



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELECTION PETITION NO. 4 OF 2017

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

IN THE MATTER OF: THE ELECTIONS (PARLIAMENTARY & COUNTY ELECTIONS) PETITION RULES, 2017

MWAHIMA MWALIMU MASUDI.....PETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....1ST RESPONDENT

LUCIANA SANZUA, THE RETURNING OFFICER

OF LIKONI CONSTITUENCY OF THE INDEPENDENT

ELECTORAL AND BOUNDARIES COMMISSION.....2ND RESPONDENT

THE PRESIDING OFFICERS OF MAJENGO MAPYA/ MUZDALIFA POLLING STATIONS,

LIKONI CONSTITUENCY OF THE INDEPENDENT

ELECTORAL AND BOUNDARIES COMMISSION.....3RD RESPONDENT

MBOKO MISHI JUMA KHAMIS.....4TH RESPONDENT

JUDGMENT

The Petition

1. The Election Petition herein dated 6th September, 2017 was filed under Articles 1, 2, 4, 10, 38, 81, 82, 86, 88, 138, 140, 163 and 249 of the Constitution, the Elections Act and the IEBC Act. The Petitioner seeks the following orders:

- a. That **MBOKO MISHI JUMA KHAMIS** was not duly elected and the election was void;
- b. Spent;
- c. A declaration that the non-compliance, irregularities and improprieties in the Member of National Assembly Election were substantial and significant that they affected the result thereof;
- d. A declaration that all the votes affected by each and all the irregularities are invalid and should be struck off from the final tally and computation of the Member of National Assembly Election;
- e. A declaration that the Member of National Assembly Election held on 8th August 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void;

- f. A declaration that the 4th Respondent was not validly declared as the Member of National Assembly Elect and that the declaration is invalid, null and void;
- g. An order directing the 1st Respondent to organize and conduct a fresh Member of National Assembly Election in strict conformity with the Constitution and the Elections Act;
- h. A declaration that each and all of the Respondents jointly and severally committed election irregularities;
- i. Costs of the Petition; and
- j. Any other orders that the Honourable Court may deem just and fit to grant.

The Petition is supported by the affidavit of MWAHIMA MWALIMU MASUDI sworn on 6th September, 2017 together with the affidavit evidence of his witnesses.

The Background

- 2. The Petitioner was the Member of National Assembly candidate running on a Jubilee Party Ticket in the August 2017 General Elections.
- 3. The 1st Respondent is an independent commission established under Article 88 as read together with Articles 248 and 249 of the Constitution of Kenya, 2010 (the “Constitution”) and the IEBC Act No. 9 of 2011, Laws of Kenya and is constitutionally charged with the mandate and responsibility to conduct and/or supervise referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by the Elections Act, No. 24 of 2011, Laws of Kenya (“the Elections Act”).
- 4. The 2nd Respondent was a Returning Officer of the 1st Respondent herein and was constitutionally mandated under Article 82(1)(d) of the Constitution as read together with Section 39(1A) of the Elections Act to inter alia, tally, announce and declare, in the prescribed form, the final results from each polling station in a constituency for the election of a member of the National Assembly and members of the county assembly, while the 3rd Respondent was a Presiding Officer of the 1st Respondent herein and was constitutionally mandated under Article 82(1)(d) of the Constitution as read together with Section 5(1)(1A) of the Elections (General) Regulations, 2012 with presiding over elections at an assigned polling station, tallying, counting, and announcing results at the polling station and submitting polling station results to the Constituency returning officer.
- 5. The 4th Respondent was the Member of National Assembly candidate of the Orange Democratic Movement Party (“ODM”) in the August 2017 General Elections and was declared the winner of the said elections by the 1st Respondent on 10th August 2017.
- 6. The Petitioner alleges that the 1st Respondent contravened Articles 1, 2, 4, 10, 38, 81, 82, 86, 88, 138, 140, 163 and 249 of the Constitution, provisions of the Election Act and those of the IEBC Act. It is the Petitioner’s claim that these contraventions went to the core of the election of Member of National Assembly-Likoni Constituency-held in 8th August, 2017 thus invalidating the said election.
- 7. To buttress the above contraventions, the Petitioner laid down the following allegations:
 - a. The Petitioner’s agents were denied access to polling stations either entirely or where access was granted, this was done after commencement of the voting exercise without any reasonable explanation from the 1st to 3rd Respondents. Due to lack of access to the polling stations, the Petitioner alleges that some of his agents were not able to exercise their right to vote as guaranteed by the Constitution. The Petitioner claims that his agents were denied access to the following polling centers:
 - i. Ushindi Baptist Primary School;
 - ii. Consolata Nursery School;
 - iii. St. Joseph’s Nursery School;
 - iv. Darul-Ulum Madrasa;
 - v. Likoni Muslim Primary School;
 - vi. Mrima Primary School;
 - vii. Vision Senior School;
 - viii. Mtongwe Primary School;
 - xi. Vijiweni Primary School;
 - x. Peleleza Primary School;

xi. Jamvi la Wageni;

xii. Mweza Primary School; and

xiii. Longo Primary School

Further, the Petitioner contends that his agents were denied access to the polling stations on the basis that there were already Jubilee agents at the polling stations which, in fact, was untrue.

b. In some polling centres such as Ushindi Baptist Primary School, the Petitioner claims that the number of ballot booklets utilized did not match with the number of voters who turned out to vote.

c. The Petitioner alleges that the 1st respondent together with agents for the ODM party improperly opened ballot boxes that had already been sealed after the counting and verification exercise had been completed. Specifically, the Petitioner claims that at **MAJENGO MAPYA/MUZDALIFA POLLING CENTER** some ballots that had already been cast were removed while others were introduced that had not been marked during the voting exercise. Also, the Petitioner adds that some ballot boxes from **MAJENGO MAPYA/MUZDALIFA POLLING CENTER** arrived at the Tallying Centre while not being properly sealed.

d. The Petitioner alleges that there was voter bribery as some vehicles were seen ferrying voters to polling stations and thereafter taking them to a nearby hotel after they had voted.

e. In relation to Forms 35As and Form 35B, the Petitioner contends that data and information recorded in Forms 35A at the individual polling stations were not accurately and transparently entered into the Form 35B as required and legitimately expected. The Petitioner claims that 7 copies of the Forms 35A in the Petitioner's custody lack some key features that would legitimize them, such as the 1st Respondent's stamp, some forms were not signed by all the agents and the relevant presiding officers; and some 49 polling stations were missing from the copy of the Form 35B issued to the Petitioner by the 1st Respondent being Ushindi Baptist Primary School which had 12 polling stations/streams, Likoni Muslim Primary School which had 10 polling stations/streams, Mrima Primary School which had 12 polling stations/streams, Likoni Social Hall which had 5 polling stations/streams, Likoni Vision Senior School which had 5 polling stations/streams, Majengo Mapya/Mudzalifa which had 12 polling stations/streams but only 7 have been indicated in the Form 35B supplied.

f. The Petitioner claims that counting and tallying of votes proceeded even in the absence of his agents.

8. The Petitioner claims that the nature and extent of the flaws and irregularities significantly affected the results to the extent that the 1st Respondent cannot accurately and verifiably determine what results any of the candidates got.

9. The Petitioner avers that the Member of National Assembly Election contravened the principles of a free and fair election under Article 81(e) of the Constitution as read together with Sections 39 of the Elections Act and the Regulations there under as the said election was not transparent and verifiable.

10. With regard to transparency, the Petitioner claims that the 1st Respondent and the 4th Respondent colluded to deny legitimate Jubilee agents access to polling centers and as a result in at least 11 polling centers the Petitioner claims he did not have his agents present thus the returns/forms were signed by strangers (and not his agents) who could not be held accountable.

11. On the second tenet of verifiability of the election, the Petitioner contends that in some polling stations his agents were not supplied with copies of Forms 35A as mandated by law. In addition, the Form 35B supplied to the Petitioner appeared to have missing pages while being internally inconsistent.

12. It is the Petitioner's contention that the votes cast in a significant number of polling stations were not counted, tabulated and accurately collated as required under Article 86(b) and 86(c) of the Constitution as read together with the Elections Act. The Petitioner avers that there were inconsistencies in the tabulation of the votes which were not clerical errors but rather calculated and deliberate in favour of the 4th Respondent.

13. It is the Petitioner's case that the Member of National Assembly Election for Likoni Constituency was so badly conducted, administered and managed by the 1st Respondent that it contravened and violated Articles 38, 81 and 86 of the Constitution of Kenya as read together with the Elections Act and the net effect was that it subverted the will and intentions of the constituents and should thus be declared invalid, null and void.

The Responses

1st to 3rd Respondents

14. The 1st to 3rd Respondents opposed the Petition by way of a Response to the Petition dated 20th September, 2017 and a Replying Affidavit sworn by **LUCIANA SANZUA JUMWA** sworn on 20th September, 2017 together with the affidavit evidence of their witnesses.

15. The 1st to 3rd Respondents aver that the 1st Respondent conducted the General Election on 8th, August, 2017 for the position of Member of Member of National Assembly-Likoni Constituency-in which seven candidates participated and the 4th Respondent was declared the

winner after getting the most votes being 27,462 votes.

16. The 1st to 3rd Respondents dispute the allegations made by the Petitioner, and claim that the election for Member of National Assembly-Likoni Constituency -was conducted in accordance with the Constitution, the IEBC Act, the Elections Act, the Regulations thereunder and all other relevant provisions of the law. In support of the above, the 1st to 3rd Respondents claim as follows:

a. That every eligible and registered voter who turned up to vote on 8th August, 2017 was allowed to vote for their preferred candidate by secret ballot as per the dictates of Article 81 (e) of the Constitution and that the Security agencies duly provided security before, during and after the elections in Likoni Constituency.

b. That during the voting process, voters were biometrically identified and thereafter issued with a stamped ballot paper which they marked against their preferred candidates for the respective positions in secret, and thereafter cast their ballot in the color coded ballot boxes clearly marked for each position.

c. That each political party or Independent Candidate was permitted to have an accredited agent at the polling station who observed the entire process and that there were no reports of votes tampering, interference in any manner whatsoever with the voting process or influence over the voters in any manner at all and upon closure of the polling station, the Presiding Officers of each of the polling stations duly proceeded to seal the ballot boxes in the presence of the accredited agents and observers in particular polling stations.

d. The accredited agents and observers were present during vote counting and they witnessed Forms 35A being filled by the Presiding Officer and the accredited agents signed these forms in agreement with the details reflected and/or filled therein and the Presiding Officers for each Polling Station electronically transmitted Form 35A to the Returning Officer at the Constituency Tallying Centre.

e. Upon compiling all Forms 35A and verifying Form 35B, the 4th Respondent was declared as the duly elected Member of National Assembly for Likoni Constituency.

17. In response to the Petitioner's allegation that his agents were denied access to some polling stations, the 1st to 3rd Respondents state that whereas it is a right for every political party to have an agent at the polling station, such right is accompanied by the duty of the political party to ensure that its agents are accredited by the 1st Respondent and that the agents present themselves at the polling station to perform their functions, and it is not the duty of the Respondents to look for the agents.

18. The 1st to 3rd Respondents allege that the incident that occurred at Majengo Mapya Mudzalifa Polling Station No. 2 was clearly documented and the same was caused by the Petitioner's supporters. Further, the 1st to 3rd Respondents deny that any ballot boxes were tampered with and contend that the Polling Station Diaries show a record of seals used and there is no report of tampering.

