



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**THE ELECTIONS ACT, 2011**  
**ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES 2017**  
**ELECTION PETITION NO. 19 OF 2017**

*BETWEEN*

JANE MURINGI WANGUI.....PETITIONER

*VERSUS*

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1<sup>ST</sup> RESPONDENT

RETURNING OFFICER

EMBAKASI NORTH CONSTITUENCY.....2<sup>ND</sup> RESPONDENT

JAMES MWANGI GAKUYA.....3<sup>RD</sup> RESPONDENT

**J U D G M E N T**

**INTRODUCTION**

The Petitioner herein Jane Muringi Wangui filed this Petition on 6<sup>th</sup> September 2017 challenging declaration of the 3<sup>rd</sup> Respondent JAMES MWANGI GAKUYA as Member of Parliament Embakasi North Constituency in the election that was conducted on 8<sup>th</sup> August 2017.

Results declared were as follows:-

| <b><u>Candidate</u></b>           | <b><u>Votes</u></b> |
|-----------------------------------|---------------------|
| James Mwangi Gakuya.....          | 43,733              |
| Jane Muringi Wangui.....          | 31,923              |
| Wachira Benedict Wandeto.....     | 1,428               |
| Mwangi Joseph Kirai.....          | 329                 |
| Nkubiria Sebastiano Laichena..... | 190                 |
| Njuguna Gabriel Karuga.....       | 156                 |

Grounds on the face of the Petition are that, the impugned declaration is in absolute breach of the Constitution of Kenya and international legislation governing elections and in particular the Election Regulations, Elections Act and the Constitutional principles as outlined under Articles 1, 2, 3, 10, 27(1), 38, 81, 86 and 249 of the Constitution.

That the impugned elections were shrouded by inconsistencies and /or inaccuracies and/or irregularities which were not in any way consistent with human errors but were deliberately and systematically designed to tilt the results of the said elections in favour of the 3<sup>rd</sup> Respondent.

Anomalies indicated on paragraph 9 of the Petition include:-

1. Form 35A appear to have been signed by one person, unstamped, unsigned by Presiding Officers and Agents, blank, no security features and have arithmetic anomalies.
2. Votes cast for Member of Parliament exceed votes cast for President and number of votes that should have been cast in the Polling Station. She cited Kariobangi North Primary School, Marura Primary School, James Gichuru Primary School, Wangu Primary School and Ushirika Primary School where she gave votes cast as 1072, 1180, 1211, 1041, and 1200 respectively.

Filed together with the Petition was application under Certificate of Urgency seeking prayer (a)-(e) of the prayers sought in the Petition. In a nutshell prayers sought were:-

- a) Supply to the Court and to the parties original Form 35As and 35B prepared obtained from the Polling Stations by Presiding Officers and used to generate the final tally of the Member of National Assembly elections for purposes of scrutiny, and pursuant to such production leave be granted for the use of an aid or reading device to assist in distinguishing the fake Forms from the genuine ones.
- b) Full and unfettered physical and remote access to each biometric electronic appliance used at each voting/Polling Station location used to verify voters' identification against the list of registered voters and for the appliances to be forensically imaged to capture, inter alia, metadata such as data files, creation times and dates, devices IDs MAC addresses IP.

The Court in its Ruling delivered on 18<sup>th</sup> October 2017 observed that most of the forms in the Court file were illegible and directed the 2<sup>nd</sup> Respondent to avail original Forms 35A and 35B to the Deputy Registrar for certification. The certified copies were supplied to Court, the Petitioner and 3<sup>rd</sup> Respondent. The Petitioner was also allowed access to information in Secure Digital (SD) cards in respect of all 157 Polling Stations. Order for scrutiny was disallowed at that stage.

At the close of hearing, the Petitioner filed another application for scrutiny and the application was allowed in the following terms:-

1. Scrutiny of Forms 35A in respect of

- Kariobangi North Primary School 4 of 7,
- Marura Primary School 2 of 11,
- Dandora 111 City Council Hall 8 of 9,
- Ronald Ngala Primary School 10 of 15,
- Ushirika secondary school 8 of 14.

The scrutiny was limited to opening ballot boxes in the above Polling Stations to access and examine Forms 35A .

2. Scrutiny & recount of votes cast in respect of:-

- Tom Mboya Primary School 1, 3, 7 of 20,
- James Gichuru Primary School 1 & 5 of 8 of 10.

The scrutiny was to ascertain the number votes cast and number of voters identified.

3. Scrutiny of SD card & forms 32A in respect of:-

- Kariobangi North Day Nursery school 6 of 7,
- Kariobangi North Day Nursery school 7 of 7,
- James Gichuru Polling Centre Polling Station 1,5,8 of 10,
- Tom Mboya Primary School Polling Station 1, 3, 7 of 20.

Scrutiny was conducted under the leadership of the Deputy Registrar with the assistance of the ICT officer of the judiciary and other judicial staff. Parties were each allowed to avail a maximum of two Agents and their Advocates. Scrutiny report was filed and served on all parties herein before filing and highlighting of written submissions.

In the hearing, the Petitioner availed 4 witnesses, the 1<sup>st</sup> & 2<sup>nd</sup> Respondent 5 witnesses and 3<sup>rd</sup> Respondent 5 witnesses. All witnesses filed Affidavits which were adopted as evidence during examination in chief.

Reliefs that remain for determination are:-

1. That all votes affected by irregularities be struck out,
2. A declaration that election for Embakasi North Constituency held on 8<sup>th</sup> August 2017 was not conducted in accordance with the Constitution and applicable laws rendering results invalid, null and void,
3. An order quashing the said results,
4. An order directing the 1<sup>st</sup> Respondent to organize a fresh election,
5. Costs of the Petition.

## **SUMMARY OF EVIDENCE**

### **Petitioner's evidence**

The Petitioner testified that she was among 6 candidates in Embakasi North Constituency who vied for National Assembly seat in the 8<sup>th</sup> August 2017 general elections. She voted at James Gichuru Primary School where she alleged on arrival, she did not find her Agents. She said that on calling and enquiring from her Agent as to why he was not in the Polling Station, she learnt that he was denied entry. She said her Agents were not in the 10 Polling Station at James Gichuru Polling Centre.

