



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIVASHA

NAROK ELECTION PETITION NO. 3 OF 2017

IN THE MATTER OF A PETITION CONTESTING

THE VALIDITY OF THE ELECTIONS FOR THE

SEAT OF SENATOR OF NAROK COUNTY

HELD ON 8TH AUGUST 2017

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 20, 23, 47,

81, 82, 83, 86, 87, 98, 165 (3) (b), (d), (e), 258, 259

OF THE CONSTITUTION OF KENYA

IN THE MATTER OF SECTION 75 AND 76 OF THE ELECTIONS ACT 2011

IN THE MATTER OF AN ELECTION PETITION BY NKOIDILA

OLE LANKAS AND ALBERT KIPL ANGAT

NKOIDILA OLE LANKAS.....1ST PETITIONER

ALBERT KIPLANGAT.....2ND PETITIONER

-VERSUS-

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....1ST RESPONDENT

NDUKU KIMEU ANNAHSTACIA.....2ND RESPONDENT

LEDAMA OLE KINA.....3RD RESPONDENT

J U D G M E N T

The Background

1. The 2017 General Election in Kenya was held on 8th August 2017 and was conducted by Independent Electoral and Boundaries Commission (I.E.B.C., the 1st Respondent). This dispute arises from the Senatorial election, being one of the six elective positions in the said General election. **Nkoidila Ole Lankas** (the 1st Petitioner), **Albert Kiplangat** (the 2nd Petitioner), **Ledama Olekina** (the 3rd Respondent) and one **Thomas Maitai** were the candidates in the race for the senate seat, Narok County.

2. The first three candidates above had earlier been nominated by their respective political parties, namely **Jubilee Party, National Vision**

Party (NVP) and the Orange Democratic Movement (ODM), respectively. Thomas Maitai participated as an independent candidate. In May 2017, the candidates were subsequently cleared by the I.E.B.C. to participate in the general election. They did all participate in the general election on 8th of August, 2017.

3. The 2nd Respondent **Annahstacia Nduku Kimeu** was the County Returning Officer, Narok County. After the tallying process was completed, she announced on 10th August 2017 the following aggregate results: -

a) Ledama Ole Kina - 122,565 votes

b) Lankas Ole Nkoidila - 81,550 votes

c) Albert Kiplangat - 72,632 votes

d) Thomas Maitai - 3,634 votes

Consequently, the 3rd Respondent was declared the duly elected Senator, Narok County, and was issued with the requisite certificate.

The Petition

4. Evidently, the two Petitioners herein were aggrieved with this outcome. On 6th September, 2017 they lodged the present Petition at the High Court of Kenya at Narok.

The Petitioners' Case

5. The Petitioners aver in their Petition that the 3rd Respondent was not lawfully elected Senator, Narok County, and that his declaration as the duly elected Senator is invalid. They aver that the impugned election as conducted by the 1st and 2nd Respondent was not in compliance with the Constitution, Elections Act and Regulations made thereunder. Specifically, the Petitioners raise seven grounds as the basis of their Petition.

6. The grounds can be summarized as follows:-

a. The 2nd Respondent presided over an unprocedural nomination process by clearing the 3rd Respondent on nomination day, despite there being questions concerning his registration as a voter and his identification documents.

b. That during the election, presiding officers failed to display, count and record properly the votes cast, or to transmit the results as required under the Elections Act.

c. That in Kilgoris, Emurrua Dikkir, Narok North, Narok East, Narok South and Narok West constituencies, there was widespread manipulation and tampering with results through the alteration of entries, specifically in respect of Forms 38 A. Moreover, the Form 38C completed by the 2nd Respondent and the basis of the impugned declaration is replete with errors, does not compare with the respective Forms 38A and purports that the valid votes cast were in excess of votes cast.

d. Further to (c) above, the Petitioners aver that the incidences where results in Form 38C reflected valid votes cast in excess of votes cast affected 130 polling stations which are listed; and that the particular irregularity affected over 84,958 votes. Further, that pursuant to Regulations 83 (1) (b) & (c) of the Elections (General) Regulations 2012 the said votes ought to have been disregarded. The alleged affected polling stations are identified as:-

ITEM	POLLING STATION
1.	Lengina Primary School
2.	Lengina Primary School
3.	Engare Ngiro Primary School
4.	Engare Ngiro Primary School
5.	Olenkuluo Primary School
6.	Erupata Primary School
7.	Oldonyo Orasha Primary School

8.	Enkare Nairowua Primary School
9.	Enkare Nairowua Primary School
10.	Enkiu Primary School
11.	Ingoswani Primary School
12.	Esupetai Primary School
13.	Morloo Ole Kasale Primary School
14.	Olgilai-Osupuko Primary School
15.	Koseka Nur School
16.	Kanunka Primary School
17.	Kanunka Primary School
18.	Osupuko Oirobi Primary School
19.	Nkoisusu Nur School
20.	Nkimpa Primary School
21.	Olosirua Primary School

ITEM	POLLING STATION
22.	Olepolos Primary School
23.	Isinon Primary School
24.	Elangata Enterit Primary School
25.	Elangata Enterit Primary School
26.	Ntuka Primary School
27.	Kideket Primary School
28.	Oloisuisho-Osupuko Primary School
29.	Kuntai Primary School
30.	Kuntai Primary School
31.	Kuntai Primary School
32.	Entiapirri Primary School
33.	Naserian Primary School
34.	Olepariata Primary School

35.	Enkutoto Primary School
36.	Enkutoto Primary School
37.	Iladoru Primary School
38.	Iladoru Primary School
39.	Ilchorroi Primary School
40.	Olemegili Primary School
41.	Iletukunyi Primary School
42.	Inchaishi Primary School
43.	Moyongo Nur School
44.	Olosiyoi Primary School
45.	Kotolian Primary School
46.	Eroret Primary School
47.	Olmusakwa Primary School
48.	Olmusakwa Primary School
49.	Oloisuisho Primary School
50.	Oloisuisho Primary School
51.	Oloisuisho Primary School
52.	Oloisuisho Primary School

ITEM	POLLING STATION
53.	Oсотua Primary School
54.	Oсотua Primary School
55.	Nkoben Primary School
56.	Masaantare Primary School
57.	Masaantare Primary School
58.	Oloirien Primary School
59.	Eor Ewuaso Primary School
60.	Ololoipangi Primary School

61.	Ololoipangi Primary School
62.	Ololoipangi Primary School
63.	Iltriben Primary School
64.	Olonini Primary School
65.	Olgilai-Ololulunga Primary School
66.	Oloshapani Primary School
67.	Olmekenyu Nur School
68.	Olmekenyu Nur School
69.	Olmekenyu Nur School
70.	Olmekenyu Nur School
71.	Olmekenyu Nur School
72.	Enoosokon Primary School
73.	Enoosokon Primary School
74.	Enoosokon Primary School
75.	Ilubi Primary School
76.	Ilubi Primary School
77.	Olengajinabo Primary School
78.	Olpukoti Primary School
79.	Melelo Primary School
80.	Enosagami Wuas Primary School
81.	Ole Nkanai Primary School
82.	Isinantet Primary School
83.	Ololua Primary School
84.	Olengapune Primary School

ITEM	POLLING STATION
85.	Olengapune Primary School
86.	Olmukonge Primary School

87.	Oltarakwai Primary School
88.	Ilkujuka Primary School
89.	Emorogi Primary School
90.	Olpusare Primary School
91.	Olmesutie Primary School
92.	Emupurputia Primary School
93.	Entasekera Primary School
94.	Entasekera Primary School
95.	Osinantei Primary School
96.	Morijo Loita Primary School
97.	Morijo Loita Primary School
98.	Olorte Primary School
99.	Nairebuk Nur School
100.	Kone Primary School
101.	Enkaroni Primary School
102.	Enkaroni Primary School
103.	Naisudori Primary School
104.	Naisudori Primary School
105.	Sogoo Primary School
106.	Sogoo Primary School
107.	Sogoo Primary School
108.	Kichapa Primary School
109.	Kapkatet Primary School
110.	Siwot Primary School
111.	Siwot Primary School
112.	Marinua Primary School
113.	Marinua Primary School
114.	Tumuyot Primary School

115.	Tumuyot Primary School

ITEM	POLLING STATION
116.	Minet Primary School
117.	Kewet Primary School
118.	Kewet Primary School
119.	Bondet Primary School
120.	Sitowet Primary School
121.	Tendwet Primary School
122.	Tendwet Primary School
123.	Choronook Primary School
124.	Kebenet Primary School
125.	Kebenet Primary School
126.	Kebenet Primary School
127.	Kalyet Primary School
128.	Saire Primary School
129.	Sagamian Primary School
130.	Sagamian Primary School

e. The 5th complaint is that the Independent Electoral and Boundaries Commission (I.E.B.C.) failed in its statutory duty to undertake the electronic transmission of results.

f. The Petitioners allege that in two polling stations, namely **Enekarashi** and **Endongo** of Kilgoris Constituency, there occurred vote tampering that led to the prosecution of the miscreants.

g. The Petitioners also aver that there was evident discrepancy between the results declared *via* the Form 38C and the Independent Electoral and Boundaries Commission (I.E.B.C.) portal at the tallying centre. That the former reflected the final results as follows:-

a) Ledama Ole Kina - 122,565 votes

b) Lankas Ole Nkoidila - 81,550 votes

c) Albert Kiplangat - 72,632 votes

d) Thomas Maitai - 3,634 votes

And in the portal, the results displayed were as follows:

a) Ledama Ole Kina - 122,622 votes

b) Lankas Ole Nkoidila - 82,496 votes

c) Albert Kiplangat - 72,714 votes

d) Thomas Maitai - 3,557 votes

7. It is the Petitioners' averment that the irregularities identified rendered the results inaccurate, uncertain and unverifiable. The Petitioners therefore sought the reliefs hereunder:-

“a) An Order that the Court be pleased to Order a Scrutiny of the Following:-

i. The Statutory Documents used to Nominate the 3rd Respondent as a Candidate in the Election to the Office of Senator of the County of Narok in the Elections held on 8th August, 2017.

ii. The Statutory Forms 38A, 38B and 38C all the votes cast in the Election for Senator of the County of Narok on 8th August, 2017.

AND the Court be pleased to find that the 3rd Respondents Nomination and the Counting, Recording, Tallying, Transmission and Declaration of the Results of the said Election did not comply with the Constitution of Kenya and the Elections Act 2011.

b) A declaration that LEDAMA OLE KINA was not validly elected to the office of Senator of the County of Narok.

c) An Order that the 1st Respondent do conduct a fresh election for the office of Senator of the County of Narok.

d) An Order awarding the costs of this Petition to the Petitioners against the Respondents jointly and severally.

e) Any other Order this Honourable Court shall deem mete and just.” (sic)

8. The Petition is supported by affidavits sworn by the two Petitioners and one **Sirere Ole Koikai (PW3)**, the 1st Petitioner's chief agent in the material period. Several documents, including a Form 38C are annexed to the Petition. At the hearing, the Petitioners gave oral evidence, adopting their respective affidavits. Also, **PW3** testified on behalf of the Petitioners. Predictably, the Petitioners' evidence-in-chief took cue from the affidavits filed.

9. The 1st Petitioner (**PW1**) recounted the events of the 28th May, 2017, the nomination day. He complained that because of the discrepancy in the identification documents presented to the I.E.B.C. by the 3rd Respondent who was first on the nomination queue, other candidates were delayed for 3 hours; that the 2nd Respondent appeared to favour the said Respondent who had presented a different identification document from that used in the nomination by his party, and his registration as a voter.

10. PW1 reiterated what he claimed to be irregularities and discrepancies in the statutory Forms 38A, B, C as particularized in his petition. He denied that he had placed an agent, one **Solomon Ole Nchoe**, at the I.E.B.C. offices during the nomination exercise to raise obstacles to the nomination of the 3rd Respondent. Regarding the Form 38C annexed to his affidavit supporting the Petition, **PW1** denied that it was a forgery and asserted that the 2nd Petitioner obtained it from the I.E.B.C. offices at Narok.

11. In many ways, the 2nd Petitioner (**PW2**) was the star witness for the Petitioners. He testified, while adopting his affidavit evidence that he held a Master's degree in Economics and Statistics. He explained how he obtained the Form 38C in the Petition from the I.E.B.C. It seems that **PW2** was the person who studied the statutory forms in contention in more detail than his co-Petitioner. **PW2** repeated the events of the nomination day as described by **PW1**.

12. PW2 testified said that the delay on the nomination date was caused by the 3rd Respondent's use of a passport for identification, which document differed from that used in his party nomination, and subsequent gazettelement namely, his identity card. He denied any relationship with the I.E.B.C. officer who at the time insisted that the 3rd Respondent produces his identity card for the nomination exercise, adding that the 2nd Respondent presided over the nomination exercise.

13. PW2 stated that his concern to be the confusion arising from the 3rd Respondent's identification details, noting that the identity card of the said Respondent had not been included in his response to the Petition. He raised the question whether the 3rd Respondent was a genuine voter. **PW2's** position is that the 3rd Respondent was nominated unprocedurally. He confirmed that he obtained the Form 38C annexed to the Petition from one **Ole Debe** the I.E.B.C. officer in charge of Information Technology (IT), but with the prior authorization of the 2nd Respondent. He denied that the document was a forgery or a discarded copy, pointing to the logo of the I.E.B.C. thereon.

14. PW2 further testified that upon examining the document he had thus obtained (Form 38C) he noted several errors. First, the results in the Form 38C in his possession represented more votes cast than registered voters, citing as an example **Lengina Primary School** polling station where 595 votes were allegedly cast, whereas there were 439 registered voters. And that, the total number of valid votes in the entire County as per the said document exceeded the registered voters (281,097 against 280,381 respectively).

15. **PW2** asserted that the information contained in the Petition regarding this aspect was obtained from the Form 38C given to him by the I.E.B.C. Referring to the Form, he cited **Kilgoris Constituency, Narok West Constituency, Narok East Constituency and Narok North Constituency** as some of the constituencies where other errors were noted: the total number of polling stations differed in the Forms 38B and C presented to the court by the I.E.B.C. [viz 134:165; 121:164 or (165) and (86) or 84:89, respectively].

16. That, cumulatively, the said I.E.B.C. document presented to the court (**Form 38C**) reflects a total of 799 polling stations instead of the **750**, duly gazetted polling stations in Narok County. He told the court that whereas the last page of the Form 38C presented by I.E.B.C. to the court compared with the Petitioners' copy, there were differences (errors) in the former document resulting from the duplication of polling stations. Examples of this duplication were **Seleita Primary, Enooseyia Primary, Nambao Primary, Segekot Primary** polling stations in Narok West Constituency. Ditto Narok West Constituency, where **Enelerai and Ololaimutia Primary Schools** polling stations were repeated.