19. The 1st to 3rd Respondents do admit that a person was arrested during the election process but contend that the said person was causing chaos and obstructing the election process necessitating the arrest.

20. In relation to Forms 35A and Form 35B, the 1st to 3rd Respondents state that the data from Forms 35A were accurately and transparently entered into Form 35B and the agents of respective parties agreed with the tallying and even appended their signatures on Form 35B. Further, the 1st to 3rd Respondents state that the presiding officers duly issued every agent who was present with a copy of Forms 35 A and further the presiding officers for each polling station complied with Rule 79(2) (d) of the ELECTIONS (GENERAL) REGULATIONS, 2012 by affixing a copy of the declaration of the results at the entrance of each polling station.

21. The 1st to 3rd Respondents claim that Rule 61 (4) (c) ELECTIONS (GENERAL) REGULATIONS, 2012 read together with Rule 69 (4) ELECTIONS (GENERAL) REGULATIONS, 2012 only require that the ballot papers be stamped and there is no such requirement with regard to result forms. Additionally, the 1st to 3rd Respondents contend that the failure to stamp forms was insignificant and did not affect the result noting that only 2 forms from two polling stations out of 140 forms were not stamped.

22. The 1st to 3rd Respondents also deny the Petitioner's allegation that the copy of the Form 35B issued to him was incomplete. The 1st to 3rd Respondents maintain that the Form 35B was complete with 140 polling stations.

23. It is the 1st to 3rd Respondents' case that the Petitioner has failed to prove his case in any manner and has failed to demonstrate that the irregularities, if any at all, have an effect on the election results, and thus the Petition should be dismissed.

4th Respondent

24. The 4th Respondent opposed to the Petition by way of a Response to the Election Petition dated 15th September, 2017 which is supported by an affidavit sworn by **MBOKO MISHI JUMA KHAMIS** on 15th September, 2017 together with the affidavit evidence of her witnesses.

25. The 4th Respondent claims that some of the averments contained in the Petition specifically paragraphs 6, 7, 8, 9, 10, 11 and 12 are a replica of the Supreme Court Presidential Petition No. 1 of 2017 paragraphs 5,6,7,8,9,10 and 11. As a result the 4th Respondent claims that the Petitioner has wholly re-introduced the Supreme Court Presidential Election Petition for re-determination under the aegis of the circumstances existing in Likoni Constituency.

26. The 4th Respondent contends that the Petitioner has quoted in the Petition Articles 138, 140 and 163 which are in respect to Presidential Election Petition and do not in any way govern Parliamentary Elections which is the concern of this court.

27. It is the 4th Respondent's case that by the Petitioner employing a regime of Rules which do not govern Petitions in this court, the Petitioner thereby omitted mandatory matters of content in his Petition, and in place thereof, imported into it irrelevant matters whose effect is to deem the Petition fatally defective and incompetent.

28. The 4th Respondent states that the Petitioner's allegation that his agents were denied access to 13 polling centers is untrue as affidavit evidence filed by the Petitioner shows no evidence in support of this allegation with regards to the following polling centers:

- a. Consolata Primary School.
- b. St Joseph Nursery School.
- c. Mtongwe Primary School.
- d. Jamvi La Wageni.
- e. Mweza Primary School.
- f. Vijiweni Primary School.
- g. Longo Primary School.

29. In further response to the aforementioned allegation, the 4th Respondent states that the Election Act as well as the Election General Regulations 2012 make it clear that the absence of an agent from a polling station, or the failure to sign any of the required forms, does not and cannot of itself invalidate an election.

30. The 4th Respondent states that from the affidavit evidence of the Petitioner's witnesses; Kassim Juma Kassim and Carolyn Nyambura Nyoro, the Petitioner's agents voted. Therefore the Petitioner's assertion to the contrary is untrue.

The Hearing

31. After the Pre-trial conferencing, and after the determination of all the applications, the Petition came up for hearing on 13th November, 2017. Mr. Mongeri and Ms. Mayabi appeared for the Petitioner, while Mr. Wafula appeared for the 1st to 3rd Respondents and Mr. Paul Buti for the 4th Respondent. 8 witnesses testified on behalf of the Petitioner.

32. **PW 1, Mwalimu Masoud Mnono** and **PW 2, Samuel Njuguna Kimani** both adopted the witness affidavits filed herein and testified that they were agents of Jubilee Party on 8/08/2017 with PW1 being the Chief Agent and PW 2 an agent at Maji Safi Primary School polling station No. 3. PW 2 testified that voting had gone on well at the polling station and that later in the day he received a call from one Amina Abdalla who was the Jubilee Women Representative informing him that at the tallying center some ballot boxes had seals with mixed serial numbers. PW 2 claimed that he went to the tallying center and confirmed that indeed some seals had mixed serial numbers while one ballot box did not have any IEBC seals. He testified that he informed PW 1 about this.

33. On cross examination PW1 claimed that some agents were denied access to polling stations but PW1 could not identify these agents. PW1 admitted that at page 125 of the 1st to 3rd Respondents documents there is a Form 35A that has been duly signed by a Jubilee agent and upon being shown Form 35B at page 153 of the 1st to 3rd Respondents' documents, PW1 stated that Ushindi Polling stations do appear in the Form 35B contrary to the allegation that 49 polling stations were missing in the Form 35B. PW 1 also testified that he was denied entry to the tallying Centre at around 9pm while others were allowed to go in. PW 1 upon being shown the Polling Station Diaries admitted that indeed some Jubilee agents were allowed access to polling stations including Riziki Omari who signed in at Vijiweni Primary School at 6.00am; Kassin Mwanere, Mr. Malalo; Faith Malalo; Mwalimu Kea, Sophia Makale and Mr. Ndunge who signed in at Vision Senior school Primary Polling Centre. Mwanhamisi Ali, Rajab Omari, Donald Mumo, Mwavadu Munyaka, who signed in at Darul-Ulum Madrasa. PW1 insisted that the Petitioner did not sign Form 35B and that there were complaints about election malpractice including voter bribery. PW 2 admitted that at Maji Safi polling center voting went on well throughout the day except very early in the morning when some agents were denied access due to lack of statutory documents but he negotiated with the polling officers and they were allowed in.

34. On re-examination, PW1 claimed that he did not sign Form 35 B because the form was incomplete and pointed out that the serial numbers on Form 35B at page 38 of the Petition were not consecutive as they appeared as serial No. NA001005-9, then NA001005-5 while the serial numbers on Form 35B in the 1st to 3rd Respondents bundle of documents appeared as serial no. NA001005-9, NA001005-4 and NA001005-5. Further, the witness stated that in Form 35B serial no. NA001005-5 there was a candidate by the name Rawlins Mark Mshila yet no candidate by such name contested in the Parliamentary elections and that the Form 35B had no IEBC stamp and it indicated that tallying was carried out on 8/08/2017 yet tallying took place on 10/08/2017.

35. In relation to Forms 35A, PW1 testified that at page 147 of the 1st-3rd Respondents bundle of documents only one agent from ODM signed. At page 143 of the same bundle at Majengo Mapya Mudzalifa Polling Station 2 the Form 35A is not fully filled while at page 37-St Joseph Nursery School Polling Station No.2 no agent signed Form 35A. Further PW1 claimed that at page 78-Likoni Muslim Primary School- Polling Station No. 3 the number of registered voters was indicated as zero yet 405 people voted. At the same Polling Centre-Likoni

Muslim Primary School Polling Station No. 2- PW 1 stated that the Jubilee agent was Lillian Wangare yet the Polling Station diary was signed on behalf of the Jubilee Party by one Musa Baya. At Durul-Ulum Madrasa Polling Station No.1, PW 1 claimed that the total votes cast was 387 yet the number was reduced to 378 and there was no Jubilee agent but the polling station diary is signed by Mr. Mwanamisi Ali for Jubilee.

36. PW 3, Paul Muriu Kimani, PW 4, Caroline Nyambura Nyoro, PW5, Mbarak Swaleh Mwakurauka and PW 6, Rashid Hamisi Rashid testified and claimed to be Jubilee agents at Likoni Social Hall Flat, Ushindi Baptist, Darul-Ulum Madarasa and Mtongwe Social Hall respectively on 8/08/2017. They all testified that they were denied access to the polling stations despite some of them having the relevant credentials. PW 6 claimed that he was even denied the right to vote. Adding to these allegations, PW 6 stated that on 10/08/2017 while at the Petitioner's home he was informed by PW 2 that the ballot seals had been tampered with and so together with the Petitioner they went to the tallying center. On reaching the tallying center, PW 6 testified that they found some ballot boxes without seals while others had seals that were different from those used to secure them at the respective polling stations. PW 6 stated that despite reporting this irregularity to the police, the Returning Officer went ahead to declare the winner.

37. On cross examination, PW 3 admitted that the Likoni Social Hall Flat had four (4) polling stations and all of them were represented by Jubilee agents who signed Forms 35A being Margaret Nyambura at page 102 of the 1st to 3rd Respondents bundle of documents, Hamisi Masud at page 103 of the same bundle, George James at page 104 and Naomi Wanjiku at page 104 of the same bundle. PW 4 admitted that she was allowed to carry out her duties as an agent at 12.30pm. PW 5 stated Form 35A at Darul-Ulum Madrasa was signed by a Jubilee agent one Mwarandu Mnyika and admitted that there were two Jubilee agents who reported at the polling center being Rajab Omar and Mwajuma Ali Nyoka.

38. **PW 7, Peter Mwitwa Maseke**, claimed that he works with the Kenya Television Service Media Group but on 8/08/2017 he worked as a clerk with the IEBC at Likoni Muslim Primary School and concluded his duties at 6.30pm. PW 7 alleged that on 9/08/2017 he went to the tallying center as a journalist and while there he saw a woman who identified herself as a Jubilee agent confronting the Returning Officer and he followed them. The witness testified that he heard the woman ask why the seals had been interfered with and the Returning officer answered that there was a power blackout which may have caused mis-sealing. PW 7 claimed that the agent asked the Returning officer to stop declaring the result but the Returning Officer refused and instead decided to postpone the announcement of the results. PW 7 indicated that some confrontation occurred and at around 4.00am he recorded some disgruntled persons signing a letter of complaint including Mr. Shakombo, who was one of the contestants, and the Petitioner.

39. On cross-examination, PW 7 admitted that his name did not appear at pages 82, 106, 130, 154, 173, 202, 226 and 250 of the 1st to 3rd Respondents documents as a clerk.

40. **PW 8, Mwashima Mwalimu Masudi** (the Petitioner) testified as the last witness for the Petitioner. PW8 testified that he was the Jubilee candidate for the Member of National Assembly-Likoni Constituency- on 8/08/2017. On the said day, the witness claimed that he had agents but they were denied access to polling stations except for 17 agents. It was PW 8's claim that some of the Forms 35A were not signed by his agents including those that appear at pages 37, 33, 142, 59, 60, 61, 62, 64, 65, 66, 67, 68, 73, 75, 77, 78, 81, 82, 84, 85, 88, 95, 98, 100, 101, 102, 106, 107, 109, 111, 112, 113, 124, 126, 127, 131, 134, 138, 139, 143, 144, 147, 149, 150, 152, 17, 19, 21, 22, 23, 25, 26, 28, 30, 33, 37, 42, 46, 47, 48, 50, 51, 53, 54 of the 1st to 3rd Respondents bundle of documents. PW 8 indicated that he reported this alleged irregularity to the election manager in the constituency but he was not assisted.