Petitioner testified that while at the Polling Station, she realized that voters were voting without being identified by the KIEMS Kit and at the same Polling Station, she saw a person being given two ballot papers. Petitioner said that she went to Tom Mboya Primary School and realized that people were voting without being identified by KIEMS Kit and especially people who were dressed in red. She alleged at the station she saw people being given two pink ballot papers which were for Presidential elections.

Petitioner informed Court that she visited 150 Polling Stations during the day and the remaining 7 at night and that ballot boxes were taken to the tallying centre on 9<sup>th</sup> August 2017 at 5.00a.m. she said two ballot papers arrived from Ronald Ngala unsealed. She said the two ballot boxes were not included in collating results.

Petitioner testified that irregularities on Forms 35A were failure to sign by Agents and Presiding Officers, absence of IEBC stamp or logo; forms having different serial numbers; she singled out Polling Station number 1 of 15 Ronald Ngala and further stated that results for 5 Polling Stations were not captured in Form 35B given by the Presiding Officer.

Petitioner testified that the Form 35B certified by the Deputy Registrar and the one filed by the 3<sup>rd</sup> Respondents differ and cannot validate results. She added that some stations had more than 700 votes whereas the maximum registered voters in every Polling Station as per statute should be 700.

Pw2 who was the Deputy Presiding Officer Polling Station No.7 James Gichuru Primary School, testified that they realized after 15 people had voted that polling clerk No.1 was not using KIEMS Kit. He said they informed the Returning Officer; DW1 changed the clerk and the new clerk worked well. He said Polling Station No.6 had the same problem in that 2 people had voted and that they also changed the clerk. He said they counted all the votes even where voting had been done without use of KIEMS Kit. He said that he signed Form 35A. In cross-examination he admitted that he never mentioned the number of people who voted without identification by KIEMS Kit in his Affidavit but said many. He confirmed that fingers of people who had voted were painted to avoid voting again & that he checked to ensure that was done. He confirmed that all Agents signed Forms 35A.

Pw3 who was Petitioner's Chief Agent said she placed Agents in all Polling Stations. She said one Agent was removed from Polling Stations for not being in the list but on her intervention, the Presiding Officer stamped the Agents Oath of Secrecy and allowed him in. She testified that voters in Kariobangi Nursery, Kariobangi Primary, Marura, Ushirika and Ronald Ngala were given more than one ballot paper. She also alleged that Jubilee Agents were bribing voters in the queues. She said that the Agents did not sign Forms 35A in all Polling Stations because the votes were unlawful. She confirmed that voting was done in all Polling Stations. She said both the Petitioner and 3<sup>rd</sup> Respondent were present when unsealed ballot boxes were taken there. She said Agents from the stations followed the respective Polling Stations followed the ballot boxes and guarded them until they were sealed.

In cross examination Pw3 confirmed that the name of Agent who was denied entry to Polling Station was not in the list of Agents and it was the responsibility of the Petitioner to ensure that all her Agents names were in the list. She further said she reported the bribery incident to Kariobangi North Police Station. She added that the forms didn't have security features but on cross examination, she confirmed that the certified forms have all security features. She further alleged that Forms 35A in Polling Stations No.2 and 10 of 11 have similar handwriting but on cross examination she said she is not hand writing expert. She further said some Agents were given Forms 35A. she said the forms were removed from a booklet and that she didn't know whether the forms had separate serial numbers. Pw3 said Petitioner's Agents were ODM Agents but she was unable to produce the list. She said 5 Agents were prevented from Polling Stations.

She confirmed that election was conducted in all Polling Stations and there is no station Petitioner got zero votes.

She said she doesn't have names of Agents who disputed results.

Pw4 testified he did qualitative and quantitative analysis. He testified that some forms didn't have accountability features which include, not signed by Presiding Officer, more than one signature for one party, some were illegible and some didn't have IEBC stamp. He said he looked at variance in forms 34 and form 38 and noted variance in 5 or 6 Polling Stations. He mentioned that Centres earlier listed as having more

than 700 votes. He said the discrepancy report is what had been provided to the Supreme Court in the election Petition. He said forms filed by Petitioner are different from the forms filed by IEBC. He said from his analysis 17,668 votes from 49 Polling Stations were affected. He confirmed in cross examination that certified copy of Form 35B has all security features. He further confirmed that from the Forms 35A before Court, there is no station with more than 700 votes cast and that Marura Primary School is a Polling Centre not a Polling Station. In cross-examination he said he never [\[h1\]](#) attached or availed to Court the source document of his analysis. He said the original forms were not available and he has not analyzed certified copies availed by IEBC. He added that the original were not availed to him. He said he was not able to determine the number of votes the Petitioner was not given.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondent's evidence**

DW1 who was the Returning Officer Embakasi North Constituency explained the procedure of election and filling and signing of Forms 35A, tallying of results and filling and signing of Form 35B. He said all the forms were signed and stamped by Presiding Officers and most were signed by Agents. He said Forms 35A consist of one original and 5 carbonated copies and that they do not bear the same serial number. He said that there are Polling Centres with Polling Stations in each and that there is no station known as Kariobangi North Polling Station and that there were 7 Polling Stations in Kariobangi North Primary School. He said none of the Polling Station had votes exceeding the registered number of voters. He said what the Petitioner annexed as Form 35B is a draft given to the candidates to check accuracy of the tabulation. He said he declared results on 10/08/2017 at noon and went ahead to prepare original Form 35B. He said he invited Agents to sign but at that time the Petitioner's Agents had left. He denied claims that KIEMS Kits were not used and confirmed that KIEMS Kits were used in all Polling Stations. He also denied allegations that Agents were locked out. He confirmed that unsealed ballot boxes arrived from Ronald Ngala which prompted him to call all candidates plus Agents and that they agreed to retrieve Forms 35A from the ballot boxes and sealed them. He added that results for the two stations had been announced at the Polling Station and no objection was raised on retrieval of Form 35As. He said that he excluded results from 5 Polling Stations in Form 35B because the Forms 35A were placed inside the sealed ballot boxes in 4 stations and for the 5<sup>th</sup> station, the Presiding Officer delayed in submitting the form. He listed the 5 stations as:-

1. Kariobangi North Polling Station No.4,
2. Marura Primary School Polling Station No.2,
3. Dandora 3 City Council Hall Polling Station No.8,
4. Ronald Ngala Primary School Polling Station No.10,
5. Ushirika Primary School Polling Station No.8,

He said for Ushirika (delay in submitting Form 35A).

