offences Act. (breach of Electoral Code of Conduct)**

The Petitioner further submitted that the 1st Respondent fraudulently misrepresented his affiliation to the Jubilee party purporting to be the nominated Jubilee candidate for Member of National Assembly of Tarbaj Constituency. Due to this, a large number of voters ended up voting for him and not the Petitioner who was the actual Jubilee candidate.

The 1st Respondent donned Jubilee Party colors in his attire and on his motor vehicle and used face and image of H.E. the President Uhuru Kenyatta in his billboards and posters in a bid to mislead and confuse the electorate who were largely illiterate and easily swayed by false information.

The Petitioner relied on filed affidavits of Abdi Osman Ahmed, Hassan Abdi Omar, Ali Maalim Jimale, Ahmed Muda Elmi and Sadik Sheikh Hassan attached to the Petition and affidavit to confirm the above claims.

[5h] INTERFERENCE WITH THE BIOMETRIC MACHINE:

In addition to the above, the Petitioner also challenged the data keyed into the KIEMS Kits. The Petitioner's agents in various polling stations witnessed a disparity between the total votes cast and the number of people identified. For instance, in the Berjini Dam Polling station, the total votes identified as 477 while in the Form 35A, the total votes recorded were 452. Due to this, a scrutiny of the voters register, under the provisions of **Rule 32 and 33 of the Elections Act (Parliamentary & Constituency Elections) Petition Rules (2013)**, should be allowed.

1st RESPONDENT'S RESPONSE

[6] The 1st Respondent, in his written response and Replying affidavit dated 15th September 2017 filed on 18th September 2017 opposed the present Petition on the following grounds namely:

[6a] KAJAJA 2 POLLING STATION:

The Petitioner was personally present when the Presiding Officer Omar Mohamed Bulle publicly announced the results and he affixed his signature on the Form 35A thus being conclusive proof that he approved of the results, the voting process and the tallying process. At the time; the Petitioner did not raise any discrepancy instead he signed the Form 35A. If the results were different he ought to have refused to sign the Form 35A and indicated his reasons. The 1st Respondent avers that the figures that were announced are the similar to those recorded in the form 35A and therefore the figures indicated in the Petitioner's petition are therefore a mere imagination.

It was further urged by the 1st Respondent that at the Kajaja 2 Polling Station, only two rejected votes were declared and not one as the Petitioner alleged. The 1st Respondent submitted that, contrary to Petitioner's allegations, the Petitioner's agents were in fact present but the Petitioner too in person. It was therefore the 1st Respondent's case that the voting and tallying exercise as well as the recounting of votes at the Kajaja 2 Primary School Polling Station complied with the Laws and Regulations governing Elections and the aforesaid allegations are unsubstantiated and based on mere falsehood.

The Petitioner from Kajaja2 requested the Returning Officer at Tarbaj IEBC offices to conduct recount and he agreed and the exercise took 4 hours. The Petitioner did not dispute the recount.

[6b] BERJINI DAM POLLING STATION:

The 1st Respondent contended that the allegation in his Petition on the events that took place were false. The Presiding Officer did not make any detour; the ballot boxes were transported to Tarbaj IEBC Headquarters from Berjini Polling Station due to chaos occasioned by the Petitioner and his supporters at the said polling station and RDU Police Unit was called in to ensure safety of the boxes. The ballot boxes were then taken to Tarbaj IEBC headquarters. After it was agreed between the Returning Officer and security agents and in the presence of the Petitioner and 1st Respondent and their representatives namely Ali Ahmed Osman for the Petitioner and Abdullahi Sheikh Hussein for Jubilee MCA Sarman Ward and Hussein Mohammed Farah representing 1st Respondent the ballot boxes were taken to Tarbaj Primary for tallying as earlier agreed. The Returning Officer had informed all candidates on the above and upon deliberation, it was agreed that the votes should be recounted. The recounting of votes was done at Tarbaj Primary School Polling Centre with all agents and representatives including the Petitioner's were present. His claim that his agent(s) were alienated is untrue.

[6c] HARAGAL POLLING STATION:

According to the 1st Respondent, the Petitioner's agent namely, Ibrahim Hussein Kassim, was always present at the Polling station and he took part in all the activities and that he did not dispute the results once they were announced. The 1st Respondent maintained that the allegations made were malicious and that the agent was in fact present during the whole process from when the Polling Station was opened until after counting process. He recorded both serial numbers of ballot boxes, witnessed counting and recording of votes and he took his own notes of votes as recorded and announced.

[6d] INTERFERENCE WITH BALLOT BOXES SEALS:

The 1st Respondent averred that the candidates and their agents or representatives witnessed and recorded the seals of all ballot boxes. No ballot box seals were cancelled and the Presiding Officer organized a recount of votes when either party requested.

[6e] IRREGULARITY OF FORMS 35As

The 1st Respondent deposed that all Form 35As were duly executed by the Presiding Officers in the presence of the agents or contestants in person as happened in Kajaja 2 Polling Station. The Forms also bore an authentic stamp by the 2nd Respondent. The 1st Respondent also stated that if there are forms that lacked the agent's signature and without reasons indicated. Refusal by the agents to sign the said forms did not invalidate the results announced.

[6f] ELECTION OFFENCES:

In respect to the Petitioner's claim that the 1st Respondent was in breach of the electoral code, the 1st Respondent contended that the allegation is couched in generalities and is misconceived. The Petitioner had not enumerated in what manner this breach was carried out as alleged. The 1st Respondent stated that the Petitioner's allegation of MCA could not be responded to as the MCA was not named. The 1st Respondent stated he never gave false and misleading information during campaign that he was running under the Jubilee party ticket, he at all times campaigned under Party for Democracy and Reforms (PDR). At no one point in the entire campaign did the 1st Respondent ever wear Jubilee attire as falsely claimed.

The 1st Respondent averred that the Party for Democracy & Reforms (PDR) is an affiliate party of the Jubilee Party, he did not mislead the voters during the campaign period as alleged and that in fact he urged the voters to vote for him as an individual candidate and not the party they are affiliated with.

[6g] INTERFERENCE WITH THE BIOMETRIC MACHINE :

The 1st Respondent that the said there were no disparities as alleged or at all, the statistics entered into the KIEMS Kit were not results and therefore not comparable with the results recorded in Form 35As. The results announced were with regard to results contained in Form 35As from each of the 50 polling stations in Tarbaj Constituency. In the circumstances the results declared by the 2nd and 3rd Respondents were not affected by any variances or errors that may have occurred at the point of data entry into Kiems Kit but were from Form 35As and not the KIEMS Kit as alleged by the Petitioner.

[6h] For the foregoing reasons, the 1st Respondent urged the Court to find that the election for the Member of Parliament for Tarbaj Constituency was duly conducted, that he was validly elected as the Member of Parliament for Tarbaj Constituency and to further dismiss the Petition with costs to the Petitioner.

2ND AND 3RD RESPONDENTS' RESPONSE:

[7] The 2nd and 3rd Respondents filed Response to the Petition on 20th September 2017 with the 3rd Respondent's Replying affidavit annexed and filed on the same date in Court. They submitted that the election for the Member of National Assembly for Tarbaj Constituency, Wajir County was conducted on 8th August 2017, voters turned up to exercise their democratic and Constitutional right to vote without any issues

and that the voting tallying and announcement of results was done in a free and fair manner.

[8] The Respondents' outlined in detail the procedure for counting, verification tallying and announcement of results. The salient features include the following; after voting, the polling station is closed, agents for each candidate from various political parties are present during the counting and sometimes there are independent observers. If any of the agents is dissatisfied during the process then he/she reports to the Presiding Officer or any other IEBC officer. After counting results are verified and an agent may request recount. After that Form 35A is signed by agents and Presiding Officer if the process was free and fair. If any agent refuses to sign the IEBC Officer will note the reason(s) for the refusal by agent to sign. The results in Form 35A are transmitted to the Returning Officer at the official Tallying Centre. The Returning Officer reads the results and then fills Form 35B recording votes for each candidate in various polling stations and after tallying them signs the said Form. From the above process the Returning Officer 3rd Respondent read out results from signed Form 35As from various polling stations.

[9] The Respondents opposed the Petitioner's application based on the following grounds:

[9a] KAJAJA 2 PRIMARY SCHOOL POLLING STATION

The Petitioner made an allegation that the results announced did *not* correspond with the ballots yet he signed the forms without any proof of coercion being conclusive proof that he and/or his agent approved the results in the form 35A and those that had earlier been announced.

[9b] The results announced at were similar to those in Form 35A as follows: Idris Abdi Abdullahi 230 votes; Ahmed Bashane Gaal186 votes.

[9c] The Petitioner and/or his agents were available during the whole voting and tallying process as they afterwards appended their signatures in the necessary documents. None of the agents had been excluded from the process as alleged by the Petitioner.

[9d] The issue regarding the alleged broken seals was explained to the candidates. The cancellation of the seal numbers in the Polling station Diary was due to the fact that the Presiding Officer erroneously used the numbers of the seals already used during the polling. The said seals had already been broken before tallying started.