41. Regarding the incident at the tallying center, PW 8 testified that he went to the tallying center and found that 18 ballot boxes had no seals. The witness claimed that he requested the returning officer not to continue with the tallying process until the issue of the seals was dealt with but the returning officer went ahead with the process. Pw 8 then asked his advocate, Mr. Gikandi, to write a letter of complaint and at that point the tallying was temporarily stopped but resumed soon thereafter.

42. In relation to Form 35B, the Petitioner stated that it was dated 8/08/2017 which was not the date of the tallying. Further, it included the name of one Rawlins Mushila who was not a candidate in the elections for member of national assembly in Likoni Constituency.

43. Upon cross-examination, PW 8 admitted that some jubilee agents were allowed access into the polling stations as evidenced at pages 315, 321, 886-894, 934-942 of Volume II of the Polling Stations diary and pages 36, 38, 39, 40, 41, 43, 44, 45, 49, 52, 55, 56, 57, 58, 63, 69, 70, 72, 74, 76, 79, 80, 83, 86, 87, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 102, 103, 104, 105, 108, 110, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 125, 128, 129, 130, 132, 133, 135, 136, 137, 140, 141, 144, 145, 146, 148, 151 of the 1st to 3rd Respondents response. However, PW 8 contended that these were not Jubilee agents. PW 8 admitted that the Form 35B given to him by the IEBC was complete and had three pages and refuted his earlier claim that the results in Likoni Primary School were not included in Form 35B. The witness agreed that at page 55 of the 4th Respondent's response and page 76 of the 1st to 3rd Respondents response Form 35B indicates he got 109 votes in Likoni Muslim Primary School polling station No. 1.

44. PW 8 admitted that although he had indicated in his Petition that his agents were not allowed into various polling centers the polling day diaries show that there were jubilee agents in the following polling centers:

- a. Vision Senior School polling center- pages 364, 381, 389, 408, 416 and 441 of Volume I of the Polling Day Diary.
- b. Darul-Ulum Polling Centre -Volume II of the Polling Day Diary pages 10, 34, 58, 608, 654, 678, 702, 726.
- c. Likoni Muslim Primary School – Volume II of the Polling Day Diary Pages 83, 107, 155, 179, 203, 227, 275, 299.
- d. Mweza Primary School - Volume II pages 371, 798

e. Vijiweni Primary School - Volume II pages 774, 1014

f. St. Joseph Nursery School- volume II pages 846, 1134,

1158, 1182

g. Longo Primary School - Volume page 918, 990, 1086.

h. Mrima Primary School - Volume III Pages 11, 36, 61, 86,

734, 761, 912, 937, 962, 987, 1238.

i. Consolata Nursery School- Volume III as follows pages 411, 661.

j. Ushindi Baptist Centre -Volume III pages 611, 686, 711,

811, 836, 1037, 1066, 1138.

45. On re-examination PW 8 reiterated that he did not have agents in some polling stations and pointed to pages 37, 59-62, 64, 65, 66, 67, 77, 78, 81, 82, 84 of the 1st to 3rd Respondents' Response. Pw 8 further claimed that 63 Forms 35A were not signed by his agents and that among those signed there were irregularities such as alterations and lack of IEBC official stamp.

46. The 1st to 3rd Respondents called only one witness while the 4th Respondent had four witnesses. **DW 1, Luciana Sanzua Jumwa**, testified that she was the Returning Officer for Likoni Constituency in the 8/08/2017 elections. She returned the results for the member of National Assembly and declared the 4th Respondent as the winner. The results were in Form 35B which was an aggregate of the results in Forms 35A. The witness declared the results on 10/08/2017 but the declaration form, Form 35B, was dated 8/08/2017 because that is when the process started.

47. DW 1 testified that candidates were required to avail to her their list of agents two weeks before the election through their respective parties. The witness testified that Jubilee Party did not submit its list of agents on time neither did the party send its agents and candidates for briefing meetings that she convened on various dates. The witness claimed that Jubilee's list of agents was sent to her on 8/08/2017 at 4.44am by email. DW 1 claimed that despite this she provided 140 agents badges for Jubilee Party which they were at liberty to give to anybody as their agent. She also stated that she instructed the polling officers to admit any person with a letter of appointment and oath secrecy, into the polling station as an agent.

48. DW 1 mentioned some individuals who attended the election as Jubilee agents and signed the polling day diary including PW 2, Hassan Hamisi Katambu, Shaban Abdalla Mwinya, Malik Hussein, Musa Abdalla, Josphat Njiru and Sophia Makau Joseph. The witness claimed that some of these individuals were not on the list submitted by Jubilee but were allowed in the polling rooms because they had the relevant credentials and denied the claim that Jubilee agents were denied access/entry into polling stations. DW 1 stated that the copy of Form 35A for St. Joseph Primary School polling station No. 2 of 4 in the Response appears not to have been signed but the original is signed. The witness also stated that the copy of Form 35A for Peleleza Primary School polling station No. 3 of 3 appears blank but the original is legible.

49. On cross examination, DW 1 testified that counting at some polling stations ended at 11.00pm and she started entering results at about 1.00am on 9.08/2017. The witness admitted that she never declared the winner on 8/08/2017 but she still dated Form 35B 8/08/2017 because that is when she started the polling exercise. The witness also indicated that the candidates and agents who signed the Form 35B did not date it. She admitted that Form 35B was signed by two candidates. However, one of them, Rawlings Mark Mushila, was a candidate for the MCA position and not a candidate for Parliamentary elections.

50. DW 1 admitted that the serial numbers on Form 35B; NA001005-9, NA001005-5 and NA001005-4 were not consequential and that some serial numbers were unused while others were wasted when the printing alignment did not come out well. The witness stated that she invited all the candidates to sign Form 35B but only the 4th Respondent agreed to sign. The witness indicated that a complaint was raised on 9th August, 2017 that she was tallying ballot boxes that were open. However the allegation was not true. The witness insisted that once a ballot box has been sealed, the seals cannot be removed until a court order is issued.

51. DW 1 admitted that she did not sign the polling day diaries because of the work pressure and stated that the alterations on the polling day diaries such as page 270 of volume 3 of the polling day diaries were due to human error. She also admitted that while she had said that there were no serious problems during the election, there were records of incidents and challenges and action taken by the presiding officers.

52. DW 1 admitted that some Jubilee agents did not sign Forms 35A but added that they could not be forced to sign the same. The witness admitted that there were alterations in some polling station diaries and Forms 35A which were not countersigned, but added that the lack of counter signature did not invalidate the documents. The witness also admitted that although she had stated that only 2 out of the 140 Forms 35A were not stamped there could be more unstamped forms but attributed this to officers being fatigued.

53. DW 1 insisted that although there were power interruptions, gas lanterns had been provided thus the power interruption did not affect the quality of the elections. The witness also stated that no ballot box from Majengo Mapya Polling Center had been opened. DW 1 testified that only ballot papers were required to be stamped and there was no requirement to stamp Forms 35A or Form 35 B. DW 1 stated that the results for the Petitioner indicated in the Forms 35A are the same results that were filled into the Form 35B citing the results from the

following polling centers; Visions Senior School, Mrima Primary School, Ushindi Baptist Primary School, Likoni Flats and Majengo Mapya. The witness testified that there were instances of arithmetic errors in the Forms 35A and she corrected these and put the correct figure in the Form 35 B. On this, DW1 pointed out Consolata Nursery School polling station 5 of 7 where the tally of valid votes was given as 364 but the correct figure was 358. In Darul-Ulum polling station no.1 of 10 the valid votes were indicated as 387 while the correct figure was 378.

54. **DW 2, Hon. Mishi Mboko**, was the 4th Respondent and the declared winner of the Likoni Parliamentary seat. DW2 testified that the allegation that the Petitioner's agents were not allowed into the polling stations is not correct. She pointed out that in the case of Mrima Primary school which had 12 polling stations, Jubilee agents were in 10 of the polling stations. In relation to the allegation that some agents were denied the right to vote, DW 2 stated that some of the Petitioner's witnesses who were agents have admitted that they did not vote and referred to the evidence of PW 4. DW 2 stated that the copy of the Form 35B that had been annexed by the Petitioner seemed to have been interfered with during photocopying as its size is diminished thus making it appear different from her copy of the Form 35B and that of the IEBC.

55. On cross examination, DW 2 stated that she was not at the tallying center on 8/08/2017 and neither was she declared the winner on that date. The witness indicated that all candidates were invited to sign Form 35B but they refused. DW2 admitted that there was a letter of complaint written by the Petitioner and other persons. However, the witness testified that she did not see the Petitioner raise any complaint at the tallying center. The witness testified that during the campaign period there were briefings by the Returning officer and notices for these briefings were sent through letters and text messages (SMS). DW2 testified that she did not attend all the briefings and in those that she did, she never saw the Petitioner. Upon being shown the list of Jubilee agents for Mrima Primary School polling center vis-a-vie the Jubilee Party agents that signed Forms 35A at the center's polling stations, DW 2 admitted that only 3 out of the 12 agents who signed in were in the Jubilee list of agents. However, DW2 denied that the rest could be imposters as no evidence has been tendered to that effect. DW 2 denied that any of her agents were arrested for electoral offences on 8/08/2017. The witness also denied being involved in any voter bribery. DW2 reiterated that the results in Forms 35A and those in Form 35B were the same and that any alterations on Forms 35A did not affect the valid votes cast nor did they affect the results of the election.

56. **DW3, James Owour Odongo, DW 4, Gilbert Odudu and DW 5, Henry Obuya Were** were all agents of ODM party with DW 5 being the Chief agent and DW 3 and DW 4 agents stationed at polling stations at Majengo Mapya Mudzalifa. They testified that the voting and counting of votes at Majengo Mapya Mudzalifa went on well without any incident and that there were agents of Jubilee party at the polling stations. On cross examination, DW 3 admitted that only one agent who was stationed at polling station no. 10 at Majengo Mapya appeared in the Jubilee list of agents. DW 3 testified that some Jubilee agents were present at the polling stations but may have refused to sign Form 35 A. The witness pointed out Form 35A for polling station No. 1 of 10 for Majengo Mapya where no Jubilee agents signed, but the polling station diary indicated that a Mr. Reah had reported at 6.30am for Jubilee party.

57. DW 5 testified that the results were announced on 10/08/2017 and he saw the DW 1 sign Form 35B on that day. The witness stated that on 9/08/2017 he went to Majengo Mapya polling center and saw a van with a Mr. Mwanzuka trying to stop the van from leaving complaining that the counting was proceeding without the presence of agents. DW5 claimed that the said Mr. Mwanzuka was later arrested. Apart from this incident, DW 5 claimed that he was not aware of any other incident. DW 5 admitted that the Petitioner did make a complaint and wanted the declaration of the results to be delayed.

Submissions, Analysis and Determination

General Principles governing Election Petitions

58. Election Petitions are not ordinary suits. They are special proceedings governed by their own sets of laws and regulations. Principally, elections are governed by the Constitution which is the supreme law. At Article 1(2) the Constitution provides that the people may exercise their sovereign power either directly or through their democratically elected representatives. Article 38 on the other hand affirms the sovereignty of the people by providing for their political rights. Article 38(2) provides as follows:

(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free expression of the will of the electors for—

(a) any elective public body or office established under this Constitution; or

(b) any office of any political party of which the citizen is a member.

