



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KABARNET**

**ELECTION PETITION NO. 1 OF 2017**

**IN THE MATTER OF THE CHALLENGE OF THE VALIDITY OF THE ELDAMA RAVINE  
CONSTITUENCY ELECTION, 2017.**

**AND**

**IN THE MATTER OF ARTICLE 1(1) 2(2), 3(1), 4(2), 10, 21(1), 22(1), 23; 38(3)(C), 47 (2), 48;81  
(A) & (E), 82(2) (B); 84, 86, 87 (2) & 3, 88(5), 165(3)(A) AND (E), 94, 97 & 101 OF THE  
CONSTITUTION OF KENYA.**

**AND**

**IN THE MATTER OF SECTIONS 75, 76, 80 AND 82 OF ELECTIONS ACT NO. 24 OF 2011.**

**AND**

**IN THE MATTER OF THE POLITICAL PARTIES ACT NO. 11 OF 2011**

**AND**

**IN THE MATTER OF LEGAL NOTICE NO. 128 OF 2012. THE ELECTIONS (GENERAL)  
REGULATIONS, 2012**

**AND**

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

**AND**

**IN THE MATTER OF LEGAL NOTICE NO. 126 OF 2012 (THE ELECTIONS REGISTRATION  
OF VOTERS) REGULATIONS, 2012**

**AND**

**MUSA CHERUTICH SIRMA.....PETITIONER**

**VERSUS**

**THE INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION (I.E.B.C).....1<sup>ST</sup> RESPONDENT**

**THE ELDAMA RAVINE CONSTITUENCY RETURNING OFFICER**

**(NDIRANGU PETER KURIA).....2<sup>ND</sup> RESPONDENT**

**MOSES LESSONET.....3<sup>RD</sup> RESPONDENT**

### **JUDGMENT**

#### **The Petitioner**

The Petition herein is dated 5<sup>th</sup> September 2017. It was filed the same day. The Petitioner; Mr. Musa Cherutich Sirma was a candidate for election to the office of Member of National Assembly for Eldama Ravine Constituency in the General Election held on 8<sup>th</sup> August 2017.

The 1<sup>st</sup> Respondent is the Independent Electoral and Boundaries Commission which is a Constitutional organ established under Article 88 of the Constitution. It is governed by the Constitution and the Independent Electoral and Boundaries Act (Act No. 9 of 2011). The 2<sup>nd</sup> Respondent is sued as the Constituency Returning Officer of the 1<sup>st</sup> Respondent who was charged to conducting a free and fair elections in Eldama Ravine Constituency and he was to declare results in that Constituency. The 3<sup>rd</sup> Respondent was also a candidate for the position of Member of National Assembly for Eldama Ravine Constituency in the General Elections held on 8<sup>th</sup> August, 2017 and he was declared the winner.

#### **Background**

The Petitioner states that he was a contestant together with Mr. Moses Lessonet and Bore Emanuel Ngetuny who vied for the Member of the National Assembly for Eldama Ravine Constituency on the 8<sup>th</sup> August 2017.

This Petition is based on Article 22(1), 23(1), 24(1), 38(3)(c), 47(1), 81(a), (d) and (e), 82(1) (d), 82(2), 83, 84, 86, 87(2), 87(3), 97(1), 101 and 259(1) of the Constitution which provides that the Constitution shall be interpreted in a manner that promotes it's purposes, advance & the rule of law and human rights and fundamental freedoms in the Bill of Rights.

In the Election Act No. 24 of 2011 he relies on section 3(1), 16, 30, 38(A), 39, 44(1), 44(A), 76(1), 76(2), 80(1), 82(2) and Section 82(3).

The following Regulations in the Elections (General) Regulations, 2012 are relied upon Regulation 3, 4, 5, 6, 11(4), 12, 22, 57a (1), 59(3), 69, 69(1)(e), 69(2), 70, 72, 74(1), 74(2), 74(4)(d), 76, 77, 79, 79 (2A), 79(3), 79(6) & 7, 81, 82, 83, 84, 85, 86, 87 and 87 (2) (a). Regulation & 82 (1) provides that Provisional results ought to be transmitted electronically before ferrying the actual results to the tallying Centre and Regulation 79(6) & 7 provides that the failure and/or refusal to sign a declaration form shall not by itself invalidate the results announced.

The Petitioner relies on the following under the Elections (Technology) Regulations, 2017; Regulation 8, 9, 26(1), 26 (2), 26(3) and 26(4). Regulation 26 (2) provides that before suspending or terminating the use of election technology:

*(a) The clerk at the polling station shall inform the Presiding Officer of the failure of the technology.*

*(b) The Presiding Officer at the polling station shall retry the system to confirm the failure of the technology.*

*(c) The Presiding Officer at the polling station shall document the incident on an incident report in the polling station diary which shall be signed by all the agents.*

*(d) The Presiding Officer shall notify the returning officer of the failure to submit a copy of the incident report.*

*(e) The Returning Officer shall inform the director in charge of information communication and technology of the incident and advise on the suspension or termination of the use of the election technology.*

*(f) The Returning Officer shall approve the request for suspension of the use of technology based on the advice under paragraph (e) and invoke the complementary mechanism.*

The Petitioner is a registered voter in Kiplong'on Primary School, Mumberes/MajiMazuri Ward, Eldama Ravine Constituency. He was eligible for election as a member of the National Assembly for Eldama Ravine Constituency during the Elections held on 8<sup>th</sup> August 2017 as provided under Article 101 of the Constitution of Kenya 2010. His Constitutional Right under Article 38(3) to be validly elected has been infringed on by invalidly announcing the 3<sup>rd</sup> Respondent as the winner in the Elections. This was because the 1<sup>st</sup> Respondents did not oversee a valid election in the Eldama Ravine Constituency Member of National Assembly.

The 1<sup>st</sup> Respondent compiled a principal register of voters whereby it announced that Eldama Ravine Constituency had 54, 742 votes. The Petitioner was an Independent Candidate under Section 13(1) of the Election Act, 2011 vying in the County, and in furtherance of its mandate conferred by Article 89 of the Constitution all constituencies in Baringo County were listed. On the 22<sup>nd</sup> August 2017 the 1<sup>st</sup> Respondent issued a Gazette Notice No. 8239 indicating names of all candidates in the 290 Constituencies in the whole country including the name of the 3<sup>rd</sup> Respondent.

Pursuant to Article 101(1) and Section 24 and 31 of the Elections Act, 2011 the Petitioner was cleared to vie for the member of the National Assembly Eldama Ravine Constituency. The Petitioner was issued with a nomination certificate and his name was listed as one of the candidate. He duly complied with the Elections Act, 2011 during the period before and after the 8<sup>th</sup> August 2017 elections as provided in the Electoral code of conduct. He appointed his own agents as provided in Section 30(3) of the Elections Act 2011 and Regulation 57 (1) of the Elections (General) Regulations 2012. He alleged that those agents were deliberately locked out of the polling stations by the agents of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and with the help of the rowdy youth and women aligned to the 3<sup>rd</sup> Respondent. This was a move to stuff the ballot boxes with ballot papers and inflate the votes attributable to the 3<sup>rd</sup> Respondent while reducing on votes to the Petitioner.

The Petitioner alleged that the Respondent did not comply with the Electoral code of conduct especially the 3<sup>rd</sup> Respondent who held campaign rallies beyond the campaign period. He also directly and indirectly offered bribes to influence voters to vote for him and not vote for the Petitioner. In addition there was violence, threats and intimidation of the Petitioner's supporters which was an election offence. As a tactic to scare his voters. The 3<sup>rd</sup> Respondent also conducted unfair campaigns which was characterized by unfounded and malicious propaganda for instance the 3<sup>rd</sup> Respondent would carry T-shirts that had his name and image together with those of Honourable Raila Amollo which made the battle ground unfair to him.

It was the Petitioner's claim that the elections was marred with irregularities and fraud such as rigging and other maneuvering and machination that was discovered during the voting process at various polling stations specifically Mwachon Primary Kipkoriony, Tolmo, Bikwen, Nyakio, Kagama, Orapyemit, Sachangwan, Shimon Nursery, Nyakio 1,2,3, Emkwen, Torongo Primary, Seguton, Boito Primary Town Council, Stadium hall, MajiMazuri Catholic School, Momomiat, Sabatia, Mochongoi, Kapkitet, Esageri, Kanjulul, Muserechi, Naitili, Kikorwonin Polling centres, Mumberes primary school, Chepsito polling

centre, Kapdening Primary, and Milimani Nursery Polling Stations.

The acts and omissions therein were so many that one would question whether the said results were the true, lawful and a proper expression of the will of the voters in Eldama Ravine Constituency. The Petitioner further alleged that the Elections was conducted in a manner substantially inconsistent with the provisions of the Constitution in particular Articles 1, 3, 27, 38, 81 and 86 of the Constitution of Kenya, 2010. This was a deliberate and pre-meditated non-compliance with the Constitution which jeopardized the electoral process in various ways.

### **Disenfranchisement**

a) It is the Petitioner's contention that an election is a process that begins with registration of voters, nomination of candidates to the actual electoral officers, voting or counting and tallying of votes and finally declaration of the winner by Gazettement. The entire process was flawed. The appointing of the Presiding Officers and Deputy Presiding Officer (D.P.Os) was not carried out in a transparent and competitive manner. Regulation 5(2) of the Elections (General) Regulations, 2012 was not complied by the 1<sup>st</sup> Respondent. A list of persons proposed for appointment was not given to the Petitioner's political party prior to appointments. Several people applied but only 308 were shortlisted. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents only appointed their own people. For example Mrs. Sophia Yegon who is a school head teacher and a close friend to the 3<sup>rd</sup> Respondent was appointed as the Presiding Officer at Eldama Ravine County council hall.

b) The Petitioner alleged that the 1<sup>st</sup> Respondent's agent colluded with the 3<sup>rd</sup> Respondent who admitted strangers to the polling station and they placed agents that were unknown to the Petitioner. Further NASA and ODM agents were allowed to the polling stations who were affiliated to the 3<sup>rd</sup> Respondent and this affected the Petitioner in regards to disputed votes.

### **Complaint**

c) The Petitioner alleged that the statutory Forms 35A were either signed by strangers or some were not signed at all rendering the results invalid and unconstitutional. It is as a result of the agents and proxies to the 3<sup>rd</sup> Respondent that, the Petitioner garnered 20, 206 votes and the 3<sup>rd</sup> Respondent garnered 20,669.

d) Further several Forms 35A had alterations on the face of the forms. The alterations were not countersigned which is a violation of the law. Thus those entries in Forms 35A cannot be ascertained and should be deemed as rejected.

e) Regulation 79 (1) of Election (General) Regulations requires the Presiding Officer to sign the declaration. Presiding Officer failed to sign Forms 35A thus invalidating the results. In addition to this, the agents too did not sign Forms 35A. There were no reasons given for the failure to sign the forms. For example Equator Primary School agents were given copies of Forms 35A which had not been signed. This happened in stations manned by strangers and the figures had been illegally altered.

f) The Petitioner alleged that his agents were assaulted and chased away from various polling stations in the presence of Police Officers during the voting exercise especially in Maji Mazuri and Eldama Ravine town council Hall. Therefore they did not observe the voting processes, the counting and tallying of results. Whenever the independent agents raised objections on the electoral misconducts and/or malpractices they were ignored or chased away. The I.E.B.C officers had an opportunity to stuff the ballot boxes and use the manual voter identification system without following the due process of the law. The Petitioner's request to be supplied with Forms 35As for the various polling centers, was rejected.

g) Further the Petitioner alleges that the KIEMS Kit was not used in most polling stations. The

KIEMS would enable biometric voter registration, electronic voter identification and electronic results transmission. Before the 8<sup>th</sup> August 2017, the ICT was put in place as required under the provisions of Sections 44(1) of the Election Act and Article 81 of the Constitution. The voting system was to be simple, accurate, verifiable, secure, accountable and transparent as provided under Article 86 read with Section 4(m) of the I.E.B.C Act. No agent or Presiding Officer signed any report on failure of the KIEMS system to justify the use of the complementary system. The officers went further and filled many Forms 32A without giving the Petitioner's agents to witness the same. The said complementary system was to be used upon the Presiding Officer getting approval from the commission that the KIEMS Kits had completely failed and there was no possibility of repair or replacement. He urged the court to scrutinize the logs in the KIEMS to demonstrate that the KIEMS machines were either used partially or not used at all to find out whether there was an electoral malpractice such as ballot stuffing and double voting. This method of complementary voter identification system was a pre-meditated move to allow electoral malpractices that would see the 3<sup>rd</sup> Respondent illegally garner majority of the votes. The 3<sup>rd</sup> Respondent could not have been validly elected as the Member of Parliament for Eldama Ravine Constituency.

That in Sabatia Cooperative Society polling station which is in Perkeru Ward, voters were given 5 ballot papers instead of 6 which was for the position of Member of National Assembly. The Returning Officers and Presiding Officers did not sort out this problem. The results declared in the official website and the results contained in the Form 35B were completely different. Forms 35B did not indicate any vote to have been objected yet the website indicated 7 objected votes.

It is his petition that the Presiding Officers and the Deputy Presiding Officers proceeded to illegally fill the rest of the ballot papers for voters. They took advantage of the high level of illiteracy. The agents were never involved. Further since the voter was given 6 ballot papers, the total voter turnout and the total votes cast for the various positions would not differ in any way. This was an indication that there was gross and criminal manipulation of the electoral process.

It is the Petitioner's contention that the Presiding Officers (POs) refused to display the results of the elections on the doors of the polling stations contrary to Regulation 79 (2A) (d) of the Elections (General) Regulations, 2012. The Forms 35A were to be filled at the respective polling stations which was not the case. Further the polling stations were allowed to open beyond the officially prescribed time and in some stations voting went on till the 9<sup>th</sup> August 2017. This was done to assist the 3<sup>rd</sup> Respondent gain victory.

That the 3<sup>rd</sup> Respondent committed various election offences and malpractices including: campaigning despite the campaign period having been closed on the 6<sup>th</sup> August 2017, directly and indirectly offering bribes to influence voters to vote for him; using violence and threats to intimidate the would be supporters of the Petitioners and unlawfully influencing the outcome of the elections.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents through their officers and agents refused or rejected to count any ballot paper which they knew or had reasonable cause to believe was validly cast for the Petitioner though they counted the same for the 3<sup>rd</sup> Respondent thus giving him an undue disadvantage. The officers did not report the malpractices to the commission. The ballot boxes from MajiMazuri, Timboroa and Seguton polling stations were not taken to the tallying center.

Once the Petitioner discovered that there were such irregularities and fraud; he raised the issues with officials of the 1<sup>st</sup> Respondent but the same was not resolved. Hence he was deprived of a fair opportunity and chance to be elected to the said seat as provided by the law. It is for the above breaches, violations, contraventions, complaints and non-compliance which affected the outcome of the said election. He prays for the following declarations and orders.

*a) There be an inspection of the ballot boxes, scrutiny, recount and re-tallying of the votes cast and recorded as having been cast in the said election in Eldama Ravine constituency and all its 154 polling stations.*

- b) *The 1<sup>st</sup> and 2<sup>nd</sup> Respondent be compelled to produce all Forms 32As used in the elections indicating the number of people who voted manually.*
- c) *A scrutiny on the KIEMS Kits used in all the 154 polling stations in Eldama Ravine Constituency.*
- d) *Production of all the polling station diaries used in all the polling stations in Eldama Ravine constituency.*
- e) *A declaration do issue that Moses Lessonet, the 3<sup>rd</sup> Respondent herein where election is questioned, was wrongfully returned by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents as the member of the National Assembly Eldama Ravine Constituency.*
- f) *A declaration do issue that Moses Lessonet, the 3<sup>rd</sup> Respondent herein, whose election is questioned, was not validly elected on 8<sup>th</sup> August 2017 general elections as the Member of the National Assembly for Eldama Ravine Constituency.*
- g) *An order cancelling the certificate of declaration of results of Member of Parliament Eldama Ravine Constituency election 2017, Form 35C issued to the 3<sup>rd</sup> Respondent Moses Lessonet.*
- h) *A declaration that the Petitioner Musa Cherutich Sirma was the duly elected member of Parliament Eldama Ravine Constituency from the elections conducted on 8<sup>th</sup> August 2017.*
- i) *That a declaratory order be made forbidding Hon. Moses Lessonet from ever vying as a candidate in the entire election again and or holding public office.*
- j) *The Respondents be condemned to pay Petitioner's cost of and incidental to this petition.*
- k) *An order do issue for the forthwith release of the Deposit of security for costs paid into the court by the Petitioner in furtherance of Section 78(5) of the Elections Act, 2011.*
- l) *An order do issue citing elections officials.*

## **RESPONSES**

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

In response to the Petition, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents aver that the election of the Member of the National Assembly, Eldama Ravine Constituency was free, fair, credible and verifiable and should therefore be upheld. It is their contention that the Petitioner has not been deprived of his Constitutional right to be validly elected as member of the National Assembly. It is not true that the Petitioner's agents were denied access to the polling station. The Petitioner did not identify the specific polling stations.

The said respondents averred that the election was not marred with voter bribery and there were no campaigns rallies beyond the campaign period. There were no irregularities and fraud such as rigging which the Petitioner claims in the petition. The Election was carried out in accordance with the law as opposed to the Petitioner's claim.

In respect to deployment of Presiding Officers and Deputy Presiding Officers, it is their averment that they were appointed after a competitive process. The vacancies were advertised, interviews were conducted and the candidates were presented before the candidates to weed out any issues of partiality. No complaint was lodged during that time by the Petitioner. The list of successful applicants was circulated amongst the candidates before the election date. They denied that Form 35As were signed by strangers and said agents present if at all there was a wrongful act at the polling station, the agents had a duty to raise a complaint without delay and the same would be addressed. The signed Forms 35A did not

have any alterations and if there was any complaint it should have been raised polling station. All the Forms 35A were received from all the 154 polling station and they were duly signed by their respective Presiding Officers as required by the law. The Presiding Officer's had no control over the Petitioner's agents who had opted to walk out of the polling stations and refused to sign. They denied especially that any agents who raised objections were either ignored or chased away. The Petitioner was supplied with Forms 35A upon request and the same had also been supplied to his agents.

The KIEMS that had been provided for use during voting were in operation throughout the process from voter identification to results transmission and there was no complementary manual (register) system used. The integrity of the system was not compromised as the KIEMS Kit would register an error if the number of voters cast exceeded the number of registered voters. There was no case whereby number of votes casts exceeded the number of registered voters thus the Petitioner's allegations are merely speculative. They contended that the Petitioner relied on the Presidential Petition No. 1 of 2017 yet the circumstances of the Parliamentary election and the Presidential one were fundamentally different. An extra Form 35A was posted at the door of the respective polling stations as required under Regulation 79(2A) (d) of the Elections (General) Regulations 2012. No Forms 35A are filled at the Constituency Tallying Centre and voters were issued with 6 ballot papers as opposed to the Petitioners claim. All election materials including ballot boxes were presented at the Constituency Tallying Centre.