[9e] BERJINI DAM POLLING STATION:

That the transportation of the ballot boxes from Berjini Polling Station to the Tarbaj IEBC Centre was due to the security situation. The Rapid Deployment Unit (RDU) Police Unit found the situation was tense and not conducive for tallying at the polling station. After consultation and agreement by all parties they agreed to relocate. The agents signed Form 35A confirming correctness of content in Form 35A. No seals were broken. The Petitioner did not complain to the Returning officer at Tallying Centre or other IEBC officials, it should therefore be assumed that the Petitioner did not have any issue with the activities undertaken by the 2nd and 3rd Respondent respectively.

The Presiding Officer did not turn away the Petitioner's agent from accessing the Polling station.

[10] IRREGULARITY OF FORMS 35As

The forms 35As were all signed by the Presiding Officer except in Leheley Polling Station which is not among the contested polling stations. The Deputy Presiding Officer signed on his behalf which is allowed by law Rule 5 (4) of Election General Regulation 2016. One form 35A however did not have a stamp but was duly authenticated by all agents present.

The results were announced to the public and once everyone was satisfied, the Form 35B was filled by the returning officer, Mr. Siyat Mahat Sabul.

[11] NEUTRALITY OF IEBC OFFICIALS:

The Respondents stated that all IEBC officials swear an oath of office and are bound by the oath to carry out their duties without fear or favour and in a free, fair and transparent manner. During the elections at Tarbaj Constituency there were no claims of officers being biased towards any candidate. There was also no evidence of interference with the biometric machines or false entries in the signed form 35As.

The Petitioner claims that there was evidence of collusion among the IEBC officials and the 1st Respondent during the elections. The Presiding Officer in each polling station is issued with polling station diary to indicate proceeding of the day, to indicate opening and closing of polling station, note any discrepancies or anything unusual during election process and record any complaints. The polling station diary is handed over to the Returning Officer at the Constituency Tallying Centre. The Polling Station diaries presented to the Returning Officer 3rd Respondent, there was no complaint raised and/or recorded of any bias of the Presiding Officer, it was therefore assumed that the elections at Tarbaj were conducted in a free, fair and transparent manner and that the results were therefore valid.

The Returning Officer 3rd Respondent announced the results as follows; **Idris Abdi Abdullahi 6,812 votes, Ahmed Bashane Gaal 6,836 votes, Fatuma Ibrahim Ali 1,397 votes and Siraj Jelle Hillow 38 votes respectively** in the presence of the public, agents for the candidates and/or parties, IEBC staff, nothing was done in secret. Thereafter, the 3rd Respondent issued the 1st Respondent with a

certificate.

In conclusion, the 2nd and 3rd Respondents contends that the 1st Respondent was validly elected and the petition be dismissed with costs.

[12] INTERLOCUTORY APPLICATIONS:

1) On 6th October 2017, the Petitioner through Counsel applied to have the election materials for the Member of Parliament election be safeguarded. By Consent the parties agreed that the materials shall be preserved by each party providing padlock.

2) On 24th October 2017, the Petitioner sought a recount of votes of the 5 polling stations Kajaja2, Berjini Dam, Haragal Primary School, Leheley Centre and Gunana Primary School because if the results are confirmed early on then it would dispose of the petition, save costs and time and confirm the win at the earliest time. The difference is 24 votes. The Respondents objected to recount and scrutiny of all polling stations until the hearing of the Petition. On 31st October 2017 the Court delivered Ruling and granted scrutiny in Kajaja 2 and Berjini Dam polling stations pending hearing of the petition.

3) On 10th November 2017, the 1st Respondent filed application and sought that further proceedings be halted and dismisses the petition for want of compliance of **Section 78(1) of the Elections Act**. The 1st Respondent enquired from Garissa High court where the Petitioner filed the Petition as to whether he deposited the mandatory security of costs. The 1st Respondent was advised to peruse the Court File in Nairobi High Court. He did and found that 55 days later past the statutory period, the Petitioner had not deposited the security for costs and was in breach of **Section 78(3) of the Elections Act**.

The Petitioner stated that the Petition was assessed by Clerk In Garissa High Court. The Petitioner's advocate was issued with Judiciary Deposit bank accounts details and later deposited the amount of Ksh 500,000/- as confirmed by Bank Statement.

The 1st Respondent confirmed that the copy of deposit slip was not filed in the Court File. The Registrar Garissa High court confirmed payment of security costs as provided by **Rule 13 (1) & (2) of Elections (Parliamentary 7 County Elections) Rules 2017**. The Court in its Ruling delivered on 29th November 2017 sought original receipt book and receipt for payment of security costs availed to this Court. On 7th December 2017, the affidavit by Deputy Registrar and the Accountant, Garissa High Court confirmed payment of security costs within the timeline. Although there were glaring anomalies in the Receipt book, the Bank Statement which was not challenged and confirmed payment on 5th September 2017.

4) Pursuant to Ruling delivered on 31st October 2017 as to scrutiny and the Consent by parties through Counsel on 6th October 2017 regarding storage materials; the Deputy Registrar brought to this Court's attention that in **Election Petition 4 of 2017** which involved gubernatorial election in Wajir County was involved in scrutiny and required access to the said materials stored under lock and key by the parties herein. After submissions by the parties the Court by Ruling of 6th December 2017 granted access to the election materials to parties in **Election Petition 4 of 2017** by the parties herein removing padlocks and replacing the same with additional seals for the specified 5 polling stations only.

5) During the hearing, the Petitioner made reference to Form 35As that related to 45 polling stations that were annexed to the Supplementary affidavit filed by petitioner with leave of Court in answer to the Responses to the Petition.

The Respondents objected to inclusion and reference to statutory forms of the 45 polling stations filed after 28 days of filing the Petition after the election. The Court's ruling of 14th December 2017 expunged the Form 35As from 45 polling stations as the same was not pleaded in the petition and leave was sought and granted to file Supplementary Affidavit to reply to responses to petition but not to add new and additional evidence thus expanding the Petition to prejudice the Respondents.

6) The Respondents objected to the copies of affidavits filed in Court as they did not comply with **Section 65 (1) of Evidence Act and Section 5 & 7 of Oaths and Statutory Declarations Act**. The Petitioner's affidavits save for 1 affidavit by Duale Dakat the rest are photocopies and not authenticated as required by law. Therefore, they ought to be expunged from the record.

The Petitioner clarified that the original affidavits were available and would be availed. The lack of Court stamp cannot be blamed on them, suffice is that they filed affidavits together with the Petition at the same time and the petitioner cannot be held responsible for non stamping and administrative process of the Court. By this Court's Ruling of 17th January 2018 relied on **Article 159 (2) Constitution Rule 12 of Election General Rules 2017 & Order 19 (7) Civil Procedure Rules 2010** and granted the Petitioner to replace the affidavits with originals and/or have them on record as what was important was substance not form or legibility.

7) On 7th February 2018 the Respondents objected to the inclusion of CD which in the Petition was marked **AIA- 10** in paragraph 42 of the petition but was produced in Court on 24th October 2017. The Respondents objected to the CD being admitted as evidence as there was no certificate as required under **Section 106 of Evidence Act**. The Petitioner relied on **Section 78 2 (b) of Evidence Act, Article 159(2) Constitution, Rule 5 of Elections (Parliamentary & County) Election Petition Rules 2017**.

The Court's Ruling of 8th February 2018 found that it could not exercise judicial discretion where the requirement for a certificate under **Section 106 of Evidence Act** is a mandatory requirement. The CD was not admitted as evidence.

8) At the close of the hearing, the Petitioner applied for scrutiny of 5 polling Stations and the Kiems Register/Logs. The Respondents requested the Petitioner to file a formal application for scrutiny upon filing and serving the application, the Respondents filed and

served their objection to scrutiny.

The Court's Ruling of 15th February granted scrutiny of Leheley Polling Station, Gunana 2 of 2 Polling Station, Dasheg Polling Station & Tarbaj Library Polling Station. The scrutiny was conducted at Wajir Law Courts and Scrutiny Report availed on 22nd February 2018. Written submissions on scrutiny were filed on 27th February 2018.

ISSUES FOR DETERMINATION

[13] Issues for Determination as listed in the Petitioner's Statement of Issues are:

- 1) Whether the irregularities and illegalities witnessed under the Forms 35A uphold a valid election of the 1st Respondent?
- 2) Whether any election offences were committed by the 1st Respondent either individually or collusion with the 2nd and 3rd Respondents with the aim of giving him unfair advantage over other candidates?
- 3) Whether the elections were conducted in accordance with the principles laid down in the Constitution and the law and whether instances of non-compliance with the law if any affected the validity of the results?
- 4) Whether the 1st Respondent was validly elected as the Member of Parliament for Tarbaj Constituency?

[14] The issues for Determination raised by the 1st Respondent in his Response to the Petition are:

- 1) Whether the 1st Respondent was validly elected and declared the Member of Parliament elect for Tarbaj Constituency by 3rd Respondent during the elections held on 8th August 2017?
- 2) What consequential declarations, orders and reliefs should this Honourable Court grant?

[15] The Issues for Determination raised by the 2nd and 3rd Respondent in the Statement of Issues are:

- 1) The 1st Respondent was duly elected as Member of National Assembly for Tarbaj Constituency.
- 2) The Election for the Member of National Assembly for Tarbaj Constituency was conducted in accordance with the Constitution and the Elections Act and the Regulations there under.
- 3) The Petitioner has not proved his case and disclosed sufficient grounds for granting the reliefs sought.
- 4) Who bears the costs?