59. While each citizen is entitled to a free and fair election, Article 81 (e) provides the requirements of a free and fair election being that the election should be by secret ballot; free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner.

60. Article 86 of the Constitution provides the principles of voting which are to be adhered to by the independent body being the Independent Electoral and Boundaries Commission. These are that:

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

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

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

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

election materials.

61. Apart from the Constitution there are other laws that govern elections and electoral disputes including the Elections Act and its Regulations made thereunder, the Election Offences Act, the Political Parties Act and the Independent Electoral and Boundaries Commission Act.

a) Standard of Proof

62. As stated above elections petitions are special disputes and as such the ordinary standard of proof applied in civil cases cannot apply to election proceedings. In civil proceedings the standard of proof is on a balance of probability, while in criminal proceedings the standard of proof is that of beyond any reasonable doubt. However, the standard of proof in election cases is regarded as being an intermediate one that is above the balance of probability but below beyond any reasonable doubt. This was the position in the case of **Raila Odinga & Another vs. IEBC & 3 others, Presidential Petition No. 1 of 2017** where the court held as follows:

“[148] In many other jurisdictions including ours, where no allegations of a criminal or quasi-criminal nature are made in an election petition, an intermediate standard of proof, one beyond the ordinary civil litigation standard of proof on a “balance of probabilities”, but below the criminal standard of proof “beyond reasonable doubt”, is applied. In such cases, this Court stated in the 2013 Raila Odinga case that “the threshold of proof should, in principle, be above the balance of probability, though not as high as beyond reasonable doubt...”

[150] The rationale for this higher standard of proof is based on the notion that an election is not an ordinary suit concerning the two or more parties to it but involves the entire electorate in a ward, constituency, county or, in the case of a presidential petition, the entire nation. (emphasis added)

[152] We maintain that, in electoral disputes the standard of proof remains higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi criminal nature are made, it is proof beyond reasonable doubt.”

63. This position was also reiterated in the case of **M’nkiria Petkay Shen Miriti vs. Ragwa Samuel Mbae & 2 others [2014] eKLR** where the Court of Appeal stated:

“from the practice and history of this country, the standard of proof required in Election Petitions is higher than a balance of probabilities but not beyond reasonable doubt save where offences of a criminal nature are in question.”

64. The standard of proof becomes that of beyond reasonable doubt where there are allegations that a criminal offence was committed. This is the same standard applied in criminal matters.

b) Burden of Proof

65. Section 107 of the Evidence Act provides:

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

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

66. In the instant proceedings the Petitioner has alleged that the election conducted did not comply with the law and that there were numerous irregularities that affected the election. The burden of proof therefore lies squarely with the Petitioner to prove his allegations to the satisfaction of this court. The Respondents cannot be compelled to bear the burden of proof as they have not alleged the existence of any facts. Through their responses, the Respondents believe the elections to have been properly conducted.

67. However, the burden of proof can shift to the Respondents where the Petitioner effectively discharges his burden and the court is left to question who would lose if no further evidence is adduced. This was the position in **Raila Odinga & Another (supra)** where the Supreme Court rendered itself as follows:

“[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and remains constant throughout a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting” and its position at any time is determined by answering the questions as to who would lose if no further evidence were introduced.”

[133] It follows therefore that once the court is satisfied that the Petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the Petitioner bears an evidentiary burden to adduce “factual” evidence to prove his/her allegations of breach, then the burden shift and it behoves the respondent to adduce evidence to prove compliance with the law.

c) Relevance of Section 83 of the Elections Act

68. Section 83 of the Elections Act provides as follows:

“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.” (emphasis added)

69. Considerable controversy has arisen on the applicability of this Section, whether it should be applied conjunctively or disjunctively. In the provision the word “or” is used and not “and” therefore the implication would be that only one limb of the provision needs to be proved for an election to be voided. This is the position that was taken by the Supreme Court in the case of **Peter Gatirau Munya vs. Dickson Mwenda Githinji and 2 others [2014] eKLR** where the court held as follows:

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

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

218. Where, however, it is shown that the irregularities were of such magnitude that they affected the election results, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection are not enough, by and of themselves, to vitiate an election.”

70. Further the Supreme Court in the **Raila Odinga & Another case (supra)** observed as follows:

“In our respectful view, the two limbs of Section 83 of the Elections Act should be applied disjunctively. In the circumstances, a Petitioner who is able to satisfactorily prove either of the two limbs of the Section can void an election. In other words, a petitioner who is able to prove that the conduct of the election in question substantially violated the principles laid down in our Constitution as well as other written law on elections, will on that ground alone, void an election. He will also be able to void an election if he is able to prove that although the election was conducted substantially in accordance with the principles laid down in our constitution as well as other written law on elections, it was fraught with irregularities or illegalities that affected the result of the election.”

71. In as much as a Petitioner can void an election by proving only one limb of Section 83, the intention of the provision is not to allow an election to be voided based on mere irregularities which may be based on human error. On the first limb of the provision, I should think that the elections need to have been *substantially* conducted in a manner that is not in accordance with law. Mere breach of provisions of the law will not void an election. In the **Raila Odinga & Another case (supra)**, the Supreme Court pronounced itself as follows:

“Therefore, while we agree with the two Lord Justices in the Morgan v. Simpson case that the two limbs should be applied disjunctively, we would, on our part, not take Lord Stephenson’s route that even trivial breaches of the law should void an election. That is not realistic. It is a global truism that no conduct of any election can be perfect. We will also go a step further and add that even though the word “substantially” is not in our Section, we would infer it in the words “if it appears” in that Section. That expression in our view requires that, before vitiating it, the court should, looking 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 under the first limb, the election should be what Lord Stephenson called “a sham or travesty of an election” or what Prof. Ekirikubinza refers to as “a spurious imitation of what elections should be.”

72. In the case of **Wavinya Ndeti & Another vs. Independent Electoral and Boundaries Commission (IEBC) & 2 others [2018] eKLR**, Muchelule J. rendered himself as follows:

“Section 83 of the Elections Act recognizes the sanctity of the right of the people to choose their political leaders, and forbids the court from trivializing that right by nullifying an election merely because errors or irregularities have been shown to have been committed, or that a provision of the law relating to elections has not been complied with. The errors and irregularities, or the non-compliance with election law, must be of such gravity that the integrity of the election is materially compromised.”

Issues for determination

73. The parties did not agree on the issue for determination at the pre-trial. However, the Petitioner in the Petition had listed the following as the issues for determination:

- a. Whether the Member of National Assembly Election was conducted in accordance with and in compliance with the Constitution;
- b. Whether the Member of National Assembly Election was conducted in accordance with and in compliance with the written law and national legislation;
- c. Whether the 1st, 2nd and 3rd Respondents’ non-compliance with the Constitution and/or the Law in the conduct of the Member of National Assembly Election affected the result of the said Election;

- d. Whether the 1st, 2nd and 3rd Respondents' non-compliance with the Constitution and/or the Law affected the validity of the result of the Member of National Assembly Election;
- e. Whether the non-compliance, irregularities and improprieties affected the validity of the result of the Member of National Assembly Election;
- f. Whether the 4th Respondent was validly declared as the Member of National Assembly Elect;
- g. Whether the 4th Respondent committed election irregularities;
- h. What are the appropriate orders to be made by the Court?

74. I have carefully considered the Petition and the submissions by Counsel. I have formulated the following issues for determination by this court:

- a. Whether the election for the Member of Parliament-Likoni Constituency-was conducted in accordance with the Constitution and other electoral laws.
- b. Whether there were any irregularities and illegalities in the conduct of the election for the Member of Parliament-Likoni Constituency-and whether the irregularities and illegalities affected the validity of the results.
- c. Whether the 4th Respondent was validly elected as the Member of Parliament for Likoni Constituency.
- d. Who shall bear the costs of this Petition.

I will deal with the first and second issue jointly.

(a&b) Whether the election for the Member of Parliament-Likoni Constituency-was conducted in accordance with the Constitution and other electoral laws or whether the alleged irregularities and illegalities affected the results of the election

75. The Petitioner in his Petition raised various allegations against the Respondents. These are:

(i) Agents being denied access to Polling Stations

76. In the Petition at paragraph 16 the Petitioner alleged that his agents were denied access to the polling stations either entirely or others were only able to gain access much later in the day after commencement of the election exercise with no reasonable explanation from the 1st, 2nd and/or 3rd Respondents. The Petitioner listed thirteen (13) polling centres where he claimed his agents were denied access;

- i. Ushindi Baptist Primary School;
- ii. Consolata Nursery School;
- iii. St. Joseph's Nursery School;
- iv. Darul-Ulum Madrasa;
- v. Likoni Muslim Primary School;
- vi. Mrima Primary School;
- vii. Vision Senior School;
- viii. Mtongwe Primary School;
- ix. Vijiweni Primary School;
- x. Peleleza Primary School;
- xi. Jamvi la Wageni;
- xii. Mweza Primary School; and
- xiii. Longo Primary School.

77. In his submissions the Petitioner submitted that only 17 real Jubilee Party agents gained access to the polling stations out of the 140 polling stations. The Petitioner further submitted that the entries made in the Polling Station Diaries, (herein after to be referred to as the PSDs) and the Forms 35A in relation to agents, were made by imposters as these individuals were not in the Jubilee Party agents list produced by the 1st-3rd Respondents as exhibit 3.

78. The Respondents on their part submitted that the Petitioner's agents were not denied access to polling stations and where they were, it was because they lacked the statutory documents required before admission into a polling station. The 4th Respondent submitted that in relation to the polling centers complained of by the Petitioner there was presence of Jubilee Agents citing the example of Ushindi Baptist Primary School where the 1st Respondent submitted that PW4 confirmed in her testimony that she was an agent for Jubilee Party at polling station no.3. In total, the 4th Respondent submitted that the Petitioner had 54 agents in the 13 aforementioned polling centers.

79. Additionally, the Respondents claimed that the Petitioner's agents signed in the various PSDs, another clear indication that they had access to the Polling Stations.

80. The Petitioner claimed that the effect of this denial was that the 1st Respondent abdicated its responsibility of ensuring a transparent, impartial process of voting, tallying and transmission of results contrary to Article 81(e) of the Constitution.

81. Section 30 of the Election Act provides that a political party or a candidate may appoint an agent for each polling station. Regulation 57 of the Elections (General) Regulations, 2012 (herein after referred to as the "Election Regulations") provides as follows:

57. (1) Every political party shall at least fourteen days to the date of the election submit to the commission the names of the national chief agent and forty seven county chief agents.

82. In this case the agents in question were those from the Jubilee Party. It is not contested by the parties that the Jubilee Party list of agents was sent to the 2nd Respondent vide email on 8th August 2017 at 4.44 a.m. (a copy of the said list was produced by the 2nd Respondent and marked as Exhibit No. 3). Exhibit No. 3 contained the names of the County Chief Agents, Constituency Chief Agent and Polling Station agents for Jubilee Party.

83. The Petitioner admitted that the agents named in the said list were his "genuine" agents. PW1 claimed to be the Chief Constituency Agent for Jubilee Party in Likoni Constituency. His name does appear in Exhibit No. 3. And, his name was not submitted within the period required by Regulation 57 above. Be that as it may, PW 1 was admitted as a Chief Agent of the Petitioner on 8/08/2017.