The said Respondents urged that here should be no recount and scrutiny for the reason that the Petitioner did not lay a basis for a recount as Form 35A which are the primary data had been provided. The Petitioner has not outlined the irregularities during the vote counting process and he has not shown any failure of technology or hacking to warrant scrutiny of the KIEMS Kit.

In addition to the above, they contend that a recount is a means to a remedy where there are serious allegations of irregularities which is not in this case. The results that were announced represented the will of the electorate of Eldama Ravine Constituency since the election was conducted in a transparent, credible, verifiable and lawful manner. During the entire election process they remained neutral and unbiased. Further the technology that was adopted in the 2017 elections made it impossible for any voter to cast his or her vote to more than once and there was no way the 3<sup>rd</sup> Respondents supporters could benefit.

Finally it is urged that the petition is without merit, is largely speculative and lacks particulars and that the 3<sup>rd</sup> Respondent Moses Lessonet was duly elected.

The response was supported by an affidavit Ndirangu Peter Kuria the 2<sup>nd</sup> respondent who swore a replying Affidavit on 25/09/17.

### **The 3<sup>rd</sup> Respondent's Response**

It is his contention that he was validly elected and not purportedly elected. That he garnered the largest number of votes and the election was conducted in accordance with the Constitution, the Independent Electoral and Boundaries Commission Act, the Elections Act and the Regulations. The petition is based on general claims with no specificity. That indeed he was declared the winner by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the 9<sup>th</sup> August 2017 and the same was gazetted on 22<sup>nd</sup> August 2017 pursuant to the Constitution.

The Petitioner did not comply with the provisions of the Elections Act, 2011. Who conducted campaign rallies after the close of the election campaign timelines which was a gross violation of the Elections Act and the Elections Code of conduct. He also wore campaign apparels branded Jubilee Party logos and canvassing as a member yet he was vying as an Independent candidate.

That all the candidates' agents were present at their respective polling stations in Eldama Ravine Constituency and the Petitioner's agents could not have been locked out of a polling station unless they were in breach of the ethical conduct. He complied with the electoral code. It is not true that he

campaigned or held rallies beyond the campaign period.

The Petitioner's allegations that he committed multiple election offences and malpractices are untrue. There was no fraud, rigging or any maneuvering during the voting process, before or after and during the counting process of the votes at the various polling stations. The elections of the seat of the member of the National Assembly in Eldama Ravine Constituency was carried out in accordance with the Constitution of Kenya. Posting of the Presiding Officers and the Deputy Presiding Officers was based on the qualification attained and there were no partisan officials deployed in his favour.

The alterations of the forms is denied and the results were read from signed Statutory Forms 35B. The process involved in the election including voting, counting of votes and transmission of results was in accordance with the Constitution and all the applicable Election Laws. The KIEMS Kit was used in the voting process and if the complementary system was used then the Form 32A was duly filled as prescribed by the regulations. Therefore a voter could not vote more than once as alleged by the Petitioner.

The allegation by the Petitioner that there was objected votes as seen in the 1<sup>st</sup> Respondents website, and that he benefitted from the 714 spoilt votes in the Presidential results are claims without proof. The omission by the Petitioner's agents to sign the relevant forms is false. All the agents at the polling station are required to sign the forms. The polling stations were closed down at the stipulated time and a polling station that was closed after the required time was because of the voters who were still in the queue.

It is his averment that the petition is based on claims that are mere falsehoods, allegations and hearsay which the Petitioner has not provided proof of. The results as declared by the 2<sup>nd</sup> Respondent represented the true will of the people of Eldama Ravine Constituency. The petition has been brought in bad faith to subvert the sovereign will and the right of the people to elect their leaders of choice. He prayed for the following specific orders:

*a) The Respondents were not in breach of and did not contravene the provisions of the Constitution, the Elections Act or of any other statute.*

*b) The election of Member of National Assembly for Eldama Ravine Constituency was conducted in accordance with the Constitution and the Elections Act and all other relevant statutes and a valid declaration of the outcome of the election made.*

*c) The 3<sup>rd</sup> Respondent was validly elected as the member of National Assembly for Eldama Ravine Constituency.*

*d) The Petition lacks merit and should be dismissed as the Petition has not brought a single agent but impostors, busybodies and charlatans.*

*e) The Petitioner should bear the costs of the Petition.*

The response was supported by his Affidavit sworn on 25.09.2017.

### **Interlocutory applications**

The Petitioner filed an application dated 5/9/17 for preservation of electoral materials so that they are not tampered with the ballot boxes. The Petitioner's advocate appeared in court on 19/9/17 seeking to amend the application dated 5/9/17. The court granted the Petitioner to file and serve an amended Notice of Motion including a prayer for preservation of the ballot boxes and the Respondents were to file and serve responses. The application sought for an order to be issued to the 1<sup>st</sup> Respondent and its agents to keep all electoral materials under lock and key to secure all electoral material, that the Certificate of election of the 3<sup>rd</sup> Respondent as member of Parliament, be ordered cancelled and an interlocutory injunction do issue, restraining the 1<sup>st</sup> Respondent from recognizing the results of the 2<sup>nd</sup> Respondent. The parties

canvassed this application in court. The court ordered that pre-trial directions be issued on 4.10.17.

The parties on 4.10.17 agreed that the copies of results of each polling station in the National Assembly Member of Parliament Eldama Ravine Constituency Baringo county and the issue on packets of spoilt ballot papers in the specified election was not contested upon production of Form 32A and the polling diaries during hearing. Further the parties agreed on the contested issues as follows:

- 1. Whether on the basis of evidence presented here should be inspection of the ballot boxes and scrutiny recount and retallying of the votes. Prayer no. (a) of the petition.*
- 2. Whether there were any irregularities in law and in fact during the elections held on the 8.8.17 as to warrant the declaration that 3<sup>rd</sup> respondent was not validly elected as MP for Eldama Ravine and to have certificate of declaration issued to the candidate. Prayers (e), (f), and (g) of the petition.*
- 3. Whether sufficient evidence and legal basis has been laid to warrant scrutiny of the KIEMS kit in all 154 polling stations and whether such an order is enforceable given the position taken by 1<sup>st</sup> and 2<sup>nd</sup> respondents and on availability of the KIEMS kit prayer no. (c) of the petition.*
- 4. Whether arising from the evidence availed the petitioner should be declared validly elected MP of his parliamentary election of Eldama Ravine constituency. Prayer no. (h) of the petition.*
- 5. Whether the petition has proved the commission of election related offence or whether there is any prove of person capable of such offence if any prayer (l) of the petition.*
- 6. Whether the petitioner has approached the court with clean hands raised by 3<sup>rd</sup> respondent.*
- 7. Whether there is any basis for finding that the 3<sup>rd</sup> respondent should be barred from vying again or holding a public office prayer no. (i) of the petition.*
- 8. Who pays the costs of the petition prayer no. (j) of the petition.*
- 9. What is the fate of the deposit of security for costs.*
- 10. Whether the court should not make any further order or grant any other relief. Prayer (m) of the petition.*

The parties further agreed that the issues raised could be canvassed and proved by oral evidence based on Affidavits filed. The court ordered that a party that wished to adduce electronic evidence to do so subject to compliance with the law. However the 3<sup>rd</sup> Respondent later during oral evidence abandoned the production of evidence electronic evidence. The court directed that pursuant to Rule 16(3) &(5) of the Election Petition Rules, 2017, the ballot boxes of the Eldama Ravine Constituency shall be in the custody of the 1<sup>st</sup> Respondent. The Petitioner, Respondents and their advocates or agents shall witness to the placement of additional seals on the ballot boxes. The same process was carried out on 6.10.17 and the Deputy Registrar prepared a report to that effect.

The Petitioner was granted leave to file Supplementary Affidavits to allow experts testify. The Petitioner's Supplementary Affidavits sworn on 21.1.18 was expunged from the courts record. The Petitioner abandoned his application for scrutiny.

The hearing of the petition commenced on 30.1.18 and evidence was taken as follows;

## **EVIDENCE**

## **PW1 – Benson Wasonga Ouma**

a) He testified that he was a software Developer who has a Bachelors of Science in I.T from Jomo Kenyatta University of Agriculture. He has worked as a consultant for UN, UNDP on document management Security on digitization in Kenya, Rwanda and Uganda. He was involved in Petition No. 1 of 2017 in the Supreme Court as an I.T expert. He was given access to the KIEMS to scrutinize the SD Card at the IEBC offices in Nakuru. He found that there were 154 envelopes representing the 154 polling stations. There were 135 SD Cards instead of 154 Card and the 5 polling stations which did not have SD cards were as follows:

1. Chemeswon Primary- 027
2. Tokeito Nursery -049
3. Sinende Nursery -053
4. Toniok Primary -098
5. Kapdenning centre -106

There were 19 polling stations without original SD Cards of these 19 and 9 stations did not have data or missed part of the data. There were 3 SD card with information data dated 2009: These are:

- 1) Makutano Nursery -084
- 2) Kiplombe Primary -123
- 3) Kokorwonin Primary -135

Some forms in 90 polling stations did not have statutory stamps and the firms which had statutory stamps were not legible.

Further he compiled a report and analyzed the finding of the process of the elections for Member of National Assembly on 8<sup>th</sup> August 2018. He found that the envelopes with SD cards were as follows;

- a) Lembus – 0805 – 30 SD Cards
- b) Lembus Kwen – 0806 – 24 SD Cards
- c) Ravine – 0807 – 20 SD Cards
- d) MajiMazuri – 0808 – 23 SD Cards
- e) Lembus Perkerra – 0809 – 16 SD Cards
- f) Koibatek – 0810 – 22 SD Cards
- g) Spare – 19 SD Cards

The above showed that spare Kits were used, which implied there was technology failure. Any incidence or explanation was to be reported to the Presiding Officer and be recorded in the polling station diary. The data above also showed that IEBC provided 154 SD cards which accounted for 149 polling stations. 5 polling stations were not accounted for in the SD Cards provided.

In addition from the read and access process the following was noted: Forms status, finger print, document search, Alphanumeric and voters on the queue after 5.00 p.m.

The physical Forms 35A which was presented for analysis had various illegalities and irregularities having signatures, alteration of results without countersigning, cancellation of results without signing, agents not signing and illegibility of the results and they were not stamped and they were forwarded to the tallying centre. However it contrasted with the number of Forms 35A which were availed in response to the petition herein. The KIEMS Kit were not stamped. In several polling stations voting exercise went on beyond 5.00 p.m., and this resulted to 20,414 votes. The Presiding Officer never recorded the reasons why voting was allowed after 5.00 p.m. It is the 3<sup>rd</sup> Respondent who was garnering high votes in such stations. The KIEMS Kit was to have information pertaining the 8<sup>th</sup> August 2017 however there were stations with data dated 2009 which included Makutano Nursery, Kiplombe Primary and Kokorwonin Primary. At Boito Primary – 001 no election data such as authenticated voters and results was entered. Boito Primary – 002 showed stamped Forms 35A were attached but they were not stamped.

There were several SD Cards which did not contain election data which affected 2,870 votes. This implied that the authenticity of the Forms 35A could not be verified. This was a deliberate failure and/or refusal to implement the accountability mechanisms established by law using the KIEMS. Therefore the qualitative aspect of the parliamentary elections of Eldama Ravine Constituency was violated thereby vitiating the quantitative aspects of the entire National Assembly elections for Eldama Ravine Constituency. From the analysis 11 polling stations did not have Presiding Officers, Deputy Presiding Officers or even agents; then who conducted the elections, declared and entered results in their absence.

b) Authentication of the voters was important during the 8<sup>th</sup> August 2017 elections. The following data was retrieved from the KIEMS Kit;

a) The total number of voters authenticated – 42,347

b) Total votes cast 42,167

c) Total rejected ballots 950

The above shows the total number of votes cast was 43,117 compared to 42,347 registered voters for example in Seguton Nursery polling station and Mandina polling station in case the KIEMS Kit failed to identify a voter the Form 32A was to be filled so that a voter could vote. It was found that 2,340 voters were authorized to vote using the alternative method. Then the Forms 32A should be equivalent to the 2,340 votes found. Further the 1<sup>st</sup> Respondent's online portal showed 44,304 voters voted where the 2<sup>nd</sup> Respondent's Forms 35A indicates 42,347 authenticated voters. This difference was also indicated in the various seats which showed how many votes were cast in the same constituency: Governor – 44,482, President 46,534, Women Rep 45,226, Senator 45,585. Forms 35B had many irregularities which included lack of indication of voter turnout, indication of total registered voters.

On Cross Examination he said the missing SD Cards could not be accounted for. The election data related to the authentication of the votes at the opening and closing time of the polling station. He stated that stamping was more important than having a signature on the forms. The information on the physical forms was to tally with information in the SD Card. The information in Form 35B did not tally with the data in the KIEMS Kit. In some stations where closing was after 5.00 p.m. the Petitioner beat the 3<sup>rd</sup> Respondent, for example Tinet Primary the Petitioner had 272 votes whereas the Respondent had 41 votes. On Re-Examination he testified that the Petitioner had more votes than the 3<sup>rd</sup> Respondent in 15 polling stations.

### **PW2 – Jeremiah Ochieng**

He testified that he had vast experience in electoral matters. His statement of fact is similar to Benson's (PW1). On Cross-Examination he testified that he was junior to Benson (PW1) in the ICT field. The report which was presented in court was prepared by Benson Wasonga (PW1).

**PW3 – was John Kespai** a registered voter at Sogon Nursery School within Eldama Ravine

Constituency, Baringo County. The Biometric register did not reflect him as a registered voter and the manual identification was used. It however gave a name of Ngororo Ashunta with his I.D Number. That the Presiding Officer asked him whom he would vote for and when he said he would vote for the Petitioner he was chased out of the polling station.

On Cross-Examination he stated that he never voted on 8<sup>th</sup> August 2017 since the biometric machine failed to work, those who were behind him were identified manually. Initially before voting on 8<sup>th</sup> August 2017, during verification of registration he was not identified by the machine. He made complaints but 1<sup>st</sup> Respondent's officials did not assist him. The KIEMS Kit did not give or reflect his name.

**PW4 was Moses Kiptanui Sawe** His statement of facts is dated 5<sup>th</sup> September 2017. He testified that on the 7<sup>th</sup> August 2017 the Petitioner supporters were attacked. The same evening, he heard there was a politician who was giving out money. On 8<sup>th</sup> August 2017 a voter named Chai was asked to vote with a promise of getting 500/=. The Petitioner's agent was chased out of the polling station when he raised the allegation on voter bribery. Which had happened at Torongo and Nerkwo polling station.

On Cross-Examination he testified that he voted at Ipopor polling station. That he saw voters being bribed and when the Police made a search, he found the agent with the 3<sup>rd</sup> Respondent's photos and money. He protested against this voter bribery and the 3<sup>rd</sup> Respondent's agent was thrown out of the polling station. He testified that he was not an agent for any candidate. An MCA candidate vying for Lembus Ward had his supporters throw stones at voters. The Petitioner's agent at Ipopor polling station in Torongo was Munge to render the election a sham and to subvert the manifest expression of the will of the people.

**PW5 was Agnes Bundotich.** Her statement of fact was sworn on 5<sup>th</sup> September 2017.

a) She testified that she was a registered voter in Moringo polling station. After voting she went to Elvin Motel within Ravine and found Elisha Biwott filing ballot papers. These ballot papers had IEBC logo and they were green in colour. On Cross-Examination she testified that voting went on well at Moringo. She was identified by the KIEMS Kit. She did not know which paper Elisha was filling and she did not report the same to the IEBC officers or the police. She did not see the details contained in the papers that Elisha had.

b) On Re-Examination she stated that Elisha and her brothers threw her out of her parents home.

**PW6 – Ruto Kiptoo Hillary** relied on his statement of facts dated 5<sup>th</sup> September 2017.

a) He testified that he was a registered voter at Moringo polling station within Eldama Ravine Constituency. On 7<sup>th</sup> August 2017 the 3<sup>rd</sup> Respondent campaigned by chanting slogans and waving campaign placards near Makutano junction. Further at MajiMazuri he also addressed crowds which led to fracas. Later in the evening he was attacked by the 3<sup>rd</sup> Respondent's brother who was in a convoy. He reported the matter to the police on 8<sup>th</sup> August 2017 and an OB No. 14/8/8/2017 was issued. This was a way to intimidate him so that he did not vote for the Petitioner

b) On Cross-Examination he testified that the KIEMS Kits identified him. He was assaulted at Kobil Petrol Station where he had parked his car. He confirmed that he was a prison warder but had been dismissed from work. He could not remember to have seen the 3<sup>rd</sup> Respondent himself.

c) On Re-Examination he testified that when his car was blocked he ran away. The Petitioner's supporters were being beaten. That the 3<sup>rd</sup> Respondent was with the same crowd at 11.00 a.m., 4.00 p.m. and 8.00 p.m.

**PW7 was Christine Nyangweso.**

a) She testified that she was the Petitioner's agent at stream two (2) at MajiMazuri polling centre.

Voter's turnout increased as from 2.00 p.m., on the 8<sup>th</sup> August 2017. That she was chased out of the polling station for the reason that she protested to the officers assisting elderly voters who wanted to vote for the Petitioner. She was not allowed back during counting of the votes. At the said station the Petitioner had won but votes were rigged in favour of the 3<sup>rd</sup> Respondent. This was done by the 1<sup>st</sup> Respondent's officer.

b) On Cross-Examination she testified that old voters wanted to be assisted but she was chased away. When referred to Form 35A for MajiMazuri her name did not appear as an agent. The signatures and names were for Laban Wanyama and Sammy Githinji, who were agents for Independent candidate. She said that she was not an observer as stated in the 1<sup>st</sup> and 2<sup>nd</sup> Respondents response. There had been no rigging at the polling station before she was thrown out.

c) On Re-Examination she testified that she was not an observer with SOMA International Foundation as alleged.

#### **PW8: Nathan Kipchumba Bett**

a) He testified that he is a resident of Arama within Koibatek, Baringo county. He was a campaigner and youth mobilizer for the Petitioner within Arama area. That the 3<sup>rd</sup> Respondent Hon. Lessonet send him Ksh. 1550 through his Mpesa Safaricom line 076621976. He reported to the police on 15.08.2017 about the voter bribery. Members of the public within Arama Poror were given money to influence their vote. This voter bribery offered undue advantage to the 3<sup>rd</sup> Respondent who was declared winner in a flawed exercise.

b) On Cross-Examination he testified that he voted at Arama Primary School. He has not returned the cash sent to him by the 3<sup>rd</sup> Respondent. When he reported the incident he was never issued with an O.B number. The phone that was used to send the money was was registered under his sister's name. He confirmed to have reported on voter bribery on 11.8.17. When referred to his Mpesa statement annexed to his Affidavit, he confirmed he received Ksh 1100 from the Petitioner's brother. This was balance for the supply of stones. The Petitioner was his relative. On Re-Examination he said he did not make a report since he was threatened and had to go into hiding.