[16] Issues derived from the Pleadings & Evidence on record

- 1) Was the election of Member of Parliament for Tarbaj Constituency conducted according to the principles laid down by Constitution of Kenya 2010 and election laws?
- 2) Were there irregularities and illegalities committed in the conduct of the election for Member of Parliament for Tarbaj Constituency?
- 3) Was the 1st Respondent complicit in any way by act of omission to the impugned election for Member of Parliament Tarbaj Constituency?
- 4) Did the 2nd and 3rd Respondents fail, refuse or neglect to conduct the election in a manner consistent with the Constitution and election laws?
- 5) Did the irregularities and /or illegalities if any substantially adversely impact the conduct of the election in accordance with the Constitution and election Laws?

LAW

[17.] General Principles governing the election of the Position of Member of National Assembly

The Constitution of Kenya being the Supreme law of the land is the fulcrum of all principles governing elections. All parties involved in the Election Process and adjudication of disputes are bound by national values and principles of governance when making its decisions. The Constitution under **Article 10 of the Constitution** sets out the national values and principles of governance and it provides that:

- (1) *"The national values and principles of governance in this Article bind all State organs, State officers, public officers and all*

persons whenever any of them—

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

(c) good governance, integrity, transparency and accountability;

When interpreting the Constitution Article 259 of Constitution of Kenya provides:

This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

Article 38 introduces the political rights of all citizens when deciding who to represent their interests. The Article provides:

(3) Every adult citizen has the right, without unreasonable restrictions-

(a) to be registered as a voter

(b) to vote by secret ballot in any election or referendum ; or

(c) to be a candidate for public office or office within a political party of which the citizen is a member and, if elected, to hold office.....

The Constitution of Kenya 2010 under Article 81 and 86 establishes General Principles for the Electoral System. In *GATIRAU PETER MUNYA –VS- DICKSON MWENDA KITHINJI AND OTHERS* , [2014] ECLR the Supreme Court of Kenya held that:

‘the Elections Act and the Regulations thereunder are normative derivatives of the principles embodied in Articles 81 and 86 of the Constitution and that in interfering them, a court of law cannot disengage from the Constitution. That, Article 81 and 86 establish

the constitutional threshold against which the conduct of elections is to be measured to determine whether it meets established standards of democratic franchise.’

“ 81. General principles for the electoral system.

The electoral system shall comply with the following principles;.....

(a) freedom of citizens to under Article 38:

(e) free and fair elections which are-

(i) by secret ballot

(ii) free from violence, intimidation, improper influence of corruption

(iii) conducted by an independent body;

(iv) transparent; and

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

86. Voting

At every election, the Independent Electoral and Boundaries Commission shall ensure that-

(a) whatever method is used the system is simple, accurate, verifiable, secure, accountable and transparent.

(b) the votes cast are counted, tabulated and the results announced promptly by the presiding Officer at each polling station.

(c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and

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

In addition to the Constitution, the Parliament under **Article 82 of the Constitution** is tasked with the duty of enacting legislation governing elections. Among the laws that have been formulated to deal with elections in Kenya and directly relevant to this case are the **Elections Act, 2011**, the **Elections (General) Regulations, 2012**, the **Election Offences Act, 2016**, the **Independent Electoral and Boundaries Commission Act, 2011** and the **Elections (Parliamentary and County Elections) Petitions Rules, 2017**.

The IEBC has the duty to ‘**determine, declare and publish the results of an election immediately after close of polling**’ as enumerated in **Section 39**. The Court of Appeal in the case of *Independent Electoral and Boundaries Commission vs. Maina Kiai & 5 Others*, Civil Appeal No. 105 of 2017 (the *Maina Kiai case*) stated that the results declared at the polling station are **final**.

In furtherance of the general principles of elections established under **Article 81**, the Elections Act under **Section 44A** provides that the IEBC shall “**put in place a complementary mechanism for identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent ...**”

Due to this, the **Elections Act** under **Section 44** has delegated to the IEBC the duty to “**ensure that the technology in use is simple, accurate, verifiable, secure, accountable and transparent.**”

Section 83 of the Elections Act has expatiated on the instances to be considered by an election court when deciding on whether to invalidate an election. The section provides that:

83. Non – compliance with the law

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

In the *GATIRAU PETER MUNYA –VS- DICKSON MWENDA KITHINJI AND OTHERS* (supra) case, the Court held that:

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

The Independent Electoral and Boundaries Commission (IEBC) was established by **Article 88 (4)** of the Constitution of Kenya and the Independent Electoral And Boundaries Commission Act, 2011. Its functions as provided for under **Section 4 of the IEBC Act** is mainly conducting elections and settling electoral disputes. The Learned Judge in *WILLIAM KABOGO GITAU VS GEORGE THUO & 2 OTHERS (2010) E KLR* elucidated the role any electoral commission such as the IEBC plays during any election as follows:

“...If there is any statutory body whose actions should be considered to be above the board and which should perform its duties to the required standard or integrity and probity, it should be the electoral commission. The electoral commission has a duty to inculcate and imbue confidence in the electorate that its process is transparent, free and fair....”

The legislature has also enacted the Election Offences Act, 2011 which establishes election related offences so as to ensure the election is carried out as per the Constitution and other electoral laws.

[18] BURDEN AND STANDARD OF PROOF

The requisite burden and standard of proof required in election disputes was set out in the *SUPREME COURT PRESIDENTIAL ELECTION PETITION OF NO. 5 OF 2013 RAILA & OTHERS VS IEBC & 3 OTHERS* where it was held that:

“.....a Petitioner is under the obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden. The threshold of proof should be 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.”

[19] HEARING

The hearing commenced on 13th December 2017, the record shall confirm that parties' Counsel were involved in the conduct of other election petitions within the same time lines. The Petitioner called 5 witnesses to testify in Court and provide evidence of the pleaded issues for determination in his petition.

The Petitioner reiterated what is contained in the pleadings; the petition and supporting affidavit; the Supplementary Affidavit to the extent that it did not bring in new and/or additional evidence.

The 1st Respondent called 7 witnesses to tender evidence on the issues raised in the Petition and he relied on his pleadings the Response to petition and supporting affidavit and Response to supplementary affidavit without adding new matters.

Similarly, the 2nd & 3rd Respondent called 6 witnesses mainly Presiding Officers of the listed Polling stations in the Petition and other pleadings where the conduct of election was impugned. They based their evidence on the processes of conducting elections and events of the election process in the specific polling station and stated their response to the Petition and Supplementary affidavit. 2 Security Reports were availed to Court vide Rulings of 31st October 2017 and 15.2.2018. The Security Reports were submitted on 15.1.2018 and 22.2.2018 respectively. All Counsel filed submissions with regard to applications filed final submissions for the Petition.

[20] ANALYSIS AND DETERMINATION

This Court is called upon to determine on the basis of pleadings, evidence adduced during the proceedings, annexures to the pleadings and written submissions filed by respective Counsel to both applications and the petition.

[21] AFFIDAVITS FILED AND WITNESSES DID NOT TESTIFY IN COURT

Before delving into the issues for determination; a matter regarding evidence on record ought to dispensed with and it is with regard to affidavits on record filed by witnesses to the parties, the Petitioner and 1st Respondent. At the close of the hearing, there are on record 18 affidavits where witnesses were not called to testify by the Petitioner and 8 affidavits of witnesses for the 1st Respondent who did not testify.

Although the parties agreed to reduce number of witnesses from those indicated during the Pre Conference at 38 witnesses in total, even after that there is silence as to the import of these affidavits.

The law on the issue where parties file affidavits and the witnesses do not testify on them is as follows;

In the case of *M'NKIRIA PETKAY SHEN MIRITI VS RAGWA SAMUEL MBAE AND 2 OTHERS, ELECTION PETITION NO. 4 OF 2013*, it was observed that:

“[42] In relation to the allegations that the affidavits are bad in law for being false, I take the view that as section 109 of the Evidence Act provides, the burden of proof of particular facts lies on the person who alleges those facts.The veracity of the contents of affidavits can only be tested when the witnesses of either side take the stand. This makes the issue unsuitable for determination at the preliminary stage as the court has not had an opportunity to hear the witness evidence. The Applicants are therefore asking the court to make a decision on the basis of untested evidence which this court cannot do. As was noted by Kimondo J in Nairobi Election Petition 2 of 2013 Steven Kariuki v. George Mike Wanjohi & Others at page 16: Ideally, cases should be determined on tested evidence at a full hearing.” (Emphasis added)

Rule 12 (12-13) of the Elections (Parliamentary & County Elections) Petitions Rules, 2017 provides;

An affidavit shall form part of the record of the hearing and may be deemed to be the deponent's evidence for the purposes of an examination-in-chief

Every deponent shall, subject to the election court's direction, be examined –in-chief and cross-examined.