17. In particular, **PW2** highlighted the similarity in details of the three repeated entries in respect of **Enelerai Primary School** polling station, observing that in contrast, the station only appeared once in the Petitioners' Form 38C. That in one of the impugned entries the valid votes cast (515) exceeded the votes cast. He stated that he observed that in 130 polling stations, the Form 38C issued to him reflected more votes cast than registered voters. Comparing the Petitioners' Form 38C with that tendered by the I.E.B.C., **PW2** stated that errors in the former appear to have been partly corrected in the Form 38C presented to the court by the I.E.B.C.

18. Other irregularities cited by the witness were the absence of handing over/taking over notes in respect of statutory form Form 38B [**Kilgoris Constituency; Narok East Constituency, Narok South Constituency, Narok North Constituency**]; and the fact that agents purportedly signed Form 38C on 9th August, 2017 while Forms 38 B (**Narok North and South**) were signed on 10th August, 2017 the presumed date of completion. He also highlighted that I.E.B.C security and other features (serial numbers and letter heading) appear only on some of the pages (1 to 4) of the I.E.B.C. Form 38C. That in addition, the impugned pages, bore handwritten annotations dated 10th August, 2017 to the effect that, the originals were discarded. Finally, the 2nd Petitioner stated that I.E.B.C. did not at any time notify him that it had discarded any of the statutory forms used in the election or that there were errors detected in the Form 38C or other statutory forms.

19. The last witness for the Petitioners was **Sirere Ole Koikai (PW3)**. His evidence was brief, reiterating the contents of his affidavit in support of the Petition. The gist thereof is that as the Chief Agent of the 1st Petitioner, he was present at the Narok County Tallying Centre in the material period. He asserted that electronic transmission of results was irregular in that the results were announced, streamed and displayed in 'bulk', without specifying the respective polling stations. That complaints on the matter, made by the 1st Petitioner to the 2nd Respondent were not addressed. He cites the discrepancies in the Form 38C tendered by the 2nd Petitioner as evidence that the 2nd Respondent did not verify the results before making the declaration in contention.

The 1st and 2nd Respondents' Case

20. The 1st and 2nd Respondents filed a Response, essentially disputing each of the grounds in the Petition, and in addition two affidavits sworn by the 2nd Respondent (**RW1**) and **Grace Atieno Owino**, the Returning Officer, Narok South Constituency (**RW2**). A synopsis of the Response is as follows. Concerning the nomination process in respect of the 3rd Respondent, the 1st and 2nd Respondents deny that it was unprocedural. They assert that the exercise was conducted in compliance with the Constitution, Elections Act and Regulations made thereunder; that the 3rd Respondent was a registered voter by his Kenyan passport Number **C014730** and that he was not given preferential treatment to the detriment of other voters; that no complaints were raised at nomination time to the 2nd Respondent or subsequently. They state that at this stage, this court lacks the jurisdiction to entertain a question relating to the nomination process.

21. On the complaint that the votes/ballots were not displayed, tallied, recorded or results transmitted correctly, the 1st and 2nd Respondents aver that while no particulars are given, its employees were trained prior to election date and observed strictly, the legal requirements on the conduct of the election; that no such complaint by any agents of the Petitioners is reflected in the Form 38As used; and that the said forms were duly signed by the Petitioners' agents.

22. In a detailed response to the Petitioners' allegations in respect of manipulation and tampering with statutory forms, the Respondents refute the Petition averments to the effect that presiding officers wrongly completed Forms 38A and manipulated data therein to the prejudice of the Petitioners, and state that the claim is spurious, generalized and an afterthought.

23. Specifically, regarding the alleged errors in the Form 38C, these are denied. The Respondents aver further that results in Form 38Bs captured the exact details in corresponding Forms 38A; that the Form 38C used to declare Senatorial results in Narok County accurately reflects the results in its counterpart Forms A and B, and does not indicate that the total votes cast exceeded registered voters.

24. Concerning the Form 38C copy in the Petition, the Respondents assert that it is not the one the 2nd Respondent used in declaring results for the Senatorial election. Furthermore, that the initial Form 38C prepared, was prior to the declaration, noted to have such errors as complained of and therefore the said erroneous Form 38C was discarded. That subsequently, a fresh and accurate Form 38C was prepared to reflect the correct tally of all Forms 38B, and was the basis of the declaration by the 2nd Respondent. That the errors had occurred during tallying and were discovered prior to the declaration, therefore did not affect the outcome.

25. The 1st and 2nd Respondents stated concerning the alleged incidents of higher number of valid votes than registered voters or votes cast that the affected 130 polling stations stated in the Petition are in **Narok South Constituency**. That the counterpart Form 38B for the said Constituency did not contain any such errors; and that erroneous entries in the first Form 38C led to the same being discarded, thus did not affect the results. The 1st and 2nd Respondents further reproduce the details of the Form 38C in respect of the 130 polling stations and contrast the same with the Petitioners' averments in respect of votes cast in those polling stations, to demonstrate that there was no incidence of the number of valid votes exceeding registered voters.

26. On the question of electronic transmission of senatorial election results, the Respondents assert that although the I.E.B.C. had no legal obligation to do so, proper transmission of results was done by presiding officers, after announcement of the results. With regard to alleged vote tampering at **Endongo** and **Enekarashi** in **Kilgoris Constituency**, the Respondents assert that no such polling stations were gazetted and that the allegation itself is bereft of particulars.

27. As regards alleged discrepancies between the results in the I.E.B.C. display portal and results announced by the 2nd Respondent, the 1st and 2nd Respondents described the duties of the 2nd Respondent and aver that the final declared, and legal results are based on the Form 38C and not the alleged portal.

28. Further denying the manipulation of results as alleged in the Petition, the Respondents assert that the Form 38C used to declare results by 2nd Respondent was derived from Form 38B's received from the respective Constituency Returning Officers; and that the results were duly verified.

29. Finally, it is averred that the impugned election was conducted in accordance with the Constitution and the Elections Act and Regulations; and that the impugned subsequent declaration of the 3rd Respondent as the duly elected Senator, represents the will of the people of Narok County. That the Petition is vague with regard to alleged violations of the law and does not show how the alleged violations affected the results. Thus scrutiny was not available to the Petitioners. The Respondents prayed for the dismissal of the Petition.

30. In her supporting affidavit the 2nd Respondent enumerated her duties as the County Returning Officer (CRO) Narok, during the election. She deponed that after tallying the results in the Form 38Bs (erroneously referred to as 34B) received from the Returning Officers in the six constituencies, she announced the results, prepared the Form 38C and declared the 3rd Respondent who had highest number of votes as the duly elected Senator, while publicly signing the Form 38C. That the presiding officers in the polling stations had been trained on the management of the election in conformity with the law; and that she neither received any complaint of any violation from her staff regarding the counting of votes, nor were such comments noted on the Form 38A's.

31. She said that as a County Returning Officer, she was not obligated to announce individual results in respect of polling stations, this being the duty of the Constituency Returning Officer to receive and tally results in Form 38A before preparing Form 38B, the latter which is sent to the County Returning Officer.

32. I find it useful to replicate some of the depositions by the 2nd Respondent concerning the impugned Form 38C as contained in paragraphs below:

“17. Upon receipt of the Forms 38B from the six constituencies, I executed my mandate as required by law and began the process of completing Form 38C. However, before the declaration of the results, I noted an error of computation in the Forms that had already been completed hence disregarded and discarded the first Forms that had been used and prepared a new set of Forms where the results were tallied and I signed and dated the fresh Form 38C and declared the results.

18. The error in the first Form 38C was noted and action taken to remedy the results before the declaration of the results. This is Form heavily relied on by the Petitioners to allege that the results were doctored. The Form 38C that I used to declare the result of the election of the Senator is drawn from all the Forms 38B and it is attached herewith and marked NKA-3.

19. It is not therefore true as stated at paragraph 25 of the Supporting Affidavit that the Form 38C used to declare results had errors as particularized by the 1st Petitioner. It is not true that it implies that there were more valid votes cast than registered votes at some polling stations. It is not true that the said Form contains data and figures different from Form 38A from the Polling Stations.

20. It is also not true that Form 38C used to declare results is a misrepresentation of the votes cast for each candidate in the election. It is not true that in it there were illegal alterations in Forms 38A. As a matter of fact the alleged alterations of Form 38A and the affected Polling Stations where the alteration may have taken is not stated and the nature of the alteration is not clearly stated thus prejudices the 1st Respondent as it does not comprehend the complaint being made.

21.;

22. It is not true that in at least 130 Polling Stations the votes cast were more than registered voters per Polling Station. The above assertion is premised on the discarded and disregarded Form that had an error as such the allegation has no basis. The Form 38C used to declare the results does not have any such anomaly. The primary document used to create Form 38C is Form 38B. The alleged affected Constituency is Narok South and the attachment is set out above and marked NKA-3, which is the primary document that shows a contrary position as asserted by the Petitioner.

23. I have perused through the Tabulation set out in the Response to the Petition, which is verily accurate and tallies with Form 38B presented to me by the Constituency Returning Officer that the statement at paragraph 26 is misconceived.

24. It is not accurate that the County Returning Officer upon receipt of the Forms 38A with regard to Narok South Constituency ought to have disregarded the votes cast in the entire Constituency as there was no basis for doing so under the law. An error of tallying only arose at the time of completion of Form 38C, which error was arrested before the declaration could be made.

25. The results declared by myself on the 10th August, 2017 are accurate and drawn from Forms 38B presented to me. The

assertion that the results are inaccurate and invalid is thus not true and not supported by any evidence to the contrary.

26.;

27.;

28.;

29.;

30.;

31.;

32. The generation of Form 38C by myself was premised on Forms 38B received from the Constituency Returning Officers, who also generated the Forms from Forms 38A received from the Presiding Officers in the Station. I attach herewith and produce all the Forms 38A, which are attached herewith and marked NKA-4.”

33. The 2nd Respondent’s deposition regarding **Enekarashi** and **Endongo Primary School** polling stations in **Kilgoris Constituency**, electronic transmission of results, the alleged discrepancies in totals per portal versus Form 38C, alleged manipulation of Forms 38A line up with the relevant portions of the Response by the 1st and 2nd Respondent as earlier set out. As regards the nomination of the 3rd Respondent, the deponent swears that the 3rd Respondent was a registered voter in Narok County (*vide* passport number **C014730**) and that he presented the requisite documents to demonstrate eligibility and therefore was lawfully cleared to vie. That complaints made by the Petitioners at the time of nomination were not merited.

34. In her oral evidence the 2nd Respondent (**RW1**) testified in highlighting her affidavit evidence, that whereas on nomination day, some technical hitches slowed down the processing of the 3rd Respondent’s papers, the 3rd Respondent had used his identity card to identify himself instead of his passport by which he had registered as a voter, and that, he eventually produced the latter identification document and was cleared. That concerning the I.E.B.C. Form 38C presented to court, erroneous repetition of polling stations arose while the forms were being processed but these did not affect the overall results. That the errors affected all candidates equally. That in making corrections, she was forced to use unofficial plain paper without security features in order to complete the work but that, she made a note of the incident in corrected Form 38C (Exhibit 1 herein). She identified this document as the statutory form she used to declare the Senatorial results.

35. Grace Atieno Owino (RW2) was the Returning Officer **Narok South Constituency**. She deponed in her affidavit that the constituency had 143 polling stations and that on the election date, she did not receive any complaint concerning the counting of votes. That all presiding officers had been trained on the conduct of elections. She enumerated the role of presiding officers in counting, declaration of results and completion of Forms 38A, which were subsequently transmitted to the Constituency tallying centre. The Constituency Returning Officer on receiving the Forms 38A, in this case herself, read out the results in public and that she did not hear any protests or sight an erroneous Form 38A in respect of any polling stations in **Narok South Constituency**.

36. That in the course of her work, she did not notice any incidences of Forms 38A reflecting more votes cast than registered voters. That upon verification of all Forms 38A received by her, **RW2** prepared the Form 38B which was an accurate portrayal of the former. Thus, relying on the documentation, she disputes the allegation that results for 130 polling stations in **Narok South Constituency** reflected valid votes in excess of registered voters. I have set out the Response by 1st and 2nd Respondents and affidavits attached thereto in detail. The affidavits were adopted during the evidence of the 2nd Respondent **RW1** and **Grace Atieno Owino (RW2)**. The documents referred to are annexed to the affidavits.

The 3rd Respondent’s Case

37. For his part, the 3rd Respondent stated in his Response that he was validly nominated, being a bonafide registered voter under his passport number **C014730**. He averred that delays in processing his papers on nomination day were occasioned by a staffer, allegedly an ‘operative’ of the 1st Petitioner, one **Solomon Ole Nchoe** who demand to see his identity card. Severally, it is averred in the 3rd Respondent’s Response that the Petition lacks specificity.

38. It is further averred that the Petitioners “manufactured” the Form 38C attached to the Petition with the aim of creating the impression that the votes cast exceeded the number of registered voters, and to inflate the number of votes garnered by the Petitioners. It is not clear whether references in some instances to Petitioner in singular in the Response includes both Petitioners.

39. Regarding the complaint in respect of **Endongo** and **Enekarashi Primary School** polling station, electronic transmission of results, alleged results discrepancies per portal vis-à-vis the statutory forms, counting, verification, tallying and declaration of results, the 3rd Respondent adopts the answers in the 1st and 2nd Respondent’s Response. His affidavit repeats most of the averments contained in his Response. In addition, he deponed that the entire process of the election including his nomination, the counting, tallying, announcements and declaration of results was proper and according to the law. That the process elicited no complaint. Further, that there were no discrepancies between results as captured in Forms 38A and Forms 38B, the contents of which the Petitioner does not challenge, and that the purported irregularities raised by the Petitioners are based on a forged Form 38C comprising of entries manipulated in favour of the 1st Petitioner.

40. He asserts that the claim by the Petitioners that there were incidences of votes cast exceeding registered voters is untrue. He depones

further that the Petitioners manipulated their Form 38C by substituting the aggregate votes cast with the (1st) Petitioner's votes, while excluding polling stations where the (1st) Petitioner(s) obtained most votes, such as **Ololulunga, Mause, Ilkerin, Olmesutie Primary School** polling stations. He defends as accurate and verifiable, the results declared by the 2nd Respondent. As before, he depones that the results were transmitted electronically, that the alleged tampering at **Enekarashi** and **Endongo polling stations** was unproved; that no evidence of tampering with results, improper counting or manipulation is proved. Finally he depones that the election was conducted in compliance with the law and the Constitution and the Petition should be dismissed. A series of documents are attached to the affidavits.

41. During his oral testimony **Ledama Olekina** the 3rd Respondent (**RW3**) testified that his political base is **Narok East Constituency** while the 1st Petitioner's is **Narok South Constituency**. He stated that technical hitches delayed the commencement of the nomination exercise. And that, when he presented himself, the I.E.B.C. officer concerned demanded his identity card, whereas he had registered as a voter using his passport. A brief delay ensued, but that the returning officer (**RW1**) intervened, allowing him to use his identity card. He defended his statement that the Petitioners' Form 38C is a forgery.

42. He testified that he is knowledgeable in ICT matters as he had graduated with a minor in the subject. He observed that the total number of votes reflected in the Petitioners' Form 38C was more than registered voters in the disputed 130 polling stations. Further, that having studied the entries in the Petitioners' Form 38C, he concluded that the entries were manipulated to increase the votes of the 1st Petitioner, and that the entire document was a forgery.