**PW9 Was Hon. Musa Cherutich Sirma** the Petitioner relied on his Affidavit sworn on 5<sup>th</sup> September 2017. He testified that he garnered 20,206 votes during the 8<sup>th</sup> August 2017 general elections whereas the 3<sup>rd</sup> Respondent had 20,669 votes. The difference was a margin of 463 on 3 votes per every polling station. That there was an arithmetic error in the tabulation and in the statutory forms. That the 3<sup>rd</sup> Respondent herein still campaigned after the lapse of the campaign period. Mr. Moses Lessonet offered bribe and used violence to intimidate the opponent's supporters. The 3<sup>rd</sup> Respondent Moses Lessonet tainted his name as a sympathizer of the opposition in a Jubilee Zone. This influenced the outcome of the votes since he also printed T-shirts with his image and that of Hon. Raila Amollo Odinga.

b) Further that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents willfully rejected or declined to count votes which had been validly cast in his favour. The 3<sup>rd</sup> Respondents agents assisted the elderly and illiterate voters yet voting was to be conducted in secrecy. Also the elderly were directed to specific persons who would give them money upon them voting for the 3<sup>rd</sup> Respondent. His supporter Mr. John Lagat was not allowed to vote. The results announced at the tallying centre were different from what had been announced at the polling station as he was told by his agents. Thus the 2<sup>nd</sup> Respondent declared false and incorrect results. His agents at the polling centres were denied a request for a recount of the votes when they noticed disparities, irregularities and inconsistencies. His agents were thrown out of the polling stations and his voters would be thrown out once they told the Presiding Officers that they would vote for him.

c) It is his contention that a voter was issued with 6 ballot papers and it would be impractical to claim a voter only did cast one ballot to the total exclusion of any other rank. In addition to this the

total voter turnout and the total votes cast for the various seats differed so much due to gross and Criminal manipulation of the electoral process. The annexed Forms 35B and 34B contained different number of total voters, total number of spoiled votes and votes cast. The results in Form 35B showed valid votes cast for the parliamentary seat was 44,304, rejected votes 248 Making a total of 44552. The 1<sup>st</sup> Respondents website showed total votes cast as 45266. It was illogical that votes cast was equal to valid votes cast yet there were rejected votes. Forms 35A that were supplied to the Petitioner showed 248 rejected votes yet Form 35B on the website showed 955 rejected votes. The statutory documents and the forms given to him had been altered and the number of votes changed without any countersigning the Form 35A were unstamped and altered.

d) That the 1<sup>st</sup> Respondent failed to announce and declare results in a valid Form 35C thus it invalidated the results. That the Forms 35As for County council polling station supplied to him did not have rubber stamps, it had rejected votes yet no explanation was given. There was alteration of figures in the valid votes, rejected votes, registered voters. Forms 35A were not signed by the Presiding Officer and Deputy Presiding Officer at Chepterwo Nursery, Kaptiegan, Kabulyot Primary, Kipkoriony, Bodeni, Tokeito Nursery, Kebulwo Nursery, Kibias and Sobei Primary. In addition his agents did not sign these forms in these stations. His agents at Seguton, Lalut, Chepterwo and Kabulyot did not have their names indicated in the forms.

e) On Cross-Examination he said he did not have his set of results as given by his agents. He confirmed he did not have any Affidavit of his agent. He testified that he was not given a list of Presiding Officers and the Presiding Officers were recruited by 9 close friend of Hon. Lesonnet. The 3<sup>rd</sup> Respondent carried out campaigns beyond the stipulated time. And there was voter bribery whereby one Kipchumba went to report the same. Violence was also involved though he did not experience or witness the same. He did not raise a complaint on the propaganda made by the 3<sup>rd</sup> Respondent. That the returning Officer declined to count votes at Mumberes polling station. In reference to difference in votes cast and registered he said the stray votes cast had to be accounted for.

f) Further he testified that he did not witness the 3<sup>rd</sup> Respondent bribe anyone. He had 154 agents and Christine Nyangweso was amongst them. He did not get a document examiner to verify on the alterations which were in 12 polling stations. He did not carry out a parallel tally of the results. He attended the Jubilee rally held at Kerkwony stadium, though he was dressed in independent colours. He has never instigated violence.

### **On Re-Examination he testified**

g) That he made a complaint to the Returning Officer about the disputed results. His agents did not sign some of the Forms. He confirmed to have won in some of the polling stations. He never witnessed the 3<sup>rd</sup> Respondent campaign. That Sophia Yegon who was a Presiding Officer was the 3<sup>rd</sup> Respondent's relative. My agents asked for a station but it was declined.

### **R1W1 - Julius Chebon**

a) He testified that he was a Presiding Officer at Sogeon polling station. He knew John Kespai Arap Lagat, he was not identified by the KIEMS Kit.

On Cross-Examination he stated that John Kespai was assisted by the Presiding Officer to ensure that he voted. That there were three modes of voting; one had to be identified by the KIEMS Kit, then if it failed the voters National Identity Card would be used eventually the hard copy register would then be used. The polling station was opened at 6.00 a.m. and closed at 7.00 p.m. That he recorded to have assisted 52 voters by filling in the Form 32A. This was possible if they were identified by the KIEMS Kit. He never evicted John Kespai as per his allegation, he had tried his best to assist and even referred him to the IEBC offices.

### **R1W2 was Joel Kiprono Keino.**

- a) He testified that he lived at Eldama Ravine and he was a Presiding Officer at Koibatek Primary School polling station. He did not send away any voter nor prevent any agent from discharging his duties.
- b) On Cross-Examination he stated that he did not favour the 3<sup>rd</sup> Respondent at all. There was a Nasa agent at the polling station. That some voters had their own people to assist in voting. 84 voters were recognized by Alpha Numeric which implied their fingers were not identified on the KIEMS Kit. Voting at the station ended at 5.00p.m. and thereafter the agents would sign at the end of the counting. He would then fill in the Form 35A, and then he would send a copy. There are agents who signed at the beginning of voting at the polling station diary.
- c) On Re-Examination he testified that the KIEMS Kit could not show which voter had been assisted to vote. The agents were not required to fill in the polling station diary.

### **R1W3 Willy Latango**

- a) He testified that he was a Presiding Officer at Kamelilo Primary School at Eldama Ravine. He gave agents copies of Forms 35A for the polling stations and they also took photographs. On Cross-Examination he testified that he had 377 valid votes cast which was a total of what all the candidates had garnered.

### **R1W4 was Valarie Chelagat Keitany**

- a) She testified that she was a Presiding Officer at MajiMazuri Roman Catholic polling station stream (2) that Christine Nyangweso was an observer and she was never thrown out since she was never present at the end of counting the votes. Further she was never stopped from assisting elderly voters.
- b) On Cross-Examination she testified that she did not have any personal relationship with the 3<sup>rd</sup> Respondent. The agents signed in and out when they left the station. The polling station diaries were signed by the Presiding Officer. At this station there were voters in the queue who were yet to vote by 5.00 p.m. These voters could have come from the other streams if they could not be identified by the KIEMS on other streams.

### **R1W5 was Margaret Wanjiru Mbaro.**

- a) She testified as the County ICT for Baringo County. The SD Cards which were not availed were those of Chemoswon, Tokerit, Toniok and Kapdenning polling stations since they had been recalled on 20/9/17 for preparation of the re-election. Those were never returned from the Ottomorpha warehouse. They had 19 spare kits which comprised of 5 Kits for the training 14 spare kits. Two stations namely Bondeni and Wandama had SD Cards without data. The voter would place his finger on the device, he would be identified by his details popping up on the Kit. The voter would then be identified and referred to the clerk to be issued with ballot papers. If a voter was not recognized after 3 attempts, the KIEMS would automatically go to Alpha Numeric search method. This method used the name, I.D number of birth and other details on the I.D Card. If this method also failed a voter was sent to a supervisor to use a KIEMS supervisor validation form which was Form 32A. This was done in the presence of agents to confirm the voter physical appearance and identity. Another method used for voter identification was by use of a valid National I.D or Passport, which would be scanned and if the voter was registered, his information would be reflected. Then would place his fingers validation. The printed register was on exact printout of the KIEMS through it was never used. The transmission of results was also well done.
- b) On Cross-Examination she testified that the 3<sup>rd</sup> Respondent did not have anything to do with the cards. On reference to the report prepared by the Petitioners witness on the data, she stated that the

information on Presidential candidate did not come from the 1<sup>st</sup> Respondent's office.

That further there was a packaging confusion of Boito (1) and Boito (2) in the entries in the SD Card. The rejected votes for both member of National Assembly and Presidential was 349. Form 35A is filled by the Presiding Officer. When the same information is filled in the KIEMS Kit thus an error could have occurred for Seguton station. The authenticated figure for the constituency was 43176. She confirmed that some polling stations were open after 5.00 p.m. She was never informed of any failure of the KIEMS Kit or any malfunctioning.

**R1W6 was Mr. Peter Ndirangu Kuria** who was the Constituency Election Coordinator for Eldama Ravine Constituency. He testified as follows;

a) He was gazetted as the Returning Officer of Eldama Ravine Constituency for the Parliamentary elections. The officers retained by the 1<sup>st</sup> Respondent as Presiding Officer, Deputy Presiding Officers, and clerks were appointed after a competitive process in which the candidates were involved to avoid any issue on partially. In order to conduct a free, fair, transparent and verifiable election, the Presiding Officers were posted in other wards other than the wards they were registered as voters. That the 1<sup>st</sup> Respondent carried out voter verification to verify the biometric information that will be used to identify them as voters. The public was taught on voter education through the media for example on identification using one's biometrics, use of 6 ballot papers for the six positions, to ensure ballot papers bear the IEBC Stamp, marking of one's candidate of choice and casting the ballot paper in the respective ballot. There were three candidates vying for the position of Member of National Assembly. They include:

- i) Moses Lessonet
- ii) Musa Cherutich Sirma
- iii) Bore Emmanuel Ngetuny

b) The results that were announced was as per the collating and tallying of the results from the respective polling stations and there was no fraud or illegality involved at all. The results of votes garnered by each candidate was entered in Forms 35A which is the primary data. The results would then be taken to the Constituency Tallying Centre at Baringo High School. The results were brought in sealed ballot boxes and he ensured Forms 35A were duly signed, were stamped and results had been entered. He declared results as follow;

- i) Moses Lessonet - 20,669
- ii) Musa Cherutich Sirma - 20,206
- iii) Bore Emmanuel Ngetuny - 3,429

Agents for the above candidates and other persons vying for other seats were allowed into the station upon presentation of oath of secrecy of a commissioner of oaths, an appointment letter by the candidate or party then the would be issued with an IEBC badge. The agents who were present at the time of poll closing and counting are the only ones who appended their signatures on Forms 35A. There were no alteration of results as alleged by the Petitioner in the following stations;

- i) Bikwen Primary School polling station.
- ii) Chemeswon Primary School polling station
- iii) County council hall polling station
- iv) Equator Primary School polling station

v) Equator Primary School polling station

That the number of votes cast equals the number of valid votes. There was no report made to the 1<sup>st</sup> Respondent's offices that the 3<sup>rd</sup> Respondent was involved in any irregularities such as campaigning beyond the prescribed period. There was no willful rejection of votes as alleged by the Petitioner at Sogon Nursery school polling station.

c) It was first ascertained that a voter was elderly and illiterate by testing his ability to read, write and see before he could be assisted to vote. The person assisting the elderly person would then take a declaration of secrecy but in the absence of that, the Presiding Officer would assist the voter in the presence of the agents. No individual voter was asked to reveal one's preferred candidate since voting was via a secret ballot and there were no voters who were coerced. There was no voter bribery as alleged by Nathan Bett. The writing process was done in the presence of the agents present with their input and participation. All voters were issued with 6 ballot papers as opposed to the Petitioner's allegation. In addition to this the KIEMS Kit was programmed in such a way that it would register an error if the number of votes exceeded the number of registered voters. There was no alteration to the returns as presented by the Presiding Officers which would affect the results.

d) On Cross-Examination he testified that he never received any written complaint from the Petitioner apart from the 3<sup>rd</sup> Respondent who called to complain about the Petitioner who associated himself with Jubilee. He met the Petitioner on 23/5/17 to prepare him for nominations, then on 1.6.17 when he presented his nomination papers and on 10.8.17 when he complained about the election results. The recruitment of the Presiding Officers was done in a free and fair manner and all the candidates were involved. Further it's the candidates who would pick people from the list whom they felt favoured any candidate. The Petitioner was represented by Isaack Bett and Ben Kiplimo. There was no incident where the Petitioner's agent was chased away or assaulted.

e) The KIEMS Kit did not fail and if it did then the spare Kits would be used. A Kit would be replaced by removing an SD Card then another SD Card would be inserted. There would not be any voting without the KIEMS Kit. There was no collusion of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to assist the 3<sup>rd</sup> Respondent garner more votes. The ballot boxes for all stations were available by 2.00 p.m. on 9.8.17 thus boxes for Majimazuri and Seguton could not have disappeared. The 1<sup>st</sup> Respondent did not receive a complaint of T-shirts branded with the Petitioner and Hon. Raila's photo. This was an injurious act that needed to be prosecuted. Neither did he receive any formal complaint on voter bribery. He received a complaint on 1.6.17 about the Petitioner's and 3<sup>rd</sup> Respondents supporters clashing Hillary's Ruto complaint on assault was never brought to his attention. He confirmed to have tallied what came to his attention and he did not have any control over the public portal. He could not have made any alterations to Forms 35B. The final list of the Presiding Officers was issued on 7/8/2017 when they collected election materials. He had heard of Kespai John's complaint. The voter register for 2017 was cleaned up. He was aware some SD Cards were lacking on the Result Transmission System Server. He denied to have made alterations on Form 35As for Kamelilo, Kihari, Kipkoriony, Kaptiegan, Chepterwo, Kabulyot, Seguton, Soibei, Kibias, Tokeito, Luita Nursery polling stations. It was not necessary for the agents to be present at the tallying centre but it was good for credibility purposes. Bribery within the station during voting could not have occurred since the police were within the polling centre. He confirmed to the court that each booklet had 6 copies. The carbonation could have been weak since some copies did not have overwritings. The figure he entered in Form 35B was got from the results that had been entered in Forms 35A. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent closed their case.

### The 3<sup>rd</sup> Respondent's case

The 3<sup>rd</sup> Respondent had one witness.

a) **R3W1 Elisha Biwott** who testified and his statement sworn on 25/9/17 was adopted as evidence of the court. He testified that he was the County Coordinator of Simon Chelugui who was vying for

the Senatorial Seat. He stated that he knew Agnes Bundotich since she is a relative and neighbour. He had appointed letters form IEBC for Mr. Simon's agents. He stated that he could not fill ballot papers openly in a hotel as claimed by Agnes. He further testified that he was related to the Petitioner herein.

b) On Cross-Examination he testified that he voted at Kaptum Primary School. He was identified by the KIEMS Kit. There was no irregularity at the station. He confirmed not to have had any access to the ballot papers. The forms that he had were not to be used in voting or tallying. He confirmed not to have voted for the 3<sup>rd</sup> Respondent. Further he testified that he was not with any person who had a laptop. He was given 6 ballot papers when he went to vote. He was aware Kiems failed at Sogeon polling station and that Agnes allegations was because he had failed to help her in a family dispute. During the campaign rallies where the Deputy President was present the Petitioner was booed but there was no violence.

### **R3W2 was the 3<sup>rd</sup> Respondent Hon. Moses K. Lessonet.**

a) He testified that he was elected as the Member of National Assembly Eldama Ravine Constituency in 2007, 2013 and 2017. In those elections he had defeated the Petitioner. He knew Josphat Sirma and Jeremiah Sirma who had sent cash to Nathan Bett. He denied that he printed T-shirts that had posters of the Petitioner and Hon. Raila and affirmed that they could be those he used in 2013 elections, when the Petitioner was an ODM candidate. The Petitioner had been a strong supporter of ODM and the people have always associated him with ODM and not Jubilee.

b) He confirmed that the election campaign period ended on 5.8.17 so that he could prepare for elections on 8.8.17. He never left his home on 6.8.17 as alleged by Hillary and it was not possible for him to have been Makutano junction while at Eldama Ravine town.

He denied to have a brother by the name of Gilbert who alleged attacked Hillary. Nathan Bett is not involved in any meaningful activity as he alleged, and because he walks freely within Arama area without security Nathan got a chance to talk to him. He denied to have sent any cash to him since he does not have an Mpesa.

c) The President and Deputy President visited Baringo and Eldama Ravine and the Petitioner was present as a Jubilee friendly candidate and he was dressed as a Jubilee supporter. He has never been summoned by any court, police or any investigation body for bribery allegations. It was not true that he colluded with the Returning Officer to declare him as the winner. He asked the court to find the elections were held in a free, fair and transparent manner and to uphold his win. He prayed for costs.

d) On Cross-Examination he testified that he voted at Eldama Ravine Town Council Hall on 8.8.17. He did not see any problem with the KIEMS. He was invited by IEBC and he sent a representative to the meeting that was held on 6.7.17 on the proposed nominees for the Presiding Officers and Deputy Presiding Officer's position. He never received any complaint from his agents. The Petitioner was not at the Tallying Centre on 9.8.17. He did not receive any report that an agent had been thrown out or voting took place outside the gazette polling stations. He came to know of voter bribery when the petition was filed and the investigations on the allegations was completed. No results had been doctored. He also made complaints to the Returning Officer about the Petitioner dawning on Jubilee attire yet he was an independent candidate. He had informed the chairman of Jubilee about this. Further the Petitioner could have had his set of results and then compare with those at the tallying centre. That the Petitioner failed during the nominations but he decided to position himself as a Jubilee candidate and that is why the votes garnered were close.

e) On Cross-Examination he testified that he did not send an amount Ksh.1550 through Mpesa to Nathan Bett. He stated that he did not have any personal relationship with the Presiding Officers or the Returning Officers. He believes he was re-elected because of the work he does for his Constituents. The bribery allegation against him on bribery was false and the police were

investigating on the same.

## **SUBMISSIONS**

### **The Petitioner's Submission**

The Petitioner filed a Petition dated 6<sup>th</sup> September m 2017 for a declaration that the 3<sup>rd</sup> respondent was not validly elected as the MP for Eldama Ravine Constituency and the nullification of the Election of the 3<sup>rd</sup> respondent as the MP for Eldama Ravine Constituency. There were three contestants for the position of the Member of Parliament.

- i. Bore Emmanuel Ngetuny
- ii. Musa Cherutich Sirma
- iii. Moses Lessonet

The Petitioner alleges that the entire electoral process was marred with massive irregularities and non-compliance with both the Constitution and electoral laws that substantially affected the electoral results. The margin between the 3<sup>rd</sup> respondent and the Petitioner was only 463 votes.

The Petitioner prayed for nullification of the Election of the 3<sup>rd</sup> respondent for the following reasons.