On cross-examination Dw1 said the certified Form 35B is dated 10<sup>th</sup> August 2017.

He said he never received report from any Polling Station that an Agent was locked out neither did he receive complaint of any votes not accounted for the Petitioner. He said he announced results without tally from the 5 Polling Stations because the gap between the Petitioner's votes and 3<sup>rd</sup> Respondent was huge.

RW2 testified at the time he realized he had placed Form 35A in the sealed ballot box, he had announced results. He attributed placing of Form 35A in ballot box to fatigue. Same explanation was given by DW5 Presiding Officer Dandora 3 City Council Hall Polling Station No.8.

Dw3 confirmed that she was Presiding Officer Kariobangi day Nursery School. She said clerk No. 1 who was using KIEMS Kit called her to validate a voter and that is when she realized the voter she validated was the first one identified by the KIEMS Kit. She checked and confirmed that 13 ballot papers had been issued. She said 6 were still in the room and she asked them to go for identification before their fingers were marked. She said she called Agents and explained. She confirmed that the Petitioner's Agent one Tobias was in the room. She said she captured the incident in the Polling Station diary.

RW4 who was Presiding Officer Ushirika secondary school Polling Station No. 8 testified that she delayed in submitting Form 35A because she fell sick. She said that she went to the tallying centre and left everything with Deputy Presiding Officer but she later learnt that she had kept Form 35A in her bag. She said she took it to the Returning Officer on 11/08/2017.

### **3<sup>rd</sup> Respondent's evidence**

The 3<sup>rd</sup> Respondent denied the Petitioner's allegations. He said voters were identified using KIEMS Kit and that voting was peaceful. He said all Polling Stations had not less than 3 or 4 Agents and that results were declared at the Polling Stations. He said he was hearing the bribery allegation for the first time in Court. He confirmed that 2 ballot boxes arrived at tallying centre from Ronald Ngala Primary School unsealed. He confirmed that the Returning Officer called them and consulted them on how to deal with the ballot boxes. He said they agreed that Forms 35As be retrieved and ballot boxes be sealed. He said the results were tallied and Form 35B attached to his response was issued to his Chief Agent and that results in the form are the same results in the certified copy. He said election in Embakasi North Constituency was free, fair and credible. He said at the time results were declared, the Petitioner had left with her Agents. He said votes that were not tallied from the 5 Polling Stations were 3,215.

3Dw2 who was the 3<sup>rd</sup> Respondent's Chief Agent testified that he was issued two Forms 35B; the one attached to 3<sup>rd</sup> Respondents response

and the certified copy. He said the Returning Officer called him to sign original after he had signed the one filed by 3<sup>rd</sup> Respondent

3DW3, 3DW4 and 3DW5 all testified that they were appointed by Jubilee Party to represent all Jubilee candidates. They confirmed that they signed and were given Form 35A. 3DW3 said he never saw anyone using manual register for identification. They all said people were being identified using KIEMS Kit and other modes of identification used for those not identified by KIEMS Kit. 3DW5 who was an Agent in Ushirika Primary School Polling Station No.8 testified that he was given a copy of Form 35A; that the original was taken to Returning Officer. He said he did not understand why results from the station were not accounted for.

## **SUBMISSIONS BY PARTIES**

### **PETITIONER'S SUBMISSIONS**

Ms. Opiyo for the Petitioner submitted that Section 83 of Elections Act requires an election to satisfy Constitutional principles relating to elections for it to be valid. She referred to the case of **WILLIAM KABOGO VS GEORGE THUO & 2 OTHERS (2010)** where the Court observed that the Court should look into the entire electoral systems and processes rather than results alone in dealing with malpractices.

She further submitted that Section 81 (e) is the yardstick as pointed out by Musinga J. in the case of **JAMES OMINGO MAGARA VS MANSON ONYANGO NYAMWEYA & 2 OTHERS, CIVIL APPEAL NO.8 OF 2010** where the Court held as follows:-

***“The Court has to consider whether the grounds as raised in the Petition sufficiently challenge the entire electoral process and lead to a conclusion that the process was not transparent, free and fair. It is not just a question of who got more votes than the other. It cannot be said that the end justifies the means. In a democratic election the means by which a winner is declared plays a very important role. The votes must be verifiable by the paper trail left behind, it must be demonstrated that there existed favourable circumstance for a fair election and that no party was prejudiced by an act or omission of an election official.”***

That the principles relating to elections are laid down in Article 81 and 86 of the Constitution that the election results must be accurate, verifiable, secure, accountable and transparent. That these principles were stressed in the case of **AHMED ABDULLAHI MOHAMMED & ANO VS IEBC & OTHERS ELECTION PETITION NO.14 OF 2017.**

She further submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents made irregular and unlawful returns of the elections by declaration results in forms with different serial number for the same Polling Station, forms with alterations, unstamped forms and forms without signatures from the Presiding Officers and the results are therefore unauthenticated and unverifiable. That the results were not mathematically precise, not properly tabulated and Form 35B did contain summation of all votes for the entire Constituency as votes for 5 Polling Stations were omitted.

She argued that the statutory forms are key component for they are instruments through which final results are declared as prescribed by law.

On the issue of failure to sign, stamp, alteration without signing and lack of security features, Ms. [h2] Opiyo submitted that the said forms are crucial in electoral process as they form the basis of the results to be announced and Regulation 79 of Elections (General) Regulations 2017 provide for the mode of signing which include provision for recording reasons by candidate or Agent who refuse to sign.

