



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

ELECTION PETITION NO.13 OF 2017

JOSEPH AMISI OMUKANDA.....PETITIONER

VERSUS

1. INDEPENDENT ELECORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

2. RETURNING OFFICER,

NAVAKHOLO CONSTITUENCY2ND RESPONDENT

3. EMMANUEL WANGWE.....3RD RESPONDENT

JUDGMENT

Introduction:

1. The petitioner was a contestant in the seat for Member of National Assembly for Navakholo Constituency in the August 8th General Elections in which the returning officer the 2nd respondent, returned the 3rd respondent the duly elected Member of Parliament for the constituency after garnering 17,876 votes against those of the runner up, the petitioner at 9,882. The petitioner was dissatisfied with the manner the election was carried out and filed this petition challenging the election of the 3rd respondent as the duly elected Member of National Assembly for Navakholo Constituency and sought for:

- (a) A declaration that the 3rd respondent was not validly elected Member of the National Assembly for Navakholo Constituency on 10.8.2017, and such declaration by the 2nd respondent was null and void.
- (b) An order that the 1st respondent do conduct a re-election for Navakholo Constituency in regard to Member of National assembly in accordance with the Constitution and Elections Act No.4 of 2011 and Regulations thereunder;
- (c) That the respondents do pay costs of this petition.

Grounds of the Petition:

2. The petitioner contends that the election in Navakholo Constituency was not conducted in conformity with the Constitution, the Elections Act and the Elections Rules and is accordingly not a true reflection of the will of the people of Navakholo Constituency. That the will of the people of Navakholo Constituency was compromised and suppressed by:

- (1) intimidation of the petitioner's agents by the employees of the 1st respondent in collusion with security officers who were in charge of the elections preventing the agents from verifying the counting, tallying and transmission of results.
- (2) massive commission of voter bribery coupled with the supervision of voters when casting their vote by persons employed by the 3rd respondent in collusion with the presiding officers in a pretext they were assisted voters taking away the right of many voters to a secret ballot.

- (3) stuffing boxes with ballot papers after close of voting by the presiding officers.
- (4) casting of pre-marked ballot papers into the ballot boxes by the employees of the 1st respondent in favour of the 3rd respondent.
- (5) willful failure of presiding officers to use the designated forms 35A and 35B for the recording and tallying of votes in some polling stations.
- (6) violence perpetuated by and on behalf of the 3rd respondent at polling stations and tallying centres and attack on petitioner's agents by supporters of the 3rd respondent.
- (7) electoral malpractices and glaring illegalities including:
 - (i) Allowing persons who were not candidates nor accredited agents to fill in their names and sign forms 35A and 35B.
 - (ii) allowing counting and tallying of spoilt ballot papers and votes for other candidates in favour of the 3rd respondent
 - (iii) hiding or causing to disappear some of the ballot paper booklets at the time of voting up to and until the close of voting which ballots miraculously re-appeared in the ballot boxes at the time of counting and tallying having been cast in favour of the 3rd respondent.
 - (iv) refusing to give agents of the petitioner and those of other political parties forms 35A and failing to display them on the wall as required in some known polling stations, making it impossible to verify the result.
 - (v) favouring the agents of the 3rd respondent in some known polling stations by allowing them to sit at the ballot paper counting table together with the polling clerks employed by the 1st respondent while agents of other political parties sat at the far end of the room, far from the ballot counting table, where they were not able to clearly see the ballot papers and verify in whose favour they had been cast.
 - (vi) refusing a recount of ballot papers cast for all candidates to verify the same at the polling stations before the declaration of results at the polling stations and subsequent filling of form 35A.
 - (vii) ejecting accredited agents of the petitioner from counting halls of various polling stations at the conclusion of the elections.
 - (viii) failing to transmit the results to the Constituency tallying centre electronically.
 - (ix) in some known polling stations the votes garnered by the candidates and which were entered in forms 35A differed with those that were entered in form 35B, which votes had the effect of increasing the votes for the 3rd respondent.

Response by the 1st and 2nd respondents:

3. The 1st and 2nd respondents denied all the allegations made by the petitioner and contended that the election for Member of National Assembly for Navakholo Constituency was carried out in strict conformity with the Constitution as well as the Elections Act 2011 and reflected the democratic will of the majority of the voters who turned out and cast their votes. They contended that the election was free, fair and credible. They contended that the counting and tallying of votes was done accurately in the presence of candidates' agents and that there were no inconsistencies in the figures entered in forms 35A and those entered in form 35B. They stated that they are not aware of incidents of voter bribery or improper influence by the 3rd respondent or any other candidate. They contended that the process was being carried out transparently and all agents were given copies of election declaration forms. They denied that there were pre-marked ballots in favour of the 3rd respondent.

Response by the 3rd respondent:

4. The 3rd respondent similarly denied all the allegations made by the petitioner and contended that the declaration of himself as the duly elected Member of the National Assembly for Navakholo Constituency was above board and was conducted professionally in conformity with the Constitution and the Elections Act and Rules, hence the final result as announced by the 2nd respondent reflected the democratic will of the people of Navakholo Constituency. He said that he is not aware of the alleged acts of bribery and intimidation of voters.

The petitioner's case:

5. The petitioner testified in the case and called 5 witnesses. The complaints raised in the petition were in respect to 5 polling stations - Lutaso, Kochwa, Namirama, Shinoyi and Shikomari polling stations, and Chebuyusi High School tallying centre. The petitioner stated that he had presented agents in all the 118 polling streams of the Constituency. His main complaint was that there were pre-marked ballot papers in all the polling stations which were in favour of the 3rd respondent. He also complained that there were numerical differences between the figures entered in forms 35A that were filed by IEBC and those that he had filed. He complained that the declaration of the results was not made in the prescribed form. He complained that non-credited agents were allowed to sign forms 35A and 35B.

6. The witnesses who testified for the petitioner were his agents at Kochwa polling station (Julia Khaemba, witness No.1); Lutaso 2 polling centre (Yusuf Mayende, witness No.2); Shikomari 2 polling centre (Charles Ong'ayo, witness No.3) and Shinoyi 1 polling centre (Josephat Makenga, witness No 4). The fifth witness Wilson Wachakana was an agent for one of the candidates, Leonard Maembe, at Namirama 2 polling centre. The witnesses in their evidence variously supported some of the claims made by the petitioner in his petition.

Case for 1st and 2nd respondents:

7. The 1st and 2nd respondents called 6 witnesses who included the presiding officers at Lutaso, Shikomari, Namirama, Kochwa and Shinoyi polling stations. The sixth witness was the returning officer. The presiding officers denied the claims made by the petitioner in the petition. They denied that there were pre-marked ballots at their respective polling stations. They said that the election was professionally conducted and that agents for the parties signed some aspects of the polling station diaries such as list of agents present at the opening of station, list of agents present at the polling station before counting, list of agents present at sealing of ballot boxes, list of agents present during the sealing of packets, etc, which was an indication that the election was transparent, free and fair. The agents also signed form 35A. The witnesses said that they issued copies of forms 35A to agents of the parties.