Provided that the parties may, by consent, accept not to cross-examine the deponents but shall have the deponent's evidence admitted as presented in the affidavits

In *AHMED ABDULLAHI MOHAMMED & ANOR vs DON MOHAMED ABDI MOHAMMED HCT EP 14 OF 2017* held;

The net effect of the foregoing is that, an affidavit under Rule 12 of the Election petition Rule forms part of the evidence in support of whose case it is sworn. However, the deponent of such affidavit is examined in chief and cross examined. That is mandatory by virtue of use of the term shall in subrule 13 of Rule 12 of Election petition Rules. It is therefore expected that once a party has filed affidavits in support of his case in an election petition, he shall offer the deponents thereof for cross

examination. Those affidavits being part of the record, they are not struck out or expunged. Since the veracity of the witnesses' testimony is confirmed through cross examination, failure to test such evidence only waters down the probative value of such affidavits....Denying such a party the right to cross examine a witness who has made allegations in an affidavit is to deny such a party right to a fair trial.

The law on probative value of affidavits in proceedings is settled. The value to be attached to averments in an affidavit for purposes of a trial are based on the veracity of such evidence through cross-examination of the witness. In the absence of the evidence being tested through cross examination by the adverse parties; the veracity of the evidence and credibility of the witness is untested and adversely impacts on the probative value of such evidence. The Court cannot attach probative value to content of the said affidavits.

The petitioner contested the conduct of the election held on 8th August 2017 and declaration of the results for Member of Parliament Tarbaj Constituency on the following grounds;

IRREGULARITIES

[23] PETITIONER'S AGENTS DENIED ACCESS AT POLLING STATIONS

[23a] KAJAJA 2 POLLING STATION

The Petitioner contended that on the evening of voting day, he was called by somebody who travelled to Kajaja Polling Station and he reported to him that his agent was not at the Polling station the whole day. He was informed by his supporters that the Presiding Officer declared different results from those announced at the Tallying Centre. He was informed that at the Polling Centre the Presiding Officer counted 1 rejected vote which if added he had 288 votes. He travelled to the said polling station the next day and found the 2nd Respondent's staff, he signed the Form 35A.

The Presiding Officer Omar Mohammed Bulle(DW6) confirmed that Adow Manney was the agent for the Petitioner and was at the polling station during voting and counting process. He signed the Polling Station diary on Pages 11; Particulars of Agents; 15 Certification of ballot box serial numbers and seals used at start of Polling, 21 Confirmation by agents present during the sealing of packets & 23 affirmation of records of seals by agents at closure of counting. He did not sign Form 35A as the Petitioner signed it.

[23b] BERJINI DAM POLLING STATION

At Berjini Dam Polling Station after chaos marred the election process, then the election materials were transported to Tarbaj Constituency Tallying Centre. The Petitioner deponed that the Presiding Officer made a detour at the request of the 1st Respondent. He intimated that at Tarbaj Tallying Centre that the Returning Officer ordered recount at the request of 1st Respondent. During the recount conducted at Tarbaj Primary Polling Station, his agent and himself were alienated by the Respondents.

The Presiding Officer Abdille Ahmed Birik (DW4) stated that the Petitioner was represented by an agent Ali Ahmed Osman and Abdullahi Sheikh Hussein both of Jubilee Party ; one appointed for the Petitioner and the other representing MCA candidate, who presented the requisite documents that showed he was Jubilee Party agent. They were present at the Polling Station and they accompanied the other officials in ferrying election material s from Berjini to Tarbaj Tallying Centre when chaos and fracas arose. They participated at the Tarbaj Primary School where the recount was conducted. This was also confirmed by Hussein Mohammed Farah (DW6) for 1st Respondent, he was PDR Party Agent representing the 1st Respondent as his agent.

Both agents For Jubilee Party signed the Polling Station Diary on Pages 11; Particulars of Agents; 15 Certification of ballot box serial numbers and seals used at start of Polling Pg 21 Confirmation by agents present during the sealing of packets only Abdullahi Sheikh signed & Pg 23 affirmation of records of seals by agents at closure of counting only Abdullahi Sheikh signed. They also signed Form 35A but the copy filed in Court was not clear. The original Form 35 A found in the ballot box during scrutiny in the Report filed in Court on 15th January 2018, the Form as stipulated in Form B(1) of the Report; both Presiding and Deputy Presiding Officers signed the Form 35A and 7 agents from different parties signed the said Form too.

[23c] HARAGAL POLLING STATION

At Haragal Polling station, the Petitioner deponed that his agent was Issa Ahmed Alason was turned away for better part of the voting day. The Petitioner was unable to verify the validity of the votes. Ibrahim Hussein Kassim (DW3) testified he was appointed agent by Jubilee Party and the Petitioner gave him the document and represented the Petitioner at the Polling Station. He was at the polling station throughout the day. He signed the Polling station diary at pages 11 for particulars of Agents; 15 Certification of ballot box serial numbers and seals used at start of Polling, 21 Confirmation by agents present during the sealing of packets & 23 affirmation of records of seals by agents at closure of counting. He also signed Form 35A. Sadiq Abdullahi Omar (DW2) Presiding Officer of Haragal Polling station testified that he did not turn away any authorised agent. Before he could allow an agent in the Polling Station, the agent had to produce and present letter of appointment from Party or candidate, Oath of secrecy, Identity card or passport and IEBC badge. Issa Ahmed Alason came to the polling station and did not produce the requisite documents. Ibrahim Hussein unlike Issa Ahmed Alason produced the necessary documents. Therefore he did not allow him in the polling station. The Presiding Officer said he was not hostile to any agent and he did not intimidate any of the authorised agents.

Ahmed Mohammed Sheikh (DW4) agent for the 1st Respondent testified that at the Polling station, he was with other agents, Ibrahim Kassim represented the Petitioner and he did not see Issa Ahmed Alason.

[23d] GUNANA PRIMARY SCHOOL 10F 2

It was pleaded by petitioner that the Form 35A was not signed by Presiding Officer. The 3rd Respondent in Response to Supplementary Affidavit filed on 13th November 2017 and attached the Form 35A which was signed by Deputy Presiding Officer, Zeinab Mohammed who also signed the polling station Diary.

The polling Station Diary showed, there were Ali Abdullahi, Ali Dahir Abdul Rahman, Abdulahi Osman were Jubilee agents who signed Pg 11 and Pg 23 was signed Ali Abdullahi only.

Wargadud, Dasheg, Gunana 2 of 2 and Tarbaj Library were not pleaded but later included during the hearing of the Petition. No specific allegations were made by the Petitioner. However, during the proceedings it emerged that some forms from some of these polling stations namely Dasheg and Gunana 2 of 2 had overwriting and cancellations without countersigning and scrutiny was conducted which confirmed the votes cast.

[23e] LEHELEY POLLING STATION
At Leheley Polling Station his agent was denied access and the 2nd Respondent through presiding Officer enabled irregular voting tally and announced results without any reasons given as to why his agent was denied access to the polling station.

The Presiding Officer Abdullahi Hillow (DW5) sated the agents for Jubilee Party were Hassan Mohammed and Bishar Hussein Jelle; one for the Petitioner and the other for MCA candidate. He signed Pages 11 for particulars of Agents; and 15 Certification of ballot box serial numbers and seals used at start of Polling, but did not sign pages 21 Confirmation by agents present during the sealing of packets & 23 affirmation of records of seals by agents at closure of counting. He also signed Form 35A but was not legible as the original he put in the ballot box and sealed. the copy was not legible. The copy in the ballot box as per Scrutiny Report filed on 22nd February 2018 at Form B(1) confirms, the Form 35A was signed by Presiding and Deputy Presiding Officer and 3 agents though again it was very faint.

The Court has considered the Petitioner's allegation with regard to access of his agents to the above mentioned polling stations. Cumulatively, the evidence does not disclose the allegation and that the Petitioner has not discharged the burden of proof that on a balance of probabilities as the Petitioner could not have been in all 50 polling stations at once on the voting day. His allegations are based on information derived from undisclosed sources who did not tender direct evidence on events related to hindering access of the Petitioner's agents. Further, none of the alleged agents who were denied access to the polling station deposed an affidavit filed in Court and did not adduce evidence and testify to the fact of hostility and/or intimidation of the Presiding Officer to any of them and unlawful refusal or access to the Polling station. The evidence amounts to hearsay evidence.

The probative value of hearsay evidence was considered in the case of **GOVERNORS BALLOON SAFARIS LIMITED V ZACHARIA W. BARAZA T/A SIUMA AUCTIONEERS, CIVIL APPEAL NO. 484 OF 2015**, the It was held that hearsay evidence is inadmissible. **The Judge noted thus:**

[31] There is nothing on record to show that the Ombudsman called for the original file and that he personally verified the record and found that the documents were "suspect"? What he was writing is what he had been told was "suspect" documents which, in my view, was hearsay and such evidence cannot be admissible (See Kinyatti V Republic Nairobi [1984]eKLR CA 60/1983 Kneller JA, Chesoni&Nyarangi Ag JJA where the Court of Appeal made it clear that " The rule against hearsay is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a stated fact...Evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is not admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made.

Therefore, the evidence on record does not establish the allegation that agents were denied access from polling station. In the absence of direct testimony from the said agents the evidence on record is inconclusive and insufficient as proof of claim.

The 2nd Respondent is mandated through Presiding Officers under **Rule 62 (1) (c) & 74 (1) of Elections (General) Regulations, No. 24 of 2011[Rev. 2016]** to admit authorised agents to the polling station who provide identification and appointment documents only.