She cited the case of **WILLIAM KABOGO VS GEORGE THUO & 2 OTHERS (2010)** where the Court held that common sense dictate that alteration should be countersigned and that it is important for statutory forms which contain results that will be required to be verified by other parties, including members of public, to be written without any alterations or cancellations and that cancellations and alterations raised questions regarding veracity and authenticity and could not therefore contain valid results.

She submitted that while it is human error to miscalculate a single or two digits, a systematic designed error cannot be said to be human error and that failure to comply with clear statutory provision regard to various forms is non-human error but blatant disregard to the law.

That Regulation 79(1) of the Elections (General) Regulations 2017 uses the operative word “shall” in stating that the Presiding Officer is required to sign the forms and failure to comply with the requirement therefore invalidate the results. She cited that case of **JOY KABATSI KAFURA VERSUS ANIFA KAWOoya BANGIRANA & ANOTHER, EP.NO.25 OF 2007 (SUPREME COURT OF UGANDA)** where the Court held as follow:-

***“An election is a process encompassing several activities from nomination of candidates through the final declaration of the duly elected candidate. If anyone of the activities is flawed through failure to comply with the applicable law, it affects the quality of the electoral process, and subject to the gravity of the flaw, it is bound to affect the election results. One such activity is the declaration of the results at every Polling Station. If any declaration is invalid by reason of non-compliance with the applicable law, it affects the quality and the result of the electoral process...”***

***I share the same view and should add that sub-Section (5) of Section 47 reiterates the Constitutional requirement under Article 68(4), which reads –***

***“The Presiding Officer, the candidates or their representatives and in case of a referendum, the sides contesting or their Agents, if any, shall sign and retain a copy of a declaration stating –***

#### **a) The Polling Station**

**b) The number of votes cast in favour of each candidate...**

**And the Presiding Officer shall there and then, announce the results of the voting at that Polling Station before communicating them to the Returning Officer.”**

**...It follows that an announcement of results that is not based on a duly signed DR form is invalid for contravening both the Constitution and the EA...”**

She further cited **ABDIKHAIM OSMAN MOHAMMED COMMISSION & 2 OTHERS CIVIL APPEAL NO.293 OF 2013** where the Court held that Forms 35A with no Presiding Officer’s signature were worthless and their results should have been excluded from the final tally. The Court further held that where such alterations relate to votes garnered by candidates, the results of the election on those forms are unverifiable. She added that the above decision was cited with approval by the Supreme Court in **NADHIF JAMA ADEN VS ABDIKHAIM MOHAMMED & ANO. & 3 OTHERS (2014)**.

On exclusion of Petitioners Agents in the Polling Stations, the Petitioner submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed to act neutrally and impartially by undertaking actions in favour of the 3<sup>rd</sup> Respondents without justified reasons; that in the process of election, counting and tallying of results was shrouded by secrecy and opaqueness contrary to principles of transparency provided under Article 81 of the Constitution and Regulation 62(1) (a) and (c) of the Elections (General) Regulations, 2012. That the case of **BWANA MOHAMMED BWANA VS SILVANO BUKO BONAYA & 2 OTHERS MALINDI ELECTION PETITION NO.7 OF 2013** the Court held that the role of an Agent is a legal requirement which must not be taken lightly.

Petitioner further submitted that there is unexplained difference between the total number of votes cast for member of National Assembly in comparison with other positions in the Constituency casting doubt on the legality and validity of results declared; that Regulation 69(2) require a voter to be issued with 6 ballot papers for the 6 positions and where there is discrepancy on the elective posts, it raises question on validity and authenticity of the final results declared.

Petitioner submitted that Forms 35B did not bear any signatures of the Returning Officer and the Agents and that the forms filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents was distinct form the Form 35B filed by 1<sup>st</sup> and 2<sup>nd</sup> Respondent following Court order and that it was signed on 16<sup>th</sup> August 2017. Further, the Returning Officer admitted to giving the Petitioner a draft Form 35B which is not allowed in law.

On use of KIEMS Kit the Petitioner submitted that at Kariobangi Day Nursery Polling Station, 15 voters voted without being identified using KIEMS Kit. Further results transmitted to tallying centre did not conform with results declared in actual Form 35As and 35B contrary to Section 39 of Elections Act; that the irregularities were of grave nature as a total number of votes affected were 17,668 plus 3500 making a total of 21,168 which exceed the margin by which the 3<sup>rd</sup> Respondent was declared a winner elect.

In respect of standard of proof, the Petitioner submitted that the supreme Court in **PRESIDENTIAL PETITION NO.5 OF 2013:RAILA ODINGA VS IEBC & OTHERS** created an intermediary standard of proof in election matters by setting it as higher than balance of probability but lower than beyond reasonable doubt. She submitted that the Petitioner herein proved her case to the required standard by demonstrating that elections were not free and fair and that the elections failed to comply with Articles 10, 38, 81 and 88 of the Constitution, Section 83 of Elections Act. She urged Court to allow the Petition.

Ms. Maumo submitted on the burden of proof and costs.

She restated burden of proof set in Raila case and submitted that what need to be proved is non-compliance with the law and that irregularities affected the results. She submitted that Section 83 of Elections Act has been interpreted before in the case of **MORGAN VS SIMPSON (1974)3 ALLR 722** and the Court should not be asked to interpret again.

Ms. Maumo submitted that the forms do not comply with prescribed format. She referred to the case of **AHMED ABDULLAHI MOHAMMED & ANO VS IEBC & OTHERS ELECTION PETITION NO.14 OF 2017** where Judge Mabeya held that failure by Presiding Officer to sign the forms cannot be excused. She said that the decision of Jackton Ranguma should not be applied in this case as there was no scrutiny. She submitted that election was not conducted in accordance with the Constitution and irregularities were not administrative.

### **Costs of Petition**

Ms. Maumo submitted that costs are governed by Rule 30 and the word used is “may” grant costs. She submitted that award of costs is discretionary and reasonable amount should be granted not exorbitant. She submitted that an amount of Kshs. 2,000,000 is reasonable.