8. On her part the returning officer stated that the election was free and fair. That she tallied the results after receiving forms 35A from all the polling stations. She denied that there were pre-marked ballot papers in favour of the 3rd respondent.

Case for 3rd respondent:

9. The 3rd respondent testified in the case and called 5 witnesses. Four of the witnesses were his agents at Kochwa, Lutaso 2, Namirama 2, and Shinoyi 1 polling stations. The fifth witness was his chief agent. The polling station agents testified to the effect that the polling exercise went on smoothly.

Submissions by advocates for petitioner:

10. The advocates for the petitioner submitted that there was no proper verification of the results before they were declared. That verification of the results is a fundamental constitutional principle that is mandatory on the basis of primary data and is a process that if skipped or if not done in accordance with the law vitiates the entire result. That the petitioner in paragraph 24 of the petition averred that the tallying at the tallying centre was not done on the basis of forms 35A. That the petitioner contended that the results were tallied purely on the basis of results that were electronically submitted, yet in some polling stations his agents complained that they did not witness the electronic transmission of results.

11. The advocates submitted that the returning officer admitted that when she tallied the results she had not received the original forms 35A from three polling stations – **Shikomari**, **Naluchira** and **Nambacha** polling stations. That the polling officers from these three polling stations did not submit the original forms to her. That the admission adds credence to the petitioner's claim that verification was not on the basis of forms 35A.

12. Further that the chief agent of the petitioner **Kennedy Ngao Barasa** admitted in his testimony before court that forms 35A were not at the tallying centre before the declaration was made. That he came to see the forms after the declaration of results when his agents took them to him. The advocates submitted that this admission buttresses the claim by the petitioner that tallying was conducted without forms 35A at the tallying centre. The advocates submitted that failure to submit forms 35A to the returning officer directly affected the credibility, integrity, accuracy and accountability of the result as envisaged under article 86 of the Constitution. That it is uncertain whether the results electronically submitted are the actual votes garnered at the polling stations. That without the original forms from these polling stations the validity of the results are in doubt. The advocates cited the holding by the High Court in **Karanja Kabage vs Joseph Kiuna Kariambegu Ng'ang'a & 2 others** (2008) eKLR where the court said:

“an election is an elaborate process that begins with registration of voters, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally declaration of the winner by Gazetement. In determining the question of the validity of the election of a candidate, the court is bound to examine the entire process up to the declaration of results The concept of free and fair elections is expressed not only on the voting day but throughout the election process Any non-compliance with the law regulating these processes would affect the validity of the election of the Member of Parliament.”

13. The advocates further submitted that the results for some polling stations were not transmitted electronically. That some of the forms 35A produced by the returning officer in court are copies of scanned forms and others are copies of originals. That the returning officer in cross-examination was referred to 14 forms that bore the words “copy, copy, copy” on them which the returning officer said that it meant they were produced from the original documents. That there were other forms produced in court that did not have the said words. That the presiding officer said that the documents without the said words were scanned copies. That the returning officer had indicated that the original documents were forwarded to headquarters. The advocates then posed the question how the returning officer would have obtained photocopies from the original documents yet the original documents had been sent to headquarters. Therefore that the authenticity of the forms from the 14 polling stations is uncertain as there is no explanation why the original forms remained in the custody of the returning officer when the others were scanned and original sent to IEBC headquarters.

14. The advocates further submitted that there was no accountability by the presiding officers of the forms 35A issued to them. That the returning officer in her testimony stated that some of the presiding officers were given 3 booklets of the forms while others were given 4 booklets. That there is no reason as to why there was this inconsistency because the number of candidates was constant in all the polling stations. That the returning officer admitted that she did not have any records of how many forms 35As were used by each of the presiding officers since it depended on the number of agents that were available at every polling station. That the admission by the returning officer that she did not know how many forms 35A were utilized by the presiding officers and how many original forms 35A each presiding officer

had proved the petitioner's case that IEBC failed to keep election material secure hence leaving room for manipulation of results.

15. The advocates submitted that the presiding officer stated in her evidence that each form 35A has a different serial number. That the petitioner applied to the returning officer to be furnished with copies of forms 35A but was not given. That a letter to one **Lawrence Simbaoni Ndombi** from the returning officer indicated that she did not have the forms as she had taken them to the headquarters. That it is therefore dishonest of the returning officer to testify in court that she had kept scanned copies of the said forms in the office. The question then is why she declined to give the petitioner copies of the said forms yet she had them in her custody. Moreover the 3rd respondent filed forms with the same serial numbers as those of **IEBC** which means that they are copies of the same forms. The question is why the 3rd respondent had custody of those forms, yet other candidates were denied. That the fact that the 3rd respondent had copies of the forms yet other candidates were denied speaks to the impartiality of the **IEBC** officials against other candidates. The advocates submitted that the source of these forms that the respondents brought to court are suspect and impeach the credibility and authenticity of the results.

16. The other submissions by the counsel for the petitioner will come out later when considering the subsequent issues. The advocates urged the court to find that the result that was declared was therefore invalid for non-compliance with the verification process in violation of the Constitution, the Elections Act and regulations laid down thereunder. That the non-conformity with the law cannot be regarded as mere human errors but are violations of the cardinal principles of a free and fair election that call for the election being vitiated.

Submissions by Advocates for the 1st and 2nd respondents:

17. In their submissions the advocates went through the evidence for the petitioner and the evidence for the 1st and 2nd respondents and submitted that the election was conducted strictly in compliance with the law. They asked the court to dismiss the petition.

Submissions by advocates for 3rd respondent:

18. The advocates submitted that the petitioner has failed to prove any of the grounds enumerated in his petition. That the witnesses for the petitioner did not specifically prove the alleged incidences of electoral malpractices and irregularities. That at the hearing of the petition, the petitioner seems to have generally abandoned all the other grounds and narrowed down his case to one single issue on pre-marked ballot papers. That the 1st and 2nd respondents called witnesses from the 5 polling stations in which the petitioner had claimed the existence of irregularities and illegalities. That the witnesses for the 1st and 2nd respondents denied that there were pre-marked ballots and the petitioner never proved otherwise.

19. The advocates further submitted that two witnesses for the petitioner, **Yusuf Mayende** and **Wilson Wachakana** gave contradictory evidence to what they had deposed in their affidavits thereby showing that they are not credible witnesses.

20. The advocates submitted that the petitioner and his witnesses did not challenge the results entered in forms 35A and the results tallied in form 35B. That three of his witnesses, **Julia Khaemba**, **Charles Ong'ayo** and **Josephat Alusamba** signed forms 35A in their respective polling stations which act meant that they were satisfied with the manner the counting was done and the end result declared.

21. The advocates submitted that the petitioner did not provide specific facts and particulars of any inconsistencies in the counting, computation and tallying of votes. That the petitioner during his application for scrutiny introduced some forms 35A whose source was not known. That the petitioner cannot use documents from unknown source to challenge documents filed by the 1st and 2nd respondents.