43. He cited the example of **Lengina Primary School** polling station. He said that the entries in respect of the said station were similar to those in the I.E.B.C. Form 38C in respect of the station, except that in the Petitioners' document, the 1st Petitioner's votes had been inflated. He said **Lengina Primary School** polling station was a good example of this manipulation. He said this was true of all the 130 polling stations in dispute. He said he was puzzled that despite the changes inserted in the Petitioners' Form 38C the totals of the document did not change.

44. **RW3** proceeded to state that **Narok South Constituency** had 143 polling stations but only 130 were listed in the Petitioners' Form 38C and the latter included polling stations where the 1st Petitioner lost or had a narrow gap in votes between the Petitioner and himself. He cited **Ololulunga, Masantari, Itumaro, Nkupuni, Ilkerin, Osumuma Primary School polling stations** as stations where the 1st Petitioner emerged winner and were left out in the list.

45. **RW3** testified that said he had not seen any Forms 38A or 38B wherein valid votes exceeded the registered voters or votes cast. He dismissed the Petitioners' Form 38C as a forgery citing the absurdity reflected by tallies therein reflecting more votes than (registered) voters. In his view, the Petitioners' document (Form 38C) was made through alterations made after the creation of the regular statutory form.

Submissions

Submissions by the Petitioners

46. The Petitioners anchored their submissions on several constitutional principles as encapsulated in Article 81 (e) of the Constitution which provides for free and fair elections, Article 86 (d) and Article 88 (5) of the Constitution, the latter which enjoins the I.E.B.C. to exercise its powers and carry out its functions in accordance with the law and the Constitution.

47. Mr. Marete for the Petitioners emphasized that these principles apply at all stages of the electoral process and that the I.E.B.C. is duty bound to account for its actions. That where any part of the process failed the test of scrutiny, nullification of the election could well be a consequence. The Petitioner sought support for this proposition in the decision of **Odunga J, in Republic -Vs- Independent Electoral and Boundaries Commission & 3 Others Ex-Parte Osman Khelef Khalifa [2017] eKLR**.

48. Mr. Marete confined his submission to four areas, namely, the declaration of results, transmission of results, nomination of the 3rd Respondent and Costs.

Declaration of Results

49. On this issue, reliance was placed on Section 39 (1b) of the Elections Act and Rule 87(2) of Elections (General) Regulations which stipulate the manner in which election results ought to be declared by the County Returning Officer and the statutory forms to be used in making the declaration.

50. It is submitted that the Form 38C tendered by the Petitioners as the basis of the Petition, was lawfully obtained from the I.E.B.C. offices. That all pages were authentic, but the document is replete with errors. On the other hand, the corresponding document relied on by the I.E.B.C., unlike the Petitioners' Form 38C is printed on plain forms without security features of the I.E.B.C. Mr. Marete also submitted that the I.E.B.C. owned form cannot stand as it represents a manipulation of the original Form 38C (Petitioners') with the aim of discrediting the Petitioners' claim. Mr. Marete poured cold water on the I.E.B.C. assertion that the Form 38C presented by them to the court was the one used to declare the Senatorial results.

51. Also highlighted in the submissions was evidence on the actual date when **RW1** discovered the errors on the initial Form 38C. Because, she had stated that she corrected the errors on 9th August, 2017, while **RW2** testified to have completed her work on 10th August, 2017 and delivered the results physically to the County Returning Officer (CRO) on that date, **RW2** also confirming that she had not electronically transmit any results before then. Mr. Marete pointed to the date reflected on the Form 38B (for **Narok South Constituency**) 10th August, 2017 in this regard.

52. He argued that **RW1's** admitted handling of the Form 38C has no legal backing and that even the Form 38C now relied on by the I.E.B.C. is equally full of errors, including the replication of results in respect of **49** polling stations, valid votes being more than votes cast, etc. Besides, parts of the document did not bear the I.E.B.C. logo or security features.

53. It was therefore argued that the Form 38C tendered by the I.E.B.C. was invalid in light of the stated defects and not capable of sustaining a valid declaration. Citing a passage in the majority decision of the Supreme Court in **Raila Amolo Odinga & Another -Vs- Independent Electoral and Boundaries Commission & 2 Others Election Petition 1 of 2017; [2017] eKLR (Raila 2017)** where a comparable declaration Form (34C) was considered, the Petitioners urged the court to conclude that the Form 38C relied upon by the I.E.B.C. herein is irredeemably flawed.

54. Therefore it is the Petitioner's submission that the Form 38C used to declare results was incapable of sustaining the declaration, is invalid and must be nullified. In Mr. Marete's view the difference between the Form 38C owned by the I.E.B.C. and the Petitioners' copy is that the I.E.B.C. attempted unsuccessfully to cure the defects in the latter.

Transmission of Results

55. Regarding the electronic transmission of results, the Petitioners posit that once the I.E.B.C. took up the responsibility of transmitting the results electronically, they were obligated to conduct such transmission in a proper manner. That the 'bulk' streaming of results without specifying the polling stations, rendered it impossible for parties to verify the results.

Nomination of the 3rd Respondent

56. Turning to the question of the 3rd Respondent's nomination, the Petitioners submit that the process was flawed in that, while the said Respondent's registration as a voter using his passport, his nomination by the **ODM** party and his final declaration as the duly elected Senator were based on his National Identity Card Number **12422950**, there being no evidence that the latter identification was used to process his nomination. That by merely providing proof that the 3rd Respondent was a registered voter, the Respondents and did not adequately answer the issue. Besides, a copy of the 3rd Respondent's identity card was not proffered at the trial.

57. Pointing to the admitted conduct of the 2nd and 3rd Respondents on nomination day, the Petitioners assert that, Regulation 38 of the Election (General) Regulations was flouted when the 2nd Respondent overruled her subordinate's insistence that the 3rd Respondent furnish his identity card. And that **RW2** had proceeded to clear the 3rd Respondent on the basis of an identification document other than his identity card. Thus, it is contended that the said nomination was a nullity for want of procedure. The Petitioners view as preferential the treatment accorded to the 3rd Respondent.

58. In view of this, they take issue with the confusion occasioned by the fact the registration details of the 3rd Respondent could not be searched by way of identity card. The court was invited to scrutinize the 3rd Respondents documentation and to find that the nomination process was irregular, and ultimately that the 3rd Respondent was not validly elected to the office of Senator, Narok County.

On Costs

59. Regarding costs, the Petitioners have submitted that they approached the court in good faith, basing their Petition on documents issued to them by the I.E.B.C., which raise serious issues. They urged the court to allow their petition and exercise its discretion concerning the question of costs.

Submissions by the 1st and 2nd Respondents

Declaration of Results

60. The 1st and 2nd Respondent were represented by Messrs Mwangi and Guto. Their submissions open with a quotation from the Court of Appeal decision in **Independent Electoral and Boundaries Commission -Vs- Maina Kiai & 5 Others Civil Appeal No. 105 of 2017; [2017] eKLR (Maina Kiai case)** which emphasizes the sanctity and finality of the vote tally at the lowest voting level, the polling station. On the issue of the declaration of results *vide* the impugned statutory Form [38C], the 1st and 2nd Respondents take issue with Petitioners' excessive emphasis on this one part of the of election process.

61. They assert that the Petitioners' Form 38C which reflected totals of valid votes exceeding registered voters in 130 polling station, is not the basis of the declaration of the duly elected Senator. Rather, it is the Form 38C tendered by the I.E.B.C. at the trial and so identified by **RW1**. That in view of her position, **RW1** was best placed to tell which form was used at the declaration. It is stated that the I.E.B.C. Form 38C does not contain the anomalies reflected in the Petitioners' copy regarding the total valid votes vis-à-vis votes cast/registered voters.

62. Reverting to the **Maina Kiai** case, the Respondents assert the centrality and assumed accuracy of the results declared at the polling station as captured in Form 38A, pointing out that the Petitioners deliberately avoided any inquiry into the contents of the Forms 38A which corresponded with the questioned contents in the Petitioners' Form 38C. They urged the court to ignore any additional complaints raised in evidence in relation to constituencies outside the pleaded 130 polling stations in the **Narok South Constituency**. These extra complaints relate to duplication of polling station results which, it is submitted, affected all candidates alike and did not affect the County totals.

63. The court was urged to accept the explanation given by **RW1** to the effect that indeed she noted erroneous entries in the initial Form 38C, which she discarded, and proceeded to prepare accurate forms on plain paper, not having enough official statutory forms; and that other

errors involving the total number of votes cast vis-à-vis valid votes occurred as a result of erroneous switching of columns.

Tallying and Transmission of Results

64. Regarding the question of counting, tallying and electronic transmission of results, the 1st and 2nd Respondents argue that the Petitioners did not prove their claims which, at any rate were generalised. Specifically, regarding the transmission of results, the Respondents cite the provisions of Section 39 (1) (c) of the Elections Act and Regulation 5 (1) (d) of the Regulations which impose a duty on the I.E.B.C. to transmit electronically results in respect of the presidential elections only.

Nomination of the 3rd Respondent

65. As to the issue of the impugned nomination of the 3rd Respondent, the 1st and 2nd Respondents submissions are as follows. The regulation of party nominations including resolution of disputes is the mandate of the 1st Respondent by dint of Article 88 (4) of the Constitution, Section 4(d) of the I.E.B.C. Act and Section 109(x) of the Elections Act. Thus, any dispute in respect of the 3rd Respondents nomination ought to have been referred to the 1st Respondent for determination as provided under Section 74 of the Elections Act.

66. Therefore, the Petitioners having failed to avail themselves of the opportunity to present their dispute as provided above, they cannot canvass it before an election court. The court was referred to **Mabeya J's** decision in **Josiah Tarayia Kipelian Ole Kores -Vs- Dr. David Ole Nkediye & 3 others [2013] eKLR** as authority for that proposition. In any event, the Respondents continue, the complaint in respect of nomination is without merit.

67. The Respondents assert that the ground upon which the nomination complaint was based, as pleaded in the Petition, relates to the fact of the 3rd Respondent's registration as a voter. That the Petitioners changed tack in their testimony latching on to the question of the identification document used in the nomination process. Which claim, at any rate has no legal basis as the relevant provisions of Rule 38 of the Elections (General) Regulations only require that the name of the nominated candidate compares with his name as it appears on the voters' register. And that the duty of the 1st Respondent at the nomination of a candidate was to assure itself that the 3rd Respondent was a registered voter.

On Scrutiny

68. The 1st and 2nd Respondents in addition submitted that the prayer for scrutiny as contained in the Petition was not available in this case. Because, first; Rule 29(4) of the Election [Parliamentary and County Elections] Petition Rules does not envisage scrutiny in respect of nomination materials, as is sought in the Petition. Secondly the prayer for scrutiny in respect of results at unspecified and therefore undisputed polling stations is outside the scope of the Rule, which envisages scrutiny where results are disputed. Further that the court ought to consider the purpose of scrutiny before considering moving *suo motu* to order scrutiny.

69. Two decisions, including **Philip Mukwe Wasike -Vs- James Lusweti Mukwe & 2 Others [2013] eKLR** were cited to buttress the above view. Further, the above decisions were relied upon regarding the circumstances when an order for scrutiny may be made. Also cited was the Supreme Court decision in **Gatirau Peter Munya -Vs- Dickson Mwenda Kithinji & 2 Others [2014] eKLR (Munya's case)** as to the circumstances in which scrutiny may be allowed and the scope of such scrutiny. The decision was also the basis of the 1st and 2nd Respondent's closing submissions concerning the requisite threshold of evidence for the invalidation of an election. They urged the court to dismiss the Petition with costs.

Submissions by the 3rd Respondent

Declaration of Results

70. In launching his submissions, the 3rd Respondent through his counsel Mr. Odhiambo placed reliance on the principles enumerated in **Raila Odinga & 5 Others -Vs- Independent Electoral and Boundaries Commission & 3 others Supreme Court Election Petition No. 5 of 2013; [2013] eKLR, (Raila 2013)** and in particular, the court's deliberation on Section 83 of the Elections Act, the burden of proof and evidentiary burden to be borne by the respective parties in an election litigation. On the issue of declaration of results, the 3rd Respondent hinged his submission on Section 83 of the Elections Act concerning when a court may void an election.

71. Emphasizing the provisions of Section 83 (2) of the Elections Act, the 3rd Respondent stated that the I.E.B.C. having admitted that part of the original Form 38C was not in the prescribed form, proffered an explanation. To the effect that erroneous entries affecting total valid votes in the initial forms and the scarcity of regular forms forced **RW2** rework the transposition on plain sheets of paper. That she therefore discarded the initial form.

72. The 3rd Respondent urged the court to consider substance and the spirit rather than mere form, as stipulated in Section 83 of the Elections Act, and as stated in **Joseph Amisi Omukanda -Vs- Independent Electoral and Boundaries Commission & 2 Others [2013] eKLR**. And emphasised, that the Petitioners have not challenged the Forms 38 A and B in this case the latter which constitute the primary documents. (See **Hassan Abdalla Albeity -Vs- Abu Mohamed Chiaba & another [2013] eKLR**). In distinguishing this case from the **Raila 2017 case**, the 3rd Respondent states that in this case, unlike the former, the I.E.B.C. has offered an explanation through oral evidence.

73. As regard the contents that constitute entries in the impugned Form 38C, the 3rd Respondent repeats explanations made by **RW1** as regards the erroneous transposition of results in columns for votes as well as repeated polling stations. It is the 3rd Respondent's contention, citing the explanations that this was a case of administrative errors that did not affect results, particularly the total votes for all the candidates.

74. It is submitted that the contradiction relating to the dates when **RW2** surrendered Form 38B to **RW1** was as minor issue and does not detract from the documentary evidence. In further emphasis on this point, the 3rd Respondent quoted at some length from the Supreme Court decision in **Zacharia Okoth Obado -Vs- Edward Akong'o Oyugi & 2 others [2014] eKLR** and **Munya** Case as to the application of the principles in Articles 81 (e) and 86 of the Constitution and Section 83 of the Elections Act.

75. Returning to the **Omukanda** case, and citing the case of **Ledama Olekina -Vs- Samuel Kuntai Tunai [2013] eKLR** , the 3rd Respondent argued that the irregularity in the posting and tallying of results in this case not having affected the results does not justify a vitiation of the election; and that the errors can be “detected and rectified.” He accuses the Petitioners of cunning and lack of candour, pointing to their alleged reluctance to compare the Forms 38A and B with the Form 38C; and their use of 3rd Respondent’s identity card details to search the 3rd Respondent’s voter registration details even after seeing the voters’ register.

Tallying and Transmission of Results

76. On the question of the I.E.B.C.’s alleged failure to transmit results electronically, the 3rd Respondent’ position is similar to that taken by the 1st and 2nd Respondents.