### **1<sup>ST</sup> and 2<sup>ND</sup> RESPONDENT’S SUBMISSIONS**

Mr. Kitur for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that the burden of proof lies on a person who alleges existence of fact to prove that they exist; that the Petitioner failed to prove the alleged irregularities to the required standard as set in the case of **RAILA ODINGA & 2 OTHERS VS INDEPENDENT ELECTORAL COMMISSION (2013) eKLR** where the Court held as follows:-

***“The threshold of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt save that this would not affect the normal standards where criminal charges linked to an election, are in question.”***

He submitted that the Petitioner failed to produce originals of the copies attached to the Petition and the document she alleged were not signed or stamped and do not therefore have evidential value. He said the 1<sup>st</sup> and 2<sup>nd</sup> Respondent on the other hand availed certified copies in Court.

Pw4 confirmed that Form 35A of Polling Station No.1 of 15 Ronald Ngala was signed and stamped contrary to her allegation in examination in chief; that the said witness confirmed that all the certified copies were signed by the Presiding Officers/ Deputy Presiding Officers and stamped with IEBC official stamp.

He added that notwithstanding the fact that the forms were stamped there is no legal requirement for Form 35A to be stamped with IEBC stamp and that Regulation 79 of Election (General) Regulations, 2012 only require the forms to be signed by Presiding Officers, candidates and Agents. He submitted that the Deputy Presiding Officer deputizes the Presiding Officer and will perform his duties if he is unable to perform; that signing by either of them amount to compliance of Regulation 79 of Election (General) Regulations, 2017. He cited the case of **JACINTA WANJALA MWATELA VS COUNTY RETURNING OFFICER (TAITA TAVETA) & 3 OTHERS (2013) ECLR** where the Court held that announcement of result by Deputy Presiding Officer fulfills the legal requirement for the reason that the DRO has the same authority as RO. He further submitted that most of the party Agents signed Form 35A at the Polling Stations and the Petitioner cannot deny the authenticity of the results as the act of signing is confirmation of accuracy of the results.

That the position was held in the case of **NOAH MAKHALANG'ANGA WEKESA VS ALBERT ADOME & 3 OTHERS (2013) ECLR** and in **PAUL GITENYI MACHORWA VS TIMOTHY E. BOSIRE & 2 OTHERS (2013) ECLR** the Court held, if the purpose of candidate or Agents participating in the elections is to confirm the contents of Form 35, all accredited candidates present at announcement of results, whether candidates in the particular election or candidates in other elections may sign the Form 35 and it must be observed that the general election involved election for 6 positions with some elections having over 10 candidates.

He added that the Petitioner failed to prove that the forms were blank but Court noted that they were illegible.

He further submitted that the Petitioner failed to adduce evidence to prove that the stamp used was fake. On serialization of Forms 35 he submitted that the Returning Officer confirmed that all Forms 35A do not bear the same serialization and the original and self-carbonating Forms 35A would bear the same serial number and that the Petitioner failed to understand that fact; the allegation has not therefore been proved.

On allegation that that votes exceeded total number of registered voters, Mr. Kitur submitted that on cross examination, the Petitioner confirmed that the places mentioned were Polling Centres not Polling Stations. On allegation of one hand filling the forms Mr. Kitur submitted Pw3 could not prove that as she was not a handwriting expert.

On identification by KIEMS Kit he submitted it is only in Polling Station number 7 of 15 Kariobangi North Primary School where only 7 people were not identified using KIEMS Kit as confirmed by DW2 and corroborated by the 2<sup>nd</sup> Respondent.

On exclusion of results from 5 Polling Stations, he submitted that, the Returning Officer (Rw1) explained that results from the stations could not be added as Forms 35A had been placed inside the sealed ballot boxes and he could not access them without a Court order. He said adding all the votes from the 5 Polling Stations could not alter the results. He submitted results were announced and posted on the door in all Polling Stations; voters therefore knew their will. He attributed placing all Forms 35A in the ballot boxes to fatigue as per evidence of DW2 and Dw5.

In respect to Form 35B, Mr. Kitur submitted according to the 2<sup>nd</sup> Respondent only one Form 35B was used to announce results and that it has all security features. He submitted that results from Ronald Ngala Polling Station No.1 of 15 whose ballot box was unsealed were included with the consent of the Petitioner who has not disputed the results.

On doctor Oduwo's evidence Mr. Kitur submitted that he failed to demonstrate that he is an expert in any filed to be able to analyze the election. He urged Court to disregard his evidence.

Mr. Kitur submitted that the Petitioner failed to demonstrate that any malpractices and irregularities substantially affected the results. He added that, irregularities cannot on itself invalidate an election as held in **GATIRAU PETER MUNYA VS DICKSON MWENDA GITHINJI & 2 OTHERS (2014) ECLR** where the Court cited the case of **MORGAN V.SIMPSON (1975) 1Q.B151.**

On scrutiny and recount, Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents submitted that scrutiny of ballot boxes did not reveal any tampering in respect of Dandora Polling Station No.8 of 9 & Tom Mboya 1 of 20 each has a digit omitted in one serial number but all the other digits are intact/correct. He submitted that all votes cast remained the same in all Polling Stations where recount was done; that all voters were identified by KIEMS Kit except Tom Mboya Primary School no 3 of 20 where the Presiding Officer explained that 22 people were unaccounted for because of error made by a clerk who was replaced. On unavailability of Form 32A he submitted that Regulation 81 of Elections (Parliamentary and County) Petition Rules, 2017 is silent on how it should be preserved. He submitted that it could have been placed in a ballot box of any of the 6 elective posts.

### **Costs of the Petition**

Mr. Kitur urged the Court to consider challenges involved in conducting this matter which include labour intensive, complexity, urgency necessitating deployment of resources towards it, that it involved drafting, perusal, filing and preparing pleadings and documents of huge portions and the interest involved. He urged Court to consider the case of **MARTHA WANGARI KARUA & ANOTHER VS IEBC & OTHERS, KERUGOYA HIGH COURT ELECTION PETITION NO.2 OF 2017** where costs were capped at 10,000,000 and **SAMMY NDUNGU WAITY VS IEBC & 3 OTHERS (2018) eCLR** where costs were capped at 12,000,000. He submitted that an award of 7,000,000 is commensurate with work done in this matter.