22. The advocates submitted that an election can only be nullified if it is proved that the same was conducted without strict adherence to the electoral laws and the Constitution as was held by the Supreme Court in the case of **Raila Amollo Odinga vs Uhuru Kenyatta & others** (2017). That in this case the petitioner has failed to demonstrate that the 1st and 2nd respondents were in breach of any law while conducting the election. The advocates cited the case of **Murgor vs Ingonga & another**, (2008) KLR (EP) 171, where the court stated that where an election is so conducted that it is substantially in accordance with the law, it is not to be vitiated by a breach of the rules or mistake at the polls provided it did not affect the results. They also referred to **Ali Hassan Joho vs Hotham Nyange & Another** (No.4 of 2008) 3 KLR (EP) 500 where **Maraga J** (as he then was) stated that generalized allegations will not wash in an election petition but that an election must be proved by cogent, credible and consistent evidence.

Principles and the applicable law:

23. An election is required to be conducted in conformity with the Constitution, the Elections Act, 2011 and rules and regulations made thereunder.

24. **Article 81(e)** of the Constitution of Kenya, 2010 sets out the principles of free and fair elections to be:

- (i) by secret ballot,
- (ii) free from violence, intimidation, improper influence or corruption;
- (iii) conducted by an independent body;
- (iv) transparent; and
- (v) administered in an impartial, neutral, efficient, accurate and accountable manner.

25. **Article 86** provides that:

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

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

(b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at the 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 malpractices are put in place, including the safekeeping of election materials.”

26. In *Raila Odinga vs IEBC & 3 others Election Petition No.5 of 2013* the Supreme Court set out the legal position regarding the question of burden of proof and the standard of proof in election petitions as thus:-

“[52.] ... a petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should in principle, be above the balance of probabilities, though not as high as beyond-reasonable-doubt. Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary.

[196] ... This emerges from a long standing common law approach in respect of alleged irregularity in the acts of public bodies, all acts are presumed to be done rightly and regularly omnia praesumuntur rite et solemniter esse acta. So the petitioner must set out by raising firm and credible evidence of the public authority’s departures from the prescriptions of the laws.”

27. With regard to the standard of proof, the court held at paragraph 203 of its judgment that –

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

In addition **section 107** and **108** of the Evidence Act provides that,

107 (1) – whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

108 – The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

28. The standard of proof in election disputes is therefore higher than that of a balance of probability that is applicable in civil cases but lower than that applicable in criminal cases of proof beyond reasonable doubt.

29. In *Gitarau Peter Munya vs Dickson Mwenda Kithinji & 2 others* (2014) eKLR case the Supreme Court set out the guidelines applicable in election petitions where it held in paragraph 216-218 that:-

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

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

[218] Where, however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election. In this regard, we stand on the same plane as the learned Judges in Morgan, Optitz and Nana.”

Questions for determination:

30. The questions for determination before the court are:

(1) whether there were irregularities and illegalities on the conduct of the election and if so whether they had any effect on the results of the election.

(2) whether the election was verifiable

(3) whether the election was conducted in conformity with the law.

ANALYSIS AND DETERMINATION:

(1) whether there were irregularities and illegalities on the conduct of the election and if so whether they had any effect on the results of the election:

Pre-marked ballots:

31. In paragraph 19 of the petition the petitioner pleaded that the 1st respondent failed to secure election materials as a result of which there were pre-marked ballot papers in all the polling stations that were in favour of the 3rd respondent. In paragraph 17 of the supporting affidavit he deposed that during the voting he received complaints from his agents that there were pre-marked ballot papers in virtually all the polling stations with some having blue markings and others black markings in favour of the 3rd respondent. The stations that were complained in the petition to have had irregularities were Lutaso, Kochwa, Namirama, Shinoyi and Shikomari.

32. It is an offence under **section 5(f)** of the Election Offences Act No.37 of 2016 for a person to put into any ballot box anything other than the ballot paper which he is authorized by law to put in. Pre-marked ballots are examples of material that any person is not allowed to put into the ballot box. A petitioner alleging introduction of pre-marked ballot papers into the ballot is required to prove it beyond reasonable doubt.

33. The five witnesses for the petitioner testified that there were pre-marked ballot papers at their respective polling stations. That they became aware of the pre-marked ballot papers after midday. That on raising complaints with their respective presiding officers, the presiding officers contacted the returning officer who gave instructions that the ballot papers henceforth be marked with red pens to distinguish the pre-marked ballots from the voters' marks. However that the instructions were given after mid-day by which time very many people had voted. That as a result of the pre-markings and the voters markings there were many spoiled votes.

34. The returning officer and the presiding officers denied that there were incidents of pre-marked ballots. They said that what was there was accidental print marks on some ballot papers. That these were discovered at the tallying centre on the eve of the election i.e on the 7th August 2017, when the presiding officers were being issued with the election materials. That the said accidental print marks were not confined to the ballot papers for the election of the Member of Parliament but involved all the six elective posts. That on that discovery the returning officer gave instructions that the ballot papers be marked in red pen so as to distinguish any foreign mark on the ballot papers with the voters' marks. That on the voting day the ballots in the entire constituency were marked by use of red pens for all the elective posts.

35. The presiding officer at Lutaso 2 polling centre (IEBC witness No.1 Festus Wangwe) stated that at his station he only came across one ballot paper with accidental ink marks. That the ballot paper was marked spoiled and was not used.

36. The presiding officers at **Shikomari** and **Shinoyi 2**, IEBC witnesses No.3 (Roselida Wandera) and No.5 (Peter Wakhanu) stated that they did not come across any such ballot papers at their respective polling stations.

The agents for the 3rd respondent stated that instructions to use red pens in making the ballots were given at 6 am before voting started.

37. Though the witnesses for the petitioner claimed that there were many rejected votes as a result of pre-marking of the ballot papers this was not supported by the results from their polling stations. Kochwa had 2 spoiled votes. Lutaso had 12. Shikomari had 3. Shinoyi had 9 and Namirama had 4 spoiled votes. These cannot by any standard be said to be a high number of spoiled votes. There was no evidence that the rejected votes were outside the accepted range of percentage of rejected votes. If the evidence was true that there were many spoiled votes, the question is why the pre-marked ballots were not found during the counting. Why would the number of rejected votes have been very low yet the witnesses claimed that the number was huge?

38. The witnesses for petitioner claimed that the instructions to mark the ballots in red pen were given after midday. The petitioner in his evidence stated that he voted at **Eshikholi primary** school polling centre. That he voted before 10 am. That during the voting he was instructed to mark the ballot papers with a red pen. That there were no complaints of pre-marked ballots at the polling centre where he voted. How then could the petitioner have marked the ballot papers in a red pen before 10 a.m if the instructions were given after midday? Why would the ballot papers have been marked in red at a polling station where there were no complains of pre-marked ballots?

39. In paragraph 19 of the petition the petitioner had pleaded that there were complaints of pre-marked ballots in all the polling stations. If this was the case how come that there were no such complaints at Eshikholi primary school polling station? The fact that the petitioner himself marked the ballot papers in red pen before 10 a.m supports the evidence of the IEBC witnesses that the instructions had been given on the previous day and that they applied to all the elective posts. The petitioner did not call any witness who marked the ballot papers with any pen other than red. It has not been shown that marking the ballot papers in red pen disadvantaged any of the candidates. No independent voter testified that there were such pre-marked ballots.