- a) Several Forms 35A were not signed by both the Presiding Officer and Deputy Presiding Officer in violation of Regulations 79 of the Elections (General) Regulation 2012
- b) There were several alterations on the Forms 35A that were not countersigned making it impossible to ascertain or verify the results that were declared in the affected Polling Stations.
- c) There was deliberate disenfranchisement.
- d) There was failure of the KIEMS KITS in several Polling Stations;
- e) There were different sets of electoral results for the same Polling Stations making it hard to verify the results
- f) Illegal voting beyond 5pm in several Polling Stations which was a violation of Regulation 64 and 66 of the Elections (General) Regulations 2012
- i) Missing SD cards for certain Polling Stations contrary to Regulation 93 of the Elections (General) Regulation 2012 which mandates IEBC to store Election materials for at test 3 years.
- j) Petitioner's agents were chased in some Polling Stations in violation of Reg. 79 of the Elections (General) Regulations 2012.
- k) There was massive bribery of the electorate by the 3<sup>rd</sup> respondent

## **THE LAW THAT GOVERNS ELECTION**

It was his submission that world over the validity and integrity of any Election is delivered from that Election being conducted in compliance with the relevant electoral law, if there is non-compliance it should not affect the results. 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.”*

This was explained by the Supreme Court in the Presidential Election Petition No. 1 of 2017 **Raila Amollo Odinga v. IEBC** where an Election had to be carried out in accordance with the Principles of Article 80(e). The Elections Act and the Regulations are the substantive and procedural law for the conduct of Elections if it is shown it was carried out well in accordance with the Constitution and the Regulations then such an Election cannot be invalidated only on ground of irregularities.

The Non-compliance with the entire process would affect the validity of the Election in question. In **Karaiya Kabage v. Joseph Kiuna Karambegu Ng'ang'a Election Petition No. 12/13** it was acknowledged that an Election is not an event but a continuous process and any non-compliance with the law regulating these processes would affect the validity of the Election. These sentiments were echoed in **Moses Masika Wetangula v. Musikar Nazi Kombo [2004]**.eKLR where it was held that the validity and integrity of any election is in substantial compliance with the electoral law of that Election. In **Morgan v. Simpon [1974]** 3 ALLER 722 Lord Denning stated as follows:

*“If the Election was conducted so badly that it was not substantially in accordance with the law as to Elections the Election is vitiated, irrespective of whether the result is affected, or not .... if the Election is so conducted that it was substantially in accordance with the law as to Elections, it is not vitiated by breach of the rules or a mistake at the polls... but, even though the Election was conducted substantially in accordance with the law as to Elections, nevertheless, if there was a breach of the rules or a mistake at the polls and it did affect the result , then the result is vitiated.”*

#### Standard proof

The Principle on burden and standard of proof in Election Petitions was laid out in **Raila Odinga and Another v. the IEBC and Others**. Election Petition. 1 of 2017. The court stated *“the burden is on the Petitioner primarily but once he lays a prima facie case that the Elections were not conducted in accordance with the Constitution, statute and Regulations, that burden shifts to the parties defending the Petition to demonstrate that the Elections were held in accordance to the law and that any irregularity did not affect the results.”* The principles on burden of proof was also laid out in **Moses Wanjala Lukoye v. Bernard Alfred Wekesa Sambu & 3 others [2013]** eKLR where Justice Gikonyo stated that . *“The evidential burden initially rests upon the party bearing the legal burden, but as the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would foul without further evidence.”*

In **Ahmed Abullahi Mohamad & Another v. Mohamed Abdi Mohamad & 2 others [2017]** eKLR the court further stated that the Petitioner does not only bear the burden to establish there were variations, omissions. Malpractices, irregularities and illegalities but they also affected the result of the Election by not reflecting the will of the people.

It was counsel’s submission that the Petitioner had discharged the evidentiary burden of proving and thus the burden had shifted to the 1<sup>st</sup> respondent.

#### **Failure to sign form 35A**

It was the Petitioners claim that several forms 35A were neither signed by the Presiding Officers or their deputies. It was the Returning Officer (2<sup>nd</sup> respondent) evidence in court that some forms were not signed.

The following Forms 35A from these Polling Station were not signed.

- i. Kipkoriony Primary Polling Station – 099
- ii. Chepterwo Nursery School – 111

- iii. Kabulyot Primary School Polling Station – 61
- iv. Kabias primary school Polling Station – 144
- v. seguton Primary school Polling Station-015
- vi. Loita Nursery school -070

The signing of Forms 35A assists in accountability purposes as was held in ***James Omingo Magara v. Manson Nyamweya & 2 others. Civil Appeal No. 8 of 2010 eKLR***. The court upheld the sentiments of Justice Musinga who gave the importance of signing the statutory declaration Forms by the Presiding Officer as follows:

“Forms 16A that are not signed by Presiding Officers raise serious legal questions that may not be resolved by a forensic audit of an Election for example

- i. Who was in charge of the polling exercise in the station
- ii. Who opened the ballot box and supervised the counting of the votes
- iii. Who announced the results
- iv. Who communicated the results to the returning officer
- v. Who put the copy of the Form 16A in the ballot box
- vi. Who sealed the ballot box after counting the votes
- vii. Who ensured proper accountability for the ballot papers delivered at the station?”

Further that courts have been candid on signing of Forms 35As. Signing of forms is termed as authentic and verifiable. In the Election court in *Manson Onyango Nyamweya (supra)* the court gave the importance of the forms being signed by the Presiding Officer that if a form is not signed by the Presiding Officer and or any of the candidates agent, that declaration is of no value and cannot be used or authenticate any declared results, that it is an Election offence for a Presiding Officer without reasonable cause, to fail and / or refuse to sign and stamp a form 16A including completion of all the parts as required of him under the said regulation.

In *Reuben Ndolo v. Dick Wathika & 2 others Election Petition no. 11 of 2008 (Nrb)*. Rawal J. held that where Form 17A, had arithmetical errors, the Form 16A were not signed by the Presiding Officers, their candidates and /or agents the court must nullify the Election.

Also in *Raila Amollo Odinga & another v. IEBC & 2 others [217] EKLR (supra)* the majority decision of the Supreme Court of Kenya held that Forms 34A and 34B must be signed by the authors for verification purposes. It was important for the Returning officers to append his signature to a document to ascertain the contents he has generated.

This is a sign of assurance to the voter by such an officer that he stands by the “numbers” on that form. The same holding was opined in *Election Petition no. 2 of 2008: Bernard Shinali Masika v. Boni Khalwale & 2 others [2011] eKLR* where the court could not ignore the forms 16A which had not been signed by the Presiding Officer and his name was also missing.

The Petitioner submitted that Forms 35A which had not been signed by both the Presiding Officer and Deputy Presiding Officer represented a total of 1,465 votes without votes for Chepterwo Nursary School Polling Station 1. Yet the margin between the Petitioner and 3<sup>rd</sup> respondent was only 463 votes. That there were forms 35A which had either the Presiding Officer or Deputy Presiding Officer sign.

They include.

- i) Kiptegen Centre – P.O did not sign -110
- ii) Soibei Primary school D.P.O did not sign -001
- iii) Bondeni Nursery D.P.O did not sign -073
- iv) Tokeito nursery school P.O did not sign -049
- v) Lalut Primary School D.P.O did not sign whereas the P.O did not date the Form 35A -051

Under Regulation 5(5) of the Elections (General) Regulations 2012 it is mandatory for both the P.O and DPO to be present thus Failure by any of them to sign has to be accompanied by a reason, but in the above case no reason was given.

### **Alteration in Forms 35A**

It is their submission that many Forms 35A were altered without countersigning by either the POS, DPOs or the political party agents. In cross examination Mr. Peter Ndirangu said he did not alter the FORMS and he did not know who had altered. The alterations were made in the following stations.

- a) Muchukato Nursery School- Code 029- Alterations had not been counter signed. There was no number of registered voters, number of rejected objected ballot papers, disputed and valid votes cast. The Presiding Officer Fred Kimutai Rerimoi in this station did not testify though he had filed an affidavit.
- b) Kamelilo Primary School.-code 062 had 541 registered voters. The results of the 3<sup>rd</sup> Respondent had alterations which were not counter signed. 3<sup>rd</sup> respondent's votes had been changed from 100 to 200. Willy Laktano confirmed he changed the figures.
- c) Kinari Nursery School- code 085 had 357 registered voters. The 3<sup>rd</sup> Respondents votes were altered without countersigning from 111 to 177. The PO or the DPO in this Station was not called to testify.
- d) MajiMazuri Forest Primary School –code 090 had 519 registered voters. the alterations were not counter-signed on the valid votes cast. The PO and the DPO were not called to testify.
- e) Kibias Primary School –code 093-it had 218 registered voters .The PO and the DPO did not sign, neither did any single Political Party agent sign. No witness was called to clarify on this.
- f) Kamkoech Primary School-code 044- it had 223 registered voters. There are alterations on the number of valid votes cast. It had two sets of results with one showing votes cast as 188 and another 189.
- g) Nerkwwo Primary School- code 008- it had 248 registered voters. The alterations were not counter signed on the 3<sup>rd</sup> Respondent's votes. No PO or DPO was called to testify.
- h) Kaptumbu Nursery School –Polling Station-code 109. It had 233 registered voters. There were alterations on the 3<sup>rd</sup> respondent's voters which were not countersigned. The form 35A of this station was not clear, it was impossible to tell whether there were agents or not.
- i) Kaptiegon Center Polling Station 1-code 110-it had 194 voters. The forms had alterations on the 3<sup>rd</sup> Respondent's votes, which were not countersigned; alteration in number of rejected votes, which were not counter signed; alteration on the number of rejected ballot papers and valid votes

cast.

j) Lebolos Primary School –code 124-it had 367 voters – there were alterations which were not countersigned on the total number of registered voters in the Polling Station and Total number of valid votes cast. No PO or DPO were called to testify.

k) Kokorwonin-code 135-it had 208 registered voters. It had alterations which were not countersigned on the Petitioner’s votes and alteration to the total number of registered voters and the number of rejected objected ballot papers.

Where alterations are not countersigned, such results become unverifiable and cannot be used to declare a winner. This issue was explained in ***Abdikhaim Osman Mohammed (supra) and James Omingo Magara (supra)*** that in the absence of counter signatures against alterations, especially where such alterations are related to votes garnered by the candidates, the result of the Election on these forms were unverifiable.

The issue on alteration was also elaborated in ***William Kabogo Gitau v. George Thuo and 2 others or [2010]*** eKLR where the court said a statutory form which contains results should be countersigned by the concerned official where he made a cancellation or an alteration. This is because it contains results which will be required to be verified by the other parties including members of the Public. This same Petition was held in ***Hassan Jimal Abdi v. Ibrahim Noor Hussein and 2 others [2017]*** eKLR .Where it was held that cancellations and alterations in the Forms 16As produced in court raised questions regarding the veracity and authenticity of the said results.

In ***Ahmed Abdullah (supra) J.A Mabeya*** inferred that in the face of all these allegations and despite specific Polling Stations having been named the 2<sup>nd</sup> and 3<sup>rd</sup> respondent did not call any of the Presiding Officer from the said Polling Stations to either deny or confirm. This was in regard to the issues raised in this Petition in regard to the secrecy of ballot.

The counsel for the Petitioner Mr. T. Ojienda urged the court to refer to the case ***in IEBC v. Kiai and 5 others (2017)*** eKLR where the court of appeal stated as follows.

*“It is clear beyond peradventure that the Polling Station is true locus for the free exercise of the voters will. The counting of the votes as elaborately set out in the act and the regulations, with it’s open, transparent and participatory character using the ballot as the primary material, means as it must , that the count there is dotted with a finality net to be expressed to any risk of variation or subversion”*

In view of the above it was their submission that the votes as counted and falling at the Polling Station and entered in the result declaration by the Presiding Officer is not to be edited, varied or disrupted unless by an Election court. Thus the authenticity of these forms 35As was wanting.

### **Missing SD Cards**

The Petitioner was granted an access to the SD cards that were used in the general Election in Eldama Ravine Constituency. The read only access exercise was conducted in the presence of all parties or their representatives and their advocates. Mr. Benson Wasonga the Petitioner’s witness prepared a report whereas the IEBC expert Margaret Wanjiru was present upon the read only exercise From the Report it was discovered that 5 Polling Stations had missing SD Cards, a fact confirmed by Margaret Mbaro. The Polling Stations that did not have SD Cards are;

<u>SD Cards</u>	<u>Polling Station</u>	<u>Registered voters</u>
030162080502701	Cliemeson Primary	248
030162080604901	Tokeito Nursery	267

030162080605301	Sinende Nursery	158
030162080909801	Toniok Primary	431
030162080910601	Kapdenning Center	653

Article 86(d) of the Constitution provides that: “At every Election, the independent Electoral and Boundaries Commission shall ensure that (d) appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safe keeping of Elections materials.” Regulation 86(1) of the Elections (general) Regulations 2012 provides that:

*“After the final tallying and announcement of results, the Returning Officer shall keep in safe custody the following documents –*

- (a) Copies of all Election result declaration forms*
- (b) Copies of register of voters sealed and labelled; and*
- (c) The electronic voter identification device”.*

The information that was in the KIEMS KIT was stored in the SD cards following fresh Presidential Elections that were to be conducted on 26.10.17. Further Regulation 86(2) of the Elections (general) Regulations 2012 provides that;

*“The returning officer shall*

- (a) Put the Polling Station diaries in a separate ballot box, seal and label the box.*
- (b) Keep the sealed ballot boxes and all material relating to the Election in safe custody for such period as may be required under these regulations and the Act.*

Also Regulation 93 of Elections (general) provides that;

*“All documents relating to an Election shall be retained in safe custody by the returning officer for a period of three years after the results of the Elections have been declared and shall then, unless the commission or the court otherwise directs, be dispensed of in accordance with procedures prescribed by the commission subject to the Public Archives and Documentation Service Act (cap 19)*

In the absence of the 5 SD Cards, it would be impossible for the parties to verify the number of voters who identified through the KIEMS Kits. It was very important for the 1<sup>st</sup> Respondent to secure electoral materials. The court in **William Odhiambo Oduor v. Independent Electoral and Boundaries Commission and 2 others [2013]** e KLR held that

*“When the Commission is handing over the ballot boxes to court it should reasonable anticipate that scrutiny and recount may be ordered, at which time the handling of all the Election materials may be inquired into. It is the responsibility of the commission to indicate to the court hearing the Petition any instance of interference or tampering, or suspected interference or tempering, so that appropriate action or inquiry can be undertaken .the commission has to bear in mind that it is the custodian of the results as declared in the forms and as declared in the forms and as evidenced by the voters in the ballot boxes”*

In **James Omingo Magara v Manson Onyango (supra)** the court observed that irregularities could not have been cured under Section 28 of the National Assembly and Presidential Election Act (which is equivalent to Section 83 of the Election Act). *That Section cannot be used to cover a situation where even the source of the votes in the ballot boxes cannot be conclusively determined. again to use that Section to*

*cover the disappearance of ballot boxes, irrespective of the number of the ballot papers in the boxes, would simply amount to encouraging vandalism in the electoral process”*

The only identification of voters was through the KIEMS Kit. The court in **Civil Appeal 258 of 2017 National Super Alliance (NASA) Kenya v. IEBC and 2 others of [2017]** eKLR adopted the internal memo of IEBC where it had agreed to only use the KIEMS Kits for voter identification. The manual register was to be used where the KIEMS failed. Thus the KIEMS was the primary voter identification instrument which information was to be found in the SD Cards.

In addition to this the report by the Deputy Registrar stated that there were 24 ballot boxes that had missing and broken seals thus the sanctity of the electoral materials could not be ascertained.

### **Missing Election data**

The 1<sup>st</sup> respondents witness miss. Margaret Mbaru testified that there was 100% electronic transmission whereby all the Forms 35A were uploaded. However during the exercise it emerged that a Polling Stations had missing electoral data. They included;

<u>SD Card</u>	<u>Polling Station</u>	<u>Form</u>	<u>Reg. voters</u>
030162080501901	Boito Primary	None	389
030162080501902	Boito primary	None	389
030162080505601	Regesoi trading centre	None	266
030162080707302	Bondeni Nusery	None	401
030162080808201	Wandama Nursery	None	540
030162081911301	Chepnas Nursery	None	149
030162081011701	Emkwen Nursery	None	356
030162081011801	Sabatia Boarding	None	150
030162081012801	Orinie Primary	None	230
Total number of votes affect			2870

Initially the IEBC expert Margaret Wanjiru had testified that there was 100% transmission of the results. On the other hand she testified that Bondeni and Wandama had no filled data. It is the Petitioners submission that the Election data could have been deleted to disable the court from finding the massive electoral fraud that had occurred in those Polling Station.

### **The electoral results.**

The Petitioner averred that the Form 35A in the 2<sup>nd</sup> respondents affidavit were different from those that were supplied to the Petitioner’s agents. The following Polling Stations had different Forms 35A;

- a) Tumon Trading Centre- Code 055 1 of 1. One form had 210 the other 209
- b) Kamngoech Primary School Polling Station 1 of 1 –Code 144 1 of 1 the first form had 189 number of valid votes the other had 188.
- c) Chepterwo Nursery school Polling Station 1 of 1 code 111

During cross-examination the original form 35A shown to the Petitioner was signed by both the Presiding Officer and Deputy Presiding Officer. The one in the affidavit by the 2<sup>nd</sup> respondent dated 25/9/2017 was not signed by either of them.

d) Lalut Primary School code 051 1 of 1

-During cross-examination, the alleged original Form 35A shown to the Petitioner was signed by both the Presiding Officer and Deputy Presiding Officer. The one annexed to the affidavit of the 2<sup>nd</sup> Respondent was signed but not dated by the Presiding Officer. The Deputy Presiding Officer did not sign and date.

e) Luita Nursery School Polling Station – code 070

- In this station, the Form 35A which was supplied to the Petitioners agent and annexed to the Petition is not signed by both the Presiding and Deputy Presiding Officer while the annexed copy in the 2<sup>nd</sup> respondent's affidavit is signed by both Presiding Officer and Deputy Presiding Officer. No Deputy Presiding Officer or Presiding Officer was availed in court to testify on these anomalies. The Returning Officer testified to this issue that two different booklets were given to the Presiding Officers (POs) for each Polling Station, and each booklet had 6 carbon copies. It was not justification enough.

Further through the Read Only Access of the SD cards it was discovered that almost all the Forms 35A that had been transmitted electronically DID NOT had IEBC stamps while almost all the forms 35A that were annexed did not have. There were two different sets of Form 35A thus it was impossible to verify the results that were declared. There were 89 Polling Stations with these anomalies.

### **Voting beyond the prescribed time.**

The Read Only Access revealed that many Polling Stations voted after 5 p.m. The Petitioner listed 26 Polling Station which affected 13,072 votes in the Constituency.