84. Although the Petitioner pleaded that his agents were not allowed access to the 13 polling centers mentioned above, this was contradicted during his cross-examination and that of his witnesses. During cross examination of PW1 he admitted that Riziki Omar attended Vijiweni Primary School (one of the 13 polling centers mentioned above) as a Jubilee agent. Riziki Omar does appear in Exhibit no. 3. Further in his cross examination PW 1 admitted as follows:

"Among the schools I said there was no agent is Vision Senior School. However, see page 364 of the PSD Volume 1. Kassim Ali Mwamere signed for Jubilee. Also at page 389 two Jubilee agents signed in. They are Mr. Malalo and Ndunge. These are in Vision Senior School Polling Center. Page 416 we have two agents Faith Malalo and Mwalimu Kea both for Jubilee. AT PAGE 441 Sophia Makale signed as agents for Jubilee. He signed in at 6.05 a.m. So I agree that at Vision Primary School we had 6 Jubilee Agents. See Volume II Diary. At Daru-Ulum Madrasa. At Page 10 we find that Mwanahamisi Ali signed for Jubilee. He signed in at 5.30a.m. At page 34 there is a Jubilee Agent called Rajab Omari. At page 58 Jubilee Agent is Donald Mumo. At page 608 we have a Jubilee Agent Mwavadu."

85. The Petitioner also in his cross examination admitted that his agents were in some of the 13 polling centers in which he claimed they were denied access. He stated as follows:

"However, I have noted that my agents were in polling stations found in the following pages of the 1st to 3rd Respondent's Response. These pages are: 36, 38, 39, 40, 41, 43, 44, 45, 49, 52, 55, 56, 57, 58, 63, 69, 70, 72, 74, 76, 79, 80, 83, 86, 87, 89, 90, 91, 92, 93, 94, 95, 96, 97, 99, 102, 103, 105, 108, 110, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 125, 128, 129, 130, 132, 133, 135, 136, 137, 140, 141, 144, 145, 146, 148, 151."

86. The Petitioner's main contention is that some of the agents who appeared for Jubilee party were imposters and that he had only 17 genuine agents who gained access to the polling stations. The Petitioner, however, failed to produce a list of these 17 genuine agents. Further, the Petitioner brought to court some witnesses who testified as being his agents but did not appear in Exhibit No. 3. These witnesses are PW2, Samuel Kimani and PW4- Caroline Nyoro who testified that they were Jubilee agents at Maji Safi Primary School polling station no. 3 and Ushindi Baptist Primary school polling station no. 3 respectively. It is therefore difficult to believe the Petitioner's assertion that some of the persons who gained access to polling stations were imposters, yet some of his witnesses who claimed to be his agents did not appear in the list produced as Exhibit 3.

87. Further, PW2 in his cross examination admitted that he was denied access to the polling station because he did not have some of the statutory documents. However, when he did acquire the said documents he was allowed access into the polling station and he later signed Form 35A. It is therefore plausible that the alleged Jubilee agents were denied access because they lacked some of the statutory documents. The Petitioner also failed to produce a list of his agents and the specific polling station to which the agent was denied access.

88. Under Legal Notice No. 72 published on 21st April 2017, the Election (General) (Amendment) Regulations, 2017 amended the Election Regulations at Regulation 2 to include the definition of the term "polling station diary" In the Amended Regulation a polling station diary is

defined as :

“a record of all the activities at a polling station on the polling day.”

A polling station diary contains a section (page 11 of the Diary) where agents of the candidates or of a political party sign in on arrival at the polling station. In the said section the agents indicate their names, I.D number, name of the party they represent and the time they entered the polling station. Then they append their signature. I have carefully perused Vol. I-III of the copies of polling station diaries produced by the 2nd Respondent. In all the 13 polling centers complained of by the Petitioner there appears to be 73 agents who signed in for the Jubilee Party while in a few polling stations in the said polling centers there are no Jubilee agents. In some of the polling stations in the 13 polling centers there were even more than one agent for Jubilee party contrary to Regulation 62(2) of the Election Regulations. The contention by the Petitioner that he did not have any agents in the 13 polling centers appears unsubstantiated.

89. In the case of **Harry Okello Nadimo vs. IEBC & 2 others [2013] eKLR**, the court held as follows:

“For these reasons, how the Agent carries out his duty, conducts himself, treats, or is treated by the polling officials is important. An Agent who accepts or acquiesces to an outcome but wishes to recant it must give plausible reasons for the change of heart. Where at the hearing an Agent raises complaints about the conduct of the Election the Agent must be asked about the action taken by him or her to seek intervention when the issue arose. Where the Agent is guilty of inaction, then the Agent will be hard put to explain the inaction. On the converse the court may take a benign view of the evidence of an Agent who raises a legitimate complaint or query in a formal and timeously fashion. These are but a few instances of how the evidence of an Agent can assist the court to assess the credibility of the election process. The Point to be made is that the evidence of an Agent can turn out to be crucial in aiding the court to get a true impression of how an election was managed and conducted.”

90. The court acknowledged the relevance of the evidence of agents in discerning what occurred during the election process. The Petitioner called six (6) agents to testify. Of the six, PW1 was the Chief Agent, the remaining five (5) agents, only two (2); PW 4 and PW 5 were agents at two of the thirteen polling centers in which the petitioner alleged his agents were denied access. These two agents attended Ushindi Baptist Primary School and Darul-Ulum Madrasa. The Petitioner did not call any of his agents who attended Consolota Nursery school, St. Joseph’s Nursery School, Likoni Muslim Primary School, Mrima Primary School, Vision Senior School, Mtongwe Primary School, Vijiweni Primary School, Peleleza Primary School, Jamvi la Wageni, Mweza Primary School and Longo Primary School to testify that they were denied access to the polling stations in these polling centres and the reasons as to why they were denied access. Therefore, the contention by the Petitioner that his agents were denied access in the 13 polling centers mentioned above also appears unsubstantiated.

91. Additionally, Regulation 62(3) of the Election Regulations provides that the absence of agents shall not invalidate the proceedings at a polling station. The Petitioner has not proved that his agents were unreasonably denied access to polling stations. It is the finding of this court that the allegation by the Petitioner that his agents were denied access to the polling stations was not proved and the allegation lacks merit and is dismissed by this court, pursuant to Section 107 of the Evidence Act, and the Supreme Court case of **Raila Odinga & Another 2017-** both of which I have quoted above, on the burden of proof which the Petitioner has failed to discharge with respect to the foregoing issue.

(ii) Signing and Stamping of Form 35A

92. The Petitioner in his Petition pleaded that some of the Forms 35A were not signed by his agents while some of the Forms 35A were unstamped and lacked some of the necessary security features. The Petitioner also claimed that some forms were not signed by the relevant presiding officers. The Petitioner submitted that over 62 Forms 35A were not signed by his agents and that reasons were not provided as to why the agents did not sign the Forms 35A. The Petitioner further contended that a good number of Forms 35A lacked the 1st Respondent’s official stamp being about 15 Forms 35A.

93. The 1st-3rd Respondents submitted that the refusal of agents to sign Forms 35A does not by itself invalidate the election and that the Forms 35A contained the 1st Respondent’s logo and name. The 4th Respondent submitted that there is no requirement to stamp Forms 35A.

94. Regulation 79(3) (4) (5)(6) of the Election Regulations provides as follows:

(3) Where any candidate or agent refuses or otherwise fails to sign the declaration form, the candidate or agents shall be required to record the reasons for the refusal or failure to sign.

(4) Where a candidate or 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.

(5) Where any candidate or agent of a candidate is absent, the presiding officer shall record the fact of their absence.

(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. (emphasis added).

95. The implication of Regulation 79(6) is that where agents refuse to sign or fail to sign Forms 35A and refuse to provide reasons for their refusal, this on its own shall not be a ground upon which an election can be invalidated. This was the position taken by the court in the case of **Odalo Makojwando Abuor vs. Dalmas Otieno Anyango & 2 others (2013) eKLR**. Also in the case of **Kakuta Maimai Hamisis vs. Peris Pesi Tobiko & 2 others [2013] eKLR**, the court observed as follows:

“The forms are meant to be signed by all the agents. The reasons for refusal to sign are also noted. The presiding officer can also make remarks at the bottom of the form. The presiding officer and/or his assistant also execute the form. Under Regulation 79(7), refusal or failure by the presiding officer to make remarks do not invalidate Form 35. It is thus not surprising that all the editions of the Forms 35 are not signed by all the agents for example.”

96. It is therefore the finding of this court that although some of the Forms 35A were not signed by Jubilee agents and reasons as to why they refused to sign not indicated by either the agents or presiding officers, this cannot invalidate the results announced by the presiding officers in the affected polling stations.

97. As regards stamping of Forms 35A, there is no mandatory requirement that the Form 35 A should be stamped. Regulation 79 of the Election Regulations only requires the presiding officer to announce the results of the voting at the polling station, request each candidate or agent present to append his or her signature, provide each political party, candidate or their agent with a copy of the declared results and affix a copy of the declared results at the place easily accessible by the public within the polling station. There is no requirement that the presiding officer should stamp the Form 35A. In the case of **John Murumba Chikati vs. Returning Officer Tongaren Constituency & 2 others [2013]eKLR, Gikonyo J**, held as follows with respect of unstamped Form 35:

“42. What about Form 35 which had not been stamped. The court takes the view that affixing the official stamp is important, but, lack of it does not invalidate the Form. The requirement of the law under Regulation 79 of the Elections (General) Regulations, 2012 (hereinafter General Regulations is that the Presiding Officer signs the statutory form. Under Regulation 5 of the General Regulations, Presiding Officer includes the Presiding Officer and the Deputy Presiding Officer duly appointed by IEBC. The statutory form is valid once it has been signed by the Presiding Officer; both the Presiding Office and the Deputy Presiding Officer or by either of them. The Forms were signed by the Presiding Officer appointed for the polling stations in question and therefore, lack of the official rubber stamp does not invalidate the Form or the results thereto.”

98. The Petitioner did not identify in his Petition the Forms 35A that were unstamped. That notwithstanding, I should think that if the Forms had been signed by the agents and the mandated IEBC officials, non- stamping of the forms would be a minor issue. The agents and IEBC officials by signing the Form have already attested to the correctness and/or validity of the declared results. Thus mere non-stamping of the Forms 35A will not invalidate the declared results.

99. The Petitioner also alleged that the Forms 35A were not signed by the Presiding Officers. In his Petition the Petitioner did not identify the specific Forms 35A that were not signed by Presiding Officers. However, in his submissions the Petition identified Form 35A from Polling Station No. 2 at St. Joseph Nursery School as the only Form 35A that was not signed by the Presiding Officer.

100. The Petitioner did not identify the Presiding Officer that was stationed at the said polling station. The Petitioner did not also cross examine the 2nd Respondent on this issue. In the Petition the Petitioner did not state that he contested the results declared in this polling station. This is one polling station out of one hundred and forty polling stations in Likoni. I do agree that the Presiding Officer ought to have signed the Form 35A in line with Election Regulations. However, I am not of the opinion that the non-signing of the Form 35A affected the results declared in that polling station or in Likoni Constituency. The Petitioners did not tender any evidence to prove that the results in the said polling station were affected by the omission. On this issue, I am inclined to the views espoused in the case of **Abdikam Osman Mohamed & Another vs. Independent Electoral & Boundaries Commission & 2 others [2013]eKLR**, where Mabeya J. held as follows:

“Regulation 79 (1) of the Regulations imposes a duty on the presiding officer to sign the Form 35. Where there is failure to do so, the Election Court should resolve the issue in favour of preserving the voter’s inalienable right to vote particularly when there is no proof that failure by the Presiding Officer to sign or stamp the Form 35 was willful or affected the election results in any manner.