Nomination of the 3rd Respondent and Costs

77. The 3rd Respondent endorsed the 1st and 2nd Respondent’s objection to the raising of the question of nomination in this case. The 3rd Respondent’s view is that the Petitioners are estopped from raising the issue at this forum, having eschewed the opportunity to raise it at the appropriate time as a pre-election dispute, as provided of in Article 88 (4) (e) of the Constitution and Section 74 of the Elections Act. As authority for this view, the court was referred to the case of **Emiliano Kipkorir Tonui -Vs- National Alliance Party [2016] eKLR**. The submissions reiterate that the 3rd Respondent was nominated by use of his identity card and is a registered voter, hence was properly cleared. Finally, the 3rd Respondent urged the court to dismiss the Petition and order that the costs be borne by the Petitioners, citing Section 84 of the Elections Act and the case of **Omukanda**.

The Petitioners’ Reply

78. In his reply to the Respondents’ submission, Mr. Marete asserted that the court’s jurisdiction in respect of a nomination question flows from the constitutional imperative to examine the entire process of the election. That the impugned Form 38C used in the Petition was authored by the I.E.B.C. and is erroneous and invalid. He stated that orders on costs lie within the discretion of the court.

Analysis and Determination

Common Ground and Disputed Issues

76. The court having reviewed the respective pleadings, evidence and submissions found that certain basic facts are not in dispute. These include the fact that the Form 38C annexed to the Petition was obtained from the I.E.B.C. by the 2nd Petitioner with the authority of **RW1**. Further, that the said document contains erroneous entries.

80. Regarding transmission, and display of results at the county tallying centre, it is not in dispute that, cumulative results were streamed on the screens mounted at the tallying centre in the material period. As far as the nomination of the 3rd Respondent is concerned, it is common ground that his name appeared in the voters’ register at the time, and that an issue arose regarding his identification document during nomination, but he was nevertheless cleared by **RW1**. In that regard, the issue in dispute is whether the court has jurisdiction to entertain the questions raised by the Petitioners and if so, whether the nomination was procedural.

81. Although the Petitioners had in their petition complained about the failure by presiding officers at polling stations to display ballots, to properly count, tally and transmit election results, at the trial, the real issue in dispute coalesced around the question whether the I.E.B.C. conducted a proper tally, transmission and display of final results.

82. As I see it, the gravamen of this petition relates to the declaration of the county results by **RW1**. The court must therefore determine whether the election was conducted in accordance with the principles in the Constitution and in accordance with the written law and whether any illegalities or irregularities adversely impacted on the integrity of the election thereby vitiating the entire election. In dispute are the twin questions; which Form 38C was used to declare the results; and secondly, whether the said statutory form was accurate and verifiable or whether it was substantially erroneous and therefore invalid, and ultimately what consequences flow therefrom.

Burden of Proof and Standard of Proof in Electoral Disputes

83. The Supreme Court decision in **Raila Amolo Odinga & another -Vs- Independent Electoral and Boundaries Commission & 6 Others Presidential Election No. 1 of 2017 (Raila 2017)** dealt exhaustively with the issues of burden and standard of proof in election petitions. I find it apposite to quote in *extenso* from that decision. This is what the court stated:-

“[129] The common law concept of burden of proof (*onus probandi*) is a question of law which can be described as the duty which lies on one or the other of the parties either to establish a case or to establish the facts upon a particular issue. Black’s Law Dictionary defines the concept as

“[a] party’s duty to prove a disputed assertion or charge....[and] includes both the burden of persuasion and the burden of production.”

With that definition, the next issue is: who has the burden of proof?

[130] The law places the common law principle of *onus probandi* on the person who asserts a fact to prove it. Section 107 of the Evidence Act, Cap 80 of the Laws of Kenya, legislates this principle in the words: “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.” In election disputes, as was stated by the Canadian Supreme Court in the case of *Opitz v. Wrzesnewskyj*, an applicant who seeks to annul an election bears the legal burden of proof throughout. This Court reiterated that position in the 2013 Raila Odinga case, thus:-

“[195] There is, apparently, a common thread in...comparative jurisprudence on burden of proof in election cases...that an electoral cause is established much in the same way as a civil cause: the legal burden rests on the petitioner....

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

[131] Thus a petitioner who seeks the nullification of an election on account of non-conformity with the law or on the basis of irregularities must adduce cogent and credible evidence to prove those grounds “to the satisfaction of the court.” That is fixed at the onset of the trial and unless circumstances change, it remains unchanged.....”

1. 84. 84. Concerning the evidential burden the court observed that:-

“[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 question 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 shifts and it behoves the respondent to adduce evidence to prove compliance with the law. We shall revert to the issue of the shifting of the burden of proof later in this judgment.”

85. On the question of the standard of proof in electoral petitions, the court ruled that:-

“[145] The application of the criminal standard of proof of ‘beyond reasonable doubt’ arises when the commission of criminal or quasi criminal acts are made in a petition. This is the standard the Supreme Court of India employed in the case of *Shiv Kirpal Singh v. Shri V. V. Giri* where it stated:

Although there are inherent differences between the trial of an election petition and that of a criminal charge in the matter of investigation, the vital point of identity for the two trials is that the court must be able to come to the conclusion beyond any reasonable doubt as to the commission of the corrupt practice.”

[146] Kenya adopts this standard of proof. In the 2013 Raila Odinga case, this Court stated that “where [there] are criminal charges linked to an election,... the party bearing the legal burden of proof must discharge it beyond any reasonable doubt.”

[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 ‘beyond reasonable doubt’, is applied. In such cases, this Court stated in the 2013 Raila Odinga case that:-

“[t]he threshold of proof should, in principle, be above the balance of probability, though not as high as beyond- reasonable-doubt....”

86. The court gave the rationale behind this standard as follows:-

“[150] The rationale for this higher standard of proof is based on the notion that an election petition 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. As the Tanzanian High Court stated in the old case of *Madundo v. Mweshemi & A-G Mwanza*:

An election petition is a more serious matter and has wider implications than an ordinary civil suit. What is involved is not merely the right of the petitioner to a fair election but the right of the voters to non-interference with their already cast votes i.e. their decision without satisfactory reasons.”

Nomination of the 3rd Respondent

87. With the foregoing in mind, this court proposes to deal with the issues raised in this Petition, starting with the nomination of the 3rd Respondent. It is true as submitted by the Petitioners’ advocate that the constitutional principles found in Articles 81 and 86 of the Constitution, *inter alia* apply to the entire electoral process, starting with the nomination of candidates. Article 81 states:

“The electoral system shall comply with the following

Principles-

(a) freedom of citizens to exercise their political rights under

Article 38;

(b) not more than two-thirds of the members of elective public

bodies shall be of the same gender;

(c) fair representation of persons with disabilities;

(d) universal suffrage based on the aspiration for fair

representation and equality of vote; and

(e) free and fair elections, which are:-

(i) by secret ballot;

(ii) free from violence, intimidation, improper influence or corruption;

(iii) conducted by an independent body;

(iv) transparent; and

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

88. The key duties imposed on the I.E.B.C. by the Constitution are enumerated in Articles 88 (4) of the Constitution as follows:

“(1) There is established the Independent Electoral and

Boundaries Commission.

(2)

(3)

(4) The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for-

(a) the continuous registration of citizens as voters;

(b) the regular revision of the voters’ roll;

(c) the delimitation of constituencies and wards;

(d) the regulation of the process by which parties nominate candidates for elections;

(e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;

(f) the registration of candidates for election;

(g) voter education;

(h) the facilitation of the observation, monitoring and evaluation of elections;

(i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;

(j) the development of a code of conduct for candidates and parties contesting elections; and

(k) the monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.”

89. Under Article 88(5) the I.E.B.C. is enjoined to exercise its powers and to perform its constitutional functions in accordance with the Constitution and national legislation. The I.E.B.C. functions set out under Article 88 (4) a – k of the Constitution are replicated *in verbatim* in Section 4 of the I.E.B.C. Act. The duties and functions are fleshed out in precise detail in the Elections Act and the Regulations made thereunder. There can be no dispute therefore that the I.E.B.C. is exclusively responsible for the regulation of the nomination process.

90. The question raised by the Respondent’s submissions in relation to nomination disputes is whether the I.E.B.C. has exclusive jurisdiction over such disputes. It is the Respondents’ common position citing Section 74 of the Elections Act *inter alia*, that this court has no jurisdiction to entertain, or alternatively that the Petitioners are estopped from raising, a dispute arising from the nomination exercise.

91. For their part, the Petitioners urge the court to view the entire election as a process as stated in the **Karanja Kabage’s case**. And that every part of the process is subject to the court’s scrutiny in an election petition. It is true that the Supreme Court in **Raila (1) 2017** endorsed the decision in **Kabage’s case** once more, as it had earlier done in the matter of **Gender Representation in the National Assembly, Advisory Opinion No. 2 of 2012; [2012] eKLR**.

92. However in my reading, the Supreme Court while citing a portion from **Kabage** was emphasising the point that an election is a process. This is what the Supreme Court stated:-

“Here in Kenya, the issue of elections as a process was discussed in

the case of **Karanja Kabage -Vs- Joseph Kiuna Kariambegu Nganga**

& 2 Others where the High Court observed that:

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

This case was cited with approval by the Supreme Court in *In the matter of the Gender Representation in the National Assembly and Senate*. Therefore the process of getting a voter to freely cast his vote, and more importantly to have that vote count on an equal basis with those of other voters is as important as the result of the election itself.”

93. Clearly therefore, the Supreme Court was in the quoted portion, not dealing with the question of the elections court’s jurisdiction in a nomination dispute, as suggested by the Petitioners in their submissions. The argument as made in **Kabage** for a qualified jurisdiction of the election court over all disputes arising in the entire process of an election, including nomination is generally persuasive. I also find the reasoning by **Kimondo J** in **Emiliano Kipkorir Tanui** pertinent and consistent with the preponderance of jurisprudence by election courts on this matter. And especially where, as in this case, a party has not invoked in good time, the initial prescribed mechanisms for the settlement of a nomination dispute

94. Although **Kimondo J** was not presiding over an election court, he described eloquently the electoral processes and the various nodes between component parts of the process as follows:

“Prior to the general election, the petitioner could have utilized internal TNA party dispute resolution mechanisms. The petitioner was also at liberty to refer the dispute to the Independent Electoral and Boundaries Commission (IEBC). The IEBC is vested with wide powers to independently manage the electoral process. An election is a continuum that starts before polling day; spills over into the IEBC; and, ends up in the election courts. Along that journey, various institutions have been granted distinct mandates to resolve certain disputes. The IEBC, for example, has power to resolve certain disputes over nomination of candidates. Article 88 (4) (e) of the Constitution is express in that respect. See generally International Centre

for Policy & Conflict and 4 Others -Vs- Uhuru Kenyatta and others, Nairobi, High Court Consolidated Petition 552 of 2012 [2013] eKLR, George Wanjohi -Vs- Steven Kariuki & Others, Supreme Court, Petition 2A of 2014 [2014] eKLR. Lastly, the petitioner could have approached the Political Parties Disputes Tribunal created by section 40 of the Political Parties Act 2011.

The petitioner did not refer the dispute to any of those organs. He instead presented this petition on 6th November 2014, nearly a year and eight months after the general election of 4th March 2013. Quite apart from the laches, I find that the petition is incompetent. **Having by-passed the Constitutional and legal institutions for settlement of pre-election nomination disputes, the petitioner is now estopped from claiming a violation of his political rights. The original jurisdiction of the High Court is circumscribed in that respect.** See International Centre for Policy & Conflict and 4 Others -Vs- Uhuru Kenyatta and others, Nairobi, High Court Consolidated Petition 552 of 2012 [2013] eKLR. I have also found that the petitioner was a member of TNA and bound by the pre-election coalition agreement with URP.”

95. This view resonates with the clear intent of Article 88 (d) and (e) of the Constitution as well as Section 4 (a) and (e) of the I.E.B.C. Act, Section 74 of the Elections Act and the Rules of Procedure on Settlement of disputes made thereunder. It is noteworthy that the object of the national legislation envisaged under Article 87(1) was the establishment of “**mechanisms for timely settling of electoral disputes.**”

96. This object is reiterated in the Rules of Procedure on Settlement of disputes in Rule 3 follows:-

“The object of these rules is to provide a procedure and mechanisms for the expeditious, efficient, lawful, reasonable and procedurally fair settlement of disputes including those contemplated under Article 88(4)(e) of the Constitution and section 74 of the Act.”

97. Further Rule 4 states:-

(1) These rules shall apply to disputes or complaints arising from-

(a) registration of persons;

(b) nomination of candidates;

(c) violations of the Code of Electoral Conduct; and

(d) any other election related complaint.

(2) These rules shall not apply to election petitions or disputes and complaints subsequent to the declaration of election results.”

98. Under the Rules, a dispute is defined as a “**complaint, challenge, claim or contest relating to any stage of the electoral process and includes an objection to the acceptance of nomination papers of a candidate by a Returning Officer.**” The Rules prescribe the form, manner and timelines for the filing and processing of a complaint or dispute relating to nomination (See Rule 9). A procedure for notification of the decision and appeal therefrom to the Commission is provided for.

99. It is thus clear from the foregoing that the purpose and intent of the provisions in the Constitution, the Elections Act, and the Rules were that disputes arising at nomination stage be handled, at least in the first instance, by the I.E.B.C. and as close as possible to the nomination event in dispute, and not delayed until the election is over. Secondly, that where the I.E.B.C. has acted in blatant negligence or in breach of the law, the election court may nevertheless intervene to right the wrong as stated in **Kabage’s case**.

100. Evidently, a party who avails himself of the initial mechanism and who is aggrieved by the outcome of the I.E.B.C. Dispute Resolution Committee process could appeal to the High Court. For this reason, I agree entirely with the words of **Mabeya J** in **Josiah Taraiya Kipelian** to the effect that:-

“[29].....Any party disputing nomination of a candidate has a duty to follow the dictates of the Constitution as set out in Article 88(4)(e), Section 74 (2) of the Elections Act, 2011 and Regulations 99 (2⁵) of the Elections (General) Regulations, 2012. These provisions are clear in their tenure in giving the 4th Respondent jurisdiction to hear matters that touch on or disputes arising from nominations.....

My view is that, the law did not provide the detailed procedure for pre-election dispute resolution mechanisms for no reason. It was intended that the procedure be strictly followed. There is ample authority, including Diana Kethi Kilonzo’s case cited above, Kituo cha Sheria -Vs- John Ndirangu Kariuki (2013) eKLR, ICPC & 5 Others -Vs- Attorney General & 4 Others (2013) eKLR, Re Francis Gitau Parsimei & Others -Vs- National Alliance Party & Others Petition No. 356 of 2012(UR) to the effect that once a procedure on dispute resolution has been provided for, the court has no business extending its tentacles thereto. It should be noted that the provisions I have cited above are clear that a decision on those disputes must be rendered before the subject election. A dissatisfied party to such a dispute can only appeal to the High Court in its normal jurisdiction against such a decision not an Election Court.”