Regulation 64(3) of the Elections (General) Regulations 2012 provides that;

*“A Presiding Officer shall, in consultation with the Retuning officer – extend the hours of polling at the Polling Station where polling has been interrupted under this regulation or for other valid cause, and here polling in that station has started late, extend the hours of polling by the amount of time which was last in starting late”*

64(4) provides – *“Where the hours of polling have been extended as contemplated under sub regulation 3 that the presiding officer shall give a detailed report on the clear facts justifying such extension of hours.”*

Regulation 66 (1) provides.

*“Subject to regulation 64, voting shall commence at 6 o'clock in the morning and end at 5 o'clock in the afternoon on the polling day.”*

*66 (2) Notwithstanding sub regulation (1), a person who is on a queue for the purposes of voting before 5 o'clock in the afternoon shall be allowed to vote despite the fact that the voting time may extend to after 5 o'clock.*

The only people who would be allowed to vote after 5.00pm were those on the queue as at 5.00pm. Which was not the case on these Polling Stations. In Civil Appeal No. 293/2013 *Abdikhaim Osma (Supra)* the court held that the results of the Polling Station where voting time was extended illegally ought to be excluded and / or exempted from the final tally of the results. This finding was not overturned by the Supreme Court.

The counsel urged the court that no reason was given by the Presiding Officer or Deputy Presiding Officer. They did not even come to court to testify and moreover the counsel asked their affidavits to be expunged from the courts record.

### **Agents being chased away**

a) The Petitioner averred that most of his Polling Station agents were chased, denying them the right to witness counting and tallying of votes. Christine Nyangweso (PW7) testified that she was the Petitioner's agent and she was chased away. Though the Presiding Officer registered her as an observer from some Organization. The Petitioner had quoted Regulation 79 which provides for the right to have an agent of the polling station however it is Section 30 of the Elections Act which provides as Follow:

*30(1)“ A political party may appoint one agent for its candidates at each Polling Station.*

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

The following are the other stations where the Petitioners agents were chased away.

1. Kipkoriony Primary School Code 099
2. Chepterwo Nursery School code 111
3. Kabulyot Primary school code 093
4. Seguton primary school code 015

b) The counsels urged the court to refer to **Ahmed Abdullahi Mohamed (Supra)** where Regulation 79(4) was emphasized that: (As regards the signing of the declaration forms by agents, the regulations give a caveat as to when the failure of agents or candidate to sign the declaration forms will be exercised. The failure to sign is excused if the Presiding Officer records that fact in the declaration form itself.

It was their humble submission that these Polling Station ought to be excluded from the final tally as they were made in violation of Regulation 79 of the Elections (General) Regulations 2012.

### **Bribery**

Further an issue on bribery was alleged by the Petitioner. That the 3<sup>rd</sup> Respondent influenced the voters to vote in his favor through bribery. Two witnesses Moses Sawe and Nathan Bett testified. Moses Sawe testified that old men were bribed to vote for the respondent whereas Nathan said he had received cash from the 3<sup>rd</sup> respondent.

The Petitioner's counsel urged the court to refer to **Moses Masika Wentagula v. Musikari Nazi Kombo [2004] eKLR** where the court nullified the Election of Moses Wetangula because he had given out bribes to influence the voters.

In addition the Election offence Act (No. 37 of 2016) at Section 9 provides as follows;

*(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, demons station or other event of a political nature or in some other*

manner / letting support to or for a political party or candidate.

b) In any manner unlawfully influences the result of an Election

(2) A person who, during an Election period, accepts or agrees to accept a bribe that is offered in the circumstances described in subsection (1) commits an offence.

Section 87 of the Elections Act, (No. 24 of 2011) provides as follows

87 (1) an Election court may, at the conclusion of the hearing of a Petition, in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature may have occurred.

(3) Where Election court determined that an electoral malpractice of a criminal nature may have occurred, the court shall direct that the order be transmitted to the Director of Public Prosecutions.

Mr. John Kespai testified that on 8<sup>th</sup> August 2017 when he went to vote the KIEMS Kit failed to work properly and his name failed to appear against his I.D Number. The 1<sup>st</sup> respondent declared to correct the anomaly to enable Mr. John Kespai vote. Julius Chebon a Presiding Officer testified that in his station the KIEMS Kit failed to work for several hours. This evidence was collaborated by Elisha Biwott's evidence when he testified that when he visited Segeon Primary School Polling Station the KIEMS Kit were not working.

#### Illegal recruitment of Presiding Officers and the deputy Presiding Officers

It was their submission that several Presiding Officers and Deputy Presiding Officers were illegally recruited. The 1<sup>st</sup> respondent failed to comply with Regulations of the Elections (General) Regulations 2012. That the entire process was opaque and was done secretly, in the absence of the Petitioner who was an independent candidate.

Regulations provides as follows:

5- Assistant registration officers.

5 (1) The commission may appoint one or more assistant registration officers to assist a registration officer.

(4) The recruitment and appointment of registration officers and assistant registration officers under this regulation shall be done competitively and transparently.

The Constituency Returning Officer testified that those

POs and DPOs who came drunk were replaced, however he did not give a list of replaced candidates. The law mandates the 1<sup>st</sup> respondent to share the list of the POs and DPOs with the political parties. It is therefore apparent that the POs and DPOs were illegally recruited, thus incompetent and they could not return any electoral results. In *Ahmed Abdullahi Mohamed and Anor v. Mohammed Abdi* [2007] the court "held that irregularities committed by the 3<sup>rd</sup> respondent cannot be said to have conducted the Elections competently and efficiently. It employed Election officials who were incompetent or negligent and whose conduct made the Elections unaccountable and unverifiable"

In *Karanja Kabage v. Joseph Kiuna Kuria* the Supreme Court stated that:

"An Election is an elaborate process that begins with registration of votes, nomination of candidates to the actual electoral offices, voting or counting and tallying of votes and finally

*declaration of the winner by gazettment. The concept of free and fair Elections is expressed not only on the voting day but throughout the Election process thus its counsels submission that recruitment of Presiding Officers and their deputies forms part of the electoral process and must be conducted in strict compliance with the law. Failure to do such recruitment in compliance with the law renders the entire process valid.”*

Also in **Ahmed Abdullah case (supra)** the court expressed itself as follows:

*“That the view the court takes is that, It is due to lack of proper and adequate training that the action of some Presiding Officer in this case exhibited non compliance. Some failed to sign statutory forms contrary to the law, others failed to countersign alterations.”* In view of the above observations by the courts counsel urged the court to find that several malpractices and irregularities occurred in the Polling Stations.

In conclusion the counsel urged the court to find that the Elections for the Member of parliament in Eldama Ravine Constituency was not free, fair and credible, the same ought to be nullified for having failed to meet the Constitution test set out in Article 81(e). They urged the court to allow the Petition as prayed.

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

The Counsel urged the court to rely on the evidence on record and the affidavits that had been filed for the witnesses who testified. They framed the following issues ;

- (a) Whether the standard of proof on allegation of violence and bribery has been discharged.
- (b) Whether the Petitioner’s agents were denied to the Polling Station and to the returns.
- (c) Whether the alleged inconsistency, tampering and alteration of returns affected the results.

### **The burden of proof in Election Petition**

It is their submission that a candidate who losses should get away by filing of an Election Petition on sustainability grounds and irrespective evidence .The court has to respect the public expression and be reluctant to set aside or declare void on Election which has already been held unless clear and cogent evidence is adduced. The burden is on the Petitioner to prove.

On the standard of proof, the Supreme court in the Petition no. 5 of 2013 **Raila Odinga v. IEBC and 2 others** states as follows;

*“A Petition to nullify an Election should clearly and decisively demonstrate that the conduct of the Election was so devoid of merits and so disturbed as to reflect the expression of the Peoples’ electoral intent and that the evidence should disclose profound irregularities in the management of the electoral process and further that where a party alleges non-conformity with electoral law, the Petitioner must not only prove that there had been non-compliance with the law but such failure and non-compliance did affect the validity of an Election . So the Petitioner must set out by raising firm and credible evidence of the Public Authority’s departures from the Presumption of the law’.*

*It therefore gave the guidance with regard to standard of proof in Election Petitions:*

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

The Petitioner had a burden to demonstrate how such irregularities, malpractices and transgressions

materially affect the result’.

In deed an Election Petition is neither a civil suit nor a Criminal case. When a result is invalidated the electors have to mobilize once again to participate in an exercise that is politically descriptive and financially and socially expensive.

Section 107 of the Evidence Act, Cap 80 of the laws of Kenya provides that he who alleges must prove. The Petitioner has to prove there was non-compliance with the Constitution and electoral law.

Section 83 of the Election Act provides:

*“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 in that written law or that the non-compliance did not affect the result of the Election”*. In **Morgan v. Simpson [1974]** ALL ER in interpreting a Statutory Provision similar to our Section 83 of the Election Act; Lord Denning MR said:

‘Collating all these case together, I suggest that the law can be stated in these propositions:

*i) If the Election was conducted so badly that it was not substantially in accordance with the law as to Elections, the Election was vitiated , irrespective of whether the result was affected ;or not*

*ii) If the Election was so conducted that it was substantially in accordance with the law as to Elections, it is not vitiated by the breach of the rules or a mistake at the Polls. Provided that it did not affect the result of the Election.*

*iii) But even though the Election was conducted Substantially in accordance with the law as to Elections, nevertheless if there was a breach of the rules or a mistake at the Polls and it did not affect the results then the Election is vitiated...’*

Back in Kenya, our Supreme Court in *Raila v. IEBC [2017]* expounded the interpretation of Section 83. It stated:

*“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 thereunder, constitute the substantive and procedural law for the conduct of Elections. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection are not enough, by and of themselves, to vitiate an Election”*

They urged the court to look at the conduct of the whole Election, be satisfied that it substantially breached the principles in the Constitution, the Elections Act and other electoral law. To be voided, the Election should be what Lord Stephenson called a sham or travesty of an Election’ or what Prof. Ebirikubinza refers to as ‘a spurious initiation of what Elections should be Further,

The Primary object of the Election law is to respect and uphold the will of the expressed through the vote where breaches of the Election law does not affect the result. In *John Fitch v. Tom Stephenson and 3 others. QBD(2008) EWHC 501* it was held :

*“the courts will strive to preserve an Election as being in accordance with the law , even where there have been significant breaches of official duties and Election rules provided the results of the Election was unaffected by those breaches. This is because where possible, the courts seek to give effect to the will of the people.”*

The ones on proof in this Petition should be the Petitioner. Thus the courts role should not be to use its power to substitute it’s will for that of the People.

## **The Results in an Election Petition**

Section 83 of the Election Act (non-compliance of the law) puts an emphasize on the question of results. In democratic societies, the will of the people is based on numbers; which has not changed. That the Petitioner cannot justify the results were not legitimate without showing to the court that there is a different version of results which are correct.

The candidates in the 2017 general Elections were afforded an opportunity to fully participate in the process at the following level.

(a) Before the Elections, sufficient legal and administrative safe guards to make the process open was put in place .Parties were involved to ensure the candidates were fully represented during the Election date.

(b) On Election date

The Petitioner had his agents in all the Polling Stations on the voting day .It was the agents duty to collect the results and relay to the Petitioner. The Petitioner did not prove or give alternative results.

(c)Post Election Phase

The Petitioner had legal safeguards that would enable him to ascertain the results. That was the scrutiny or recount exercise in an Election Petition. Scrutiny is limited to areas where there is a dispute. The Petitioner in this case, did not have his set of the results and he had no specific areas where results were disputed. It is no wonder he abandoned the exercise for scrutiny.

Further the Petitioner did not know the votes he garnered other than those announced by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. He did not avail an affidavit by his agent for the Petitioner to dispute the results as contained in the forms availed. The Petitioner did not point out any discrepancy between Form 35A and the entries in Form 35B. It was Counsel's submission that the Petitioner had not laid any basis for the court to interfere with the results

## **Bribery**

a) Section 9 of the Election offences act defines bribery as the conduct that amounts to voter bribery. Both the giver and the taker deserve censure. Section 9 (2) provides that during an election period where a person who accepts or agrees to accept a bribe that is offered commits an offence.

**In Mohamed Ali Mursal v. Saudia Mohamed and Others-Garissa Election Petition no. 1 of 2013 (unreported) Mutuku** described bribery as follows; *'bribery is an electoral offence. It is also a criminal offence in ordinary life. Being such, proof of the same must be credible evidence, nothing short of proving this offence beyond reasonable doubt will suffice. Bribery involves offering, giving, receiving or soliciting of something of value for the purpose of influencing the action of the person receiving. Under the act, bribery is an Election offence and being the giver and taker of a bribe in order to influence voting are guilt of this offence upon proof'*

**b) In Simon Nyaundi & Another vs. Hon. Joel Omagwa Onyancha & 2 others (2008)eKLR**, *"the court held as follows "clear and unequivocal proof is required to prove an allegation of bribery. Mere suspicion is not sufficient. The court cannot be satisfied by anything less than the best evidence which always direct evidence is given first hand."*

The Petitioner testified he did not witness the bribery. His witness Moses Kiptanui Sawe (PW4) confirmed to the court he did not get any money.

In *Henry Okello Nadimo v. IEBC and 2 others (2013) eKLR*, it was held that suspicion alone was not good enough.

In **Hosea Mundui Kiplagat v. Sammy Komen Mwaita and 2 others Election Petition 11 of 2013** Hon L.A Achode stated that “*the prevalence of an act, more so, a criminal act, does not automatically render the matter one that the court ought to take judicial notice of. An allegation of voter bribery should be specifically proved. An alleged electoral malpractice cannot be established through inference; it must be specifically proved to its full elements.*”

c).The Petitioner was the ones to prove that the bribery was from the 3<sup>rd</sup> respondent himself.

In **Kondaveti Gurunath Reddy v. Seshiaiah and others Andhra High Court AIR 1966 ap33**, the Lordships said: “*it may be remembered that in the trial of an Election Petition, the burden of proving that the Election of a successful candidate is liable to be set aside on the plea that he was responsible directly or through his agents for corrupt practices at the Elections lies heavily upon the applicant to establish his case, and unless it is established in both its branches. i.e the commission of acts which the law regards as corrupt, and the responsibility of the successful candidate directly or through his agents or with his comment for its practice not by mere preponderance of probability, but by agent and reliable evidence beyond any reasonable doubt, the Petitioner must fail. The evidence may be examined bearing this approach to the evidence in hand.*”

d.) The Petitioner signed the code of conduct which covered some of the complaints e.g. briberies, violence. He did not file any report of violence or any allegation of bribery. In **Wilson Mbithi Munguthi Kabuti and 5 others v. Patrick Makau Kingola and another (2013)** eKLR, the court had dealt with allegations on bribery and campaigning out of time. The court observed as follows “*the second schedule of Elections act specifically provides that any misconduct on and should be reported by any person to the electoral code of conduct enforcement committee which committee will liaise with government security agencies in the Constituency and report the campaigning out of time, alleged bribery and vote buying cannot be remanded by this court unless there is concrete proof.*”

The Petitioner failed to offer clear and cogent evidence to convince this court to uphold the allegation set out in the Petition.

### **Denial to access the Polling Stations**

(a) The Petitioner’s witness Christine Nyangweso (PW7) claimed that she was thrown out of MajiMazuri Roman Catholic Church. The form 35A for this station was signed by Sammy Githinji and Wanyama. The respondent’s witness Valarie Chelagat (RW4) testified that Christine Nyangweso left the station at the end of voting exercise and neither was she stopped from assisting the old voters.

*Regulation 62 (1)(2)and (3) of Elections (general) regulations 2012 legal notice No. 128 provides as follows (1) the Presiding Officer shall regulate the number of voters to be admitted to the Polling Station at the same time and may exclude all, other persons except; (C) authorized agents*

*(2)Notwithstanding sole-regulation (1) the Presiding Officer shall admit to the Polling Station not more than one agent for each candidate or political party.*

*(3) The absence of agents shall not invalidate the proceedings at a Polling Station.*

In view of the above the Petitioner has not adduced any evidence in the form of a complaint that the results were manipulated. In **Elizabeth Ongoro v. Tom Joseph Kajwang and IEBC EP No 5 of 2017**. The Petitioner claimed her agents were denied access to the Polling Stations, but the court stated that there were no evidence availed that the Elections in this station was compromised or were not properly conducted. The agents are to carry out their candidates responsibilities and the same should not be imposed on the 1<sup>st</sup> respondents. Further the Petitioner did not avail any agent to testify in court. No affidavit evidence of was filed in court. The Petitioner was seeking to rely on evidence one Christine to apply to the following stations which were not pleaded on the Petition such as:

- i) Kipkoriony primary school Polling Station 1 of 1
- ii) Chepterwo nursery school Polling Station 1 of 1
- iii) Kabulyot primary school Polling Station 1 of 1
- iv) Kabias primary school Polling Station 1 of 1
- v) Seguton primary school Polling Station 1 of 1

The counsel urged the court to rely on ***Bukenya v. Uganda (1972)*** EA 549 where the court of appeal held that a failure to call crucial witness by prosecution entitles the court to make an adverse conclusion against the prosecution case and acquit the accused person. Whereas in *Trust Bank Limited v. Paramount Universal Bank Limited & 2 others Nairobi HCCR no 1234 of 2001* the learned judge stated that where a party fails to call evidence in support of its cases that parties pleadings remain mere statements of fact.

(b) Further that the Petitioner cannot rely on the 1<sup>st</sup> and 2<sup>nd</sup> respondents affidavits where deponents were not availed in court to testify on allegations that his agents were denied an opportunity to sign form 35A'S

Regulation 79 (2A) provides as follows;

*The Presiding Officer shall*

- i) Immediately announce the results of the voting at the Polling Station before communicating the results to the returning officer.*
- ii) Request each of the candidates or agents present to append his or her signature.*
- iii) Provide each political party, candidate or their agent with a copy of the declaration of the results; and*
- iv) Affix a copy of the declaration of the results at the public entrance to the Polling Station or at any place convenient and accessible to the public at the Polling Station.*
- v) Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidates or agents shall be required to record the reasons for the refusal or failure to sign*
- vi) Where a candidate or an agent refuses or fails to record the reasons for refusal or failure to sign the declaration form, the Presiding Officer shall record the fact of their refusal or failure to sign the declaration form.*
- vii) Where any candidate or agent of a candidate is absent, the Presiding Officer shall record the fact of their absence.*
- viii) The refusal or failure of a candidate or an agent to sign a declaration form under sub regulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under sub regulation (2) (a)*
- ix) The absence of a candidate or an agent at the signing of a declaration form or the announcements of results under sub regulation (2) shall not by itself invalidate the results announced.*

The counsel urged the court to find that failure by the Presiding Officer to record the reasons for the refusal to sign by the candidate or agent shall not invalidate the results.

### **Validating of the Returns.**

(a) The Petitioner alleged that after the Read Access Only, it was discovered that the returns for some Polling Stations were not signed. However that was not the case. The following stations had their forms stamped.