40. The petitioner at first stated in his evidence in court that he did not see any pre-marked ballots at the station that he voted. Later in his evidence he changed this story and said that he saw a mark of a dot on the ballot paper that he was given. Later he said that the mark he saw was a tick. The contradictions are a clear indication that the evidence was a fabrication.

41. Though **Yusuf Mayende** petitioner's witness No.2, claimed to have been the agent for the petitioner at Lutaso stream 2, his supporting affidavit states that he was his agent at Lutaso stream 3 which stream did not exist. His letter of appointment as an agent for **Maendeleo Development Party** that he filed with his supporting affidavit was not signed by the party, yet the letters of other agents were signed. To make matters worse, the witness did not sign any of the IEBC documents to indicate that he was an agent there. He was not appearing in the IEBC list of agents. Instead, it is a lady called **Ziprosa** who was appearing on the list as the agent for the petitioner at Lutaso 2. Ziprosa is the one who signed the list of agents as the agent for **Maendeleo Development Party** at Lutaso 2. She is the one who signed form 35A in that stream. It is then clear that the witness is lying that he was the agent for the petitioner at Lutaso stream 2.

42. **Mr Wachakana**, petitioner's witness No.5 stated in his supporting affidavit that the instructions to mark the ballot papers in red pen were given at 12 noon which was after a ballot booklet No.6 went missing. That he and other agents raised concern with the presiding officer. That the presiding officer then gave instructions that the ballot papers be henceforth marked in red pens. That he realized that voters were being issued with pre-marked papers.

43. In his evidence in court the witness stated that the booklet went missing between 11 am and noon. That would mean that they discovered about the pre-marked ballots after 11 am. However the witness stated that he had arrived at the polling centre at 8 am. That on arrival he was told of some pre-marked ballot papers that were placed at some place at a corner. The question then is whether the issue of pre-marked ballot papers was discovered after 11 am after one booklet went missing or whether the pre-marking was going on when the witness arrived at the polling centre at 8 am. In face of the contradictory evidence by the witness on the issue, the conclusion of the court is that the witness is lying that there were pre-marked ballots in favour of the 3rd respondent.

44. The witness further stated that 7 voting booklets were used at the polling centre. Each booklet has 50 ballots. Therefore that the votes cast should not have exceeded 350 in number. That according to him the number of votes that were cast at the polling centre were 327 but that the count indicated 384. He suspected that the extra votes were from the missing booklet. However the witness signed the IEBC record of the sealing of packets after count that indicated the counterfoil of used ballot papers as 384 which matched with the votes cast. Why would the witness have signed the certificate if the votes cast were actually 327 and not 384? This evidence is further proof that the witness is lying.

45. Three witnesses for the petitioner – **Julia Khaemba** PW1, **Charles Ong'ayo**, PW3, and **Josphat Alusumba** PW4 all signed form 35A for their respective polling centres though they still claimed that there were irregularities of pre-marked ballots. They did not raise any complaints in the said forms. The act of signing the form meant that they agreed with the results captured therein. The claim about pre-marked ballots is all hot air. The allegation is thereby dismissed.

Assistance of illiterate voters:

46. In paragraph 32 of the petition, the petitioner complains that the presiding officers allowed several voters to be assisted to vote by the same persons at known polling stations with the intention of deliberately ensuring that they voted for the 3rd respondent thereby denying the voters their right to a secret ballot and freedom to vote for a candidate of their choice. In paragraph 21 of the supporting affidavit the petitioner says that he received reports from his agents that presiding officers were only allowing agents of the 3rd respondent to assist illiterate voters who influenced the voters to vote in favour of 3rd respondent and that the 3rd respondent's agents were allowed to assist several voters.

47. Assistance of illiterate voters is provided for by **Regulation 72** of the **Elections (General) Regulations, 2012**. **Regulation 72(2)** provides as follows:-

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

Regulation 72(5)(c) requires that a person who assists a voter to assist only one voter at that election.

48. The witnesses for the petitioner who claimed that the presiding officers denied them opportunity to assist illiterate voters but only allowed the agents for the 3rd respondent to do so were **Julia Khaemba**, the agent at Kochwa polling centre and **Yusuf Mayende**, the purported agent at Lutaso 2 polling centre. Their allegations were denied by the presiding officers at the two polling stations. Julia stated in her supporting affidavit that the presiding officer only allowed the agent of the 3rd respondent to assist illiterate voters. However in her evidence in court she only gave one instance where one person called **Daniel Wafula** came with his two wives who required assistance to vote. That the presiding officer marked the ballot papers without any agent being there to witness the marking. The witness did not give any instance where the presiding officer only allowed the agents of the 3rd respondent to witness the marking of ballot papers for the illiterate voters as was stated in her affidavit. The witness never stated that there were agents who were allowed to assist more than one illiterate voter. The evidence of the witness is hardly enough to prove the allegations.

There is doubt whether Yusuf Mayende was an agent at Lutaso polling station. His evidence is not credible.

49. The petitioner has not proved the allegations that only agents of the 3rd respondent were being allowed to witness the marking of ballot papers for illiterate voters. No such illiterate voter was called to support the petitioner's case on the issue. The allegation can only be a fabrication since there is no evidence to support it. In the premises I find no evidence to prove the allegations made in paragraphs 32 of the petition and 21 of the supporting affidavit.

Failure to sign Forms 35A by presiding and deputy presiding officers:

50. In the application for scrutiny, the petitioner contended that some of the forms 35A filed in court by IEBC were not signed and stamped

by the presiding officers and deputy presiding officers. That the form for **Mayuke Primary School** polling station was not signed by both officers. That some forms were signed by the presiding officers but were not signed by the deputy presiding officers and vice versa.

51. Counsel for the petitioner submitted that failure by the presiding and deputy presiding officers to sign the form for **Mayuke Primary School** polling station renders it invalid as there is no evidence that it was prepared by the officials of IEBC. That the total number of votes recorded as valid for the polling stations which were not signed by the presiding and deputy presiding officers is 3,316 which votes are therefore invalid. The advocates cited the case of **Raila Amollo Odinga & Another vs Independent Electoral & Boundaries Commission & 2 others** (2017) eKLR where the Supreme Court made a finding that failure to sign the statutory forms rendered the result not authentic. The court stated that:

“Of the 4,229 Forms 34A that were scrutinized, many were not stamped, yet others, were unsigned by the presiding officers, and still many more were photocopies. 5 of the forms 34B were not signed by the returning officers. Why would a returning officer, or for that matter a presiding officer fail or neglect to append his signature to a document whose contents, he/she has generated.” Isn’t the appending of a signature to a form bearing the tabulated results, the last solemn act of assurance to the voter by such officer, that he stands by the numbers on that form.”

52. Counsel pointed out that in the said case the court rejected an argument by counsel for respondents that since the number of votes in those unsigned and unstamped forms had not been challenged then the forms were valid. They submitted that failure by election officers to sign the statutory forms renders them invalid and that it is an irregularity and illegality that goes to the root of the election process hence the election cannot stand in light of the said irregularities.