It would seem that the internal arrangements regarding appointment of agents between the Political Party and candidate is outside the purview of Presiding Officers; all agents shall present appointment letters to be admitted to the Polling station. For these reasons, this Court finds the said irregularity not established by evidence on record.

[24] IRREGULARITY OF FORMS 35A

The Petitioner pleaded that a significant number of Forms 35A were not executed by Presiding Officers of the 2nd Respondent rendering the Forms invalid.

The Petitioner avers the Form 35As were not signed by Presiding Officers and no reasons were given for lack of Presiding Officers' signatures.

The Petitioner averred that numerous forms did not bear the particulars and signatures of the agents of the Petitioner or the party hence invalidating the Forms 35A since no reason or fact of their absence was recorded as required by **Regulation 79(5) of the Election (General) Regulations 2012**

The Petitioner avers that some Forms 35 As do not bear the authentic stamp of the 2nd Respondent. Their authenticity and validity cannot therefore be ascertained.

The Petitioner deposed in his Supporting affidavit that Gunana Primary School Polling Station lacked the Presiding Officer's signature annexed as **AIA-7**

The Form 35A of Leheley Polling Station did not bear the authentic stamp of the 2nd Respondent annexed as **AIA-9**

During his testimony, the Petitioner complained of irregularity of Forms 35As as follows;

1. Forms 35As did not have IEBC stamps

2. Forms 35As did not bear names and signatures of Presiding Officers

3. Forms 35As were not signed by Petitioner's agents

4. There were differences between Forms 35As and Form 35B (this aspect was introduced during trial and was not pleaded)

The Petitioner relied on Forms 35As annexed to Supplementary Affidavit filed with leave of Court on 17th October 2017 and those filed by letter dated 24th October 2017 of Form 35As of 45 polling stations both filed by the Petitioner. The Court's Ruling of 14th December 2017 expunged the Form 35As from the record on the basis that the Supplementary affidavit introduced new evidence or grounds beyond those pleaded in the Petition and since filed after 28 days of filing petition; these Forms 35As were expunged from the Court record as it would amount to materially changing the position of the petition.

As alluded to by 1st respondent through Counsel, it was also pleaded by the petitioner in paragraph 12 (c) (i-iii) of the Supplementary affidavit, that on 12th August 2017, he sought from 2nd Respondent copies of Forms 35As and was provided with the same from 49 Polling stations in a flash disc. This means the Petitioner has sufficient time to annex the Form 35As to the Petition filed on 5th September 2017.

The Petitioner annexed copies of Form 35As to the petition to establish his claim. These are as follows;

The Petitioner annexed copies of Form 35As to the petition as follows;

AIA-1 Form 35A-Kajaja Two Primary School 1 of 1

AIA-2 Screenshot of Form 35A of Kajaja Two Primary School

AIA-3 Form 35A-Berjini Dam Polling Station 1 of 1

AIA-4 Form 35A- Haragal Primary School Polling Station 1 of 1

AIA-5 Form 35A Leheley Centre Polling Station 1 of 1

AIA-6 Two Records of Ballot Box seals used at the end of counting from the Polling Station Diary

AIA-7 Form 35A Gunana Primary Polling Station 1 of 2

AIA-8 Form 35A Wargadud School Polling Station 1 of 1

NotMarked Form 35A Dasheg Primary School Polling Station 1 of 1

AIA-9 Form 35A Leheley Centre Polling Station 1 of 1

The Court noted as copies they were faint and some were not legible. The 2nd & 3rd Respondents filed original similar Form 35As that were legible and confirm as follows;

a) Form 35A Gunana Primary Polling Station 1 of 2 is not signed by Presiding Officer but by Deputy Presiding Officer Zeinab Mohammed on 8th August 2017. The Agents who signed are Ali Abdallah (Jubilee) AbdiRahman Ibrahim (ODM/NASA)

b) Form 35A Leheley Centre Polling Station 1 of 1 which was alleged to lack a stamp is not legible on parts of the Form but the figures are clear. The legible copy is annexed to the affidavit of Mohammed Mude filed on 16th January 2018 with leave of this Court. It shows the votes and the name and signature of Presiding Officer, signature and date. There are names and signatures of agents but not quite legible. The other copy is attached to the Presiding Officer's affidavit Abdullahi Hillow (DW5) which is not legible. It is not stamped.

c) Form 35A-Kajaja Two Primary School 1 of 1-The legible Form 35A is annexed to the affidavit filed by Omar Mohammed Bulle (DW6) Presiding Officer of Kajaja 2 Polling Station. It is signed by Presiding Officer and Deputy presiding officer Ahmed Abdi Mohammed. It is signed by Petitioner Idris Abdi Abdallah (PW1)

(Jubilee) and Abdallah Ahmed Osman (ODM) and stamped IEBC stamp.

d) Form 35A-Berjini Dam Polling Station 1 of 1 has the name of Presiding Officer signed and dated but not clearly legible. There are writings of names of agents but not legible. The Scrutiny report produced in Court on 15th January 2018 confirms original Form 35A was found in the ballot box and is signed by Presiding Officer Abdille Ahmed Birik(DW4)and Deputy Presiding Officer and 7 Agents of different Parties and candidates. It is stamped.

e) Form 35A Wargadud School Polling Station 1 of 1 (not Pleaded in the Petition but was annexed to the Petition and was included later during the proceedings) It is signed by Presiding Officer, Deputy Presiding Officer and agents but not legible enough to confirm all the details. It is stamped.

f) Form 35A Dasheg Primary School Polling Station 1 of 1 a copy also attached to affidavit of Presiding Officer Mohammed Mude Ibrahim (DW3).The details are clear ,Deputy Presiding Officer Abdi Jimare Omar signed the Form. The Agents AbdiRashid(Ford Kenya) and Mohammed Ali(ODM) signed and stamped IEBC.

g) Form 35A- Haragal Primary School Polling Station 1 of 1 Sadik Abdullahi Omar (DW2) signed the form, Ali Abdi Yussuf Deputy Presiding Officer signed the Form . Ahmed M. Sheikh (PDR) and Ibrahim Hussein (Jubilee) agents signed the Firm. It is stamped IEBC

Therefore all the Form 35As that the Petitioner pleaded and annexed copies are confirmed to have been signed by Presiding Officer and/or Deputy Presiding Officer. The Forms where not legible have had to have scrutiny to confirm details from original Form in the Ballot Box.

Where the Presiding Officer did not sign the Form 35A, Gunana Polling Station 1of 2 ,it was signed by the Deputy Presiding Officer in line with **Section 5(4) of Elections (General) Regulations 2012 revised 2016**.

Section 62 (3) of Elections (General) Regulations 2012 revised 2016 mandates that the absence of agents shall not invalidate the proceedings at the Polling Station. So that if Agents presented documents to the Presiding Officer and were allowed in the Polling Station and thereafter left the Polling Station and failed by design or default to sign the Form 35A and/or the Polling Station Diary that responsibility may not lie with the 2nd Respondent through the Presiding Officers and shall not invalidate the proceedings thereof on this account only.

With regard to stamping of the Form 35As, some Form 35As are stamped and some are not. This Court is persuaded that if there are other security features, they serve to confirm the authenticity of the election process. These are watermarks, IEBC Logo Polling Station and Constituency Code etc.

In INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & ANOTHER V STEPHEN MUTINDA MULE & 3 OTHERS(2014)EKLK the Court stated

“...There is no stamping requirement in the case of the Form 35. All that is required with regard to Form 35 as provided for in Regulation 79 [ELECTIONS (GENERAL) REGULATIONS,2012 REVISED 2016]is the signature of the presiding officer and the agents of the candidates.....We agree with the submissions on behalf of the appellant that it is the signatures of the presiding officers and the agents that authenticate the Form 35. If any such forms were stamped, it was gratuitous and superfluous discretionary or administrative act incapable of creating a statutory obligation, less still the invalidation of the Forms 35 that did not contain the stamp.”

The Petitioner alluded to the fact that the Forms 35As did not correspond to the content of Form 35B. First is to note that this fact was not pleaded in the Petition. However, **Section 74-81 Elections (General) Regulations 2012 revised 2016** sets out the process of filling Form 35A and signing declaration by Presiding Officer. The Form 35 B is filled after the process prescribed by **Section 83 Elections (General) Regulations 2012 revised 2016** by the Returning Officer 3rd Respondent.

The Petitioner did not specifically allude to the discrepancy between the entries in Forms 35As and 35 B. His agents did not swear affidavits and testify in Court as to the events on the voting day. Any discrepancy alleged, with regard to Tarbaj Library, Berjini Dam & Gunana 2of 2 Polling stations; this Court subjected the process to Scrutiny. The results were by and large the same.

The allegation by the Petitioner that there were false entries in the Forms 35As were not highlighted or brought to the attention of this Court nor was evidence adduced to prove the same. These were very general statements that remained unproved.

From the above consideration of evidence presented with regard to the fact that Form 35As were not signed as required by law is not borne out by the evidence. However, it is admitted that some Form 35As were not stamped.

[25] INTERFERENCE OF BALLOT BOX SEALS;

The Petitioner pleaded that contrary to **Article 81 of COK2010 Section 39, 44& 44Aof the Election act, Section 25 of IEBC Act**, the 1st Respondent selectively manipulated, engineered and/or deliberately distorted and interfered with ballot boxes seals.