In this regard, the Petitioners did not lead any evidence that the lack of signatures or stamp of the presiding officers in Forms 35 for the above mentioned polling stations affected the outcome of the election. Further, the Petitioners did not even challenge the results that were tallied and declared in those polling stations. It is not enough for the Petitioners to merely allege and indicate a failure on the part of the 1st and 2nd Respondent, but it was also essential for them to demonstrate that such failure affected the result of the election. The concerned Presiding Officers who failed to sign or stamp the Forms 35 should however be sanctioned but this does not mean that the voter who toiled for hours to exercise his or her right to vote should be disenfranchised for the omissions of the electoral officials.” (Emphasis added)

101. In the finding of this court therefore, this ground of unsigned and unstamped Forms 35A must fail on account of Regulation 79(1) aforesaid and also on account of Section 107 of the Evidence Act, for failure to discharge the burden of proof by the Petitioner.

(iii) Failure by 1st Respondent to include 49 polling stations in Form 35B and denial of access to statutory forms

102. The Petitioner in his Petition alleges that the 1st Respondent issued him with a copy of Form 35B that was incomplete as it did not include 49 polling stations being:

- i. Ushindi Baptist Primary School- 12 polling stations
- ii. Likoni Muslim Primary School -10 polling stations
- iii. Mrima Primary School- 12 polling stations

- iv. Likoni Social Hall- 5 polling stations
- v. Likoni Vision Senior School- 5 polling stations
- vi. Majengo Mapya/ Mudzalifa- 12 polling stations

102. The Petitioner submitted that they were able to only secure two pages (first and last) of Form 35B bearing serial numbers; NA001005-9 and NA001005-5 and could not get the third page. Further the Petitioner submitted that he only got a few forms 35A (seven in number) from his agents. The Petitioner claimed that if the 1st and 2nd Respondents had complied with the law and affixed copies of Forms 35A and Form 35B at the entrance of the polling stations and the tallying center as required by law he would have had access to the forms.

103. Although the Petitioner claimed in his Petition that his copy of Form 35B was incomplete, he contradicted himself in cross examination when he admitted that the Form 35B given to him was complete and it is only his document at page 38 of the Petition (which is the alleged Form 35B) that is incomplete. A closer look at the copy of the Form 35B annexed by the Petitioner at page 38 of the Petition shows that the Form could have been printed and/or photocopied wrongly. The annexed copy does not seem to take the page format similar to those of the Form 35B annexed by the Respondents. This could be the reason as to why the Petitioner's copy appeared to be incomplete. Further, this court requested for the original Forms 35A and Form 35 B to be deposited in the court. A perusal of the original Form 35B shows that it is complete and contains all the 49 polling stations complained of by the Petitioner.

104. As regards the allegation that the Petitioner was denied access to the Forms the same has not been proved. The Petitioner did not tender any evidence to show that the 1st and 2nd Respondent did not affix copies of the Forms 35A and Form 35 B at the entrance of the polling stations and tallying center as alleged. The Petitioner also did not call any witnesses to testify on this allegation. Therefore this allegation is accordingly not proved, and is dismissed.

(iv) Bribery and Intimidation/undue influence

105. The Petitioner submitted that the instant election was marred and significantly compromised by intimidation and improper influence or corruption contrary to Article 81(e) (ii) of the Constitution. The Petitioner alleged that there was coercion of public officers and improper influence of voters which persisted even during the hearing of this Petition as at least three of the Petitioner's witnesses were allegedly compromised and failed to testify. The Petitioner cited an incident where he alleged that there were some cars that were ferrying voters to the polling stations and thereafter taking them to a nearby hotel after they voted. The Respondents denied these allegations and submitted that the Petitioner did not prove any of these claims.

106. Section 9 of the Election Offences Act No. 37 of 2016 states 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, demonstration or other event of a political nature or in some other manner lending support to or for a political party or candidate;

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

(c) directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates, commits an offence.

(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.

(3) A person who commits an offence under this section shall be liable, on conviction, to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both.

107. The standard of proof in relation to election offences is that of beyond reasonable doubt. The Petitioner should not only allege that the offence occurred but also provide unequivocal proof that the offence was committed. The importance of tendering proof beyond reasonable doubt was discussed in the case of **Moses Masika Wetang'la vs. Musikari Nazi Kombo & 2 others [2014] eKLR** where the court observed as follows:

“There is good reason for this requirement. Election Offences are criminal offences. For anyone to be held criminally liable, Article 50 (2) (a) of the Constitution requires that the case against such person should be proved beyond reasonable doubt. In election petitions, the law requires the election court to report such person to the IEBC, which may bar such person from contesting in that or future elections. This is besides the sentence that may be meted out to such a person if criminal charges are brought against him. It is on account of these dire consequences that the law demands proof beyond reasonable doubt of allegations of commission of election offences.”

108. The Petitioner did not tender any evidence during the course of these proceedings to support this allegation. The Petitioner did not call any witnesses to identify the car that purportedly ferried voters to the polling stations and thereafter took them to a nearby hotel after they voted. The persons said to have been ferried in the unidentified vehicle were also not identified. The Petitioner did not also identify the person who allegedly bribed the voters. It is not enough for the Petitioner to merely allege bribery. He must also strictly prove the same. The burden of proof which rested with the Petitioner, remains undischarged. This allegation is accordingly dismissed.

109. Section 10 of the Election Offences Act No. 37 of 2016 makes provisions for undue influence. It states as follows:

(1) A person who, directly or indirectly in person Undue influence or through another person on his behalf uses or threatens to use any force, violence including sexual violence, restraint, or material, physical or spiritual injury, harmful cultural practices, damage or loss, or any fraudulent device, trick or deception for the purpose of or on account of—

(a) inducing or compelling a person to vote or not to vote for a particular candidate or political party at an election;

(b) inducing or compelling a person to refrain from becoming a candidate or to withdraw if he has become a candidate; or

(c) impeding or preventing a person from being nominated as a candidate or from being registered as a voter, commits the offence of undue influence.

(2) A person who induces, influences or procures any other person to vote in an election knowing that the person is not entitled to vote in that election commits an offence.

(3) A person who directly or indirectly by duress or intimidation—

(a) impedes, prevents or threatens to impede or prevent a voter from voting; or

(b) in any manner influences the result of an election, commits an offence.

(4) A person who directly or indirectly by duress, intimidation or otherwise compels or induces any voter who has already voted at an election—

(a) to inform that person or any other person of the name of the candidate or political party for which the voter has voted; or

(b) to display the ballot paper on which the voter has marked his vote, commits an offence.

110. The Petitioner alleged that his agents were intimidated by the 1st-3rd Respondents when they complained about the propriety of the process at the tallying center. The Petitioner did not call any witness to testify about the alleged intimidation. Neither did the Petitioner identify the person or persons who intimidated his agents. The Petitioner did not also identify his agents who were intimidated. Section 107 of the Evidence Act provides that he who alleges must prove. The Petitioner ought to have proved beyond reasonable doubt that his agents were intimidated. For this reason, this ground of the Petition fails.

(v) Power Black-outs

111. At paragraph 30 of the Petition, the Petitioner contended that there were intermittent periods of electricity black out when the counting process was ongoing but the counting proceeded and as a result his agents were not able to properly participate in the counting process. All the Respondents admitted that there were indeed periods of electricity black out but contended that the black outs did not affect the process. DW 1, Luciana Sanzua (the Returning Officer), in her testimony admitted that there were power outages but added that the process went on well despite the black outs. She also testified that there were no malpractices arising from the power blackout.

112. In the case of **Kakuta Maimai Hamisi vs. Peris Pesu Tobiko & 2 others [2014] eKLR**, the learned Judges of the Court of Appeal observed as follows:

“That there may have been evidence of power outages but there is nothing to show that these had been orchestrated by the respondents with a view to committing offences as there was no allegation that these aided any party to sneak in any ballot papers with a view to stealing the election.”

113. The occurrence of periods of power black outs during the counting process is not disputed. Occasional black outs, I should think, are not caused deliberately with the intent to disadvantage any party. The Petitioner did not lead any evidence to show that he was disadvantaged by the black outs while the 4th Respondent or other candidates gained some advantage from the black outs. The Petitioner failed to identify the specific polling centers that were affected by the black outs. Further, the Petitioner did not prove how the black outs affected the results. The Petitioner only claims that the effect of the black outs was that his agents were not able to properly follow that process. The question then is, did those agents dispute the results that were declared in these polling stations? The Petitioner laid no evidence to show that they did. For these reasons, this ground of the Petition also fails.

(vi) Information on Forms 35A at polling stations not accurately entered into Form 35B and alterations, cancellations and omissions on Forms 35A without counter signature

114. The Petitioner pleaded that the information on Forms 35A was not accurately entered into Form 35B. Further, the Petitioner submitted that there were various alterations and cancellations on Forms 35A that had not been countersigned and therefore their authenticity is in doubt. The Petitioner submitted that the 2nd Respondent's testimony that the alterations were made by the presiding officers cannot be trusted as there is no means of verifying if it is actually the presiding officers who made the changes. The 4th Respondent submitted that the alterations and/or omissions made in the Forms 35A did not affect the results that were declared.

115. The Petitioner in his petition did not identify the Forms 35A with alterations or omissions. However, the polling stations are identified in the Petitioner's submissions at page 25-26. I have carefully perused the original Forms 35A for the polling stations identified at pages 25-26 of the Petitioner's submissions. In relation to Ujamaa Polling Station 3 of 5 alterations have been made on the total number of valid votes cast. However, the said alterations have been countersigned. At Darul-Ulum Madrassa polling station 1 of 10-the total number of valid votes cast in favour of all candidates is indicated as 387 while in the station count the total number of valid votes is indicated as 378. At Darul-Ulum Madrassa polling station 7 of 10- there is an alteration on the number of votes obtained in favour of DOMOKO KHAMIS ALI but the same has been countersigned. The Petitioner alleged that in this polling station there was also an alteration on the number of valid votes obtained but the same was not evidenced from the Form 35A. At Jamvi La Wageni Polling Station No. 4 of 5- the total number of votes cast in favour of each candidate are indicated against the names of the candidates while the Petitioner alleged that they should have been indicated in the column provided for the same. At Likoni Muslim Primary school polling station 1 of 10- there are alterations made on the total number of votes cast and the total number of registered voters in the polling station and the same have not been countersigned. At Likoni Muslim Primary School polling station 3 of 10- there is an alteration on the total number of valid votes cast in the polling station count which has not been countersigned. At Likoni Muslim Primary School Polling Station 9 of 10- there are alterations on the total number of valid votes cast and the valid votes cast in the polling station count. At Likoni Primary School polling station 2 of 12-there are alterations on the number of votes cast in favour of the 4th Respondent and on the name of the Deputy Presiding Officer. At Likoni Primary School polling station 3 of 12- there is an alteration on the number of votes cast in favour of SHAKOMBO SULEIMAN RASHID. At Likoni Primary school polling station 4 of 12- there is an alteration on the number of valid votes cast in the polling station count. At Mrima Primary School polling station 6 of 12- there are alterations on the number of valid votes cast in favour of the 4th Respondent. At Majengo Mapya Mudzalifa polling station No. 6 of 10- there are alterations on the total number of valid votes cast and the total number of valid votes in the polling station counts. At Majengo Mapya Mudzalifa polling station No. 8 of 10- there is an alteration on the number of valid votes cast. At Majengo Mapya Mudzalifa polling station 9 of 10- there is an alteration on the number of valid votes cast in the polling station counts.