1. Saibei Primary School
2. Mwacho Primary School
3. Kibarasoi Primary School
4. Tiripkatoi Primary School
5. Torongo Primary School
6. Tinet Primary School
7. Tarigo Primary school
8. Nyakio Primary School
9. Kamura Primary School
10. Seguton Primary school
11. Tamtoras Primary school
12. Boito Primary School
13. Kabulyot Primary School
14. Chemoson Primary School.
15. Muchukato Primary school
16. Kwangoi primary school
17. Sigoro primary school
18. Kipkunyung primary school
19. Chemususus primary school
20. Sinoniin primary school
21. Kamasaba primary school
22. Arama primary school
23. Kapcholo primary school
24. Kamngoech primary school
25. Sachangwan center

- 26.Kabor primary school
- 27.Ngormus nursery school
- 28.Lalut primary school
- 29.Segeon primary school
- 30.Tumon trading center
- 31.Rosgei trading centre
- 32.Tamket primary school
- 33.Benonin primary school
- 34.Segonin primary school
- 35.Koibatek primary school
- 36.Kinikwet primary school
- 37.Eldama Ravine town council
- 38.Eldama Ravine town council
- 39.Sinende primary school
- 40.Luita nursery school
- 41.Town council stadium
- 42.Shimoni nursery school
- 43.Tulwopmoi primary school
- 44.Equator primary school
- 45.Soimining primary school station 1
- 46.Soimining primary school station 2
- 47.Mumberes primary school
- 48.Kiplongon primary school station1
- 49.Kiplongon primary school station 2
- 50.Kinare nursery
- 51.Majimazuri Roman Catholic station 1
- 52.Majimazuri Roman Catholic station 2
- 53.Kipsoit primary school

- 54.Kiprorwo primary school
- 55.Majimazuri Forest primary
- 56.Ekwen nursery
- 57.Techasis nursery school
- 58.Tolmo primary school
- 59.Saos primary school
- 60.Cheraik primary school
- 61.Simowet primary school.
- 62.Kipkorweny Primay School.
- 63.Sabatia cooperative society
- 64.Sagat primary school
- 65.Kimawoi primary school
- 66.Kabimoi social hall polling station
- 67.Kapdening centre.
- 68.Kaptumbei nursery
- 69.Kaptiegan centre
- 70.Chepterwo nursery
- 71.Koibatek Agricultural Training centre
- 72.Solian primary school
- 73.Kipkabor primary school
- 74.Kapkitet primary school
- 75.Lobolos primary school;
- 76.Muserechi primary school
- 77.Orihie primary school
- 78.Kokwamoi primary school
- 79.Lemayowet nursery
- 80.Kokorwonin primary school
- 81.Manndina primary school.

82.Tarakwanin primary School.

(b) The results were made in form that had six carbon copies. The first carbon copy was different from the next to the sixth copy. As a result of the carbon copy, the stamp as well as the figures did not show well. **In Elizabeth Ongoro vs. Tom Joseph Kajwang and IEBC E.P NO. 5 of 2017**, the court stated that form 35A was not a ballot paper of which the rubber stamp of IEBC was legally required to be affixed by an Election officer. In **IEBC and other vs. Stephen Mutinda Mule and 3 others [2014]eKLR**. The court of appeal held *that*.

*“There is no stamping requirement in the case of the form 35. All that is required with regard to form 35 as provided for in regulation 79 is the signature of the Presiding Officer and the agents of the candidates”.* The same sentiments were echoed **by Aroni J. in Sitati Peter Juma v. Sitati Daniel Wanyama & 2 others [2018] eKLR** where it was held;

*“Clearly stamping of form 35A against the Presiding Officers signature is not a requirement of the law and may simply be termed as an extra caution taken by the IEBC and this cannot be an illegality”.*

### **Failure to sign form 35A by agents**

Further the Petitioner alleged that this agents did his sign forms 35A which was an irregularities. The counsel Mr. Kahiga submitted that the agents signed the forms in those stations. The Petitioner alleged the stations were:

- a) Ngormus nursery school- it was signed by three agents
- b) Tamket primary school-signed by 8 agents
- c) Shimoni primary school – signed by 5 agents
- d) Eldama Ravine town council hall – signed by 5 agents
- e) Eldama Ravine boarding primary school- signed by 3 agents
- f) Koibatek primary school- signed by 6 agents
- g) MajiMazuri Forest primary school- signed by 5 agents
- h) MajiMazuri Roman Catholic Primary school-signed by 5 agents

It was their submissions that failure to sign form 35 or failure to record reasons would not invalidate the results as was stated in **Abdikam Osman Muhamed and another vs. IEBC [2013] eLKR**. Regulation 76(6) cures the irregularity of not signing by agent.

### **Signing by agents not the Petitioner.**

The Petitioner alleged that the returns were signed by unauthorized strangers purporting to be ODM/NASA agents during the counting and signing of form 35As. The signing of form 35A by agents authenticated the contents of the forms as agreed by all present. The entries are made after counting and tallying at the Polling Station. Those agents who were present at the end of the exercise would sign the form 35A. The agents who sign are those who represent the candidate in that Election or those present at the close of counting the results. The Petitioner did not adduce evidence that those who signed were not authorized agents as per Section 30 of the Election act and regulation (62) (1) and (2). **In Paul Githenyi Mochorwa v. Timothy Bosire** the court stated.

*“If non-signing of the forms by the agents cannot invalidate the Election, the signing of the forms*

*by the agents whether is more or less than the number of the candidates in the particular Election should not invalidate the Election. It is an issue of first principles; the object of the agents signing the form 35 is to confirm the results contained therein. It is signed by the agents in the other Elections taking place alongside then particular Election, there cannot be a valued objection to such over confirmation unless it can be shown to have affected the result adversely in some way.”*

The Petitioner did not adduce evidence to show those who signed were not agents to any of the political party or candidate who vied. The signing of agents did not in any way affect the results.

### **Returns not signed**

a) The Petitioner alleged that the returns’ were not signed. He cited two stations. However counsel submitted that the allegation was unfounded. Upon perusal it was found that the Presiding Officer had signed.

a) Soibei primary school signed by Presiding Officer

b) Tokeito Nursery school signed by the deputy Presiding Officer.

In ***Raila Odinga and another v. IEBC*** to the Supreme Court held that the appending of a signature to a form bearing the tabulated results, solemn act of assurance to a voter by such officer that he stands by the “numbers” on that form. Also regulation 5(4) of the general Elections regulations 2012 [provides that;

*“A Deputy Presiding Officer can do any act, including the asking of any question, which a Presiding Officer is required is authorized to perform by these regulations”*

The counsel urged that the Presiding Officer and his Deputy are both employed by the first respondent and they play complementary roles and both can sign or either of them. This was the position held in ***John Murumba Chikati v. Returning Officer Tongaren and 2 others*** [2013] eKLR where regulation 79 provides that the Presiding Officer is to sign the statutory form .The Petitioner did not adduce evidence to find that the anomalies were of such a magnitude to lead the court to oust the will of the people of Eldama Ravine Constituency. In ***Summy Ndungu Waita v. IEBC and 3 others*** [2018] eKLR where the learned judge confronted with unsigned form 35 stated.

*“Where there is failure to do so, the Election court should resolve the issue in favor of preserving the voters inalienable right to vote particularly when there is no proof that failure of Presiding Officers to sign or stamp the form 35 was willful or affected the Election results in any manner.”*

b) The Petitioner did not avail any handwriting expert to proof the allegations he raised that the forms were not signed by IEBC officials. The alleged experts who prepared the report after the Read Only Access to were not qualified. The educations qualifications were not availed I court. The signatures would have become eligible since the copies were photocopied and the Petitioner did not request for the originals.

### **Alterations of form 35.**

The Petitioner alleged that there were forms with alterations but had not been countersigned. They urge the court that the booklets were filled manually and there would be minor discrepancies which would not and did not affect the results. The few cancellations pointed out were not alterations but overwriting. In ***Jakton Ranguma v. IEBC and another*** E.P NO. 3 of 2017. where it was held that an Election is a process where mistakes would be made and malpractices but in order to succeed in annulling Election, the Petitioner must establish either that there was non-compliance with the Constitution and the law governing the Election or that Election malpractices and irregularities that took place were of such magnitude that they substantially and materially affected the results of the Election. There was no evidence to show that the results announced at the tallying center were different from those announced at the Polling Stations. In ***Philip Mukui Wasike v. Jame Leswete*** E.P NO 5 of 2013 where the court opined

that even where the alterations are not countersigned the court would not ignore the results which are verifiable from the entries made on forms 35.

Also in *In Wavinya Ndeti v. IEBC and 4 others Machakos* E.P NO 4 OF 2013 Majanja J. stated;

*“An Election is a human endeavor and is not carried out by programmed machines. Perfection is an aspiration but allowance must be made for human error. Indeed the evidence is clear that the counting and tallying was being done in less than ideal conditions hence errors, which were admitted were bound to occur particularly in the tallying of the results. What is paramount is that even in the face of such errors, whether advertent or otherwise is that the ultimate will of the electorate is ascertained and upheld at all costs.”*

It is their submission that the officers were conducting Elections in all the 6 positions and were under pressure to complete the exercise and produce the results thus there would be arithmetical errors which had to be corrected. These cancellations and /or alterations had not affected the results.

### **Whether the Elections were conducted in accordance with the law**

a) It was counsel's submission that the 1<sup>st</sup> and the 2<sup>nd</sup> respondents complied with the provisions of the Constitution, the Election act, the Election rules and the regulations. An Election Petition cannot be based on generalities and speculation and the Petitioner is required to adduce specific evidence in support of the Petition to be able to discharge both the burden and standard proof. In *Joho v. Nyange & Anor* [2008] eKLR E.P 500 the court laid the general principles for determination of an Election Petition follows; *“A collar to that principles is that Election Petition are disputes in remembering of great public importance and therefore not ordinary suits. They should not be taken lightly and generalized allegations are not the kind of evidence require in such proceedings. Elections Petitions should be proved contrite and consistent evidence”*.

b) Further the non-compliance with the Constitutional principles or written law was not material widespread or significant as to affect the outcome of the Elections. The errors made were honest, unintended and innocent. The Nigerian persuasive case of *Olusola Adeyeye v. Simeon Oduoye* [2010] LPER-CA-1/EPT/HA/67/08 the court stated;

*“It is not enough to merely catalogue instances of malpractices and breaches of the electoral act without adding up or tallying in the number of votes involve or affected and their impact on the overall result of the Election. The reason for lying such malpractices to votes affected thereby in because irregularities affecting minority votes would not upset the Election of a candidate with majority of lawful votes”*

In addition to this the Petitioner alleged there was violence intimidation and undue influence to his supporters but did not adduce evidence since the standard of proof in respect of the allegations made should be beyond a reasonable doubt. It was their submission that the results in favor of the 3<sup>rd</sup> respondent were valid and it reflected the will of the people. Counsel urged the court to dismiss the Petition with costs to the 1<sup>st</sup> and the 2<sup>nd</sup> respondents. Counsel urged court to refer to *Martin Sarakwe Wachuli v. IEBC and 2 others* [2013] eKLR Bgm No. 7 of 2013 where the court held,

*“Since the respondents have incurred considerable expenses and time in preparing the responses to the Petition and engaging counsel in attending court and collecting evidence, the respondents are entitled to costs”*

### **THE 3<sup>RD</sup> RESPONDENTS SUBMISSIONS**

The Counsel urged that the following issues have been issues raised for determination by this Honor court are

1) whether there should be an inspection of the ballot boxes , scrutiny , recount and retailing of the votes cast

a. The above was spent by the court.

2) Whether there were irregularities in law and in fact during the parliamentary Election as to warrant the declaration that the 3<sup>rd</sup> Respondent was not validly elected and have the certificate of declaration issued to him cancelled.

3) Whether sufficient evidence and legal basis has been laid to warrant scrutiny of the KIEMS Kits in issue present and whether such an order is enforceable given the Petition taken by the 1<sup>st</sup> and 2<sup>nd</sup> respondent on the non-availability of the KIEMS Kits- this has been spent.

4) Whether arising from the evidence availed, the Petitioner should be declared the validly elected member of Parliamentary Elections of 8<sup>th</sup> August, 2017- Edema Ravine Constituency.

5) Whether the Petitioner has proved the commission or any Election related offence and any proof of the person culpable of such and offence if any.

6) Whether the Petitioner has approached the court with clean hands.

7) Whether there is any basis for finding that the 3<sup>rd</sup> respondent should be barred from vying again / holding public office.

8) Who pays costs of the Petition?

9) What is the fate of the deposit deposited?

10) Whether there is any other order or relief that the court should make / grant?

## THE LAW AND PROCEDURE

### (a) Alterations and signing of forms 35

It was alleged by the Petitioner that Form 35As had been altered without countersigning. Evidence was adduced in court by the 2<sup>nd</sup> Respondent witness that the alteration was overwritten due to failure of carbon. This did not require countersigning. Further the Petitioner is not a document examiner to say that the forms were altered or not. No handwriting expert was availed to testify in court.

In ***Shitandi Edith Were v Henry Majimbo Okumu and 2 others*** [2017]eKLR where the Petitioner had claimed alterations in Form 35A and not countersigned. The court noted that the copy 35A was faint and it would not appear to have the signatures of the Presiding Officers and Particulars of the party agents which are present the court stated that: *“It is true the results are overwritten boldening the figures but clearly there are no alterations. These results were not disputed by the party agent who signed both forms. That discrepancy was however sufficiently explained away by the returning officer who stated that it was possible that some carbonated copies may have been written in original and then Photocopied.”*

In ***Hosea Mundu Kiplagat v. Sammy Komen Mwaita and 2 others*** [2013] eKLR the court stated: *“The court cannot infer lack of credibility in results just because there are alterations in the electoral forms. The court can only reach a finding emanating from such cancellations and alterations after examining them in the light of the circumstances surrounding the impugned Elections. The Petitioner has not shown to this court how the alteration referred to have the result of affecting the integrity of the results in the highlighted forms. He did not assert that the cancellations were intended to interfere with the actual results of the Elections to his detriment or to the benefit of the 1<sup>st</sup> respondent”*

Also in **Sammy Ndungu Waita v. IEBC & 3 others** [2008] eKLR the court found minor failures which had no substantial effect to the Elections or its result and it echoed the Supreme Court's finding in Raila 2017 "No Election is perfect. Even the law recognizes this reality."

Regulation 79 provides for the Presiding Officer and the agents of the candidates to sign.

The Petitioner alleged that strangers signed Form 35A who had purported to be his agents. The Petitioner did not demonstrate on this allegation. The agents did not complain at the Polling Station that they had been denied the forms to append their signatures neither did they complain of any irregularity.

Regulation 79(6) and (7) of the Elections (General) regulations 2012 provides as follows:

*(6) The refusal or failure of a candidate or an agent to sign a declaration form under subregulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under subregulation 2(a)*

*(7) The absence of a candidate or agent at the signing of a declaration form or the announcement of results under sub regulation (2) shall not by itself invalidate the results announced.*

### **Signing of forms**

The Petitioner complained that the Presiding Officers and the agents did not sign form 35A in the following schools.

a. Tokeito Primary School

b. Soibei Primary school

The Petitioner did not demonstrate how this anomaly affected the result. The Petitioner did not avail his set of results to indicate that the POs and DPOs did not sign.

The court in **Sammy Ndungu Waita (Supra)** the court referred to **Nana Addo Dankwa & 2 others v. John Dramani Maham & 2 others** [2013] **unreported** the Judge stated as follows in regard to failure to sign Form 35. "Where there is failure to do so, the Election court should resolve the issue in favor of preserving when there is no proof that failure of a Presiding Officer to sign or stamp the Form 35 was willful or affected the Election results in any manner. Failure of the Presiding Officers to sign declaration Forms did not affect the results of the Elections at the respective Polling Station."

The same principle was held in the case of **Wavinya Ndeti v. IEBC & 4 OTHERS [2013]**eKLR where D.S Majanja J. held that. "The issue here is whether Form 35 is null and void if any of the particulars is missing or is incorrect, altered or overwritten. Defective forms cannot be used to declare results or validate an Election outcome. This, I think, is gilding the lily. The issue must be interrogated from the position that it is the duty of the court to sustain the will of voters. Since Form 35 is a record of persons who voted, the court should not be quick to discount it as to do so would amount to disregarding the fact that people went to the polls, stood in line and voted."

**In Kakuta Maini Hamisi v. Peris Pesi Tobiko & others** Kimondi J. explained that Form 36 was not a static instrument. He observed that "I am satisfied that the process can result in clerical errors due to the speed and flow of information. What is important is whether the final form 36 corresponds in all particulars with entries in part B of all the Forms 35."

The Petitioner did not avail an agent as a stress to adduce evidence, he only kept saying "spirit" for the court to speculate in his favor.

**Whether from the evidence availed the Petitioner should be declared the validly elected member of parliament in the Elections held on 8<sup>th</sup> August 2017 for Eldama Ravine Constituency.**

## **Burden and standard of proof**

The counsel urged the court that if the Petitioner alleged the Elections were not conducted in accordance with the law, it was not free, fair and verifiable why then does he seek to be declared as the duly elected Member of Parliament. These allegations have not been substantiated. The Petitioner has endorsed the integrity of the Elections since he wants to be declared the winner.

The standard of proof in Election Petition is higher than in ordinary civil cases since human errors are bound to occur. In *John Marie Waweru v. Beth Wambui Mugo & 2 others* it was stated that.

*“As regards the standard of proof which ought to be discharged by the Petitioner in establishing allegations of electoral malpractices, there is consensus by electoral courts that generally the standard of proof in electoral Petition cases is higher than applicable in ordinary civil cases i.e that proof on a balance of probabilities. The standard is higher than proof on a balance of probabilities but lower than the standard of proof beyond reasonable doubt required in establishing criminal cases. Allegations of electoral practices like for instance bribery, require higher proof.”*

In *Raila Odinga v. the IEBC [2017]* The Supreme court of Kenya stated thus:

*“But at the same time, a Petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to clear the evidential burden. The threshold of proof should in principle, be above the balance of probability, though not as high as beyond reasonable doubt...”*

On the other hand in *Raila Odinga & 5 others v. IEBC & 3 others* [2013] eKLR it was held that:

*“Where a party alleges non conformity with the electoral law, the Petitioner must not only prove that there has been non – compliance with the law, but that failure of compliance did affect the validity of the Elections.... So, credible evidence of the public authority’s departures from the prescriptions of the law”*

It was their submission that the Petitioner has to demonstrate that there was an arithmetic error so that there is a recount and declaration based on results.

**Whether the Petition has proved the commission or any Election related offence and any proof of the person culpable of such an offence if any.**

## **Campaign beyond the prescribed time**

The Petitioner alleged that the Elections campaign ended on 6<sup>th</sup> August, 2017. The 3<sup>rd</sup> respondent proceeded to campaign beyond this time which was in violation of the code of conduct and the Elections law. He relied on the affidavit of Ruto Hillary (PW6) who alleged that he met the 3<sup>rd</sup> respondent campaign convoy at headed towards Makutano and he also met them at Maji Mazuri where the 3<sup>rd</sup> respondent addressed a crowd and gave them money. That he was beaten by the alleged 3<sup>rd</sup> respondent’s brother. He had to run for his life and he came for his car later.