More particularly, he stated that there was interference with the ballot box seals at Kajaja 2 Polling Station by the 2nd and 3rd Respondents who cancelled the original IEBC Ballot box seals recorded as being used at the end of vote counting.

The Petitioner said there is doubt cast on the validity of the votes given the cancellation of the ballot boxes seals by 2nd and 3rd Respondents which would require scrutiny of the actual seals used by the Respondent. He annexed copies of the cancelled seals as **AIA-6 -2** Records of Ballot Box seals used at the end of counting from the Polling Station Diary.

DW6 Presiding Officer Omar Mohammed Bulle filed Replying affidavit on 13th November, 2017 Kajaja 2 Polling Station. In the affidavit and his testimony in Court he stated that the voting was conducted and his agent was present and then filled Form 35A. Before his agent signed, the Petitioner came and asked for the Form 35A and he signed it. The votes were as confirmed from annexed original Form 35A as follows;

- i. Abdullahi Idris Abdi 230 votes
- ii. Ali Fatuma Ibrahim 71 votes
- iii. Gaal Ahmed Bashane 186 votes
- iv. Hilow Siraj Jelle 7 votes

The Presiding Officer stated that the fact of different results announced at Polling Station from what was announced at Tarbaj Constituency Tallying centre was not proved by evidence, the informant who heard the contested figures as votes different from what is in the Form 35A was not called to testify in Court.

The Presiding Officer, admitted in his testimony in Court that the Polling Station Diary at Page 22 'Record of Ballot Box Seals used at the end of counting', confirms that the IEBC Ballot seals for all ballot boxes from Presidential right up to County Woman Member to National Assembly ballot boxes, the last 3 digits of the seals are cancelled, replaced with other seal numbers and not countersigned.

The Presiding Officer explained that there was no interference of seals at the end of counting. The cancellations were as a result of human error necessitated by the fact that the Deputy Presiding Officer erroneously recorded opening seals numbers in place of closing seals. Having noted the error, the opening seals were cancelled from the closing seals column and copied to their rightful place, and the closing seals numbers recorded thereafter. For Member of Parliament ballot box the seals were;

- 1) 1632878
- 2) 1632836
- 3) 1632876
- 4) 1632877

A look at the Polling Station Diary at page 13 'Record of Ballot Box serial numbers and seals used at start of Polling' shows in the column for Member of National Assembly, the Seals numbers are identical to those crossed out at Page 22; 'Record of Ballot Box seals used at the end of Counting' They are;

- a. 1632890
- b. 1632853
- c. 1632854
- d. 1632887

The above crossed out seal numbers confirmed that they were already used at the start of polling.

This Court granted scrutiny *suo moto* on 31st October 2018. The scrutiny report was delivered on 15th January 2018. Form A' for ballot box inspection shows the seals for IEBC as

- 1) 1632878
- 2) 1632836
- 3) 1632876
- 4) 1632877

The votes after scrutiny exercise were;

- 1) **Idris Abdi Abdullahi 231 votes (one stray vote from Fatuma Ali)**

2) Fatuma Ali 70 (originally 71 until stray vote recovered for Petitioner)

3) Ahmed Bashane 186 votes

4) Siraj Jelle Hillow I vote

The totality of the evidence on record is that the alleged interference with ballot boxes specifically in relation to Kajaja 2 Polling Station was/is human error and was conceded but it did not affect the votes even after scrutiny was conducted. However, suffice is to note that 1 stray vote was added to the Petitioner to have 231 votes.

[26] INTERFERENCE WITH BIOMETRIC MACHINE

The Petitioner deponed that there was/is disparity witnessed by his agents in various polling stations which cast doubt between the actual votes cast as the number of people identified especially in Berjini Dam Polling Station vary as those who were identified were 474 compared to the recorded 452 on Form 35A

The Presiding Officer Abdille Ahmed Birik filed 2 affidavits on 20th September 2017 in response to petition and 13th November 2017 in response to Supplementary Affidavit.

He stated that chaos erupted from the Petitioner's agents and supporters at around 10'clock and then abated. Later another fracas erupted this time by the 1st Respondent's supporters during the counting of votes and the issue was stray votes. At this time counting had started but could not go on due to the chaos. The Security personnel came in; he contacted the OCPD and after consultation sealed ballot boxes and together with security personnel, agents, clerks travelled to Tarbaj Constituency Tallying Centre. The incident was recorded in the Polling Station Diary. After consultations between the Returning officer both Petitioner and 1st Respondent, counting was to be completed at Tarbaj Primary School polling Station. The Petitioner did not approve or consent to the recount. In Court the Presiding Officer explained that at Berjini Dam Polling Station the results were as follows;

a. 628 registered voters

b. 474 voters were identified biometrically through the Kiems Kit

c. Of the 474 voters 27 were identified alpha numerically and were added erroneously for the 2nd time to total to 501 valid votes cast.

d. There were 22 stray votes found in the Member of Parliament ballot box.

e. If one deducts the 27 votes for voters identified alpha numerically from 501 it will be 474 as identified by Kiems Kit.

This Court granted scrutiny for Berjini Dam Polling station and the Scrutiny Report was presented on 15th January 2018. The Report revealed the following as the Presiding Officer testified in Court;

a. There were 474 voters identified through Kiems Kit

b. There 22 stray votes added that were found in Member of Parliament ballot box 4 for Governor 10 for MCA

c. Counterfoils of used ballot papers 476

d. Spoilt votes 2

e. 27 Duly filled Forms 32 for those identified alphanumerically.

f. Deducting the 22 stray votes from 474 the number will come to 452 votes which is indicated in the Form 35A

The Petitioner did not adduce evidence to prove the fact that the KIEMS Kit /Biometric Machine was interfered with or manipulated to distort the votes cast. The agents in various polling stations did not file affidavits or testify as to the specific polling stations that the results were skewed apart from Berjini where the Petitioner relied on information from Ali Osman his agent; who did not testify in Court.

In the absence of any evidence to controvert the Presiding Officer's explanation of the discrepancy and/or evidence from the Petitioner's agents from any of the polling stations; I find the evidence adduced the Petitioner insufficient to sustain the claim of irregularity of the Biometric

Machine /KIEMS Kit.

[27] NON COMPLIANCE OF MANUAL REGISTER

The Petitioner relied on the case of *JUSTUS MUNGUMBU OMITI VS. WALTER ENOCK NYAMBATI OSEBE & 2 OTHERS EP NO. 1*

OF 2008, the Court held that:

‘All issues raised in the petition and those which crop up during the hearing, whether pleaded or not, and which had the potential to affect adversely the final result, and the will of the voters in a constituency must come under spotlight, scrutiny and interrogation. They have interrogated and determination made thereon. In this case all illegalities and irregularities which impugn the credibility of the outcome of the elections ...have to be considered.

The 1st Respondent relied on the following case to buttress his position **JACKTON NYANUNGO RANGUMA V INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION AND 2 OTHERS E.P NO 3 OF 2017 HIGH COURT KISUMU, MAJANJA J :-**

‘An election petition is not do-over of the just concluded election. It is not an opportunity to conduct another election through the court as every election conducted in accordance with the law is presumed valid unless it is set aside by the court. The burden of establishing the allegations of non-compliance with the Constitution and the law, electoral malpractice and misconduct which would result in the election being declared invalid rests on the petitioner.

Although it was not pleaded, it arose during the hearing, that there was failure to comply with voting procedure as required by **Regulation 69(1) (d) of the Election (General) Regulation 2012 revised 2016**. The Petitioner did not depose the issue of voting through identification of Manual Register and the voter’s name is crossed out before voting so as not to vote again or twice. Yet from the Scrutiny report of 15th January 2018, Form C confirms that in both Berjini Polling Station and Kajaja 2polling stations the registers were not used and there are no markings on any of the Registers. This confirms that in the 2 Polling Stations there was contravention of the electoral process provided by **Section 69 (1) (d) of the Election General Rules that mandate;**

Require a voter to place his or her fingers on the finger print scanner and cross out the name of the voter from the printed copy register once the image has been retrieved.

Did the lack of compliance with the regulation on process of voting by not using Manual Register adversely impact free fair election process?

The 2nd & 3rd Respondents submitted that the election law was amended and included **Section 44A of the Elections Act** to provide for biometric voter registration, electronic voter identification and electronic transmission of results. In Court of Appeal **IEBC vs. MAINA KIAI& OTHERS [2017] eKLR** affirmed the position that the complimentary identification would be the use of the manual register.

The 2nd Respondent explained in Court that the information contained in the Manual Register is identical to what is contained in Storage disc in the KIEMS Kit. The electronic components of manual voting enhanced integrity to prevent ‘dead’ voters from voting. Therefore crossing out of voter’s name in Manual Register is an added safeguard and lack of it would not automatically allow voters to vote twice.

The 3rd Respondent relied on **Section 44 & 44A of Elections Act** that voter identification was biometric or alphanumeric only and did not use Manual Register.