101. Several High Court decisions including **Kituo Cha Sheria –Vs- John Ndirangu Kariuki [2013] eKLR, Luka Lubwayo & Another –**

Vs- Gerald Otieno Kajwang Nairobi Petition 120 of 2013 [2013] eKLR appear to take a position aligned to the **Kabage case** and finding, that the jurisdiction of the High Court is not excluded in all matters relating to nomination, examples of exceptions being where the I.E.B.C. has acted negligently or otherwise failed to exercise its mandate under statute; and/or where the question of validity of an election in an election petition encompasses the nomination exercise. It may also be stated in reverse that a party who had reason to object to a nomination process but neglected or otherwise failed to do so, ought not to be given an easy opportunity to raise such an objection after the election, by a petition brought for the purpose of annulling the election results.

102. The question of timeliness in the settlement of electoral disputes is an integral part of legislation dealing with such disputes. In **Munya's case**, the Supreme Court, albeit considering Section 85A of the Elections Act which provides for the filing of appeals emanating from the High Court had this to say:

“[62] Article 87 (1) grants Parliament the latitude to enact legislation to provide for “timely resolution of electoral disputes.” This provision must be viewed against the country’s electoral history. Fresh in the memories of the electorate are those times of the past, when election petitions took as long as five years to resolve, making a complete mockery of the people’s franchise, not to mention the entire democratic experiment. The Constitutional sensitivity about “timeliness and timeliness”, was intended to redress this aberration in the democratic process. The country’s electoral cycle is five years. It is now a constitutional imperative that the electorate should know with finality, and within reasonable time, who their representatives are. The people’s will, in name of which elections are decreed and conducted, should not be held captive to endless litigation.

[63] Herein lies the nexus between Article 87 (1) of the Constitution and Section 85A of the Elections Act. Election petitions, not surprisingly, come up for special legislation that prescribes the procedures and scope within which Courts of law have to resolve disputes. Thus, judicial resources should be utilized efficiently, effectively and prudently. By limiting the scope of appeals to the Court of Appeal to matters of law only, Section 85A restricts the number, length and cost of petitions and, by so doing, meets the constitutional command in Article 87, for timely resolution of electoral disputes.

[64] Section 85 A of the Elections Act is, therefore, neither a legislative accident nor a routine legal prescription. It is a product of a constitutional scheme requiring electoral disputes to be settled in a timely fashion. The Section is directed at litigants who may be dissatisfied with the judgment of the High Court in an election petition. To those litigants, it says:

Limit your appeals to the Court of Appeal to matters of law only.”

103. Similar observations may be made in respect of complaints or disputes emanating from nominations. The procedure and timelines laid out in Article 88 (d) and (e) of the Constitution, the I.E.B.C. Act, the Elections Act and the Rules of Procedure are intended to regulate nomination dispute settlement in a manner that meets the imperatives of Article 87(1) of the Constitution regarding timeliness.

104. In the case of **Isaiah Gichu Ndirangu & 2 Others -Vs- I.E.B.C. & 4 Others; Nairobi Petition No. 83 of 2015, (2016) eKLR, Lenaola J.** as he then was confronted what he found to be essentially a nomination dispute presented as a constitutional petition. In dealing with objections raised by the Respondents in relation to the jurisdiction of the court, the learned judge observed concerning the provisions of Articles 87 and 88(4) of the Constitution and Section 74 of the Elections Act and Section 4 of the I.E.B.C. Act, that:

“[49] My understanding of the laws that I have cited above is that the Legislature intended to enact legislation to govern electoral matters and the resolution of any related disputes therein. Section 74 (1) of the Elections Act and Section 4 of the Independent Electoral and Boundaries Commission Act as reproduced above makes it explicit that the Commission shall be responsible for settling disputes arising from or relating to nominations. It therefore follows that where any person has a dispute relating to or arising from any nominations, the first port of call is ideally the Commission. The next question then that begs for an answer is whether the Petitioners utilized the Commission’s dispute resolution port as required of them before approaching this Court. Based on their pleadings and submissions before this Court, their argument was that the instant Petition has been filed not as an election dispute but rather that the jurisdiction being invoked herein is the one under Articles 165 and 258 of the Constitution and no more.

[50] I appreciate the Petitioners’ contentions in that regard but I am however in disagreement with their reasoning. I agree that indeed this Court has unlimited jurisdiction in civil and criminal matters and further the jurisdiction to determine the constitutionality of anything alleged to have been done under the Constitution. I also appreciate that Article 258 of the Constitution grants every person the right to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention. I however take the view that Parliament in its wisdom, being well aware of the existence of the judicial arm of the Government, enacted statutes that made provisions for settling disputes arising from or relating to nominations and elections. In the said enactments, the Legislature anticipated the existence of such disputes and that is why it created necessary and specialized dispute resolution fora.

105. The Learned Judge continued:-

“[54] I also note that in previous decisions of this Court, a view was taken along the above lines and that is why in Republic - Vs- Speaker of County Assembly of Nyandarua and Another Exparte David Mwangi Ndirangu, Miscellaneous Application No.414 of 2013.

[55]. Further, in Narc Kenya and Another -Vs- Independent Electoral and Boundaries Commission Another, Election Petition No.12 of 2013, the 2nd Petitioner raised a complaint over the nomination of the 2nd Respondent with the dispute resolution committee of the Commission. The Committee heard the complaint and dismissed the same in its decision of 7th June, 2013. The Petitioner not being satisfied with the outcome filed Judicial Review No.203 of 2013 challenging the

nomination of the 2nd Respondent as the gender top up nominee for Garissa County for NARC Kenya party. The point is that the first port of call was the Commission.

[56]. In *Beatrice Nyaboke Oisebe -Vs- Independent Electoral and Boundaries Commission 2 others*, Civil Appeal No. 179 of 2013, in the run-up to the general elections held on 4th March 2013, the Commission requested political parties to submit party lists under Article 90 in respect of the Senate, the National Assembly and the County Assemblies. Based on these party lists, and the result of the general elections published on 13th April 2013, the Commission published the allocation of nominees to county assembly special seats. Thereafter a constitutional reference, *Petition No.147 of 2013, The National Gender & Equality Commission -Vs- the IEBC, the Hon. The Attorney General* was filed, challenging the manner in which the Commission had allocated the said special seats. The High Court delivered a ruling which ordered that the Commission ought to put in place mechanisms to resolve any disputes concerning the lists in accordance with Article 58(4) (e) of the Constitution as read with Section 74 of the Elections Act, 2011. This was to ensure that while dealing with the disputes touching on the said lists the Commission was discharging its constitutional responsibility to satisfy itself that the lists, met the constitutional criteria.

[57]. I have deliberately set out the above decisions with a view to highlighting the approach the courts have taken, which I believe is the correct one, in addressing disputes in regard to nominations pertaining to election matters. In the above cited decisions, I note that the parties alleged violation (s) of the Constitution and the various electoral laws in regard to the nominations and in that regard, their first port of call was the Commission's Dispute Resolution Committee. Being dissatisfied with decision of the Committee, they thereafter approached the Courts. It is thus clear that the parties did not bypass the Commission's dispute resolution avenue as the Petitioners have now done."

106. The learned Judge declined jurisdiction in the matter before him. Similarly, in this case, the Petitioners' first port of call ought to have been the I.E.B.C. Dispute Resolution Committee. By raising the challenge to the nomination of the 3rd Respondent for the first time in this court, well over four months since the nomination exercise, the Petitioners have defied the prescribed procedure and time limits. And no explanation has been proffered for this omission.

107. From their evidence, the Petitioners were as at the nomination day, not entirely satisfied with the *bonafides* of the 3rd Respondent as a registered voter eligible to vie as Senator Narok County and besides, were dubious concerning his identification details. While they claim to have raised the issues with **RW1** on the date of nomination, a fact initially conceded by the 2nd Respondent in her affidavit but denied in oral evidence, the Petitioners did not tender any evidence that they lodged any objection in the manner prescribed in the Rules to **RW1** or at all.

108. Having failed to prove that they availed themselves of the opportunity provided in the Rules for raising a challenge against the nomination of the 3rd Respondent, it is my view that it is too late for that issue to be canvassed at this stage. At any rate, the 3rd Respondent was admittedly a registered voter, which issue appears to be the main reason for the Petitioners' disquiet. That said, it seemed odd that despite the challenge raised concerning his identification details the 3rd Respondent did not provide a copy of the identity card which he claims to have used at the nomination. Be that as it may, the court declines the invitation to deal with the question of his nomination at this stage.

Transmission of Results

109. The Petitioners appear to have abandoned their complaint regarding display, counting and tallying of votes at polling stations, and confined their submissions to the question of electronic transmission of election results. Admittedly the I.E.B.C. did stream results at the County tallying centre, albeit in bulk. As the Respondents have pointed out, under Section 39 (1)(c) of the Elections Act and the Elections (General) Regulations 5(1)(d), electronic transmission is only prescribed for presidential election results. Nevertheless, the I.E.B.C. having taken up the obligation to transmit results electronically, ought to have conducted the exercise in a manner suitable for the purpose, and in keeping with the principles enshrined in Article 81 and 86 of the Constitution.

110. Although the Court of Appeal in **Maina Kiai's case** dealt primarily with the presidential election, I think the court's consideration in respect of the stated rationale behind Section 39 (1) (c) and 44A equally applies to a situation such as before us:

"...that the Elections Act be amended to provide for the "489.that the Elections Act be amended to provide for the electronic transmission of the tabulated results of an election for the President from a polling station to the constituency centres and to the national tallying centre". (Emphasis supplied)

Following that and other recommendation, the Act was extensively amended by the Election Laws (Amendment) Act No. 36 of 13th September, 2016. For our purposes, to section 39 was introduced subsection (1C) to specifically provide for the transmission of presidential results. It reads;

39(1C)

(a)

(b)

(c)

One of the factors in the electoral system reforms that was underscored in the 2016 and 2017 amendments to the Elections

Act, was the use of information technology to guarantee the accuracy and integrity of the results of elections. Section 44 was introduced in the 2016 amendment to provide, *inter alia*, that the appellant shall;

“44. (1) ...establish an integrated electronic electoral system that enables biometric voter registration, electronic voter identification and electronic transmission of results.

(3) ...ensure that the technology in use under subsection (1) is simple, accurate, verifiable, secure, accountable and transparent.

(5) ...in consultation with relevant agencies, institutions and stakeholders, including political parties, make regulations for the implementation of this section...” (Emphasis supplied)

In 2017 section 44A was inserted after section 44 to provide that;

44A. Notwithstanding the provisions of section 39 and section 44, the Commission shall put in place a complementary mechanism for identification of voters and transmission of election results that is simple, accurate, verifiable, secure, accountable and transparent to ensure that the Commission complies with the provisions of Article 38 of the Constitution”. (Emphasis supplied)

We are satisfied that with this elaborate system, the electronic transmission of the already tabulated results from the polling stations, contained in the prescribed forms, is a critical way of safeguarding the accuracy of the outcome of elections, and do not see how the appellant or any of its officers can vary or even purport to verify those results, particularly when it is clear that, by Article 86 (d), section 2 of the Act and regulation 93(1), all election materials, including ballot boxes, ballot papers, counterfoils, information technology equipment for voting, seals and other materials, are to be retained in safe custody by the returning officers for a period of three years after the results of the elections have been declared, unless required in proceedings in court.” (emphasis added)

111. In my view, the I.E.B.C.’s admitted streaming of lumped up transmitted results was not fit for purpose. Those interested in the results could not tell which polling stations the results were in respect of. However, in light of the absence of any statutory obligation on the I.E.B.C. to facilitate electronic transmissions of results other than for the presidential election, nothing turns on this point. Not even the admitted disparity between the candidates’ total votes in the Form 38C vis-à-vis the I.E.B.C. portal at the tallying centre.

Declaration of Results

Scrutiny

112. On 30th January, 2018 the court moved *suo motu* to order a partial scrutiny, pursuant to the provisions of Section 82 (1) of the Elections Act and Rule 29 of the Elections (Parliamentary and County Elections) Petition Rules (Petition Rules). This order followed a preliminary consideration of the evidence and material placed before the court by the parties, including respective their submissions. The 3rd Respondent had in his submission regarding the declaration issue emphasized a portion of the court’s decision in **Omukanda’s case**, to the effect that, an irregularity occasioned by improper posting of results could be cured through the paper trail, that is statutory forms available, and errors corrected.

113. The 3rd Respondent therefore invited the court to undertake a comparison of the Forms 38A, B and C in respect of any erroneous entries in Forms 38C as a way of confirming the true position. For their part, the 1st and 2nd Respondents also anticipated the question of scrutiny and submitted in opposition to such an exercise, as earlier set out in the judgment. While the High Court authorities cited (**Mukwe’s** and **Mugali Rubaya’s cases**) dealt with an application made to the court for scrutiny, they nonetheless reiterate an important principle that the court can only order scrutiny where there exists a proper basis and, for the purpose of investigating alleged breaches of law and or irregularities. More pertinent however was the Supreme Court decision in the **Munya’s case**.

114. In **Munya’s case**, the Supreme Court considered the provisions of Section 82 (1) of the Elections Act and Rule 33 (now Rule 29) of the Petition Rules. After setting out the two provisions and several decisions by the High Court, the Court reiterated that a party seeking scrutiny must lay a basis or give sufficient reason therefor. The Court further restated the purpose of scrutiny as ordered *suo motu* in **Raila Odinga - Vs- Uhuru Kenyatta & 3 Others Petition Number 5 of 2013** where the court had stated that:-

“The purpose of the scrutiny was to understand the vital details of the electoral process, and gain impression on the integrity thereof.”

115. With specific reference to scrutiny orders made by the court *suo motu*, the Supreme Court highlighted a portion of **Odunga J’s** decision in **Ramadhan Seif Kajembe -Vs- Returning Officer of Jomvu Constituency & 3 Others, Mombasa High Court Election Petition No. 10 of 2013**; [2013] eKLR before observing that:-

“[152] We have considered the wording of Section 82 (1) of the Elections Act and Rule 33 of the Petition Rules. Taking into account the intention of Parliament (which in this instance is “to provide legislative mechanisms for the timely resolution of electoral disputes”), and the judicial thought-process as expressed by the election Courts, we are of the view that:

i. There is no fundamental inconsistency between Rule 33 (1) of the Petition Rules and Section 82 (1) of the Elections Act. It is our position that an order for a recount or scrutiny of the vote may be made *at any stage after filing of an election petition* or

during the hearing of an election petition and before the determination of the said petition.

ii. There is no inconsistency between Rule 33(2) of the Petition Rules and Section 82 (1) of the Elections Act, as regards the exercise of discretion as to whether to order for scrutiny and recount or not. Contrary to dicta in some of the High Court decisions, the discretion vested in an election court by Section 82(1) of the Act, is not unfettered. Such discretion must be exercised reasonably, so as not to defeat the objectives of Article 87 (1) of the Constitution and the Elections Act.