53. It is only one form 35A from Mayuke primary school polling station that was not signed by both the presiding and deputy presiding officers. The others were either signed by both of them or by one of them. The duty to sign form 35A is imposed on the presiding officer as provided by **Rule 79(1)** of the **Elections (General) Regulations** that provide that:

“90 (1) The presiding officer, the candidates or agents shall sign the declaration in respect of the elections.”

54. A deputy presiding officer can perform the duties of a presiding officer as provided by **Rule 5(4)** of the **Elections (General) Regulations 2017** which provides that:

“A presiding officer may perform any act, including the asking of any question, which a presiding officer is required or authorized to perform by these Regulations.”

55. In that case forms signed by the deputy presiding officer without being signed by the presiding officer are valid.

The Supreme Court in the case of **Nathif Jama Adam vs Abdikhaim Osman Mohamed & 3 others** (2014) eKLR stated that the test where presiding and deputy presiding officers have not signed or stamped forms 35A is whether the failure to do so had an effect on the result of the election. The court delivered itself thus:

“[90] From the foregoing passage, and from the record, we find that the authenticity of the results on the unsigned and unstamped forms 35A, had not been the subject of challenge. But there had been an irregularity in the handling of statutory forms from the polling station. There was no explanation of how that irregularity affected the results of the election.”

56. The court affirmed the decision of the trial judge where the judge had held that:

“[91] In this regard, petitioners did not lead any evidence that the lack of signatures or stamp of the presiding officers in forms 35A for the above mentioned polling stations affected the outcome of the election. Further, the petitioners did not challenge the results that were tallied and declared at those polling stations. It is not enough for the petitioners to merely allege and indicate a failure on the part of the 1st and 2nd respondents, but it was also essential for them to demonstrate that such failure affected the result of the election.”

57. There is no conflict in the principle set out by the Supreme Court in the **Raila Amollo Odinga 2017** petition (supra) and in **Nathif Jama Adam** case (supra). In the Raila Odinga case the court found that the many unsigned and unstamped forms had an effect on the outcome of the election while in the Nathif Jama case the court found that this had not been established. There is thereby no conflict in the two authorities.

58. The three witnesses for the petitioner who testified – **Julia Khaemba, Charles Ong’ayo** and **Josphat Alusamba** all ascertained that the results entered in form 35A were correct. Even **Mr Wachakana** witness No.5 who declined to sign form 35A said that the results entered therein were as announced at the polling centre. The petitioner had a duty to show how the unsigned forms 35A affected the result of the election. The result for Mayuke polling station which was not signed by both the presiding and deputy presiding officers contained 449 registered voters. Even if this number of votes were to be subtracted from the votes garnered by the 3rd respondent it will still leave the 3rd respondent way ahead of the petitioner by a wide margin. The error therefore did not have any effect on the result of the election. The petitioner did not thereby show that the unsigned and unstamped forms affected the result of the election.

Verification of results by non-accredited agents:

59. In paragraph 2 of the petition and paragraph 4 of the Supporting affidavit the petitioner states that the tallying of votes was not credible as even persons who were not agents of candidates for Member of National Assembly were allowed to verify and sign forms 35A and 35B.

60. It was not disputed that some agents of parties which had not fielded candidates signed form 35A and 35B. The advocates for the petitioner submitted that the Independent Electoral and Boundaries Commission Act mandates the returning officer to issue accreditation documents to persons who are authorized to act as agents, observers and reporters during the election day. That candidates to the election and political parties are allowed to employ agents who will verify the results in the relevant elections. That this means that agents can only verify results in the statutory forms and/or documents where they have a candidate, or the position on which they are employed. That the verification of the forms by non-accredited persons further put to doubt the authenticity of the verification process of the results at the polling stations and the tallying centre.

The advocates for the respondents did not make a reply to this aspect of the submission.

61. The returning officer stated in her evidence that an accredited party agent is allowed to verify the results for any of the party candidates at the polling centre. She further said that as long as the agent has witnessed the exercise he/she is allowed to verify the results in form 35A.

62. **Section 30** of the Elections Act provides that:

(1) A political party may appoint one agent for its candidates at each polling station.

(2) Where a political party does not nominate an agent under subsection (1), a candidate nominated by a political party may appoint an agent of the candidate's choice.

(3) An independent candidate may appoint his own agent.

Rule 74 of the Elections (General) Regulations stated that:

74(1) No agent shall be deemed to be an agent for the purposes of counting unless at least forty eight hours before the close of the poll in that election, the candidate or political party, as the case may be, has submitted to the presiding officer:

(a) the name and address of the agent; and

(b) a letter of the appointment of the agent.

63. It is clear from these provisions that a party or candidate cannot be represented by an agent that the party or candidate has not appointed. A party that is not taking part in that particular contest cannot verify the results as the party has not submitted any names for that purpose to the returning officer. It was thereby an error for agents of parties that had not fielded candidates in the contest for Member of Parliament to verify results for that position.

64. The test, in my view, where agents for parties/candidates who had not fielded candidates but ended up verifying the results in forms 35A and 35B is whether this had an effect on the outcome of the result of the election. In **Nathif Jama Adam vs Abdikhaim Osman Mohamed & 3 others (2014)** eKLR it was held that it is not enough to point out errors in an election petition but it has to be shown how the error affected the result of the election. The petitioner has not established that the signing of the said forms by non-accredited agents had any effect on the result of the election.

Refusal of presiding officers to issue agents with copies of forms 35A:

65. In paragraph 39 of the petition, the petitioner stated that presiding officers refused to give his agents and those of other political parties forms 35A and that they failed to display them on the wall as required in some known polling stations making it impossible to verify the result. In paragraph 32 of the supporting affidavit the petitioner says that his agents complained to him that they were not given forms 35A to verify the tallies in a number of polling stations.

66. **Regulation 79(1)** of the Elections (General) Regulations require the presiding officer, the candidates or agents to sign the declaration in respect of the election. After the declaration is signed **regulation 79(2A) (c)** provides that the presiding officer shall:

Provide each candidate, political party, or their agent with a copy of the declaration of the results.

It is therefore a right of a party, candidate or agent to be provided with a copy of the declaration of results. The presiding officers who testified in court stated that they issued copies of the forms to the agents for the participating candidates.

67. Four witnesses for the petitioner – **Julia, Ong'ayo, Alusumba** and **Wachakana** - testified that after the exercise their respective presiding officers had declined to issue them with copies of forms 35As.

68. The petitioner stated in his evidence that he managed to collect 21 copies of forms 35A from the agents of other political parties that had taken part in the election because none of his agents had been issued with the same. The question then is how come that agents of other parties were being issued with copies of the forms and not a single agent of the petitioner was issued with a copy. The claim that the agents of the petitioner were not issued with copies of forms 35A is not believable. The petitioner may have deliberately refused to file the

documents issued to his agents as an excuse to file documents of dubious source. The claim that his agents were not issued with copies of forms 35A has not been established.