This Court finds that there are sufficient safeguards to hinder voting twice by any voter without recourse to Manual Register as mandated by law. The **Elections Act No 24 of 2011 revised 2017 included Rule 38A** which provides;

Number of Voters per polling station

For purposes of providing efficient and effective conduct of elections, the number of voters per polling station shall not exceed seven hundred

The Scrutiny Reports confirmed numbers of registered voters in each polling station, voter turnout and valid votes, none exceeded the registered voters. There were also counterfoils of ballots used during voting and the same would tally with those who were identified voters through the KIEMS Kit.

The 3rd Respondent’s testimony in Court was that the KIEMS Kit is configured such that if a voter came to vote the 2nd time, and placed the finger on the scanner, the KIEMS kit would beam a red light and it indicates the voter was already identified. So this is a safeguard from serial voters.

In **RAILA ODINGA CASE NO 1 OF 2017**, reference was made to the Nigerian case of **BUHARI VS OBASANJO**, the Supreme Court of Nigeria in interpreting the statutory version of **Section 83** stated thus:

‘The burden is on petitioners to prove that non compliance has not only taken place but also has substantially affected the result....There must be clear evidence of non-compliance, then, that the non compliance has substantially affected the election.’

ILLEGALITIES

[27] BRIBERY

The witness Ahmed Muda Elmi PW6 testified that he was a voter in Damdas. He was at the polling station at 6am when the polling station was opened. He voted and by 8am he was home near the polling station He saw the 1st Respondent who drove in a car near the Polling

station. He could not recall the colour, make or type of car the 1st Respondent came in. He alleged the Petitioner parked the car and people came to talk to him and then they left.

He did not know Ali Noor the 1st Respondent's agent but he saw him walking to the crowd that had lined up to vote and the Presiding Officer stopped him from going outside and he was accused of dishing out money.

The witness in his affidavit at paragraph 6 claimed that the 1st Respondent came parked his car outside the polling centre gate and as voters were entering, he would summon them to his vehicle and have a secluded talk and they would go to vote. At no part or point did he attribute bribery by the 1st Respondent? However, this Court finds it strange that the witness admitted that he did not know Ali Noor was the 1st Respondent's agent; so how did he know this fact yet he was watching from his house as events unfolded?

Secondly, was it possible to see exchange of money between parties from his house? How much was it from whom to whom? He claimed that Ali Noor was stopped from going outside by the Presiding Officer. Presumably, they were inside Polling Station, how did the witness see and hear this talk from his house and the Presiding Officer and Ali Noor were inside the Polling Station? I find the details scanty in proving the allegation and the witness is not credible.

Idle Gele Dagane, Adan Alaso and Abdullahi Mohammed Hussein filed affidavits and implicated Abdi Omar Gaal, Jelle Hassan Gaal and Siyat Shukri as dishing out money to voters on behalf of the 1st Respondent on voting day,

They did not testify as to the contents of their affidavits in Court. The veracity of their evidence was not tested through cross examination and their credibility as witnesses was not confirmed.

Similarly, Jelle Hassan Gal, Abdi Omar Gaal, Siyat Shukri Hassan did not testify in Court except for Shukri Mohammed Dahir (DW5) who testified in Court and he was cross examined. Their evidence was also not tested in cross examination. He denied the claim of bribery. Adoy Hussein Mohammed DW4 testified in Court and she denied that she witnessed any bribery incident as was alluded to by Mohammed Sugal Dahir in his affidavit.

Cumulatively the evidence on record does not meet the threshold of standard and burden of proof borne by the Petitioner. Since the illegality in form of bribery is a criminal offence the standard of proof is higher than on a balance of probabilities to beyond reasonable doubt.

[28] UNDUE INFLUENCE IN CAMPAIGN & VOTER ASSISTANCE

The Petitioner stated that 1st Respondent together with the Jubilee candidate for Member of County Assembly MCA for Wajir County Issa Garore Robe (DW2) campaigned on the false and misleading information that the 1st Respondent was the Jubilee candidate for Member of Parliament MP for Tarbaj Constituency when in fact the 1st Respondent was candidate for PDR Party and competitor of the Petitioner contrary to **Section 20 of the Elections Offences Act**.

It was alleged through oral testimony in Court by Hassan Nur, Ahmed, Muda Elmi Hassan, Abdi Omar, Abdullahi Mohammed and Sadik Sheikh Khan that they witnessed the 1st Respondent and Issa Garore in various parts of Tarbaj Constituency, they campaigned together, the 1st Respondent donned Jubilee Party colours in attire and branded his motor vehicles the same colours with faces and images of the Jubilee Presidential candidate, he used the face of Jubilee's Governorship candidate instead of PDR Party and used the UHURURUTO slogan in his campaign and therefore misled and confused the electorate largely illiterate and easily swayed by the said information. This is confirmed by annexure **ABG-003** to the 1st Respondent's Response to Petition. Therefore he contravened the **Election Offences Act** and the **Ethic Code of Conduct**.

The 1st Respondent in his testimony stated that he was a PDR candidate and he campaigned alongside MCA candidate Issa Garore of Jubilee Party but did not misrepresent the fact that he was the Jubilee candidate for Member of Parliament and that the Petitioner had defected and/or abandoned the election at all. He adorned attire with PDR logo of a bull

and used PDR party colours and not Jubilee colours. This is shown by the annexure **ABG-003** branding of motor vehicle KCH 402 T. These were the same colours that were on the ballot papers on the Election Day.

It was his testimony that in May 2017, the PDR Party held National Delegates Conference at Bomas of Kenya and it was resolved that the PDR Party would not field Presidential candidate and would support the Jubilee Party. During the Campaign the Presidential candidate of Jubilee Party and team visited the area and agreed that PDR Party was an affiliate to Jubilee party. The 1st Respondent averred that the Party for Democracy & Reforms (PDR) is an affiliate party of the Jubilee Party, he did not mislead the voters during the campaign period as alleged and that in fact he urged the voters to vote for him as an individual candidate and not the party they are affiliated with.

The evidence by (DW2) Issa Garore was that he did not intimidate anyone to vote for 1st Respondent but made a choice to campaign with him. He was an IEBC official before this election but at the time he was MCA candidate under Jubilee Party and he could threaten or intimidate anyone. In fact he was elected as MCA in the just concluded election.

The evidence of Adan Musa Alason, the 1st Respondent's Chief Campaigner stated that he was in charge of 50 agents of 1st Respondent's team. He was in charge of branding campaign materials. He did not use the Jubilee Party slogan 'Tuko Pamoja' but the 'Uhuruto' the Presidency slogan. It was agreed with the Presidency that affiliate parties PDR, Maendeleo Chapchap, UFP and Kanu would support Jubilee Party Presidential candidacy. He procured 1st Respondent's attire and it was not in Jubilee Party logo but PDR logo.

The Petitioner lay his claim on **Sections 6 a) f) k) & l) of the Elections Offences Act and Section 110 of the Elections Act** and submitted that the burden of proving an election offence is now on a balance of probabilities as the law was amended in 2017. The power to find one guilty of an election offence has been removed from the Election Court and the Court can only in line with **Section 87(1) of Elections Act 2011** determine if an electoral malpractice of a criminal nature may have occurred. This Court is of the view that to determine if a criminal offence may have occurred in order to recommend to the Director of Public Prosecution (DPP) to investigate, the evidence on record should be able to disclose the alleged offence not on a balance of probabilities but the standard of proof to be proved by Petitioner ought to be higher than on a balance of probabilities.

The 2nd & 3rd Respondents submitted that the 2nd Respondent's Dispute Resolution Committee adjudicated several disputes brought to its attention by various candidates concerning violation of the Electoral Code of Conduct Committee. The 1st Respondent did not lodge any complaint or make any report on allegation of 1st Respondent's campaign misleading the electorate that he was the Jubilee candidate.

This Court has referred to **Section 4 d) & e) of the IEBC Act 2011** and one of the mandates of IEBC is the settlement of electoral disputes, including disputes relating to and arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results. **Section 74 of Elections Act no 24 of 2011** also prescribes dispute resolution by the Commission and settlement of certain disputes by the IEBC.

In the following cases *E.P. 8 of 2017 HABIL NANJENDO BUSHURU vs IEBC & 3 OTHERS* *E.P 2 of 2013 ROZAAH AKINYI BUYU vs IEBC & 2 OTHERS 2013 eKLR* & *E.P. 95 of 2013 WILLIAM KABOGO GITAU vs JAMES KARANJA NYORO vs IEBC* where similar issues were canvassed the consensus is that the candidate or political party ought to report the campaign anomaly to IEBC for resolution of the dispute. This is provided by **Rules of Procedure on Settlement of Disputes L.N 139/2102 revised 2016. Rule 15** addresses Complaint arising from violation of the electoral Code of Conduct which is what is alleged in the instant case. This Court finds that allegations regarding the campaign issues ought in the first instance to have been lodged with the 2nd Respondent, IEBC for resolution. If the Jubilee Party also was aggrieved then the same would have been resolved at Political Parties Tribunal. From the record no complaint was made during the campaign period by either the Petitioner or by Jubilee party and the issue arose after the election.