[153] From the foregoing review of the emerging jurisprudence in our Courts, on the right to scrutiny and recount of votes in an election petition, we would propose certain guiding principles, as follows:

a. The right to scrutiny and recount of votes in an election petition is anchored in Section 82(1) of the Elections Act and Rule 33 of the Elections (Parliamentary and County Elections) Petition Rules, 2013. Consequently, any party to an election petition is entitled to make a request for a recount and/or scrutiny of votes, at any stage after the filing of petition, and before the determination of the petition.

b. The trial Court is vested with discretion under Section 82(1) of the Elections Act to make an order on its own motion for a recount or scrutiny of votes as it may specify, if it considers that such scrutiny or recount is necessary to enable it to arrive at a just and fair determination of the petition. In exercising this discretion, the Court is to have sufficient reasons in the context of the pleadings or the evidence or both. It is appropriate that the Court should record the reasons for the order for scrutiny or recount.

c. The right to scrutiny and recount does not lie as a matter of course. The party seeking a recount or scrutiny of votes in an election petition is to establish the basis for such a request, to the satisfaction of the trial Judge or Magistrate. Such a basis may be established by way of pleadings and affidavits, or by way of evidence adduced during the hearing of the petition.

e. Where a party makes a request for scrutiny or recount of votes, such scrutiny or recount if granted, is to be conducted in specific polling stations in respect of which the results are disputed, or where the validity of the vote is called into question in the terms of Rule 33(4) of the Election (Parliamentary and County Elections) Petition Rules.”

116. Article 87(1) of the Constitution and legislation made thereunder place emphasis on the timely resolution of electoral disputes. Scrutiny by its nature is laborious and time consuming, as stated by **Wendo J** in **Ledama Olekina -Vs- Samuel Kuntai Tunai & 10 Others [2013] eKLR**. Besides, the scope of scrutiny is circumscribed by Rule 33 (4) as well as its proper purpose namely that, it is not intended as an opportunity for a fishing expedition, to the detriment of an adverse party (See **Wavinya Ndeti -Vs- The I.E.B.C. & 4 Others Machakos High Court Election Petition No. 4 of 2013; [2013] eKLR**).

117. Concerning the facts of this case, it is not in dispute that the Form 38C tendered to the court by the Petitioners was indeed authored by the I.E.B.C. as admitted by **RW1**. Further that the said document contained a series of errors in results posted therein was not in dispute. The I.E.B.C. witness (**RW1**) testified that having noted the errors in question, she had a fresh Form 38C prepared. The said fresh Form 38C was tendered as an exhibit by **RW1**. This document too had its own share of issues. Not only was a portion thereof without I.E.B.C. logo and security features, but also as **RW1** admitted, it too contained some serious errors, including the switching of columns for votes cast and valid votes and the consequently, total votes cast appeared less than valid votes.

118. The total number of votes cast in Narok County for instance, exceeded the votes cast in the I.E.B.C. Form 38C. The Form 38C is an important statutory document as it is the final declaration of the results of the Senatorial election at the County. Besides, a question arose as to which, between the Petitioners' Form 38C and the I.E.B.C. version was used to declare the impugned results. The issue of the Form 38C dominated the pleadings, the evidence and submissions.

119. As Supreme Court observed regarding scrutiny in **Munya's case**:-

“[163] The authority granted to the election Court is discretionary in nature. In this regard, the Court may order for scrutiny on its own motion or upon application by a party to the election petition. This necessarily entails that the Court may decline to grant an order for scrutiny following an application seeking one. The Court may also grant an order for *partial scrutiny*, even where a party has applied for scrutiny in a wider electoral area. In exercising this discretion, however, the Court must act judiciously. An order for scrutiny must be rationalized on the basis of evidence, or sufficient account in the pleadings. As we have noted, the purpose of recount and scrutiny is to determine who actually won the election, the validity of votes, and the integrity of the election. Therefore, it is only logical that recount and scrutiny follows “disputed results”, or “impugned electoral processes.” If an election Court were to order for scrutiny and recount in the *absence of a specific dispute*, then such order would amount to an abuse of discretion, and an act in vain.

[164] Rule 33 (4) is a logical extension of the Court's discretion under Section 82 of the Elections Act. Indeed, the Rule should be seen as providing the necessary guidelines for the exercise of discretion by the Court under Section 82 of the Act. By providing that scrutiny shall be confined to the polling stations in which the results are disputed, the Rule is by no means limiting to the Court's discretion. If election results are seriously disputed in all the polling stations in a constituency, then Rule 33(4) would not erect any barrier to an order for scrutiny in those polling stations. Otherwise, why should a Court order for scrutiny in a polling station in which there is no dispute whatsoever? What would the Court be scrutinizing? It is clear that the overwhelming trend in the emerging judicial opinion, frowns upon the possibility of granting orders of scrutiny that serve no purpose and that may, indeed, be contrary to the public interest.

[165] If on the other hand, Rule 33(4) had provided that the Court may only grant an order for scrutiny upon application by

a party to an election petition, then to that extent, it would have been inconsistent with Section 82(1) of the Elections Act, for placing a fetter on the Court's discretion to order for scrutiny *suo motu*. Rule 33(4), in our opinion, looks up to Article 86 (b) and (c) of the Constitution, which places a premium on *the polling station* as the basic arena of voting, and counting of votes. The Article provides:

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

....

(b) the votes 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.”
(emphasis added)

120. At the heart of this petition is a challenge to the validity in form and substance of the declaration of the 3rd Respondent as the duly elected Senator, the Petitioners' contention being that the Declaration Form is invalid and incapable of supporting such declaration. Given the I.E.B.C.'s admitted authorship of two different sets of Form 38C in respect of the same County, albeit with some qualification, and the surrounding disputation, this court was duty bound to make inquiries as a way of investigating the alleged anomaly, as well as the admitted errors, in order to assure itself of the integrity of the declaration, particularly, and the election process in general.

121. It was the view of the court that a *suo motu* order for scrutiny was imperative for the just and fair determination of the petition. However, mindful of the provisions of Rule 33 (4) of the Petition Rules, and the fact that the dispute primarily centred on one constituency, namely, **Narok South**, the court confined the partial scrutiny to the statutory forms executed in respect of the said Constituency.

122. Thus, the court made an order for partial scrutiny in respect of 130 polling stations in **Narok South Constituency**, directing *inter alia* for the:-

“a) General examination of the printed copy of the Register of voters, all original Forms 38A, 38B and 38C, as well as Candidate Vote Tally Sheets which were used in the 130 polling stations identified at paragraph 39 of the Petition namely:-

.....;

b) Examination and comparison of the entries in the printed copy of the Register of Voters, the Candidate Vote Tally Sheets, the original Forms 38A and B alongside corresponding entries in the original Form 38C, stated above to confirm:-

i. the general accuracy of the entries;

ii. the number of registered voters in the polling stations in question;

iii. specifically, the accuracy in the tallying and transposition of votes as captured in the entries in the stated documents.

iv. where necessary reference may be made to relevant notices in the Kenya Gazette.

c) Special note is to be made of incidents, if any, where the total number of votes cast or valid votes exceed the total number of registered voters; and of any similarities in entries that may be noted in the Form 38C annexed to the Petition and the Original Form 38C supplied by the Independent Electoral & Boundaries Commission (I.E.B.C.).”

123. The scrutiny exercise was conducted at Naivasha Law Courts and at the I.E.B.C. warehouse at Bomet between the 5th February, 2018 and 9th February 2018, under the supervision of the Deputy Registrar of this court. The Deputy Registrar's report dated 12th February, 2018 was served on all parties who were also invited to make submissions.

124. The submissions can be restated briefly as follows. The Petitioners' advocate Mr. Marete, though unhappy that the exercise did not abide with the spirit of the Court's directions, stated that the report vindicated the Petitioners case. He observed that there was an overreliance on carbon copies of statutory Form 38As. He also pointed out that eight polling stations which formed the subject of the court's order of scrutiny were not included in the report. These are identified on the scrutiny list as follows:-

a) 54 Osotua Primary School stream II

b) 85 Olengapune Primary stream (II)?

c) 95 Osinantei Primary School

d) 98 Olorte Primary School

e) 108 Kichapa Primary School

f) 114 Tumuyot Primary School

g) 115 Tumuyot Primary School

h) 118 Kewet Primary School

125. He also observed that the Form 38As in respect of these polling stations were not availed. He faulted the report for not including a narrative in respect of transposition of entries in the Form 38C, which the court had directed be scrutinized. He also took issue with remarks to the effect that the Form 38C in respect of the **Narok South Constituency** did not reflect total votes cast or rejected votes, and highlighted the fact candidate tally sheets were missing in 34 polling stations. Regarding the latter, he submitted that under regulation 76 (3) of Elections (General) Regulations, the candidate tally sheet [Form 33] was a mandatory statutory form.

126. Mr. Marete further observed that the report failed to mention repeated polling stations in (Form 38C) and the alleged failure to scrutinize the dates and signatures on the two sets of Form 38C. Asserting that there were multiple irregularities unearthed by the scrutiny, he urged the court to find that these vitiated the results.

127. Mr. Mwangi for the 1st and 2nd Respondent submitted that the scrutiny exercise had laid to rest the allegations of votes cast or valid votes exceeding the registered voters. That the scrutiny revealed, to the contrary, that the total valid votes reflected in the I.E.B.C.'s Form 38C were reflected as the 1st Petitioner's votes in his (Petitioners') Form 38C, and that apparent excess vote totals reflected in respect of **Kilgoris Constituency** resulted from posting entries in wrong columns.

128. Concerning the missing tally sheets, Mr. Mwangi said it was of no moment as the primary document is Form 38A, and whether copies or not, the latter did compare with the Form 38B. He pointed out that the Form 38A for **Osotua Polling Station** is reflected in the report as availed. He submitted that there is no provision in Form 38B for recording total votes cast.

129. Mr. Odhiambo did not agree with Petitioners' misgivings on the scrutiny report and defended the findings. In his view, the Petitioners have not demonstrated what prejudice was occasioned by the non-availability of tally sheets, especially as Form 38As were not disputed. He cited the case of **Mercy Kirito Mutegi -Vs- Beatrice Nkatha Nyaga & 2 Others [2013] eKLR** to support that view. As before, he reiterated the wide vote margin between the 1st Petitioner and the 3rd Respondent.

130. It was his view that even if all the questioned polling stations are discounted, the margin would still be large. Furthermore, citing the Supreme Court decision in **Munya's case**, he argued that tallying errors cannot justify the nullification of an election especially where such errors do not affect the results. He said that only the Petitioners' Form 38C differed from other statutory forms completed in the impugned election.

131. In his opinion, there was evidence of willful manipulation of data towards a certain result. He took issue with the Petitioners for emphasizing what he said were administrative errors while eschewing a recount of votes.

132. The court has considered the evidence on record in light of the scrutiny report and the submissions. The most disturbing feature of this petition is the existence of two differing Form 38C in respect of the same County, both authored by the I.E.B.C. As observed earlier the question dominated the pleadings and proceedings. In my considered view therefore, this Petition stands or falls on the court's determination in regard to this aspect. It is useful before delving into the evidence touching on the question to restate the relevant requirements of the Constitution and the law in the conduct of elections.

133. The provisions of Articles 38, 81 and 86 of the Constitution are the guiding beacons. The citizens right to free and fair elections as guaranteed in Article 38 of the Constitution is reinforced by Article 81 of the Constitution which further sets out the hallmarks of free and fair elections.

134. Article 81(e) provides that such elections are to be:-

“(i) by secret ballot;

(ii) free from violence, intimidation, improper influence or corruption;

(iii) conducted by an independent body;

(iv) transparent; and

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

135. Article 86 imposes an obligation as the I.E.B.C. to ensure that

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

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

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

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

136. The majority judgment of the Supreme Court in **Raila Amolo Odinga & another -Vs- Independent Electoral and Boundaries Commission & 6 Others Presidential Election No. 1 of 2017 (Raila 1 of 2017)** considered the principles in Article 81 and 86 inter alia, observing that:

“Of importance are the expectations of transparency, accountability, simplicity, security, accuracy, efficiency and especially, verifiability of the electoral process. These terms should be understood to refer to:

(a) an accurate and competent conduct of elections where ballots are properly counted and tabulated to yield correct totals and mathematically precise results;

(b) an election with a proper and verifiable record made on the prescribed forms, executed by authorized election officials and published in the appropriate media;

(c) a secure election whose electoral processes and materials used in it are protected from manipulation, interference, loss and damage;

(d) an accountable election, whose polling station, constituency and national tallies together with the ballot papers used in it are capable of being audited; and

(e) a transparent election whose polling, counting and tallying processes as well as the announcement of results are open to observation by and copies of election documents easily accessible to the polling agents, election observers, stakeholders and the public and, as required by law, a prompt publication of the polling results forms is made on the public portal.”

137. Thus, it is expected that the polling, counting and tallying processes are conducted in alignment with these principles. Every component of these processes of an election is important and liable to examination by the election court before which the validity of an election is challenged (See **Kabage’s case**).

138. In the instant case, there is no complaint regarding the conduct of the polling exercise; moreover complaints in respect of counting and tabulation at polling stations were generalized and not borne out by evidence. Nor is there any complaint with regard to the tallying of results at the constituency level. It appears to me that the locus of the Petitioners’ challenge is the County Tallying Centre where, results from Constituency Returning Officers were received and processed, in order to create the county results in the prescribed Form 38C. This task lay with the County Returning Officer by dint of Section 39 of the Elections Act and Regulation 4 of the Elections (General) Regulations.

139. The role of commission in this regard is prescribed in Section 39 of the Elections Act, which provides that:-

“(1) The Commission shall determine, declare and publish the results of an election immediately after close of polling.

(1A) The Commission shall appoint constituency returning officers to be responsible for-

(i) tallying, announcement and declaration, in the prescribed form, of 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;

(ii) collating and announcing the results from each polling station in the constituency for the election of the President, county Governor,

Senator and county women representative to the National Assembly; and

(iii) submitting, in the prescribed form, the collated results for the election of the President to the national tallying centre and the collated results

for the election of the county Governor, Senator and county women representative to the National Assembly to the respective county

returning officer.

(1B) The Commission shall appoint county returning officers to be responsible for tallying, announcement and declaration, in the prescribed form, of final results from constituencies in the county for purposes of the election of the county Governor, Senator and county women representative to the National Assembly.

(1C)

(1D)

2)

3)"

140. Regulation 87 of the Elections (General) Regulations sets out the procedure for the delivery of returns by the Constituency to, and the processing of the said returns by the County Returning Officers (CRO). It provides that:

“(1) The constituency returning officer shall as soon as practicable-

(a) deliver to the county returning officer all Forms 37B, 38B and 39B from the respective constituencies and the collated results; and

(b) deliver to the National tallying centre all the Form 34B from the respective polling stations and the summary collation forms.

(2) The county returning officer shall upon receipt of the results from the constituency returning officers as contemplated under regulation (1)-

(a) tally and announce the results for the county governor, senator and county woman representative to the National assembly;

(b) complete Forms 37C, 38C and 39C set out in the Schedule in which the county returning officer shall declare, as the case may be, the-

igate number of rejected votes; and

(c) sign and date the relevant forms publicly and declare the result for the position of-

i. County Governor

ii. Senator; and

iii County woman representative to the National Assembly; and

(d) issue certificate to persons elected in the county Governor, Senator, county woman representative to the National Assembly in Forms 37D, 38D and 39D respectively set out in the Schedule.