Claim on counting and computing:

69. **Regulation 76(2)(a) and (b)** of the **Elections (General) Regulations 2012** require the presiding officer during the counting of ballot papers to announce the candidate in whose favour the vote was cast and to display to the candidates or agents the ballot paper sufficiently for them to ascertain the vote.

70. The five witnesses for the petitioner stated that they were not allowed to verify the counting of the ballot papers and that the ballot papers were not being displayed to them to allow them verify the marks on them. The petitioner's witnesses No.1 (**Julia**) and No.5 (**Wachakana**) further stated that they requested for recount but that their requests were declined. The allegations were denied by the presiding officers in the alleged polling stations.

71. Three witnesses for the petitioner **Julia, Ong'ayo** and **Josphat Makenga** signed forms 35A for their respective polling stations. Some of them in addition signed IEBC diary that is signed after counting. The act of so doing meant that they were satisfied with the manner the counting was done and the end results declared. They cannot now turn around and claim that there was irregularity in the counting. I therefore do not believe their evidence that there was irregularity in the counting of the ballot papers.

The evidence of the petitioner's witness No.5 has been discredited. His evidence on the issue is therefore dismissed.

72. The petitioner did not tender in any evidence to prove that there was any problem in the counting and tallying of votes. The evidence that his agents were not given an opportunity to witness the counting processes was just an allegation without anything to back it up. There is no evidence to prove that there was irregularity in the manner the ballots were counted. There is no evidence that any of the agents was denied a request for re-count of the votes.

(4) Numerical inconsistencies:

73. In paragraph 50 of the petition, the petitioner alleges that in some known polling stations votes entered in form 35A differ with those that were entered in form 35B which votes had the effect of increasing the votes of the 3rd respondent. The petitioner however did not state the affected polling stations. No single station was identified to have had this problem. The allegation has thereby not been established.

74. In his application for scrutiny the petitioner filed 21 forms 35A in support of the application. He said that he was given copies of the said documents by his chief agent who had obtained them from agents of other political parties as his agents had not been issued with copies of the same by the presiding officers. He alleged that a comparison between the said forms and the forms filed by IEBC revealed that votes were being deducted from the other candidates and being credited to the 3rd respondent. The 21 forms filed by the petitioner contained material differences with the forms filed by IEBC. The petitioner did not call the agent and the people from whom the documents were obtained. Witnesses for IEBC who testified on the forms said that the forms were forged. Failure by the petitioner to call the people from whom the documents were obtained can only lead to the conclusion that the documents were forged. The petitioner cannot use documents whose source is unknown to challenge the documents filed by IEBC.

The claim that there were numerical differences in the votes entered in forms 35A and 35B has therefore not been established.

Electronic transmission of results:-

75. In paragraph 24 of the petition the petitioner complains that in some polling stations his agents did not witness the electronic transmission of the votes to the tallying centre. In paragraph 50 he avers that the votes were not transmitted electronically in accordance with the law.

76. **Regulation 82(1)** of the **Elections (General) Regulations 2012** requires the presiding officer to submit to the returning officer the results in an electronic form before ferrying the actual results of the election to the tallying venue.

77. The petitioner contends that electronic transmission of the results was required to be done in the presence of all agents of the candidates. That in some polling stations his agents were denied the chance to witness the vote transmission process and that some were ejected from polling stations.

78. The petitioner did not name the polling stations where his agents were denied the chance to witness the electronic transmission of the votes. The petitioner's witnesses No.3,4 and 5 stated that the presiding officers did not allow them to witness the electronic transmission of votes. The witnesses never contested that the results captured in form 35B were as announced at the tallying centre. The returning officer stated that all the polling stations transmitted the votes to the tallying centre electronically. That she waited for all the presiding officers to physically deliver the forms 35A to the tallying centre before she tallied the results. There are only mere assertions that results were not transmitted electronically to the tallying centre. There is no evidence to prove that this was not done. The fact the petitioner's witnesses did not dispute the results captured in form 35B makes the allegation a non-issue.

Failure to declare the results in the prescribed form:

79. In paragraph 40 of the supporting affidavit, the petitioner complains that the form used to declare the results is not the statutory form 35B

as required by the *Elections (General) Regulations 2012* but is the form 34B for the presidential tally which was changed by hand to read form 35B.

80. The advocates for the petitioner submitted that the results are void as they were not declared in the right form. That regulation 83(1)(e) of the *Elections (General) Regulations* makes it mandatory for the returning officer to complete the relevant form 35B, sign, date it and publicly declare the results. That the form used to declare the results must have all the necessary security features. That failure to use the prescribed form 35B renders the result invalid. The advocates cited the Supreme Court case of *Raila Amolo Odinga* 2017 (supra) where the court was faced with a question of authenticity of the form that was used to declare the results and rendered itself thus:

“[377] Form 34C, which was the instrument in which the final result was recorded and declared to the public, was itself not free from doubt of authenticity. This Form, as crucial as it was, bore neither a watermark, nor serial number. It was instead certified as being a true copy of the original.”

The advocates submitted that the results in this case are invalid.

81. The advocates for the respondents did not make a reply to these submissions.

It is clear that it is the presidential form 34A that was changed by hand to form 35B that was then used to declare the results. The question is whether this compromised the results of the election.

82. The form, though meant for the presidential declaration captures all the information that is required to be contained in the prescribed form 35B. The original form that was used to declare the results was produced in court. In my view the declaration of the results in the wrong form did not affect the result of the election. The results therefore stand.

Stuffing of ballot boxes:

83. In paragraph 22 of the petition, the petitioner alleged that there was breaking of seals of ballot boxes in some polling stations and ballot papers stuffed in the ballot boxes. The witnesses for the petitioner who claimed that there was ballot stuffing were Julia (PW1) and *Wilson Wachakana* (PW5). These allegations were denied by the presiding officers at the concerned polling stations.

84. *Wachakana* claimed in his supporting affidavit that after the close of voting, he and other agents were thrown out of the polling station. That when they returned, they noted that the seals to the ballot boxes had been broken and more ballot papers stuffed into the ballot boxes. However when the witness testified in court he retracted his evidence that they were thrown out of the polling room. He instead stated that they had been given a break after the close of polling. He also retracted the evidence that they had observed that the ballot boxes had been broken and said that the ballot boxes had not been broken. The refractory evidence of this witness is further proof, as already noted by the court, that he is not a credible witness. Such a witness is not worthy to believe as stated by the Court of Appeal in *Choge vs Republic* (1985) KLR

“If a witness had formerly said or written the contrary of that which he testified, unless a satisfactory reason is given to his having done so, his evidence should not have much weight except to show that he is not a credible witness.”

The witness wanted the court to believe that agents were thrown out, ballot boxes broken into and ballot papers stuffed into the ballot boxes. This is a most untrustworthy kind of a witness whose evidence cannot be relied upon to hold that there was ballot stuffing.

85. Julia claimed in her supporting affidavit that pre-marked ballots were stuffed into the ballot boxes. She however did not explain why she signed form 35A when there was such an illegality. Stuffing of ballot papers into a ballot box is a criminal offence and requires a high standard of proof which was not met in this case. I find no evidence that there was ballot stuffing.