In conclusion he submitted that the Petitioner failed to demonstrate that any malpractices and irregularities substantially affected the results; that irregularities cannot on itself invalidate an election as held in **GATIRAU PETER MUNYA VS DICKSON MWENDA GITHINJI & 2 OTHERS (2014) eKLR** where the Court cited the decision in the case of **MORGAN V.SIMPSON (1975) 1Q.B151**.

That the work of an election Court is to uphold the Constitution including the right of the people to exercise their right to exercise their political rights under Article 38 and 81 of the Constitution and right to free and fair election under Article 81 (e) of the Constitution. He urged Court to uphold the will of the people of Embakasi North Constituency by dismissing the Petition with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.

### **3<sup>RD</sup> RESPONDENT'S SUBMISSION**

Mr. Kibe Mungai for the 3<sup>rd</sup> Respondent submitted that the Petitioner's ground for challenging the 3<sup>rd</sup> Respondent's election revolve around the accuracy, technical qualities and anomalies of or contained in Forms 35As and 35B. He submitted that in all fairness, the Petitioner has not alleged illegalities and improprieties of such profound magnitude as to invite and justify the undoubted powers of this Court to annul an election in appropriate circumstances. He quoted **LORD DENNING AND STEPHENSON LJ IN MORGAN VS. SIMPSON (1974) 3 ALL ER** as follows:-

*“...We are dealing here with a challenge based on administrative errors. There is no allegation of any fraud corruption or illegal practices. Nor is there any suggestion of wrongdoing by any candidate or political party. Given the complexity of administering a federal election, the tens of thousands of election workers involved, many of whom have no on-the-job experience, and the short time frame for hiring and training them, it is inevitable that administrative mistakes will be made. If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election.”*

He submitted that the Respondents answered all the allegations as required by law and scrutiny ordered by Court does not bear out the Petitioner's allegations of systematic, substantial and widespread violation of the law by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent; that there is no evidence at all that any non-compliance was intended to favour or benefit the 3<sup>rd</sup> Respondent. He cited the holding in **GATIRAU PETER MUNYA VS DICKSON MWENDA GITHINJI & 2 OTHERS (2014) eKLR** where the supreme Court held that elections can only be invalidated if the irregularities are of such magnitude that they affected election result; otherwise procedural or administrative irregularities and errors occasioned by human imperfection are not enough by and of themselves to vitiate an election.

Mr. Kibe Mungai submitted that the averments in paragraphs 7 to 10 of the Petitioner's Affidavit are general allegations lacking material particulars and wholly unsupported by credible evidence; that despite few irregularities that were acknowledged by the Respondents in their filed submissions or observed during scrutiny, elections were conducted in accordance with applicable principles set out in Articles 38, 81 and 86 of the Constitution, Elections Act and Regulations in that all registered voters were given an opportunity to vote and adequate security was provided to voters and election officials.

He submitted that in cross-examination, the Petitioner confirmed that elections were held in all the 157 Polling Stations and that she got votes in all the Polling Stations despite those irregularities and that she believes she got the votes through a fair process; and it is through the same process that the 3<sup>rd</sup> Respondent got some votes. He added that she has not indicated any station that the 3<sup>rd</sup> Respondent got more votes that she doesn't have alternative figures.

He submitted that all elements of free and fair elections set out in *Articles 81 (e) of the Constitution* were observed and enforced, that votes were counted, tabulated, and announced promptly in all 157 Polling Stations; that at the tallying centre, the results from Polling Stations were openly and accurately collated and promptly announced by the Returning Officer; and the method used was simple and predominantly accurate, secure and transparent. He added that the election irregularities and illegalities alleged should be viewed and measured in the backdrop of the analysis of Supreme Court in the Munya case. That failure by the Petitioner to connect the alleged irregularities and improprieties to any loss of her votes or gain by the 3<sup>rd</sup> Respondent or any other candidate means they did not affect result of election; that the anomalies were cured by recount and scrutiny which confirmed that the 3<sup>rd</sup> Respondent won the election.

Mr. Kibe Mungai urged Court to give ***Section 83 of the Elections Act 2011*** the construction given in **MORGAN V.SIMPSON (1975) 1Q.B151** while constructing ***Section 37(1) of the English Act***. That the principle underlying ***Section 83 Of The Elections Act*** is that Courts are enjoined to protect the legitimacy of elections and institutions of democracy which require nullification of results as a last resort on account of incurable or irredeemable wrong doings or improprieties. He cited **TIMAMY ISSA ABDALA VS.SWALEH SALIM IMU & 3 OTHERS (2014) EKLR** where the Court held that,

*“The duty of the Court is to give effect to the will of the people and that the will was clearly demonstrated by majority of votes cast in favour of the appellant in an election that was apparently free and fair, as administrative mistakes committed by IEBC and 4<sup>th</sup> Respondent did not affect the results of the elections and undermine the integrity of the electoral process.”*

Mr. Kibe urged the Court to find that the Embakasi North Constituency election was held in accordance with all applicable laws and non-compliance if any by the 1<sup>st</sup> Respondent and its officials is directly attributed to human error and imperfection, administrative lapses and capacity challenges as opposed to a calculated scheme to steal votes for the 3<sup>rd</sup> Respondent.

In respect of scrutiny, Mr. Kibe submitted that it is not the purpose of order for scrutiny and recount to unearth new evidence or unpleaded matters upon which an election can be nullified.

He submitted that the discrepancies that the report lay bare do not go into the validity of the votes cast, numbers garnered by each candidate. That the Petitioner points at a paltry figure of 147 doubtful votes and the discrepancies cannot be remotely demonstrated to have an effect on the declared results; that the Courts eye has not been drawn to any specific and major new irregularities emanating from the scrutiny.