3.;

4.;

5.;

6.;

7.;

8.” (Emphasis added)

141. In **Maina Kiai’s case** the Court of Appeal accepted the arguments of the Respondents that the results declared or announced at the polling stations are final, and therefore no person, including the I.E.B.C. Chairman or officials can purport to verify, confirm or vary the said results. This, despite the requirement in Regulation 87 (3) of Elections (General) Regulations that the I.E.B.C. Chairman (unlike the County Returning Officer in our case), to verify Forms 38A and B before tallying and announcing results. The Court of Appeal found the provisions inconsistent with the Constitution. It is true that **Maina Kiai’s case** related to presidential elections, but an important analogy can be drawn from it, in determining what was expected of the County Returning Officer at the point of tallying and declaring results in this case.

142. The Court of Appeal stated that:-

“Pursuant to the constitutional principles of transparency, impartiality, neutrality, efficiency, accuracy and accountability

under the present legal regime, in the presidential election, the votes cast at each polling centre shall be counted, tabulated and the outcome of that tabulation announced without delay by the presiding officer. The results announced at each polling station shall be transmitted to the constituency returning officer, who in turn will openly and accurately collate the results from the various polling stations in the constituency and then promptly announce the outcome of the collation. From the constituency tallying centre, the returning officer will electronically transmit the results directly to the national tallying centre.

The dispute is on what should happen at the national tallying centre. While the appellant and the 4th respondent insist that, by the provisions of the Constitution, the Act and the Regulations, the appellant is authorised to “*verify the results*” and or “*confirm*” them, the 1st, 2nd and 3rd as well as the 5th and 6th respondents for their part have maintained that the results declared or announced at the polling stations are final and no person or entity can purport to have power to verify, confirm or vary them.

From our own reading of all the provisions under review, the authorities relied on, and bearing in mind the history that we have set out in detail in this judgment, we are convinced that the amendments to the Act were intended to cure the mischief identified by the then former Chairperson of the appellant, and other stakeholders. That mischief was, the spectacle of all the 290 returning officers from each constituency and 47 county returning officers trooping to Nairobi by whatever means of transport, carrying in hard copy the presidential results which they had announced at their respective constituency tallying centres. The other fear was that some returning officer would in the process tamper with the announced results.” (emphasis added)

143. The Court of Appeal identifying electronic transmission as one of the safeguards within the electoral system observed that:-

“We are satisfied that with this elaborate system, the electronic transmission of the already tabulated results for polling stations, contained in prescribe forms, is a critical way of safeguarding the accuracy of the outcome of elections, and do not see how the Appellant [I.E.B.C.] or any of its officers can vary or even purport to verify those results particularly when it is clear that, by Article 86 (d), Section 2 of the Election Act and Regulation 93 (1), all election materials including ballot boxes, ballot papers, counterfoilsseals and other materials, are to be retained in safe custody by the returning officers for a period of three years after the results of the elections have been declared.

It is clear beyond per adventure that polling station is the true locus for the free exercise of the voter’s will. The counting of votes as elaborately set out in the Act and Regulations, with its open transparent and participatory character using the ballot as the primary materials, means as it must, that the count there is clothed with a finality not to be exposed to any risk of variation or subversion.”

144. The duties of the Country Returning Officer include the tallying and declaration of results in the described form, in this case the Form 38C. In **Hassan Ali Joho & Another -Vs- Suleiman Said Shabhal & 2 Others [2014] eKLR** the Supreme Court was called upon to define the word declaration. The Supreme Court stated that:-

“68] Since the Constitution and the Elections Act do not define what amounts to a declaration of election results, the meaning of the term ‘declaration’ in our opinion can only be inferred from the various contexts in which it has been used in the Constitution, the Elections Act and the Regulations to the Elections Act.

.....The word “declared” in the above Article has been used to depict the finality culminating in the declaration of the winner of an election.

72] “Declaration” takes place at every stage of tallying. For example, the first declaration takes place at the polling station; the second declaration at the Constituency tallying centre; and the third declaration at the County tallying centre. Thus the declaration of election results is the aggregate of the requirements set out in the various forms, involving a plurality of officers. The finality of the set of stages of declaration is depicted in the issuance of the certificate in Form 38 to the winner of the election. This marks the end of the electoral process by affirming and declaring the election results, which could not be altered or disturbed by any authority,

.....

This Court has considered all the provisions of the law aforesaid, in the earlier part of this judgment, and, without hesitancy has come to the conclusion that the final declaration of election results is by the issuance of the certificate in Form 38 to the winner of the election. This certificate is issued by the returning officer.”

145. Similarly, in this case concerning the Senator’s election, the first declaration occurred at the polling station; the second at the Constituency Tallying centre, and the final one at the County Tallying Centre. Whereupon, the Form 38D is issued to the Senator elect. In this scheme of things, the law does not anticipate a situation where there could properly be more than a single declaration in respect of the same polling station, Constituency or County and regarding the same elective office. What is the import of the foregoing to the present case?

146. Firstly, the County Returning Officer was bound by constitutional principle and the law as to the performance of her duties. Secondly, that the County Returning Officer was bound by the declarations made at polling stations and could not vary or alter the results. Thirdly, the law requires that the final results in respect of the Senate race be accurately and transparently tallied to ensure that the final declaration was consistent with the declarations contained in the Forms 38A and B; such that the paper trail was accountable and verifiable both ways. That is the essence of Section 39 of the Elections Act. Indeed Regulation 87 indicates that the tallying process be done “upon receipt of the results

from the Constituency Returning Officers”, not earlier, or based upon other non-prescribed sources of results.

147. There is a contest in this case as to which of the two Forms 38C was used to declare the results. The Petitioners’ evidence is that the Form 38C completed by the 2nd Respondent (County Returning Officer) and issued to them was replete with errors and had little or no relation to the corresponding Forms 38A and B. In particular, in so far as it purported that valid votes were in excess of the number of registered voters in 130 polling stations in **Narok South Constituency**; and further that valid votes total exceeded votes cast.

148. It is the contention of the Petitioners that the Form 38C annexed to the Petition, and which reflects firstly, more votes cast than registered voters, and secondly, more valid votes than votes cast, was what was used by **RW1** to make the final declaration in this case, and not the Form 38C tendered by the I.E.B.C. at the trial through **RW1**. In this regard, the Petitioners pointed out the differences in the county total number of polling stations, per Forms 38B and the I.E.B.C. owned Form 38C, namely 750 vis-à-vis 799 polling stations as well as discrepancies in dates between the two Form 38C.

149. The Petitioners point to the absence of the I.E.B.C. logo or features on parts of the I.E.B.C. owned Form 38C in comparison with their copy which had all these features. The Petitioners asserted that the gross totals in their Form 38C were similar to the I.E.B.C. acclaimed Form 38C despite the latter having different entries, which, according to **PW2** were subsequently inserted with a view to manipulating the results to counter this petition.

150. The 1st and 2nd Respondents answer is yes, there are errors in the Petitioners Form 38C as identified by the Petitioners, and for that reason, that form was discarded and ‘fresh’ Forms prepared. That the ‘fresh’ forms were an accurate representation of Forms 38B which were error free and received from all the constituencies in Narok County.

151. Perhaps at this point, it is best to let affidavit of the County Returning Officer (**RW1**) speak for itself on this matter:-

“17. Upon receipt of the Forms 38B from the six constituencies, I executed my mandate as required by law and began the process of completing Form 38C. However, before the declaration of the results, I noted an error of computation in the Forms that had already been completed hence disregarded and discarded the first Forms that had been used and prepared a new set of Forms where the results were tallied and I signed and dated the fresh Form 38C and declared the results.

18. The error in the first Form 38C was noted and action taken to remedy the results before the declaration of the results. This is Form heavily relied on by the Petitioners to allege that the results were doctored. The Form 38C that I used to declare the result of the election of the Senator is drawn from all the Forms 38B and it is attached herewith and marked NKA-3.

19. It is not therefore true as stated at paragraph 25 of the Supporting Affidavit that the Form 38C used to declare results had errors as particularized by the 1st Petitioner. It is not true that it implies that there were more valid votes cast than registered votes at some polling stations. It is not true that the said Form contains data and figures different from Form 38A from the Polling Stations.

20. It is also not true that Form 38C used to declare results is a misrepresentation of the votes cast for each candidate in the election. It is not true that in it there were illegal alterations in Forms 38A. As a matter of fact the alleged alterations of Form 38A and the affected Polling Stations where the alteration may have taken is not stated and the nature of the alteration is not clearly stated thus prejudices the 1st Respondent as it does not comprehend the complaint being made.

21.;

22. It is not true that in at least 130 Polling Stations the votes cast were more than registered voters per Polling Station. The above assertion is premised on the discarded and disregarded Form that had an error as such the allegation has no basis. The Form 38C used to declare the results does not have any such anomaly. The primary document used to create Form 38C is Form 38B. The alleged affected Constituency is Narok South and the attachment is set out above and marked NKA-3, which is the primary document that shows a contrary position as asserted by the Petitioner.

23. I have perused through the Tabulation set out in the Response to the Petition, which is verily accurate and tallies with Form 38B presented to me by the Constituency Returning Officer that the statement at paragraph 26 is misconceived.

24. It is not accurate that the County Returning Officer upon receipt of the Forms 38A (should be 38B) with regard to Narok South Constituency ought to have disregarded the votes cast in the entire Constituency as there was no basis for doing so under the law. An error of tallying only arose at the time of completion of Form 38C, which error was arrested before the declaration could be made.

25. The results declared by myself on the 10th August, 2017 are accurate and drawn from Forms 38B presented to me. The assertion that the results are inaccurate and invalid is thus not true and not supported by any evidence to the contrary.

26.;

27.;

28.;

29.;

30.;

31.;

32. The generation of Form 38C by myself was premised on Forms 38B received from the Constituency Returning Officers, who also generated the Forms from Forms 38A received from the Presiding Officers in the Station. I attach herewith and produce all the Forms 38A, which are attached herewith and marked NKA-4.” (Emphasis added)

152. In her oral evidence **RW1** adopted these assertions and explained further that, while preparing the fresh Forms 38C she was forced to use non-statutory forms due to scarcity of statutory stationery, but she made a record of the events on the non-statutory pages comprising the fresh Form 38C.

153. From the foregoing, it is evident that the errors in the Form 38C relied on by the Petitioners and the I.E.B.C. Form 38C itself are not disputed by the I.E.B.C. Nor the fact that the forms were authored by the I.E.B.C. In her evidence-in-chief **RW1** stated concerning the handwritten annotations on the non-statutory pages of the “fresh” Forms 38C that:-

“yes, reference has been made concerning some notes in the Form 38C from page 5 to 7. The note at the bottom of these pages (handwritten) were by myself in order to secure the integrity of the forms as I did not use forms with security features. In the course of transposing entries I was forced to use plain sheets of papers. I was issued with 8 pages of Forms 38C..... After I had made the handwritten note on the Form 38C I announced the results.....I confirm that the form before court is the one we used for the purposes of the election.”

154. During cross-examination by Mr. Odhiambo, **RW1** admitted that she authorized the issuance of Form 38C to the 1st Petitioner but he was allegedly issued with the **“discarded form which had remained in the computer”** but which had not been signed by her. That, she only discovered this erroneous issuance on being served with the present petition. In answer to questions by Mr. Marete the witness repeated these statements and said that she noted the errors in the initial Form 38C on 9th August, 2017 after a team member alerted her. The said team member was not identified or called as a witness.

155. **RW1** admitted further that she did not notify any of the candidates or their agents concerning the discovery of errors and subsequent corrections. This, despite the fact that, candidates’ agents had already signed the “discarded” Form 38c on 9th August, 2017.

156. She stated:-

“Discovery (of error) was made between 5 – 7 pm on 9th (August) after the agents had already signed Form 38C. No candidate was present but I told the agents who signed about corrections. I cannot recall the names of the agents. That (notification) was as I gave them the documents (fresh from) on 10th (August) 2017. They did not sign and the document does not show that they witnessed the corrected documents. Yes by the time of corrections I had already given agents the copy of document. 3rd Respondent averments[he] says that the Petitioners manufactured Form 38C. I did not give his information to them. No I did not inform public about changes to Form 38C. The last page of the Petitioner’s Form 38C compares with the one we (I.E.B.C.) have produced in court. If errors were found after the declaration, we cannot amend the documents.”

157. What was confounding is that, while **RW1** asserted at least 3 times during her testimony to have completed the erroneous Form 38C on 9th August, 2017 with the use of Forms 38B, and then made corrections by preparing a ‘fresh’ set of forms, **RW2** the Returning Officer **Narok South Constituency** testified that she completed her Form 38B on the afternoon of 10th August, 2017. That she then travelled at about 2.00pm from the Constituency office to deliver to **RW1** the said form. And that, she had not previously transmitted any of the results to the County Returning Officer. When **RW1** was confronted with the Form 38B dated 10th August 2017 during cross-examination she stated:-

“Most signing to acknowledge receipt of Form 38B’s happened on next day (10th). I was using Form 38B but they had not been formally handed over to me..... I had the Form 38B’s while preparing the Form 38C but only signed later to acknowledge receipt.”

158. I have looked at all the Forms 38B in respect of Narok County. The witness **RW1** has only signed the taking over section in respect of Form 38B for **Narok North Constituency**. The date thereon is 10th August, 2017. The remaining five Form 38B are not signed by her.

159. For his part, the 3rd Respondent remained categorical that the Petitioners’ Form 38C was a forgery. He stated that the errors reflecting excessive valid votes vis-à-vis registered votes resulted from a miscasting of the 1st Petitioner’s votes in the 130 polling stations in **Narok South Constituency**. This at best is speculation there being no direct evidence by the I.E.B.C. or anyone else as to how the errors arose. **RW1** said the errors occurred during “computation” without further explanation. Besides I.E.B.C. admitted authorship of the Petitioners’ Form 38C. The 3rd Respondent also asserted that the miscasting inflated the total votes cast way above the registered voters.

160. He testified that:

“I am familiar with excel program and I know that any wrong entry in a cell will affect the totals. What is strange is in this case is that the total of the Petitioners’ Form 38C remain unchanged.”

161. He said that **Narok South Constituency** had 143 not 130 polling stations and that those stations left out in Petitioner’s complaint had no anomalies. That the Forms 38A exhibited by the I.E.B.C. do not bear out complaints that valid votes exceeded registered voters or votes cast. In his view the Petitioners’ document was altered after it was created. He confirmed during cross-examination that he was not notified by the I.E.B.C. of any changes in the Form 38C and that I.E.B.C. is the custodian of statutory forms. The witness did not avail his own copy of the Form 38C even though it is apparent that an ODM agent had signed the disputed I.E.B.C. Form 38C and the Petitioner’s copy. It would be quite unlikely that the 3rd Respondent did not obtain such a copy when agents of his party had signed the same, and were allegedly issued with the same on the night of 9th August, or on the date of the declaration of the results, per **RW1**.