116. The Petitioner submitted that the results from these polling stations are not valid and should not be relied upon in determining the final results and further that the alterations depict fraud perpetrated by the 1st and 2nd Respondents against not only the Petitioner but also the voters of Likoni.

117. To address this issue this court must emphasize the principle that elections can never be perfect although that would be the desire of every election manager. Elections are susceptible to human errors and mistakes as they are conducted by humans and not machines (which are also prone to errors). The Forms 35A were filled by persons mandated by the 1st Respondent to do so. It is important to take into account the circumstances under which these individuals operated. These individuals work for long hours sometimes without food or refreshments. When fatigue sets in, they are prone to make mistakes. In the case of **Gatirau Peter Munya vs. Dickson Mwenda Kithinji & 2 others [2014]eKLR**, the Supreme Court of Kenya relied on the case of **Opitz C v. Wrzesnewskij (2012) 3 S.C.R 76** where the court addressed administrative mistakes as follows:

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

118. It is evident that some of the alterations that were made related to mathematical errors in adding up the votes obtained by each candidate. For instance, at Darul-Ulum polling station no.1 of 10, the total number of valid votes cast in favour of each candidate is indicated as 387 while the total number of valid votes cast in the polling station is indicated as 378. A simple mathematical calculation shows that the correct figure is that indicated at the polling station counts being 378. This is also the figure that was correctly transferred to Form 35B. In Majengo Mapya-Mudzalifa polling station 8 of 10, there is an alteration in the total number of votes cast in favour of each candidates to have the total read 336. That alteration has not been made to the total valid votes cast in the polling station counts which reads 338. Again a simple calculation of the votes cast for each candidate shows that the correct figure is 336 which is also the figure that was transferred to Form 35B. In other aforementioned polling stations there are simple alterations of figures but there are no apparent mathematical errors. For instance, in Majengo Mapya-Mudzalifa polling station 9 of 10, the last number in the total number of valid votes cast in the polling station has been altered but the figure (337) is the same as that in the total number of valid votes cast in favour of each candidate.

119. In Likoni Primary School polling station No. 2 of 12, Mrima Primary School polling station 6 of 12 and Majengo Mapya Mudzalifa polling station 8 of 10, there are alterations made to the number of valid votes cast in favour of the 4th Respondent. However, in Likoni Primary School polling station No. 2 of 12 and Mrima Primary School polling station 6 of 12 there were Jubilee Agents present who signed the forms being LIVIAN WANGARE and KOMBO LAININ respectively. By signing the Form 35A these agents were attesting to the accuracy of that Form and also approving the alterations made therein. The Petitioner did not tender any evidence to show that these two individuals were not his agents.

120. The Petitioner's main claim is that the alterations were not countersigned. Countersigning on alterations is regarded as good administrative practice. In essence, countersigning gives credibility to the alterations made. However, there is no mandatory statutory requirement to countersign on alterations made on Forms 35A. The 2nd Respondent explained in detail during her testimony the reasons for the alterations citing mathematical errors. The Petitioner did not seem to dispute this assertion by the 2nd Respondent, but maintained his contention that the alterations were not countersigned. After examining the alleged Forms, this court is inclined to believe the 2nd

Respondent's reasons for the alterations.

121. Further, after examining the alleged Forms this court takes the view that the alterations made on the Forms are minor irregularities. The Petitioner did not prove that the alterations were aimed at misleading or giving undue advantage to any of the candidates. The question left to address is whether these minor irregularities affected the declared results.

122. The Petitioner submitted that the results obtained from the polling stations with alterations should be invalidated and should not be included in the final tallying of the results. However, the Petitioner did not prove that the results in these polling stations were affected by the alterations. For instance, did the Petitioner lose any votes due to the alterations, or did the 4th Respondent gain any votes that she did not deserve? The Petitioner cannot merely make an allegation. The allegation must be credible. It is for the Petitioner to show that although there were minor irregularities the same gravely affected the results of the elections as declared. In the **Kakuta Maimai Hamisi case (supra)**, the Court of Appeal observed as follows:

“...There were irregularities, inconsistencies, omissions and commissions by the 2nd and 3rd Respondents but they were minor and did not go to the root of the process to an extent that the process would be discredited.”

123. Also in the case of **Joho v. Nyange & Another (EP No. 4 of 2008) 3 KLR 500**, Maraga J. (as he then was) held that:

“Some errors in elections are nothing more than what is likely in the conduct of human activity. If the errors are not fundamental, they should be excused or ignored. But where deliberate irregularities or forgeries are committed, different considerations should be given.”

Accordingly, this court does not find that the alterations and/or omissions were substantially in breach of the law or that they were intended towards an illegality or that the alterations affected the results of the election in the affected polling stations or in Likoni Constituency.

(vii) Form 35B

124. The Petitioner submitted that Form 35B is dated 8/08/2017 yet the results of the election were declared on 10/08/2017. The Petitioner alleged that by thus dating the Form 35B, the 2nd Respondent had a predetermined result in mind and hence the election held on 8/08/2017 was merely an academic exercise. The Petitioner also alleged that Form 35B was signed by 3 representatives of ODM party and also the 4th Respondent, yet the law required only the candidate or the chief agent to sign and date the form. The Petitioner contended that one of the persons who signed Form 35B, RAWLINS MARK MUSHILA, was a stranger as he was not a candidate or an agent in the said election. The Petitioner further claimed that there were inconsistencies in the serial numbers on the Form 35 B. The Petitioner claimed that the Forms 35B that had three pages bore the following serial numbers: NA001005-9, NA001005-4 and NA001005-5. It was the Petitioner's contention that since the 2nd Respondent had admitted in her testimony that she had 10 pages of Form 35B running from serial numbers NA001005-1 to NA001005-10, there was no sufficient reason given by the 2nd Respondent as to why she chose to utilize the pages with the aforementioned serial numbers and not the rest of the pages.

125. The 4th Respondent submitted that the Petitioner through paragraph 5 of his petition stated that the winner of the election was declared on 10/08/2017. The 1st-3rd Respondents did not address this issue.

126. During cross examination of the 2nd Respondent, the witness explained that she dated the Form 35B 8/08/2017 because that is when she began the polling process. However, the tallying process began on 9/08/2017. As correctly submitted by the Petitioner Regulation 83(1) (e) and (f) of the Election Regulations require the Returning Officer to fill in Form 35B in all the relevant sections and thereafter to sign and date the Form and publicly declare the results. The 2nd Respondent therefore violated Regulation 83 (1) (f) by dating Form 35B earlier than when the results were declared. Was this violation a substantial breach of the law? I do not find this to be a substantial breach of the law warranting invalidation of the results. The Petitioner linked the dating of the Form 35B on 8/08/2017 with the 2nd Respondent having a predetermined winner. However, the Petitioner failed to prove this linkage. The results in Form 35B are clearly supported by entries in Forms 35A. It is not possible to infer that the 2nd Respondent had a pre-determined winner. The winner was as per the will of the electorate as filed in Forms 35A. The Petitioner has failed to prove that the results in Form 35B were not those from the respective polling stations, but were instead “cooked” or imagined by the 2nd Respondent.

127. On the issue of the Form 35B being signed by a stranger who was not a candidate or an agent in that election, but apparently a candidate in another elective position, I adopt the views espoused by Muriithi J. in **Paul Gitenyi Mochorwa vs. Timothy Mosei E. Bosire & 2 others [2013] eKLR**:

“It is an issue of first principles: the object of signing the Form 35 is to confirm the results obtained therein. If it is signed by agents in other elections taking place alongside the particular election, there cannot be a valid objection to such “over-confirmation” unless it can be shown to have affected the result adversely in some way.”

128. The Petitioner submitted that it was strange that Form 35B was only signed by persons from ODM party yet there were a total of seven (7) candidates in the said election and none of them signed the form. The Petitioner dismissed the explanation by the 2nd Respondent that the other candidates or their agents declined to sign Form 35B. According to the Petitioner he declined to sign Form 35B for reasons that a winner had been pre-determined by the 2nd Respondent. This court, however, is not satisfied by the reason given by the Petitioner for failure to sign Form 35B.

129. The Petitioner in his Petition annexed to his affidavit in support of the Petition a copy of a letter of complaint marked as “MMM-2”. In

the said letter signed by the Petitioner and two other candidates: SULEIMAN RASHID SHAKOMBO and BENARD WAORE, among other individuals, they complain about certain electoral malpractices and call on the 2nd Respondent to desist from announcing the results of the election until the malpractices are addressed. From this letter, it is clear that the Petitioner together with the above mentioned candidates were present at the tallying center when the results were being tallied. The Petitioner in his testimony stated that the 2nd Respondent ignored their grievances and went on to announce the results. This court believes that it is on these grounds that the Petitioner and the other two candidates refused to sign Form 35B. Having intentionally chosen not to sign the said Form 35B the Petitioner is now estopped from laying the blame for not doing so on the 2nd Respondent.

130. The Petitioner raised alleged inconsistencies with the serial numbers on the three pages of Form 35B. The 2nd Respondent in her testimony explained that she did have 10 pages of Form 35B running from serial number NA001005-1 to NA001005-10 but when printing the information onto these pages some could not properly align, so she could not use those pages. The Petitioner submitted that this reason by the 2nd Respondent is an afterthought as the same did not feature in the 1st -3rd respondents' response or in the 2nd Respondent's affidavit. This court notes that the Petitioner did not specifically plead inconsistencies in the serial numbers on the Form 35B but only alleged that Form 35B was incomplete. The Petitioner cannot therefore have expected the 2nd Respondent to respond to what was not pleaded in the Petition.

131. The Petitioner raised issues about the inconsistencies in the serial numbers on Form 35B claiming that these inconsistencies amounted to violation of Article 86 of the Constitution on verifiability, accuracy, accountability and transparency. However, the Petitioner did not show how these election principles were breached. The Petitioner did not prove that it is a requirement of law or practice that serial numbers on Form 35B be consecutive. For these reasons, the allegations concerning the Form 35B appears to this court to be superfluous, and the same is dismissed.

(viii) Unpleaded matters

132. It was submitted by all the Respondents that some issues raised by the Petitioner in his submissions were not pleaded in his Petition nor raised during the course of the trial. These issues mostly related to the Forms 35A. they are:

- i. Different polling stations bore the name of the same person as the presiding officer.
- ii. Several Forms 35A were signed by un-gazetted presiding officers
- iii. Some Forms 35A were filled in the same handwriting. The Petitioner alleged that this raised the issue whether the signatures appearing alongside the names are genuine signatures.
- iv. Allegations relating to the PSDs found at pages 50-52 of the Petitioner's submissions.

133. It is clear that all above issues were not pleaded. The Petitioner introduced these issues at the very tail end of these proceedings. These are very serious issues which a respondent to a Petition must be allowed to respond to and to canvass during the hearing of the Petition. It is trite law that a party is bound by its pleadings and parties are not allowed to go outside their pleadings. The reason for this is to enable parties to suit to prepare and respond to a suit without ambush. The principle which binds parties to their pleadings brings about fairness and predictability in a trial, as no party would be allowed to ambush the other with new issues that the other party may not have anticipated or may not have the time to respond to.