The issue of undue influence of voters through voter assistance was not pleaded but arose during the hearing. The Petitioner contended in submissions that there was irregular, unlawful and unprocedural assistance of voters by 2nd Respondent .It was alleged that Presiding Officers repeatedly and deliberately disclosed the candidate selected by an assisted voter by secret ballot as guaranteed by **Article 38 of the Constitution 2010**. This fact is not borne out by evidence on record, as the Petitioner's agent did not file affidavits or testify in Court. Secondly, the Petitioner's witnesses who claimed deception, intimidation and being misled by 1st Respondent's campaign with Jubilee Party MCA candidate and claims that the Petitioner defected and was no longer vying for Member of Parliament seat, did not in this Court's view establish the nexus between the campaign and how the assisted voter was unduly influenced and thereby voted in the wrong candidate of choice. The 1st Respondent and MCA candidate were not there at the Polling Station on voting day and could not impede the free will and choice of the voter

This because; the Presiding Officers testified that where, the voter came with a person to assist them, they did not assist but where the voter sought assistance they did. They asked the voter's candidate choice and ticked on the ballot paper and showed voter and agents then placed the vote in the ballot box. They stated that if they did not show the agents then they would be accused of not indicating the voter's choice but the Presiding Officers' own choices. In this Court's view it is a plausible explanation. Secrecy is compromised from the minute the voter communicates his/her choice candidate to the assisting person or Presiding Officer. **Section 7 of Election Offences Act** prescribes maintenance of secrecy at elections and provides;

An election officer, candidate, agent or other person who;

a) Without authority obtains or attempts to obtain, in a polling station information as to the candidate for whom any voter in the station is about to vote or has voted...commits an offence.

The Presiding Officer lawfully by virtue of **Section 72 (5) of the Elections Act NO 24 of 2011 revised 2016** assists the voter on request and therefore obtained authority to know the voter's candidate choice so as to record. The voter in the process divulges his/ her choice candidate's name and/ or Party to the Presiding Officer. This Court finds no illegality or irregularity from the evidence on record on voter assistance.

Secondly, when Ballot papers are issued to the illiterate voter, he/she will look at the ballot papers before seeking assistance. As admitted by various witnesses, the Ballot papers contained each candidate's picture and name and the party he/she represents; party symbol, colour , name and logo. The voter, saw these details to aid and inform his/her choice to the assisting person or Presiding Officer. Being illiterate is not to be able to read and write but a person/voter can look and see the ballot paper and see pictures of all candidates, parties colours and symbols etc before making an informed choice. It is not possible that one was misled deceived during the campaign due to Party colours and symbols and utterances by 1st Respondent and MCA candidate (DW2) that the Petitioner defected and/or was not in the race anymore. This is not possibly true, every voter looked at the ballot paper before voting and must have seen pictures of all candidates including the Petitioner and if he/she wanted to vote for him, nothing would have hindered the voter from seeking assistance and communicating the Petitioner as the candidate of choice.

It is not logical and /or reasonable that the 1st Respondent's campaign misled confused and misled voters not to vote for the Petitioner, in fact the opposite happened, the Petitioner was voted for and that is why the margin between him and 1st Respondent is so small

[29] IMPORT OF SECTION 83 OF ELECTIONS ACT ;

It is not for this Court to determine what the will of the people is in an election. The people's will is exercised when they vote. The Court can

only upset an election where;

- a) The irregularities either by commission or omission as such that , a Court of law applying its mind to these facts presented in the petition cannot determine what is the will of the people.
- b) Secondly, where the irregularities have been established are they of such a magnitude as to invalidate the exercise by the people of their will to choose their representative of their choice?

Section 83 of Elections Act prescribes;

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

The Petitioner did not marshal sufficient evidence to show that these irregularities affected the result of election or that there was substantial non compliance of the law. The irregularities cited above and results of scrutiny confirm that in light of Section 83, the irregularities were not of such magnitude that marred the conduct and outcome of the election. In the instant case, the irregularities may be attributed to human error as evidence was not adduced to disclose deliberate intention of deceit and fraud but negligence.

As was stated in **RAILA case PETITION 1of 2017 paragraph 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.

From the pleadings and evidence adduced and submissions made this Court found insufficient evidence to prove irregularities and illegalities except for lack of use of Manual Register as mandated by law and the overwriting cancellations that were not countersigned? Was /Is this sufficient offset the election process?

Justice Maraga (as he then was) observed in **JOHO VS. NYANGE & ANOTHER [2007] eKLR** as follows:

“in my view, the errors made and the irregularities committed in this Petitioner fall into two categories. The first ones are errors or mistakes I would call innocent even though negligent. The second category are those deliberate irregularities or forgeries that were committed.

In respect of the first category, I would like to say this: Error is to human. Some errors in an election like this, conducted under a frenetic schedule, are nothing more than what is always likely in the conduct of any human activity. But where deliberate irregularities for forgeries are committed, different considerations come into play. In either case however, serious consideration is to be given as to what effect, if any those errors, whether innocent or deliberate, have on an election before the same is vitiated. As I have said, if they are minor and do not affect the elections or its results they should be ignored. This is what I understand. Section 28 of the National Presidential and Elections Act... But when is an election said not to have been conducted substantially in accordance with the law as to elections which errors or irregularities can affect the results of an election by ballot? This is how Stephen LJ expressed this point in the case of Morgan Vs. Simpson (1974 3 All ER at 731.....

And the result of an election is affected when the cumulative effect of the irregularities reverses it. For instance, when a large proportion of the voters is by some blunder in the conduct of elections, as happened in Harrison Garama Kombe Vs. Ali Omar & Others, Civil Appeal No. 52 of 2006 (CA) do not turn up to vote the result is said to be affected.”

This Court’s view based on evidence on record is that sufficient evidence is lacking to prove illegalities to the required standard of proof.

With regard to irregularities they did not vitiate the conduct of the election process in terms of **Article 81 & 86 of the Constitution**.

[30] FINDINGS

There irregularities in the filling in details in the Statutory forms; Forms 35A Form 35B and Polling Station Diaries by 2nd Respondent through Presiding Officers had anomalies overwriting, alteration or cancellation that were not countersigned. They were explained and did not affect the valid votes cast tallying and declaration of votes as established by the Scrutiny.

Where there was doubt as to the process and outcome of election process in specific Polling stations, Scrutiny was conducted and the reports were presented on 15th February 2018 and 22nd February 2018. The 1st Report confirmed the votes as declared save for 1 stray vote attributed to the Petitioner from Kajaja 2 Polling Station 231 votes. The 2nd Report confirmed the votes declared save an error in typing the Report the 1st Respondent’s votes were erroneously indicated as 117 votes and corrected in the presence of parties and Counsel as 177 votes. Again 1 stray vote was added to the Petitioner to read 111

votes and not 110 votes in Tarbaj Library Polling Station.

Despite lack of use of the Manual Register as required by Law, the votes as declared were confirmed by Scrutiny and there is no cogent evidence that a voter voted twice or that the voter turnout exceeded the registered voters. The Irregularity did not mar the election conducted in Kajaja 2 and Berjini Dam Polling Stations. More so, the voters voted for 6 candidates at once, lack of use of manual register would have nullified all elections conducted that day.

Most of the allegations made by Petitioner were not substantiated by evidence because his agents did not file affidavits and testify in Court.

The allegations against 1st Respondent, that he made a detour from Berjini to Tarbaj Tallying Centre, he used his motor vehicle to ferry ballot papers, he interfered with ballot boxes and he bribed voters were not borne by the evidence on record. The Petitioner did not discharge the Burden of Proof as required by law. There was insufficient evidence and/or conflicting versions between the Petitioner and 1st Respondent.

The issues regarding campaign ought to be canvassed before the 2nd Respondent IEBC for dispute resolution.

The allegations levelled at 3rd Respondent that contents of Form 35B were not same as Form 35As was not proved by evidence on record.

The Petitioners results are 6812 +2stray votes and 1st Respondent 6832 votes respectively

[31] DISPOSITION

1. The final orders in this petition are as follows;-

1. The petition dated 5th September, 2017 and filed in court on the same day is hereby dismissed.
2. Ahmed Bashane Gaal was constitutionally & statutorily and validly elected and declared Member of the National Assembly for Tarbaj Constituency, Wajir County.
3. The 1st 2nd & 3rd Respondents are awarded costs under Rule 30 of Election (Parliamentary and County Election) Rules 2017 and Section 84 of Elections Act to be paid by Petitioner as follows:
 - a) Costs for 1st Respondent is capped at Kshs.2,500,000.00
 - b) Costs for the 2nd & 3rd Respondent are capped at Kshs.2,500,000.00
 - c) The costs shall be taxed by the Deputy Registrar of this Honourable Court.
4. A certificate as provided under Section 86(1) of the Elections Act, 2011 shall issue to the Independent Electoral and Boundaries Commission and the Speaker of the National Assembly.

This Court commends the advocacy and industry of legal teams and the Judiciary team comprising of the Deputy Registrars Family Division Kendagor, Rading and Mukabi and Deputy Registrar Garissa High Court and Magistrate In charge of Wajir Law Courts for assisting this Court meet statutory timelines.

JUDGMENT DELIVERED, DATED AND SIGNED AT NAIROBI IN OPEN COURT ON THIS 2nd MARCH 2018

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF :-

MR. GITONGA & MS MARIENGAFOR PETITIONER

MR. NGACHA & MR WANJOHIFOR 1ST RESPONDENT

MR.OLAHA..... FOR 2ND & 3RD RESPONDENTS

VICTORCOURT ASSISTANT