### **Costs of Petition**

Mr. Kibe Mungai submitted costs for election is governed by Section 84 of the Elections Act, 2011 and Rule 30 of elections (Parliamentary and County ) Petition Rules, 2017. He urged Court to take on board Sections 4, 5 and 59 of the Advocates (Remuneration ) Order and note that, this matter required and received exceptional dispatch, entailed business of unusual complexity, the nature and interest involved in this matter was enormous, labour and responsibility entailed in this matter as immense and the number, complexity and importance of documents prepared or examined was major. He further urged Court to take into account the trends in awarding costs and in particular to take into account the case of **MARTHA WANGARI KARUA & ANOTHER VS IEBC & OTHERS, KERUGOYA HIGH COURT ELECTION PETITION NO.2 OF 2017** where costs were capped at 10,000,000. He proposed instruction to be capped at 6,000,000 for the 3<sup>rd</sup> Respondent.

### **Issues for consideration are as hereunder:-**

1. *Whether election of 8<sup>th</sup> August 2017 in respect of Member of National Assembly Embakasi North Constituency was conducted in accordance with the Constitution, Elections Act, Regulations and Rules.*
2. *Whether irregularities and/or malpractices if any affected the validity of the results of election.*
3. *Whether declaration of 3<sup>rd</sup> Respondent as Member of National Assembly Embakasi North Constituency should be nullified.*
4. *Who is entitled to costs and to what extent should instruction fee be capped.*

### **ANALYSIS**

I have considered evidence adduced, submissions filed both on the Petition and scrutiny plus the scrutiny report filed by Deputy Registrar. I have also perused documents filed by parties herein.

In so far as the first issue is concerned, Article 81 of the Constitution sets out general principles for electoral process as follows:

- a) That citizens exercise their right under Article 38,
- e)... free and fair elections, which are transparent...administered in an impartial, neutral, efficient, accurate and accountable manner.

Article 86 provide that IEBC shall ensure that:-

- a) Whatever method is used is simple, accurate, verifiable, secure, accountable and transparent,
- b) That votes are counted, tabulated and results announced by the Presiding Officer at each Polling Station,
- c) That results from the Polling Stations are openly and accurately collated and promptly announced by the Returning Officer.

Regulations 69 to 87 of the Elections (General) Regulations 2017 provided for the voting procedure, persons allowed at the Polling Station, counting of votes, announcement of results at Polling Station, filling and signing of statutory documents tallying and announcement of results at the tallying centre.

Irregularities alleged relate to filling of Forms 35A and 35B, alterations, denying of Petitioners Agents to Polling Stations, failure to use KIEMS Kits and improper tabulation of results.

I now wish to deal with anomalies alleged as hereunder:-

### **Agents locked out of Polling Stations**

Besides Petitioner alleging that her Agents were denied entry to Polling Stations, she never went further to show that she or her party had appointed Agents for all the 157 Polling Stations. While being cross examined by the 3<sup>rd</sup> Respondent, she said that she sent a list to IEBC and that she has a copy. She did not however avail any list nor contract document or Oath of Secrecy which the Agents signed. Her Chief Agent Pw4 who said was in charge of the Agents testified that an Agent whom she took to one of the Polling Stations was not allowed in because he was not in the list but was allowed in after the Presiding Officer signed his Oath of Secrecy. Her evidence clearly shows that Agents who were not listed were denied entry. No evidence was adduced to demonstrate that an Agent was in the list submitted was denied entry Polling Station. None of the Agents alleged to have been denied entry was availed in Court to adduce evidence. The allegation was not therefore proved.

### **Failure to identify voters using KIEMS Kit**

The Petitioner singled out Kariobangi North day Nursery School Polling Station number 7 of 7. The Deputy Presiding Officer of the station whom she availed as a witness confirmed that KIEMS Kit was found to be reading zero after about 15 people had voted. This was not disputed by the Presiding Officer (RW3) who was availed to testify by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Both witnesses confirmed that the 1<sup>st</sup> clerk was not using KIEMS Kit at the start of voting but after consulting the Returning Officer, they changed the clerk and voting went on smoothly. Pw2 in cross-examination confirmed that the number of voters not identified are about 15 but not many as he indicated in his Affidavit. Rw3 confirmed that the votes were included in results declared for the Polling Station. Scrutiny revealed that 22 voters without being identified by KIEMS Kit.

The irregularity was not denied but it is not disputed that the error was rectified as soon as it was noted. There is no indication from evidence adduced that the error was intentional, neither was it designed to benefit any of the candidates.

### **Anomalies on Forms 35A and 35B**

Failure to comply with Regulation 79 of Elections (General) Regulation included the filling of the forms as required, signing by Presiding Officers/Deputy Presiding Officer, Agents/candidates.

The Petitioner pointed out several anomalies in the forms filed. Besides absence of signature, she alleged that the forms do not bear security features, some parts are blank and others have alterations which are not countersigned as required by law.

As pointed out at the introduction, the Petitioner sought original forms to be availed to Court. The Court noted that most forms filed by both the Petitioner and Respondents were not legible. This Court had opportunity to peruse the copies certified by the Deputy Registrar. The documents were compared and interrogated in Court. It was however evident that entries made on legible forms filed by parties had no variance, example being Kariobangi North Day Nursery 2 of 7 and Ronald Ngala 1 of 15. I also note that even in some Polling Stations where the Petitioner alleged Forms 35A were not signed by Agents or not properly filled, the Petitioner garnered more votes.

On variance of serial numbers in Forms 35A the Returning Officer informed Court that carbonated copies have different serial numbers; the self-carbonating forms could not therefore bear same serial number with the original. Forms 35A issued to different Agents could therefore bear the same number.

In respect of security features, Dr. Oduwo (PW1) confirmed that some of the forms given to the Petitioner were illegible and one could determine a particular feature. This therefore confirms that his report on security features could not be accurate as he never got original Forms 35A to analyze. He confirmed that the forms he only had access to were original Forms 34 which relate to Presidential election. He however did not avail the forms in this Petition. On being shown the certified copies, he confirmed that they were legible. It is evident therefore that Dr. Oduwo never got the correct forms to analyze and even the original forms which he used to prepare report for Presidential election Petition, were not availed to Court for the parties herein to interrogate. His report cannot therefore be said to be accurate.