It is submission by Counsel Mr. Kipkoech that this could not be true. What kind of coincidence it would be that he met the 3<sup>rd</sup> respondent’s convoy three times. The allegations of this witness are very contradictory and urged the court to find that the witness was not trustworthy.

## **Agents denied access to polling station**

The Petitioner alleged that his agents were locked out of the polling station by the 1<sup>st</sup> and 2<sup>nd</sup> respondent’s agents. Further that the 3<sup>rd</sup> respondents hired rowdy youth and women in the polling station

in order to stuff ballot boxes with ballot papers and to influence voters for the 3<sup>rd</sup> Respondent. The Petitioner did not adduce any evidence to counter this allegation. Christine Nyangweso (PW7) claimed she was an agent yet she was an observer with SOMA International Foundation as proved by the Presiding Officer at Maji Mazuri Polling Station. The affidavit Christine claimed to be hers was sworn by Catherine Nyangweso.

Regulation 72 of the Elections (General) Regulations 2012 provides as follows.

*i. On the application of a voter who is, by reason of a disability of being unable to read or write, and therefore unable to vote in the manner prescribed on these regulations, the Presiding Officer shall permit the voter to be assisted or supported by a person of the voters. Own free choice and who shall not be a candidate or agent.*

*ii. Where the person who applies to be assisted is not accompanied by a person who is qualified to assist such voter in the presence of the agents.*

The witness (Christine) alleged she was barred from assisting two old people. This could not be possible since Regulation 72(2) provides for assistance.

### **Bribery, violence, Intimidation of voters and Nasa / ODM Sympathizers**

The Petitioner alleged that the 3<sup>rd</sup> respondent offered bribes to influence voters to vote for him and not vote for the Petitioner. PW8 Nathan Bett claimed he received Ksh. 1500 through his MPESA account from the 3<sup>rd</sup> respondent. If at all the 3<sup>rd</sup> respondent bribed him and he reported he could have been arrested and charged as per Section 9 of the Election Offences Act.

Section 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:***

***(2) A person who during an Election period, accepts or agrees to accept a bribe that is offered in the circumstances describe commits an offence.***

It was the witnesses evidence that the line 0722619114 is owned by Joseph Yego and Gladys Tallam. On the issue of violence, no evidence was adduced in court on this issue. Hillary Rutto testified that he was assaulted by the 3<sup>rd</sup> respondent without evidence. The 3<sup>rd</sup> respondent has never been arrested in relation to the assault.

### **Filing of the Form 35A and Voting after the stipulated time.**

The Petitioner alleged that the 1<sup>st</sup> respondent in collusion with the 3<sup>rd</sup> respondent reported to fill the Forms 35A at the Constituency tallying centre. The polling stations were closed beyond time during which time there was stuffing of ballot boxes, allowing unregistered persons to vote or even allow multiple voting by individuals. There was no evidence to support these Elections allegations. It was their submission that voting is a Constitutional right and the Petitioner did not adduce evidence to the contrary that those who voted were not in the queue at 5.00p.m. He did not specify which polling stations, voters voted beyond 5.00pm. In *Hassan Mohamed Hassan v. IEBC & 2 others [2013]eKLR*. Where the Petitioner claimed that the reseing officers allowed voting beyond the official hours until midnight, the court stated:

*“The court has carefully considered the evidence on record in support and against the Petition, taking into account the above Election threshold paints. It has come to conclusion that the alleged irregularities could possibly have occurred have and there but the extent to which the same went*

was generally very limited.”

The Petitioner also alleged that filling of the Form 35As was at the Constituency Tallying centre. In **Sarah Madgudza Kai v. Mustafa Idd and Others Malindi** EP No.8 of 2013 (unreported) where the Petitioner had argued that failure to count the votes at the polling station as required by Article 86 was unConstitutional. The court held:

*“Failure of IEBC’s officials to count votes at the polling stations by itself without more cannot lead to the conclusion that the methods employed by IEBC In arriving at the result of an Election were unConstitutional and provides a basis for nullifying an Election.”* The court further elaborated the Petitioner had to demonstrate that counting at the tallying centre was not transparent or that IEBC committed irregularities or malpractices of such a magnitude as would lead to a reasonable conclusion that the Elections were not free and fair. Counsel urged the court to refer to the Ugandan cases of **Kiiza Besigye v. IEBC & Yoweri Kaguta Museveni. Presidential Election No.1/2006 and Mwiru v. Nabeta & 2 others** EP no. 3/11 where the courts observed that:

*“Courts ought to disregard irregularities for no Election can be impectable and totally free of any mistakes however, the gravity and extensiveness of the mistakes would determine the substantiality of the non-compliance complained of and inform the decision on whether or not an Election should be nullified.”*

Counsel referred to:-

*Regulation 76 on counting of votes which states as follows:*

*1) The Presiding Officer shall, in the presence of the candidates or agents.*

*(a) Open each ballot box and empty its content out the counting table or any other facility provided for the purpose and shall cause to be counted the votes received by each candidate.*

*(b) Record the total number of votes cast in favor of each candidate.*

*2) Each ballot paper shall be counted as follows*

*(a) The Presiding Officer shall in respect of every ballot paper, announce the candidate in whose favor the vote was cast.*

*(b) Display to the candidates or agents the ballot paper sufficiently for them to ascertain the vote; and*

*(c) Put the ballot paper at the place on the counting table, or other facility provided for this papers, set for the candidate in whose favor it was cast.*

*3) The Presiding Officer shall record the count of the vote in a tallying sheet in form 33 set out in the schedule.*

*4) A candidate or an agent shall have a right to*

*a) Dispute the inclusion on the count, of a ballot paper ;or*

*b) Object to the rejection of a ballot paper,*

### **Appointment of the Presiding and Deputy Presiding Officers.**

The Petitioner alleged that the 1<sup>st</sup> Respondent did not adhere to Regulation 5(1) of the Elections (General) Regulations by failing to conduct the appointment of Presiding Officers and Deputy Presiding Officers in

a transparent and competitive manner. He alleged that he was not involved. The 2<sup>nd</sup> respondent disputed this allegation and testified that the recruitment was above board. That a list of 480 interviewed candidates was displayed and on 6/7/17 all the candidates and agents were invited to check on the list. The final list of 308 Presiding Officers were not given to avoid the officers being compromised. In this meeting the Petitioner was represented by Isack Bett and he did not object to the list of 480 candidates.

The Petitioner's agent had made an allegation against Sophia Yegon claiming the results were inaccurate. The issue was resolved by the 2<sup>nd</sup> respondent who called the Presiding Officer of Eldama Ravine county hall, but it was clarified when the said agent said he had confused the result polling station (2) and polling station (1). In **Wavinya Ndeti v. IEBC & 4 others** [2013] eKLR it was stated that:

*“In cases of allegations of Election malpractices and other irregularities the Petitioner is not only required to establish that such electoral malpractices and irregularities actually occurred but that they were of such magnitude that they substantially and materially affected the results of the Elections. The primary consideration in an Election Petition is whether the will of the electorate has been affected by the irregularities. This principle was distilled in the famous case of **Morgan & others v. Simpson on & Another** [1974]B ALL E.R. 722. 728”*

### **Voting more than once where the KIEMS Kits failed.**

The Petitioner alleged that voting in several stations was done more than once in instances where the KIEMS Kits failed especially at Timboroa, Nyakio, Eldama Ravine and Maji Mazuri, whereas in Sabatia cooperative society station 1 and 2 in Lembus Perkea wards, voters were given 5 Ballot Papers instead of 6. The evidence of John Kespai that he was to vote at Segeon Polling station. This is not among the polling stations listed by the Petitioners as to have failed. He further testified that those behind him voted. His demeanor showed he was a troubled person. In the case of **Francis Mwangingi Kilonzo v. IEBC & 2 others** [2018] EKLK, 6 KIEMS Kits purportedly stopped working but 3 were successfully retouched. The court stated **“it was the Petitioner who claimed that KIEMS Kits had failed in various polling station.”**

He was required to name the polling station, and call evidence to establish the claim. The court cannot interfere with the results of the Election unless it has been marred with irregularities, malpractices and breaches of the Constitution and the Election law complained in the Petition have rendered the Election invalid.

It was evidence by the 2<sup>nd</sup> respondent that there was no KIEMS failure and even if there was, there were enough spare Kits, whereby the SD card would be removed and another inserted. Voting never took place without the KIEMS Kits.

### **Missing SD cards and missing Election data**

The Petitioner was granted the Read only Access to the SD cards. There were 5 missing SD cards. It was the counsels submission that this issue was not pleaded in the Petition. It is trite law that parties are bound by their pleadings and therefore the judgment of the court should not be based on an issue which is not pleaded. In **Joel Makori Onsando and 2 others v. IEBC & 4 others** [2017] eKLR the court stated: *“The Election Petition and responses thereto constitute the main pleadings in Election disputes resolution. The objective of these pleadings is to give the advisory a fair notice of the case against them; and indeed parties are bound by their pleadings. This is a rule on pleadings and not special to electoral disputes to the effect that a party cannot adduce evidence or adopt a line of defence which has not been set out in the pleadings”*

The Petitioner in his Petition had pleaded about the KIEMS kits failure but upon accessing the SD cards he was changed to the issue on missing SD cards, missing Election data and spare SD cards. It was their submission that the Petition cannot be amended Regulation 15 (2) provides as follows: *An Election court shall not allow any intelotary application to be made on conclusion of the pre-trial conference, if the interlocutory application would have, by its nature, been brought before the commencement of the*

hearing of the Petition. The counsel relied on the India case in **Arikal Narasa Reddy v. Venkata Ram Reddy Reddygari & Anor, Civil Appeal** No. 55710-5711 of 2012 [2014] 2. S.C.R. The court observed that:

*“in absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party.”*

Therefore, it is neither desirable nor permissible for a court to make an issue not arising on the pleadings. The court cannot exercise discrimination of ordering recounting of ballots just to enable the Election Petitioner to indulge in a raising inquiry with a view to fish material for dealing the Election to be void. The order of recounting can be passed only if the Petitioner sets out his case with precision supported by averments of material facts.

On the missing SD cards, though this was not pleaded, the 1<sup>st</sup> respondent’s witness (R1W6). Margret Wanjiru Mbaro testified that 2 stations only were incapable of providing full date. These stations were: Bondeni and Wandema. The missing cards was a result of a misplacement by Morpho suppliers.

### **Election Results**

The Petitioner testified that there were different set of Election results. That he had agents in all the 154 stations, and none of his agents had complained of any voting irregularities.

The results in Form 35As were the same results used in Form 35B thus they were authentic.

In **Wavinya Ndeti case (supra)** the Petitioner had raised issues on the manner in which Form 35S were prepared. The court observed that all the issues raised in the Petition were not brought to the returning officers attention.

Regulation 80 (1) of the General Regulations provides:

*“A candidate or agent if present when the counting is completed, may require the Presiding Officer to have the votes rechecked and recounted or the Presiding Officer may on his or her own initiative, have the votes recounted.”*

Indeed the Public Portal was not within the control of the 3<sup>rd</sup> Respondent’s and the Petitioner did not adduce evidence that his agents or him had sought for a recount of the votes which is his entitlement as per Regulation 80(1). In **Gitarau Peter Munya v Dickson Mwenda Kithinji and 2 others** [2014] eKLR court held

*“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 ...otherwise procedural or administrative irregularities and other errors occasioned by human imperfections are not enough, by and any of themselves, to vitiate and Election.”* The Petitioner did not avail to the court his set of results.

### **Whether the Petitioner has approached the court with clean hands**

The Counsel urged the court to consider the maxim in equity which states, “He who comes to equity must come with clean hands. The Petitioner stated in his evidence that the 3<sup>rd</sup> Respondent conducted an unfair campaign characterized by malicious propaganda that he Printed T-shirts that had the Petitioner’s names and image together with **Hon. Raila Amollo**. It was however established from the results that he garnered

20,206 votes whereas Hon. Lessonet garnered 20,669 votes. It was therefore false to allege that his allocation with Raila affected his votes. On the other hand, the Petitioner campaigned as a Jubilee Candidate yet he was an independent Candidate. This was evident when he admitted that on 9/7/17 when the President and Deputy President visited Baringo and Eldama Ravine he joined the team. He was dressed like a Jubilee Candidate.

*Rule 6(9) of the Second Schedule on the Electoral Code of Conduct, states that "All those bound by this code shall, throughout an Election Period- avoid plagiarizing the symbols, colours or acronyms of other parties: and to discharge and, if possible, prevent the removal, disfigurement or distraction of political campaign materials of any party."*

The Petitioner as per the said rule was in breach of the code of conduct.

**Whether there is any basis for finding that the 3<sup>rd</sup> Respondent should be barred from vying again/holding Public office.**

There is no evidence on how the 3<sup>rd</sup> Respondent had infringed on the rules and Principles of leadership and integrity. The Petitioner cited many allegations such as violence, threats, intimidation and unfair campaigns by the 3<sup>rd</sup> Respondent. There was no report made on the 3<sup>rd</sup> Respondent has never been arrested where offences have been proved.

**Who pays the costs?**

Article 87(1) of the Constitution states that; *Parliament shall enact legislation to establish mechanisms for timely setting by electoral disputes*

*Section 78 of the Elections (General) Regulation provides*

*(1) A Petitioner shall deposit security for the payment of costs that may become payable by the Petitioner not more than 10 days after the Presentation of a Petition under this part.*

*(2) A person who presents a Petition to challenge an Election shall deposit*

*(g) five hundred thousand in the case of a Petition against a member of parliament or a county governor;*

In *Tom Onyango Agimba V IEBC and 3 others [2017]* eKLR and in *Esposito Franco v Amagon Kingi Jeffa and 2 others* the Court held;

*"we are in agreement with the respondent is that the requirement that the aggrieved party remits security for costs upon filing an Election Petition is to restrict the would be vexatious litigants from coming to court and ensure that the party who comes to court is serious and will be able to pay the costs in the event he is required to do so."*

That the courts of law have been alive to the rule that costs follow the events and that the victor of any litigious process as was held in *Omabati Richard v. IEBC and 2 others [2017]* eKLR.

Rule 30(2)(b) of the Elections (parliamentary and County Elections ) Petition Rules of 2017 provides;

*30(1) the Election court may, at the conclusion of a Petition, make an order specifying*

*(a) The total amount of costs payable*

*30(2) when making an order under sub-rule (1) the Election court may*

(b). impose the burden of payment on the party who may have caused an unnecessary expense, whether that party is successful or not, in order to discourage any such expense.

### **What is the fate of the deposit?**

The security that was deposited should be used to settle the respondent's costs. In E.P. No. 8/12. **Patrick Ngeta Kimanzi v. Marcus Mutua Muluri & 2 others** Majanja J. held”

*“Security for costs ensures that the respondent is not left without a recompense for any costs or charges payable to him. The duty of the court is therefore to create a level playing ground for all the parties involved, in this case, the proportionality of the right of the Petitioner to access justice vis-a vis the respondent's right to have security for any costs that may be owed to him and not to have a vexatious proceedings brought against him.”*

In conclusion the counsel urged the court that the allegations made by the Petitioner lacked concrete evidence to warrant the court to make a determination in his favour.

The court in **Wavinya Ndeti** *supra* stated:

*“Under our democratic form of government, an Election in the ultimate expression of sovereignty of the people and the electoral system is designed to ascertain and implement the will of the people. The bedrock principle of Election dispute resolution is to ascertain the will of the voters and to give it effect whenever possible while upholding the principles that underlie a free and fair Election”.*

In **Philip Osore Ogutu v. Michael Oyura & 2 others** [2013] the court held that in carrying out that examination (that a disputed Election complies with this Constitutional minimum. The Election court must give due regard to the provisions of section 83 of the Elections Act which provides;

*“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.”*

On the other hand in **William Odhiambo Odhuol v. IEBC & another** Kisumu Ep No. 2 of 2013 where the court had to consider whether the Election with all imperfections was substantially conducted in accordance with the principles enshrined in the Constitution and if the process was compromised So much that an ordinary man could not say that the win as declared was a valid one.

Counsel also referred to the **Raila Odinga case** [2013] where the court stated *“Ultimately, of course it falls to the court to determine whether a firm and unanswered case has been made.”*

The counsel urged that the Elections of the 8<sup>th</sup> August 2017 for the Member of Parliament of Eldama Ravine Constituency was conducted as per the Constitution the Elections Act and the Rules thereon. Thus urged the court to dismiss the Petition with costs to the respondents.

### **Issues for determination**

(6) The issues for determination by the Court in this petition are:-

(a) Whether the Election at Eldama Ravine Constituency was conducted in accordance with the Constitution and the law.

(b) Whether there were irregularities that affected the result of the election; and

(c) Whether and what consequential relief will be made in the circumstances of this case.

## **Determination**

### **Burden and Standard of Proof In Election Petitions.**

It is trite law the legal burden of proof in an election petition as with other cases lies with the Petitioner under section 107 of the Evidence Act. The evidential burden of proof, however, shifts to the Respondent when the Petitioner proves existence of election irregularities and malpractice which affect the result of the election. *See Raila Odinga v. IEBC & 3 Ors Supreme Court Petition No. 5 of 2013 and Petition No. 1 of 2017* as well as *Ahmed Abdullahi Mohammed & another v. Mohammed Abdi Mohammed* [2017] eKLR

On the Standard of Proof, judicial authority is agreed that election petitions require a standard higher than the ordinary balance of probabilities but does not rise as high as the criminal standard of beyond reasonable doubt, except where the allegations of misconduct or irregularity also account to Criminal offences *See Raila v. IEBC 2013*, supra,

The duty to sign declaration of an election into Regulation 79(1) of the Election

Regulations, 2011 belongs to the Presiding Officer, the candidates and agents. The Deputy Presiding Officer may sign the declaration pursuant to Regulation 5(4) that empowers the Deputy Presiding Officer to perform any act that the Presiding Officer may perform in accordance with the Regulations. There is no obligation under the Rules for the Deputy Presiding Officer to sign the declaration form (F. 35A) in his capacity as the Deputy Presiding Officer.

Accordingly, the court rejects the claim of the petition based on the failure of Presiding

Officer to sign the Form 35As where the same has been signed by the Deputy Presiding Officer.

### **Alterations in Forms 35As**

There cannot be any question that an alteration of statutory forms without counter-signing affects the authenticities of the form and its contents, as an issue would be raised as to when and for what reason the alteration was made. Obviously, an alteration after the declaration of the result at the polling station and before transmission to the Tallying Centre at the constituency could affect the result in the sense that a different result from the one received at the polling station would be reflected in the constituency tally. While the rewriting, overwriting and alteration may be done for purposes of clarifying the votes entered on poor carbonating carbon copy, the same could be done for purposes of inflating the results garnered by a particular candidate to his favour or deflating the results of his opponent to his detriment.

### **The missing SD card**

The storage Disks for the polling station contained the register of voters, the voters identified through the electronic register system for purposes of voting and the transmission of the results of the polling station to the Constituency Tallying Centre.