Violence

86. The petitioner alleges in paragraph 28 of the petition that chaos erupted at Kochwa polling station between the supporters of *Lawrence Simboni Ndombi* and those of the 3rd respondent as a result of which a huge number of voters left the queues and went away and were therefore disenfranchised.

87. In paragraph 15 of the petition the petitioner alleges that on 7th August 2017 his agents were attacked by supporters of the 3rd respondent and left them injured. That this had the effect of compromising an environment of a free and fair elections.

88. Where violence in an election petition is alleged, the court is obliged to consider whether this affected the election and this would be so if it prevented voters from choosing a candidate of their choice. In *Muliro vs Musonye & Another* (2008) 2 KLR (EP) the court held thus:

“To the contrary, if any election is characterized and marred by violence of any kind to the extent of disenfranchising the voters this court shall consider whether or not the overall effect was such as to make that election a sham.”

89. *Julia Khaemba* testified that at Kochwa polling station there was a clash between the supporters of the 3rd respondent and those of *Lawrence Simbaoni* on the voting day as a result of which some people left the polling station and went away. Her evidence was that she thought that some people had gone away because the queue had shortened. There is no way of confirming this. The witness did not give the name of any person who went away because of the disturbance. No witness testified that he/she did not vote due to the disturbance. The

evidence that voters at Kochwa polling station were disfranchised by violence was not credible.

90. If the supporters of the petitioner were assaulted by supporters of the 3rd respondent on 7th August 2017, there was no evidence that any of them failed to vote due to the attack. The allegation that the attack compromised a free and fair election has not been proved

Bribery:

91. In paragraph 47 of the petition, the petitioner alleges that on the election day the agents of the 3rd respondent were giving cash to voters with a view to inducing them to vote for the 3rd respondent and escorting them to the polling stations and assisted them to vote under pretext of assisted voters with a view to ensuring they voted for the 3rd respondent, thus influencing the outcome of the election in favour of the 3rd respondent and hence compromised the integrity of the polls.

92. The *Election Offences Act No.37 of 2016* provides as follows:

9(1) A person who, during an election period –

(a) Directly or indirectly offers a bribe to influence a voter to –

(i) Vote or refrain from voting for a particular candidate or political party;

(ii) Attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending support to or for a political party or candidate;

(b) In any manner unlawfully influences the result of an election;

(c)

commits an offence.

93. In the Ugandan case in the *Presidential Election No.1 of 2001, Rtd Col. Dr. Kizza Besigye v Y K Museveni and Electoral Commission* the court stated that the offence of electoral bribery is not committed unless the gift, money or voter consideration is given or received by a person who is proved to be a registered voter. Justice Katurebe JSC stated that:

“... It is therefore not enough for a petitioner or any person to merely allege that agents gave money to voters; a high degree of specificity is required: the agent must be named, the receiver of the money must be named and he/she must be a voter. The purpose of the money must be to influence this voter.”

94. In the premises, for an offence of bribery to be established in an election petition, the act itself must be proved as well as a corrupt motive on the part of the giver and the receiver. The evidence adduced must establish that bribes were given to voters as a result of which they were influenced or there was an intention to influence them. It is only then that the court can safely arrive at the conclusion that the voters did not exercise their free will but were unduly influenced and consequently the integrity of the election was compromised. In this case the petitioner only made general allegations of bribery. The agents who gave out the money were not named. The voters who were given the money were not named. As was stated in *Joho vs Nyange & Another* (No.4) (2008) 3 KLR (EP) the generalized allegations as the ones made herein are not the kind of evidence required to prove that the agents of the 3rd respondent bribed voters on the election day. The allegation has thereby not been proved to the required standard.

Other complaints

95. The petitioner made several other complaints such as that security officers intimidated his agents and some instances threw them out of the polling stations thereby preventing them from verifying the results; that there was a lot of delay in transporting ballot boxes from the polling stations to the tallying centre and that the ballot boxes arrived at the tallying centre on 9th August 2017; that there was open bias by the returning officer against the petitioner; that there was destruction of electoral materials and that his chief agent was thrown out of the tallying centre for insisting that he wanted to verify the tallying at the table where the returning officer was tallying the votes from. No evidence was adduced to prove any of these allegations. The allegations are thereby dismissed.

(2) Whether the election was verifiable –

96. The petitioner complained that the returning officer declared the results before verifying forms 35As. His advocate submitted that this was supported by the evidence of the chief agent of the 3rd respondent who stated in his evidence that he did not see forms 35As at the tallying centre before the results were announced.

97. In paragraph 35 of the supporting affidavit the petitioner says that he went to Chebuyusi tallying centre after his chief agent informed him that he had been thrown out of the tallying centre for insisting that he wanted to verify the tallying at the table where the returning officer was tallying the votes since all the agents were kept away from the table. That he was allowed into the tallying centre after the tallying was complete.

The returning officer said that she had received the forms 35A from all the presiding officers before she tallied the results. The chief agent for the 3rd respondent said in his evidence that he did not see forms 35A at the tallying centre before the results were announced.

98. It is clear that the petitioner was not at the tallying centre when tallying was going on. He went there after tallying was complete. His chief agent who was at the tallying centre did not testify in this case. The petitioner then cannot know whether or not the returning officer had received the forms 35As before she announced the results. If it is true that agents were kept away from the tallying table that would explain the evidence of the chief agent for the 3rd respondent that he did not see forms 35A at the tallying centre before the results were announced. The fact that the witness did not see the forms at the tallying centre before the results were announced does not mean that the returning officer could not possibly have received the forms before she announced the results. There is no evidence that the returning officer tallied the results before she received forms 35A from presiding officers.

99. The returning officer is required to tally the results in reliance on the physical forms 35As and not the electronic results sent to the tallying centre. **Regulation 82 (1)** require the presiding officer to submit to the returning officer the results in electronic form before ferrying the actual results to the returning officer.

Sub-section 2 provides that:

The results submitted under sub-regulation (1) shall be provisional and subject to confirmation after the procedure described in regulation 76.

100. This means that any electronic results sent to the tallying centre are provisional pending the finalization of the counting process. The conduct of an election for Member of Parliament is manual. The presiding officers are required to physically deliver forms 35A to the tallying centre after counting and tallying. It is therefore the results contained in the physical forms 35A that are used for tallying. In **Jackton Nyanungo Ranguma vs Independent Electoral & Boundaries Commission, Kisumu** Election Petition No.3 of 2017 [Election for Governor for Kisumu County) **Majanja J** when considering the issue of electronic transmission of votes in the gubernatorial contest stated that:

“Unless forms 37A are disputed, any errors in election transmission of results or publication in IEBC public portal cannot, of themselves and without more, invalidate forms 37A. Where the results are electronically transmitted from the polling station to any other portal as the IEBC may direct, such results can only be termed as provisional thus underlining the primacy and finality of form 37A.”

101. The petitioner herein had agents in all the voting centres. More than half of the forms 35A that were filed in court are signed by the agents of the petitioner. None of the agents who signed the forms appeared in court to dispute the results contained therein. I then have no reason to doubt the evidence of the returning officer that she tallied results from forms 35A.