No explanation was given by the Petitioner as to why she availed copies and not the carbonated copies issued to her Agents from which copies filed were derived. The security features were shown to exist in the certified copies. The allegation was not therefore proved.

### **Votes cast exceed the registered voters**

As outlined in the introduction Petitioner and Pw4 in paragraph 10 of his Affidavit listed four places where they alleged votes cast exceeded the legally required of 700 voters to be registered per Polling Station. Pw4 listed the stations in paragraph 11. However it turned out in cross-examination, that the places she referred to were Polling Centres not Polling Stations. None of them pointed out a Polling Station which exceeded 700. This allegation therefore fail.

### **Issuance of more than one ballot paper per voter**

The Petitioner said voters in Tom Mboya and James Gichuru Polling Centres were issued more than one ballot paper contrary to Regulation 69(2) of Election (General) Regulations, 2017. Three Polling Stations were randomly picked from each of the two Centres for recount. None of the valid votes cast in the selected stations exceeded the number of registered voters. The number would have been expected to exceed the registered voters if indeed voters were given more than one ballot paper. Save for James Gichuru No. 8 of 10 scrutiny of KIEMS Kits in respect of the Polling Stations revealed marginal number of voters not accounted for and was explained to have resulted from an error by clerk who was changed. That allegation was not therefore proved.

### **Tabulation of results in Form 35B and variance in the Forms 35B availed to Court**

In respect to anomaly alleged in Form 35B, I noted the variance in the 4 copies availed to Court that's the form filed by Petitioner, 1<sup>st</sup> & 2<sup>nd</sup> Respondent, 3<sup>rd</sup> Respondent and certified copy. RW2 testified that he issued a draft to candidates to confirm tabulation results before making a final copy. He said copy filed by 3<sup>rd</sup> Respondent was a draft. He further explained that the copies have different serial numbers. On careful analysis of the 4 sets of Forms 35B, I note that the entries of the results are the same. Results from 5 stations are omitted in all the sets of Form 35B.

As earlier captured in summary of evidence, Explanation for non-inclusion of the votes by RW2 was that, in respect of 4 Polling Stations ballot boxes were sealed could not be opened without Court order and for the 5<sup>th</sup> one the Presiding Officer delayed in delivering the form to Returning Officer. The question that follows is whether non-inclusion of the votes substantially affect the results declared. Form 35As were not found in two of the ballot boxes. The irregularity is admitted. As per Regulation 79 (2) (a) the Presiding Officer is required to announce

results after counting votes before communicating the results to the Returning Officer. There is no evidence to the effect that results were not announced by Presiding Officer in those Polling Stations. The people who voted must have therefore known the result of election but the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were at fault for failing to include the results in the final tally. Did the failure substantially affect the results declared? Total number of votes not tallied in the 5 Polling Stations is 3,215; the margin between the 1<sup>st</sup> and 2<sup>nd</sup> candidate was 11,810. I agree with Counsel for the 3<sup>rd</sup> Respondent that even if the Petitioner was to be given all votes registered in the 5 Polling Stations it would not have affected the declaration of the winner.

**DETERMINATION**

The burden of proof lies with the Petitioner. It is not enough for the Petitioner to prove allegations but should go further to demonstrate that the irregularities substantially affected the result of elections.

I do agree with the holding in **MORGAN V. SIMPSON (1975) I.Q. B151** that the Court has a duty to protect the legitimacy of elections, that nullification of results should be resorted to only on account of incurable or irredeemable wrong doings or improprieties; and election should not be nullified if the irregularities never substantially affected the results. Section 83 of Elections Act provides that no election shall be declared void for failing to comply with any written law 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 election.

From the analysis above, there is no doubt that there were irregularities. The Petitioner alleged that the irregularities were intentional and systematically calculated to favour the 3<sup>rd</sup> Respondent. That was not proved. No irregularity was proved to have been occasioned by the 3<sup>rd</sup> Respondent. It is evident that all the candidates were equally affected by the anomalies; the irregularities alleged and established from scrutiny were marginal to the extent that the result of election was not substantially affected.

From the foregoing, I find that the Petitioner failed to prove her case to the required standard.

**COSTS**

Section 84 of Elections Act and Rule 30 of Election Rules provide that costs should follow the cause and the Court should exercise discretion in awarding costs.

I am however of the view that costs need not be exorbitant as to hinder access to justice as provided in Article 48 of the Constitution. I agree with Counsel for Petitioners that costs awarded should be reasonable. Petitioner asked for instruction fee to be capped at 2,000,000 while 1<sup>st</sup> and 2<sup>nd</sup> Respondents and 3<sup>rd</sup> Respondent asked for Kshs. 7,000,000 and Kshs. 6,000,000 respectively.

Having considered work put in by Advocates herein, which included long hearings and submissions which went beyond ordinary working hours, I find it appropriate to cap instruction fee at Kshs. 2,500,000. The Taxing Master will have discretion to decide on the exact figure not more than the above amount.

**FINAL ORDERS**

1. The Petition herein is hereby dismissed with costs to the Respondents.
2. Instruction fee for 1<sup>st</sup> and 2<sup>nd</sup> Respondent is capped at Kshs. 2,500,000.
3. Instruction fee for 3<sup>rd</sup> Respondent is capped at Kshs. 2,500,000.
4. The Taxing Master to assess and certify costs.
5. IEBC Certificate of this determination to be issued to IEBC in accordance with Section 86(1) of Elections Act 2012. IEBC to notify the Speaker of National Assembly upon receipt of the Certificate.

**Judgment dated, signed, and delivered at Nairobi this 2<sup>nd</sup> day of March 2018.**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:**

.....COURT ASSISTANT

.....COUNSEL FOR THE PETITIONER

.....COUNSEL FOR 1<sup>ST</sup> & 2<sup>ND</sup> RESPONDENTS

.....COUNSEL FOR THE 3<sup>RD</sup> RESPONDENT

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