### **Different Forms 35As**

However, if the Forms 35As transmitted by the KIEMS Kit had no IEBC stamp on them, it would mean that the originals used in court to cross examine the Petitioner which had the stamp were stamped after transmission to the tallying Centre. The Respondents explained that the stamping was done after the forms had been transmitted as they were being forwarded to the Returning Officer.

### **Standard of Section 83 of the Election Act.**

The Supreme Court in *Gatirau Peter Munya v. Dickson Muenda Kithinji* Petition No. 2B of 2014 at paragraph 216 to 219 has laid down the law on nullification of elections.

Having considered the evidence adduced by the Petitioner and the respondents in this case, the court does not find that the Election in Eldama Ravine was conducted in contravention of the provisions of the Constitution. The Election was held in substantial compliance with the provisions of the constitution on the Elections Act for the determination of the will of the people through the election process of registration of voters, appointment of poll officials by the Independent Electoral and Boundaries Commission and voting, counting and declaration of results in accordance with the law and Regulations enacted for that purposes.

### **Compliance with the Constitution and the law**

#### **Voting past prescribed time**

Regulation 66 allows voting to proceed after 5.00pm for all voters who are in the voting queue at 5.00pm. Under Regulation 64(4) the Presiding Officer who allows voting to proceed after hours after consulting with the Returning Officer in cases where the voting is interrupted or starts late, must “give a detailed report on the clear facts justifying such extension of hours”.

Save in one polling station where the Presiding Officer testified and stated that she only allowed voters in the queue at 5.00pm to continue with the voting, the petitioner did not provide evidence of other polling stations where voting allegedly went after 5.00pm.

#### **Agents being chased away from polling station**

The only evidence adduced in this regard relates to one Christine Nyangweso (PW 7) who states that she was removed after raising a complaint about lack of assistance to the petitioner’s elderly supporters who needed assistance. The record on the Polling Station Diary showed she was an observer. Why did she sign against her name registered as an observer for an organization if she truly was an agent? As an observer she could not assist any person in voting. The Presiding Officer may exclude a person from a Polling Station in circumstances prescribed under Regulation 62, 63 and 72 of the Regulations.

#### **The allegations of violence and bribery and disfranchisement**

The petitioner’s witness PW 6 who alleged to have been assaulted by the 3<sup>rd</sup> Respondent’s brother any other people whom he said were supporters of the 3<sup>rd</sup> Respondent. He did not report to the police station which he said was near to where he was attached. He reported the matter the following day. There was no evidence that he followed up the matter for possible prosecution of the assailants. It is not possible to say, if the attack happened, that the 3<sup>rd</sup> Respondent’s brother and his alleged companions were acting on instructions or at the behest of the 3<sup>rd</sup> Respondent.

I do not find that the allegation of violence was proved against the 3<sup>rd</sup> Respondent as to affect the integrity of the election process of the 8/8/2017.

#### **Bribery**

Bribery is an election offence under section 9 of the Elections Act, 2016. In accordance with the case law the standard of proof in election cases where candidate alleged amounts to a criminal offence, is beyond reasonable doubt.

The evidence adduced by the Petitioner’s witnesses *Moses Sawe* and *Nathan Bett* did not approach reasonable doubt standard because in the case of *Sawe*, the person alleged to have been bribing others was another candidate in Member of County assembly election called Igondi whose full name he did not know and the alleged bribe money in the case of *Nathan Bett* was sent to another persons’ mobile and no conclusive evidence adduced to show that the sender of the money was the 3<sup>rd</sup> Respondent.

***See Raila v IEBC & 3 Ors [2013] and Moses Masika Wetangula v Musikari Nazi Kombo & Ors***

### **Disfranchisement of votes – The case of John Kespai.**

The Petitioner could not build a case for disenfranchisement of voters on the case of John Kespai who in testimony before the court concede that he had a problem with his registration long before the voting date and that he had attempted to get the matter rectified ahead of the election. He knew that the voter Identification system would not recognize him because of his prior problem which he ought to have pursued during the registration period to ensure that he was able to vote on the election date.

It is mischievous to attempt to use the failure of the Kiems Kit to recognize Mr. John Kespai who was known that he had a problem with his registration as a voter to prove who must be a systemic disenfranchisement to warrant a conclusion that the election was not held in accordance with Article 81 and 86 of the Constitution of Kenya and the relevant statutes.

### **Allegation of smear campaign**

Allegation that the 3<sup>rd</sup> respondent had printed t shirts with the picture of the petitioner as a member of the opposition in an area largely seen as a ruling party zone so as to ensue he does not get votes was not proved to the required standard. No evidence was produced linking the 3<sup>rd</sup> respondent to any printed works shown to have been printed for purposes of the 8/8/17 election so as to display the petitioner adversely.

### **Illegal recruitment of Presiding and Deputy Presiding Officers.**

Regulation 5 (1) & (5) on the recruitment of Presiding Officers and Deputy Presiding Officers requires transparent and competitive appointment. The 2<sup>nd</sup> Respondent explained the procedure taken in recruiting the Presiding Officers and Deputy Presiding Officers by public advertisement followed by stakeholder engaged with the candidates and their agents or representatives and the final deployment on the eve of the election, explaining the deployment only a few hours before election to the need to avert cohesion and compromise of the officers by candidates or agents. The Returning Officer explained that he had meetings with the candidates and their representatives during the recruitment exercise, but for the reasons stated could not share the names of the officers to be deployed to the particular polling stations.

I do not find merit in the objection that recruitment of the Presiding and Deputy Presiding Officers was opaque and secret.

### **Allegations of rigging by falsifying entries**

The petitioners' witness PW 5, Agnes Bundotich's allegation that some witness named Elisha Biwott (R3W1) was found filling some documents which had IEBC logo as evidence of rigging was unclear as to what the forms were and even where the alleged malpractice was taking place. It came out in evidence that she was a bitter witness who was aggrieved with the said Elisha Biwott's support of her brother's action to chase her away from their family home in a family dispute. The said witness is a relative of the petitioner, the 3<sup>rd</sup> respondent and the witness (R3W1) Elisha Biwott.

Apart from the serious allegations of doctoring statutory forms not being proved to the required standard, the witness's bitterness arising out of the family dispute involving the 3<sup>rd</sup> respondent's witness (R3W1) affects her credibility.

### **Irregularities**

However, the court observed several irregularities from the evidence provided by the petitioner and the respondents as follows:-

- (i) Absent SD cards.
- (ii) Unsigned Forms 35As
- (iii) Alteration in entries on Form 35As statutory electoral Forms.
- (iv) Lack of record of reasons for agents not signing Form 35As.
- (v) Want of stamping of the statutory Forms 35As in original and electronically transmitted copies.

The question that arises, therefore, pursuant to the second limb of section 83 of the Statutory Act is whether the above noted irregularities affected the result of the election of Eldama Ravine Constituency.

### **Absent SD cards**

It was conceded that (5) polling stations did not have availed, pursuant to the court order for read only access, their Storage Disks in which the electronic data on the election was contained. The 1<sup>st</sup> & 2<sup>nd</sup> Respondents' expert, however, explained that the SD cards had not been returned when the kits and cards had been returned to the supplier Morpho for reconfiguration for purposes of the 2<sup>nd</sup> Presidential election for 26<sup>th</sup> October, 2017, but that the election data was available on the Forms 35As and in the IEBC server at Morpho.

How could one verify the election result in the (5) polling stations in the absence of the register on data on the voters who voted on the 8/8/2017 election?

How can the will of the Eldama Ravine voters as contained in the number of voters of the votes of the polling station, including the (5) affected polling stations been ascertained? The Forms 35As could not be verified against any other documents because it is the primary document and the Form 35B is a tally sheet of all forms 35As. As the register of voters was contained in the electronic SD cards as well as data on the numbers of voters who voted after identification by the electronic system, the entry on the hard copy Form 35A can only be verified by reference to the electronic register in the absent SD card. For purposes of the election petition, the availability of the electronic data in the IEBC server at Morpho is not helpful because the election is to the extent of the (5) affected polling stations not verifiable by the court, and it is not possible to confirm the will of the people expressed in the votes shown as garnered by the candidates in those polling station.

Did the Petitioners agents in the (5) polling stations whose SD cards sign the statutory Forms 35As? Did their agents complain that the votes were not as indicated in form 35As?

As held below, the acts of agents or candidates in accepting the results do not take away the responsibility of the IEBC under Article 86 of the constitution.

### **Unsigned Form 35As**

Regulation 79 of the Elections (General) Regulations 2011 requires Presiding Officers to sign the result declaration Form 35As. There is no requirement for Deputy Presiding Officers in their capacity as such to sign the statutory forms but they can do so on behalf of the Presiding Officers whose duty is to validate the forms by signing.

I respectfully agree with the decision of the Court in **Ahmed Abdullahi Mohamed**, supra that failure by agents or candidates to sign Form 35A should be recorded by the Presiding Officer in accordance with Regulation 79(4) of the Respondent. An empty failure by candidates or/agents to sign Form 35A without a corresponding record of reason therefor by the Presiding Officer must be an irregularity contravening the express provisions of the Regulations 79. The agents and candidates may refuse or fail to sign the statutory form 35As without giving any reason but not the Presiding Officer who is in charge of the election process in the polling station. I deal with later on in judgment.

## **Giving Effect to the Will of the People**

***Raila v. IEBC*** 2017 relied on the principle of substantive compliance and the duty of the court to uphold the will of the people by an election held in accordance with Article 81(e) and voting in accordance with Article 86 of the constitution.

Procedural or consultative, irregularities and other errors attributable to the human imperfection and which do not affect the result of the elections must not be used to vitiate an election. ***See also Fitch v. Stephen and others***. QBD [2008] EWHC 501.

## **Election is about numbers and more**

The constitutional duty of the 1<sup>st</sup> Respondent to ensure a fair voting that is free, accurate, verifiable, secure, accountable and transparent under Article 86 of the Constitution in accordance with the free and fair election principles of the electoral system of Article 81, does not depend on acquiescence on the part of the candidates. It is an absolute constitutional standard entrenched by the constitutional text of Articles 81 and 86 as held by the Supreme Court decision in ***Raila v. IEBC 2017***.

For this reason, that the Petitioner did not present in his petition and in evidence any alternative tally of votes allegedly garnered by him does not in any way diminish the constitutional duty of the 1<sup>st</sup> Respondent (IEBC) to demonstrate compliance with Article 86 standards. The duty is not taken away by apparent acceptance of the results as announced, any acquiescence or waiver by a candidate, or his agents. It is a duty that exists independent of any objection by any candidate or voter who participates in the election.

Want of alternative set of tally of votes from the one that the 1<sup>st</sup> and 2<sup>nd</sup> respondent have for a Particular polling station, or constituency, as in this case, does not mean that the figures given are accurate or that there was no rigging in the election. If rigging were to be achieved by way allowing unregistered votes to be for a particular candidate, the concerned result may be accurate by way of the actual votes cast for that particular candidate but it does not take away the spectre of unfair election by allowing unregistered voters to vote.

In this case and in concrete manner there was evidence of lack of 5 storage disks cards (5) from Polling stations whose votes as registered in the Forms 35As would not be verified by reference to electronic register which ought to have contained the voters of those stations. Without the SD cards how can it be verified that the numbers of voters in the polling stations were the registered voters identified by the Kiems Kit as duly registered in the polling stations and, therefore, eligible, to vote. It is also possible, without verification by the electronic register, that persons may cast more than one vote at the particular election, which is also proscribed by Regulation 59 of the Election Regulations.

Because the results in form 35As for the (5) polling stations whose SD cards could not be produced by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents cannot be verified, the court will reject the said results in totality.

## **Parties are bound by this pleadings**

It is a cardinal principle of pleadings that a party is bound by his pleadings. In the context of election petitions the rule has greater significance than other litigation because the time limits for filing of the petition and for the full litigation process is circumscribed. A party can not be allowed to amend his petition outside the time limits for such amendment as this has implications on the respondent's right to fair hearing within the restricted time limits of an election petition.

However, where in the course of scrutiny, or, I dare add, now a read only access of the electronic data and system, there is established irregularities which the petitioner could not have been aware of without such scrutiny or access, the court cannot shut its eyes to such irregularities if they pass the test under section 83 of the Election Act, 2011 of affecting the result or indicating a systematic breach of the provisions of the

Constitution and the law on elections.

Accordingly although the petitioner had only raised the issue of want of use of KIEMS kits in the voting and alleged an alternative means of voting, the discovery of missing SD cards during the read only access could properly be urged by the petitioner in support of his case.

However, the petitioners' introduction of additional Forms 35As which upon the read only access exercise were found to have had alterations is not permissible because that would amount to amending the petition to introduce something that the petitioner could have done at the filing of the petition because he had already been supplied with the Forms 35As. In the petition, the petitioner raised the issue of alterations of Forms with regard to only 7 polling stations to which he must by the rule of pleading be bound.

### **Alterations on Forms 35As**

The court must accept that alterations that there could be, and invariably are errors in the entries of votes in the various statutory forms. *See Philip Mukuri Wasike V. Jairus Lilswete, supra and Wavinya Ndeti v IEBC & 4 others, supra.*

However, where changes are made on the votes entered on the statutory forms, the Presiding Officers must counter-sign against the changes so as to authenticate the figures therein given.

The only alteration shown on Form 35A for polling stations set out in the Petition is at Kamelilo Primary School Code 062 which shows an alteration on the votes garnered by the 3<sup>rd</sup> Respondent as 200 from a prior figure shown as 100 but the total valid votes cast indicates correctly the figure of 377, being total of petitioner's 156, 3<sup>rd</sup> respondent's 200 and 3<sup>rd</sup> candidate Bore's 21. The other stations complained of at paragraph 112 of the Petition either did not have alterations and had elections of the rejected ballot without affecting the valid votes shown for any of the candidates.

These irregularities do not, therefore, affect the result.

### **Unsigned Form 35As**

Tokeito Nursery School Polling Station (049) Form 35A is signed by the Deputy Presiding Officer which is consistent with Regulation 79(1) as read with Regulation 5 (4) of the Regulations.

In Soibei Primary School polling station (001) Form 35A is signed by the Presiding Officer but not the Deputy Presiding Officer, but as held above, there is no requirement for the Deputy Presiding Officer to sign the statutory form. It is the duty of the Presiding Officer, which may be exercised by the Deputy Presiding Officer on his behalf.

The court notes that some of the forms had faint writing and signatures and, therefore, accepts the explanation by the 2<sup>nd</sup> respondent that this could have been the result of failure of carbonation on the carbon copies. The court does not accept this complaint of lack of signing by Presiding Officers.

### **Failure of agents to sign and Presiding Officer to record reason for failure or refusal**

As held above failure by agents or candidates to sign does not invalidate the Form 35As. See Regulation 79(6) and (7) of the Regulations. However, failure of the Presiding Officer to record the reason for the refusal or failure by agents to sign the declaration is an irregularity. The question is whether this irregularity invalidates the Form 35As. Against the principle the court should strive to uphold the will of the people which is expressed by the voting whose result is recorded in the statutory Forms, the court should invalidate a Form 35A only if the record thereof can be impugned by way of substantial errors in the capture of the votes garnered for each candidate, the computation thereof including the record of rejected ballots and disputed votes against the registered voters in the station. Failure of the Presiding Officer to record the reason for refusal or failure of agents or candidates to sign which could easily be that

the agents and candidates had left the station as they are entitled to by Regulation 79(7) is a procedural irregularity within the meaning of the Supreme Court's decision in **Raila v. IEBC** 2017, which does affect the result of the election.

The court, accordingly, rejects the petitioner's complaints that in some of the Form 35As agents had not signed them and no reason was recorded by the Presiding Officer for the refusal or failure, as these were not shown to affect to the result.

### **Missing SD Cards and the effect on the result of the election**

(8) The total votes affected by the missing SD cards are 1427 according to the Form 35As from the (5) polling stations. In the said polling stations, the Petitioner and the 3<sup>rd</sup> Respondent garnered in total 686 votes and 626 votes, respectively. When adjusted to the total votes declared for the two candidates at the end of the polling on 8/8/2017 the results are as follows:-

<b>Petitioner</b>	<b>[20,206 – 686] = 19,520</b>
<b>3<sup>rd</sup> Respondent</b>	<b>[20,669 – 626] = 20,043</b>

Therefore, the irregularities did not affect the result as the 3<sup>rd</sup> Respondent still leads by **523** votes.

### **Reliefs**

Declaration of Petitioner the validly election MP for Eldama Ravine in the election held on 8/8/2017: the remedy is not available in the circumstances where it was not demonstrated that the irregularities affected the results of the election of 8/8/2017.

### **Certificate of Court as to validity of Election**

Pursuant to section 86(1) of the Elections Act the court determines that the 3<sup>rd</sup> Respondent Hon Moses Lessonet was validly elected as the member of Parliament for Eldama Ravine Constituency at the General Election of 8<sup>th</sup> August, 2017. A certificate to that effect shall readily issue to the Commission and to the Speaker of the National Assembly.

### **Report of Court on electorate malpractices**

Pursuant to section 87 of the Elections Act, the Court confirms that no “electoral malpractice of a criminal nature” was established to the required standard of beyond reasonable doubt as to warrant the invocation of the reporting procedure under section 87(2) of the Elections Act.

### **Costs**

(2)The petitioner did not succeed in the principal complaints of violence, bribery and expulsion of agents as to render the election to be contrary to the provisions of Article 81 of the constitution, and the irregularities proved do not affect the results. The Petitioner unnecessarily exacerbated costs by filing multiple applications for scrutiny in the Petition and at interlocutory stage while upon their being deferred by the court to the close of hearing, he abandoned the application on the date of hearing of the application.

The Petitioner, having caused unnecessary expense to the Respondents in defending the multiple applications for scrutiny and extension of time for provision of read only access to the Kiems Kits, is pursuant to Rule 30(2) (b) of the Election (Parliamentary and County Elections) Petition Rules liable to pay the Respondents for the costs of those applications, in addition to costs under the principle that costs follow the event. In accordance with Rule 30 (1) (a) the court makes order for the total amount of costs payable by the Petitioner to the Respondents at Ksh.2,000,000/- for each respondent.

**Return of Deposit money Costs**

The amount of Deposit for the Petition by the Petitioner shall be returned to the depositor only in accordance with Rule 33 of the Election Petition Rules and upon payment of the costs awarded to the Respondents herein.

**DATED AND DELIVERED THIS 2<sup>ND</sup> DAY OF MARCH, 2018.**

**EDWARD M. MURIITHI**

**JUDGE**

**In the Presence of:-**

Mr. Biko with M/S Ademoyon instructed by M/S Prof. Tom Ojienda & Associates, Advocates for the Petitioner.

Mr. Kahiga instructed by M/S Mirugi Kariuki & Co. for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.

Mr. Kipkoech instructed by M/S Gordon Ogola, Kipkoech & Co. Advocates for 3<sup>rd</sup> Respondent.