102. The advocates for the petitioner referred to 14 forms 35A that have the words “copy, copy copy” from the following polling stations – **Matoi, Chebuyusi, shihankha, Naulu, Lutaso, Bumamu, Ebushibo, Ingotse, Tumaini, Khandara, Emwakhumbi, Sidikho, Sikokhe and Muregu**. The advocate wondered where the copies were produced from at the time of filing the response when the original documents had been taken to IEBC headquarters. The advocates submitted that the source of the forms is suspect. I have looked at the said documents. Seven of those documents are indicated to have been signed by agents of the petitioner. These are for **Matoi, Chebuyusi, Shihankha, Bumamu, Ebushibo, Tumaini** and **Emwakhumbi** polling stations. If the forms are suspect then the petitioner should have called his agents to deny that they signed the documents. The petitioner has not produced any witness who has disowned the documents. There is no dispute on the results declared therein. There is then no basis for doubting the authenticity of the documents.

103. The returning officer said that it is only two polling stations, **Naluchira** and **Nambacha**, that did not deliver to her the original forms 35A but that the two stations had electronically transmitted the results to the tallying centre. The results for the two polling stations have been filed. The issue came out during cross-examination of the returning officer and was not pleaded. It has not been shown how the loss of the two original forms affected the result of the election. This by itself is not enough to vitiate an election as was stated in **Raila Odinga 2017 petition** (supra) (par.208) that procedural and administrative irregularities and other errors occasioned by human imperfections are not enough by themselves to vitiate an election.

104. The returning officer stated that some of the forms 35A that they filed in court were scanned from the scanned copies of the documents that were in the KIEMS kit and some were copies of the original documents. 19 of the original documents were filed in court after an order of the court. The said 19 forms were similar in every respect to the forms that had been filed by IEBC when they filed their response. There is then no reason to doubt the credibility of the forms filed in court by IEBC.

105. The advocates for the petitioner submitted that there was room for manipulation of results because the presiding officers were issued with more copies of forms 35A booklets than was required. That the presiding officers did not account for the forms issued to them. However it was not enough for the petitioner to allege that the results could have been manipulated. The petitioner had to produce evidence of manipulation of the results which evidence was lacking.

106. The petitioner tendered evidence that he tried to procure copies of forms 35A and 35B from the returning officer to no avail. The presiding officer admitted that she had copies of the said documents in the office in the KIEMS kit. The returning officer in that case deliberately refused to issue the petitioner with copies of the forms. This however is in my view an administrative issue that had no effect on the result of the election and cannot vitiate an election.

107. It was clear from the evidence of the presiding officers who testified that agents for the parties were signing other IEBC forms such as certificate of closure of the poll before counting, confirmation by agents present during the sealing of packets, affirmation of records of seals by agents at closure of counting, etc. which indicated the measures that had been put into place to ensure that the election was transparent and

credible. It is my conclusion that the documents placed before the court are verifiable and do clearly verify the result for Navakholo Constituency.

(3). Whether the election was conducted in conformity with the law –

108. **Section 83** of the Elections Act, 2011 provides that:-

“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.”

109. In **Gatirau Peter Munya** case (supra) the Supreme Court stated that where it is shown that an election was conducted substantially in accordance with the Constitution and the Elections Act, such an election is not to be invalidated only on grounds of irregularities. However that where it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. The court added that procedural or administrative irregularities are not enough, by themselves, to invalidate an election.

110. In **Joho v Nyange & Another** (No4) (2008) eKLR (EP) **Maraga J** (as he then was) recognized that there cannot be a perfect election. Said he that:

“... because it (election) is conducted by human beings, there are bound to be errors which can be explained. There is no election which can be perfectly conducted. However, it is only when such errors, which constitute non-compliance with the law, materially affects the outcome of the results that the court will have no option other than to nullify the said results.”

In **Dr Thuo Mathenge & another vs Nderitu Gachagua & 2 others** (2013) eKLR the court of appeal set the threshold of a fair and free election as -

“... one which complies with the electoral law and/or which despite non-compliance does not affect the results which reflect the will of the electorate. The election must therefore substantially conform to the existing law.”

111. An election petition can only be vitiated where it is conducted in such a manner that it does not substantially conform with the law. In this case it has been established that there were some errors and irregularities committed in the course of conducting the election. However the errors which were noted were minor and were not of such a magnitude that they called into question the integrity of the election conducted in Navakholo Constituency. I am satisfied from the totality of the evidence that the election was conducted substantially in conformity with the Constitution, the Elections Act 2011 and the rules and regulations made thereunder. The residents of Navakholo Constituency were given an opportunity to elect a representative of their choice. They exercised their free will and the majority elected the 3rd respondent. The decision for the majority has to be respected as that is the tenet of our democracy. I accordingly hold that the 3rd respondent was validly elected Member of National Assembly for Navakholo Constituency.

112. In the foregoing the petitioner has not discharged the burden placed on him to establish the allegations he made against the respondents. The petition is devoid of merits and is dismissed accordingly.

Costs:

113. Under **regulation 30(1)** of the Elections Rules an election court may at the conclusion of a petition make an order specifying –

- (a) the total amount of costs payable
- (b) the maximum amount of costs payable.
- (c) the person who shall pay the costs under paragraph (a) and (b)
- (d) the person to whom the costs payable under paragraph (a) and (b) shall be paid.

Costs follow the event. I award costs of the petition to the respondents.

114. The court has noted that the advocates representing the respondents are based in Nairobi, except Mr Abok who is based at Kakamega and appeared in the matter while holding brief for Hassan Mutembei & Co. Advocates. I have taken into account that there must have been a lot of time spent in research, preparation of pleadings, submissions and the actual hearing. In **Thomas Matwetwe Nyamache vs Independent Electoral & Boundaries Commission & 2 others Kisii (EP) No 8 of 2017 (2018) eKLR Omondi J** capped costs for 1st and 2nd respondent at 1.5 million and for 3rd respondent at 2 million. In **Francis Mwangangi vs Independent Electoral & Boundaries Commission & 2 others Machakos High Court (EP) 2 for 2017 (2018) eKLR Muchelule J** awarded costs of 2.5 million to the 1st and 2nd respondents and 2.5 million to the 3rd respondent. In this case the 3rd respondent has asked for an award of costs of Kshs.6 million. The other advocates did not submit on the issue. I cap the maximum amount payable to the 1st and 2nd respondents at Kshs. 2.5 million and for the 3rd respondent at Kshs. 2.5 million. The costs shall be taxed by the Deputy Registrar of this court. The deposit made in court by the petitioner to remain so deposited pending taxation upon which it will be paid to the respondents on equal basis.

Pursuant to **section 86(1)** of the Elections Act 2011, a certificate of this court's determination to issue to the Speaker of the National Assembly.

Delivered, dated and signed at Kakamega this 2nd day of March, 2018.

J. NJAGI

JUDGE

In the presence of:

Mr Awanda H/B Ashioya for petitioner

Mr Abok for 1 & 2 respondents

Mr Namanda and Mr Mulanya for 3rd respondent

George court assistant