134. In the case of **David Sironga Ole Tukai vs. Francis Atap Muge & 2 others [2014] eKLR**, the Court of Appeal observed as follows:

“The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised in their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.”

135. In **Independent Electoral & Boundaries Commission & Another vs. Steven Mutinda Mule & 3 others [2014] eKLR**, the Court of Appeal similarly held that:

“We hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score.”

136. In the instant case the Petitioner waited till the submission stage to raise the aforementioned issues. This conduct of the Petitioner was not envisaged in law. How did the Petitioner expect the Respondents to answer these allegations? The allegations are an ambush on the Respondents who have had no time to seek out evidence to dispute the same. If this court addresses these issues it would amount to giving undue advantage to the Petitioner at the expense of the Respondents.

(ix) Scrutiny

137. Vide a ruling dated 8th November 2017, this court ordered the scrutiny of ballot papers, ballot boxes, ballot seals and KIEMS kits

belonging to Majengo Mapya- Mudzalifa polling centre. The scrutiny exercise was carried out on 25th January, 2017 and a report submitted by the Deputy Registrar on 5th February, 2017.

138. The Petitioner submitted that the scrutiny revealed numerous inconsistencies and illegalities. The 4th Respondent submitted that the only irregularity revealed in the scrutiny, which was minor, was that Polling Station No. 4 could not be scrutinized as there was water inside the ballot box and the ballot material inside the box had been damaged. The 1st-3rd Respondents on the other hand explained the irregularities that had been alleged by the Petitioner.

139. I have carefully read through the scrutiny report and the rival submissions by the parties. There are irregularities that have been noted by the Deputy Registrar including unstamped counterfoils, discrepancies in the seal numbers on the lid seals and on the aperture, lack of serial number on one of the apertures, use of red seals, used seals not being sealed in tamper proof paper, loose seals, missing tallying sheets, variance in disputed ballots, variance of serial numbers on the ballot boxes and those in the PSD and non-availability of KIEMS kit for polling station 1 and 4.

140. While this court takes note of the aforementioned irregularities, the question that needs to be addressed is whether these irregularities affected the results that were declared in these polling stations.

141. In order to answer this question, this court sought to find out whether there were any Jubilee Agents stationed in these polling stations. According to the original Forms 35A deposited in court, Jubilee agents signed the forms in Polling Stations Nos. 3, 4, 5, 7 and 10. In polling station No. 4, two Jubilee agents signed the Form 35A. Further, this court interrogated the originals of the PSDs that formed part of the materials that were scrutinized. As per the PSDs there was presence of Jubilee agents in some of the polling stations. For instance, according to the PSD for polling station No.1- Anzazi Reah signed as an agent for Jubilee Party. In polling station No. 2-Musa Hajj signed in as an agent for Jubilee Party while in polling station No. 4-Emily Mghoi signed in as an agent for Jubilee Party.

142. While the Petitioner claimed that majority of those who attended as Jubilee agents during the elections were imposters, this court finds this claim to be unsubstantiated. Interestingly, the court notes that in polling station No. 4 of 10 where scrutiny could not be performed, an agent by the name EMILY MGHOI signed Form 35A for Jubilee Party. This agent does not appear in the Jubilee Party list of agents produced as Exhibit 3. This agent also swore an affidavit on 6th September, 2017 which was part of the Petition. This agent was, however, never called to testify. In her affidavit, EMILY MGHOI claims that there was tempering with ballot boxes and ballot stuffing in Polling station No. 2. This court is left to wonder why the Petitioner did not call this witness to testify on the alleged malpractices that the Petitioner claimed occurred in this polling center.

143. Further, the Petitioner did not call as a witness any of his agents who were stationed at Majengo Mapya-Mudzalifa. As this court noted earlier, agents are crucial to any electoral process. They are the eyes of the candidate or the party. They are tasked with ensuring that the 1st Respondent carries out its duties as required by law. The agents, I should think, should have first-hand information on any malpractices that could have occurred during the electoral process. The agents should note down details such as the seal number of the lids and aperture so that in case of any discrepancies they can show their own record as proof of these discrepancies. Being that the Petitioner had agents in some of these polling stations it was incumbent upon him to call these agents to testify on these alleged malpractices.

144. Equally to blame are the 1st to 3rd Respondents who failed to call any of the Presiding Officers at Majengo Mapya-Mudzalifa to explain any of the alleged irregularities that occurred during the electoral process.

145. With regard to this polling center, the Petitioner in his petition raised the issues of ballot stuffing, opening of ballot boxes that had already been sealed and tampering with seals. On the issue of ballot stuffing, the Petitioner did not prove this allegation within the course of the trial. The Petitioner did not specify the polling stations within Majengo Mapya-Mudzalifa where the incident of ballot stuffing allegedly occurred. Were the stuffed ballots in favour of the 4th Respondent? Were the votes cast in favour of the Petitioner affected by the alleged ballot stuffing? The scrutiny exercise did not confirm this allegation. The Petitioner also alleged that some ballot boxes that were already sealed were opened and that some seals were tampered with. Again, the Petitioner did not prove this allegation during the trial. The Petitioner did not indicate which specific ballot boxes were opened or the ballot boxes whose seal were tampered with. The Petitioner ought to have provided agent witness evidence, especially those of agents who was stationed at Majengo Mapya-Mudzalifa. Their testimony would have provided the serial numbers of the ballot boxes that were opened and the serial number of the seals, which this court could have compared with the findings of the scrutiny exercise to confirm or dispute the allegations by the Petitioner.

146. In polling station No. 1 two (2) of the votes given to the 4th Respondent were disputed. In polling station no. 2 after the scrutiny exercise the 4th Respondent's votes reduced by 1 vote. In polling station No. 5 the 4th Respondent's votes reduced by 2 votes after the scrutiny while the votes of the Petitioner increased by 1 vote. In polling station No. 7, the 4th Respondent's votes reduced by 1 vote after the scrutiny exercise. This is a variance of seven (7) votes for the 4th Respondent and (1) vote for the Petitioner. The margin of votes between the 4th Respondent and the Petitioner is 12, 778 votes. This variance does not do much in narrowing the margin of votes between the 4th Respondent and the Petitioner. Further, the scrutiny was only limited to the ten (10) polling stations at Majengo Mapya- Mudzalifa. The Petitioner failed to lay a basis for the remedy of scrutiny in the remaining 130 polling stations in Likoni Constituency.

147. Would the results have been any different were there no irregularities? The scrutiny exercise did reveal some irregularities but this court is firmly satisfied that these irregularities were indeed so minor and so insignificant that they did not affect the overall results declared.

(x) Affidavit of the Petitioner

148. I now wish to turn to the issue of competence of the Petitioner's affidavit which came up in the course of the trial. The 4th Respondent by way of an application dated 24th November, 2017 sought to strike out the Petitioner's Affidavit on the ground that it offended Section 4 of

the Oaths and Statutory Declaration Act. The 4th Respondent through her advocate Mr. Paul Buti argued that the Petitioner's Affidavit was commissioned by one Mr. Were who also appeared in court as the Petitioner's advocate. Mr. Wafula, learned Counsel for the 1st to 3rd Respondents supported the application and contended that although Rule 15(2) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 bars filing of an application after a pre-trial conference there are good reasons why this application was delayed. Counsel, however, failed to mention these reasons.

149. Mr. Mongeri and Ms. Mayabi, learned Counsel for the Petitioner contended that there is no document that has been filed by Mr. Were to show that he represented the Petitioner nor did Mr. Were appear for the Petitioner on 6th October, 2017. Further, Mr. Mongeri argued that the instant application was barred under Rule 15 of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 as the Applicant had time to investigate the affidavit which was filed on 5/09/2017 and lodge the application within the required period. Ms. Mayabi added that if at all the Petitioner's Affidavit was defective it can be cured under Section 72 of the Interpretation and General Provisions Act.

150. This court dealt with this issue and delivered its ruling on the same day, 16th January, 2017 in which it dismissed the said application. The court still stands by its ruling.

c) Whether the 4th Respondent was validly elected as the Member of Parliament for Likoni Constituency

151. Section 83 of the Elections Act 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 the written law **or** that the non-compliance did not affect the result of the election. I would think that the words "*if it appears*" imply that if the election was substantially conducted in accordance with the law then such an election would not be subject to nullification. An election fails the test of compliance with the law if it is what the Supreme Court in the **Raila Amolo Odinga Case (supra)** borrowing from the words of Lord Stephenson and Prof. Ekirikubinza regarded as "*a sham or travesty of an election*" or "*a spurious imitation of what an election should be*".

152. From the analysis of the issues above, this court is strongly persuaded, and indeed it is the finding of this court that the election of the member of National Assembly- Likoni Constituency- was not a sham of an election nor was it an imitation of what an election should be. As stated above, the Petitioner only needed to prove one limb of Section 83 of the Election Act in order to succeed. The court finds that indeed there were some irregularities in the conduct of this election. However, those irregularities were so minor and trivial, and far in between issues, and they did not in any way offend the principles of free and fair elections as envisaged in the Constitution and other written laws. Further and/or alternatively, the Petitioner did not prove that the irregularities affected the result of the election.

153. I do find that the 4th Respondent was validly elected as the member of National Assembly for the Likoni Constituency. For this reason the Petition herein is dismissed.

d) Who shall bear the costs of this Petition

154. Section 84 of the Elections Act provides that an election court shall award costs in an election petition and such costs shall follow the cause. Rule 30 (1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 also provides for costs and states that at the end of a petition, an election court may make an order on the total amount of costs payable, the maximum amount of costs, the person who shall pay the costs and how the costs shall be payable.

155. While Section 84 of the substantive legislation provides that costs shall follow the cause, Rule 30 (2) provides that an election court may impose the burden of costs on a party that may have caused unnecessary expense whether or not that party is successful.

156. The Petitioner submitted that whether or not he is successful in this Petition, the burden of costs should be borne by the 1st Respondent. The Petitioner pegged his assertion on the claim that were it not for the 1st Respondent's actions or inactions, the Petitioner would not have found himself in the position that he is in currently.

157. In relation to the quantum of costs, the Petitioner submitted that costs should not exceed Kshs.2,000,000.00 while the 1st to 3rd Respondents prayed that costs be assessed at Kshs. 10,000,000.00. The 4th Respondent left the issue of costs to the discretion of this court.

158. In the spirit that justice is accessible to all as espoused by Article 48 of the Constitution, costs should not be so high as to lock out potential litigants. Bearing this in mind and taking into account the amount of documents filed and the work done in conducting the Petition, I do find a total amount of Kshs.2.5 million to be sufficient. The said amount shall be paid by the Petitioner to the Respondents as follows; Kshs. 1,000,000.00 to the 1st to 3rd Respondents and Kshs. 1,500,000.00 to the 4th Respondent.

159. For the foregoing reasons this Petition is dismissed. A Certificate of validity of the election shall issue to the Independent Electoral and Boundaries Commission and to the Speaker of the National Assembly in accordance with Section 86 of the Election Act.

Dated, Signed and Delivered in open court in Mombasa this 2nd day of March, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Mongeri and Ms. Mayabi for Petitioner

Mr. Wafula for 1st to 3rd Respondents

Mr. Paul Buti for 4th Respondent

Mr. Kaunda Court Assistant