162. In order to test the veracity of the evidence on both sides, I took time to study the two disputed Form 38C in detail. The findings arising therefrom may not necessarily relate to matters that were pleaded. However, they came into focus during the trial and are relevant to the determination of the question at hand. As was held by the Court of Appeal for Eastern Africa in **Oddjobs –Vs- Mubia [1970] E.A. 476**, the court may base its decision on an unpleaded issue if it appears from the proceedings in the trial the parties had left the question for the court’s decision, or where an unpleaded issue had become an issue at the trial.

163. Musinga J, as he then was in **Justus Mungumbu Omiti -Vs- Walter Enock Nyambati Osebe & 2 Others** Kisii Election Petition No. 1 of 2008 stated in similar circumstances that:

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

164. I noted that all the entries in both documents in respect of **Kilgoris Constituency** were similar, errors included. The total votes cast appear less than the valid votes in both documents. Ditto **Emurua Dikirr Constituency** where more obvious errors are noted: the total votes cast are equal to total valid votes inspite of casting of rejected votes. In other words, the rejected votes appear disregarded in the tallies, as the number of cast votes and valid votes is similar. In the entire Constituency of **Emurua Dikirr** the error is repeated.

165. With regard to **Narok North Constituency** the casting of entries in the two disputed forms are similar. Here again the valid votes appear to exceed the votes cast for all the polling stations appearing above the entry for **Nairenke Primary School polling station** (page 4 of I.E.B.C. for 38C and page 4 of Petitioners’ Form 38C). At **Nairenke Primary School**, polling station, the entries show that 319 votes were cast while 507 of the votes were valid. The difference, 188 votes, is reflected as rejected votes.

166. This entry prompted the court to look at the Form 38A and B in respect of the polling station in question. Although the former had evidence of cancellation which are not countersigned, it reflected 3 rejected ballots and 319 valid votes. The number of registered voters is 372. These figures are correctly captured in the Form 38B. On realizing this, the court sampled several more polling stations in the constituency and found that while the number of votes garnered by the candidates and registered number of voters were largely posted properly, (save for the cast votes appearing less than the valid votes), there were numerous errors in recording the rejected votes in the stations sampled. Below is a table of the findings:-

Narok North Constituency

	Station	Rejected votes per Form 38C of Petitioners and I.E.B.C.	Rejected Votes per Form 38A and B
1.	Masikonde Primary School I	0	10
2.	Masikonde Primary School II	0	5
3.	Masikonde Primary School III	0	6
4.	Masikonde Primary School IV	0	2
5.	Masikonde Primary School V	2	10
6.	Masikonde Primary School VI	0	10
7.	Masikonde Primary School VII	2	5
8.	Masikonde Primary School	1	3

	XII		
9.	Masikonde Primary School XIII	0	6
10.	St. Peters Primary School II	0	2
11.	St. Peters Primary School III	4	7
12.	St. Peters Primary School IV	0	2
13.	St. Peters Primary School V	4	5
14.	St. Peters Primary School VI	0	1
15.	St. Peters Primary School VII	2	7
16.	St. Peters Primary School VII	10	1
17.	Nairasirasa Primary School	0	1

167. In almost all entries after **Nairasirasa** (No. 17 above), to the last polling station of **Narok North Constituency**, there were erroneous entries in both the Forms 38C in relation to wrongly cast rejected votes ranging between 1 and 15. Remarkably, the total votes cast and valid votes in the Constituency is reflected as 66219 in both disputed Form 38C. The total valid votes for **Narok North Constituency** per Form 38B is 65, 845 while rejected votes total is 217.

168. The candidates' totals in the Form 38Cs is similarly different from the Form 38B as follows: In Form 38B **Ledama ole Kina** 36,513 (36,693 in Form 38C); 1st Petitioner 26,315 (26,290 in Form 38C); 2nd Petitioner 2,386 in Form 38B (2,394 in Form 38C); **Maitai** 631 in Form 38B (842 in Forms 38C).

169. The Form 38C reflects nil in the space provided for entries in respect of rejected votes for the entire **Narok East Constituency**, while a calculation in respect of Form 38B reflects that 170 votes were rejected. Similarly Form 38B in respect of **Narok East Constituency** has no totals for any column. My calculations shows totals valid votes to be 33,246 against the Petitioners' and I.E.B.C. Form 38C total of 33,259 and 170 rejected votes. A quick perusal of the Form 38As attached reveals that a good number are copies of carbon copies, some of which have been boldly highlighted and contents thereby enhanced/altered, whereas alterations in some of the form copies are not countersigned.

170. I have gone into these details to show that the Form 38C of the Petitioners and that owned by the I.E.B.C. are similar so for as **Kilgoris Constituency, Narok East Constituency, Emurua Dikirr Constituency** and **Narok North Constituency** constituencies are concerned. The errors are consistent and the only nearly correct columns, in comparison with Form 38B are candidate tallies and registered voters' totals. Both Form 38C are riddled with similar discrepancies and errors. This makes it difficult to believe the evidence by **RW1** that she obtained the data she transposed to the I.E.B.C. Form 38C from the Forms 38B received from the respective constituencies.

171. If the results in respect of the above constituencies pose difficulties **Narok South Constituency** is the difficulty, the major differences hence difficulty, is in the contents of the Form 38C of the Petitioners and that of the I.E.B.C. The differences begin with the repeat of **Narok East** Polling stations such as **Saleita Primary School, Enooseiya, Nambao** and **Sekerot Primary School** at page 4 and 5 of the latter. **RW1's** explanation is that as her team was correcting the alleged erroneous first document, more errors were made. Thus the repeat poll results which she said affected all candidates equally.

172. The entries in respect of the **Narok South Constituency** commence at the middle of page 5 of the I.E.B.C. Form 38C and also the Petitioners' document. On the face of the Petitioners' Form 38C there were no rejected votes in the Constituency and the votes cast exceeded registered voters in 130 polling stations. That notwithstanding, the total votes cast for **Ledama (17,783), Kiplagat (19,066)** and **Maitai (414)** are similar in both disputed Forms 38C and Form 38B. The total votes for the 1st Petitioner is 15,976 per I.E.B.C. Form 38C and 15,346 per the Petitioners' Form 38C despite the high number of votes posted in his column in the latter. A calculation of the total votes allegedly garnered by the 1st Petitioner per his Form 38C in the Petition indicates that he obtained 40,397 votes which would mean that there were more valid votes than votes cast.

173. The total votes cast per the Petitioners' Form 38C is 52,609 with an equal number of valid votes there being nil rejected votes. These figures make no sense at all. In all this, it has not escaped the court's attention **Narok East** and **Narok South Constituencies** are the supposedly political strongholds of the 3rd Respondent and the 1st Petitioner respectively. The total votes cast per the I.E.B.C. Form 38C is 53,427, 53,239 valid votes with 188 rejected votes.

174. So far, **Narok South Constituency** is the only constituency where the columns for the cast votes, valid votes and rejected votes make mathematical sense. **RW1** stated during the re-examination that interchanging of columns reserved for votes cast and valid votes may have caused errors in other constituencies. On page 4 of the I.E.B.C. Form 38C, just above the start of **Narok South Constituency** are the last 50-odd entries for **Narok East Constituency** polling stations. As I said, the entire column reserved for rejected votes is blank and entries for votes cast are equivalent to valid votes therein which does not reflect the position in the Form 38B. Page 4 of the I.E.B.C. Form 38C where

the last entries for **Narok East Constituency** end and **Narok South Constituency** begin is coincidentally, the first of the four pages of plain paper used to document the final results. These pages have no I.E.B.C. logo or serial number.

175. I shall revert to the explanation given by the County Returning Officer for that action but suffice it that she did not give an account as to how the anomalies occurred in the first place on the original set of documents. At paragraph 17 and 18 of her affidavit she stated that:

“17. Upon receipt of the Forms 38B from the six constituencies, I executed my mandate as required by law and began the process of completing Form 38C. However, before the declaration of the results, I noted an error of computation in the Forms that had already been completed hence disregarded and discarded the first Forms that had been used and prepared a new set of Forms where the results were tallied and I signed and dated the fresh Form 38C and declared the results.

18. The error in the first Form 38C was noted and action taken to remedy the results before the declaration of the results. This is Form heavily relied on by the Petitioners to allege that the results were doctored. The Form 38C that I used to declare the result of the election of the Senator is drawn from all the Forms 38B and it is attached herewith and marked NKA-3.”

176. The foregoing and **RW1**'s oral evidence suggest that the errors were noted after the entire Form 38C had been completed but before the declaration of the results; further that “a new set of Forms” was prepared and she then signed and dated the document at the declaration. She stated during cross-examination that errors were noted on 9th August, 2017 after the agents had signed, but that she herself had not signed the erroneous Form 38C. The Petitioners' Form 38C shows otherwise. That notwithstanding, she went on to admit that the last pages of the Form 38C by the Petitioner and her 'corrected' form are similar. The Form 38C in the Petition is not only signed in her name, but also duly stamped. The latter is dated 10th August 2017 and contains the self-same signatures of the ODM and CCM party agents, which are dated 9th August 2017. The question is why **RW1** could go ahead to authenticate by appending her signature to a document that had been discarded.

117. This Form 38C (Petitioners') has physical signatures of the County Returning Officer and the party agents as well as date, all being manual writings. If it had remained in the computer, as **RW1** has stated it must have been scanned, and stored subsequent to the signatures, on 10th August, 2017. The next question arising is why a signed but supposedly erroneous document would be scanned and stored in the computer rather torn up or crossed over and any draft deleted from the computer. Besides, what is the explanation for the fact that out of the many glaring anomalies affecting **Kilgoris Constituency Narok East Constituency, Narok North Constituency and Emurua Dikirr Constituency**, especially concerning the posting of votes cast, valid votes and rejected votes, the witness (**RW1**) did not equally make corrections during the opportunity she has on 9th August, 2017 to the entire record?

178. After all, **RW1** said she prepared a 'fresh set' of Form 38C on 9th August, 2017 and had discarded the first erroneous set of Forms 38C. And if we believe her alleged timing of the discovery, and correction of serious errors in respect of **Narok South Constituency** relating to the 1st Petitioners' votes, surely **RW1** ought to have checked if only by glancing through the entries of other constituencies for assurance regarding their accuracy. As I observed with regard to several of the constituencies, the posting of valid votes, votes cast and rejected votes was patently erroneous and it required no intensive investigations to detect them. A mere cursory perusal of the other pages in respect of the constituencies coming before **Narok South Constituency** in the Form 38C revealed these errors which are in consistent with respective Forms 38B.

179. While there was no explanation from **RW1** in her affidavit or evidence-in-chief for these posting errors, she was quick to state during re-examination that the errors were as a result of switching of entries in columns for votes cast to valid votes and vice versa. That may be a reasonable explanation but it still fails to explain how these errors escaped **RW1** at the critical time.

180. With regard to the corrections relating to **Narok South Constituency**, there is no concurrent endorsement on the Petitioners' Form 38C that it was discarded by the I.E.B.C. Nor is the document crossed over. Neither is the I.E.B.C. Form 38C countersigned by the candidate/party officials to endorse the corrections at page 4 to 7. The 2nd Petitioner admittedly received this form from the I.E.B.C. after the declaration of the results, in his words, after two weeks. **RW1** gave authority for the issuance of the form by one **Ole Debe**. **RW1** seemingly did not attempt to find out whether the 'correct' form, assuming two existed in the system, was issued to **PW2**. She claimed to have learned about the error (regarding form issued) when served with the Petition.

181. Her conduct in this regard, taken in light of all the foregoing confirms that there was only one form in the I.E.B.C. system and that it is the one **Ole Debe** gave to **PW2**. **Ole Debe** described as the IT person at I.E.B.C. Narok did not give evidence regarding the material events. The 1st and 2nd Respondents have correctly submitted that **RW1** is the proper person to say which of the competing Forms 38C she used to declare results. The only rider to that statement is that being the one who knows the truth, she could choose to state it or suppress it to suit herself. I think she was not truthful and her evidence lacks credibility overall.

182. Moving on to the last pages of both Forms 38C these contain the results in respect of **Narok West Constituency**. The last page carries the admitted signature of **RW1**. Yet on these pages the errors regarding entries as well as gross totals for votes cast, rejected votes and valid votes are self-evident. How is it believable that **RW1** only detected errors in respect of **Narok South Constituency** (in the inner pages document) but not even obvious defects on the page to which she appended her signature? For instance votes cast are less than valid votes on the face of the signature page (both individual and totals), and the rejected votes are apparently not accounted for.

183. In my opinion the only truthful thing that **RW1** could have stated in this connection is that she only discovered the errors after being served with the Petition. It is interesting that in the entire I.E.B.C. Form 38C, which is replete with errors, only the results of **Narok South Constituency** are posted correctly, with a few exceptions, by column and the entries regarding votes cast, valid votes, rejected but the votes garnered by candidates compare accurately comparison with Form 38B for the constituency. The exceptions are:-

NAROK SOUTH CONSTITUENCY

FORM 38B				FORM 38C		
	POLLING STATION	Total Valid Votes	Rejected Ballot	Total Valid Votes	Rejected Ballot	Votes Cast
1	Olenkulo Pri. Sch.	262	1	272	0	272
2.	Oloisuisho Pri. Sch	411	5	391	5	396
3.	Oloisuisho Pri. Sch	424	3	394	3	397
4.	Enkaroni Pri.Sch.	379	4	309	4	313
5.	Marinua Pri. Sch.	406	1	386	1	387

184. In Kilgoris, the valid votes appeared more than the votes cast. A summary of the obvious discrepancies noted when the I.E.B.C. Form 38C was compared with Form 38B in respect of **Emurua Dikirr Constituency, Narok East Constituency, Narok West Constituency** and **Narok North Constituency** is set out below. The affected polling stations are highlighted. In addition valid votes exceeded votes cast and rejected votes were not captured accurately or at all.

NAROK EAST CONSTITUENCY

FORM 38B			FORM 38C		
POLLING STATION	Total Valid Votes	Rejected Ballot	Total Valid Votes	Rejected Ballot	Votes Cast
Enaramatishoreki Pri. Sch.	167	0	167	0	167
Iltumtum Pri. Sch.	363	0	363	0	363
Oletukat Pri. Sch.	434	2	434	0	434
Ero-Ekule Pri. Sch.	488	3	488	0	488
Ero-Ekule Pri. Sch.	514	0	514	0	514
Ero-Ekule Pri. Sch.	517	2	517	0	517
Olooseneto Pri. Sch.	227	0	227	0	227
Oloombokishi Pri. Sch.	329	0	329	0	329
Olopironito Pri. Sch.	267	1	267	0	267
Saleita Pri. Sch.	356	1	356	0	356
Saleita Pri. Sch.	349	5	349	0	349
Enooseyia Pri. Sch.	403	4	403	0	403
Enooseyia Pri. Sch.	405	0	405	0	405
Nambao Pri. Sch.	178	1	178	0	178
Kutenoi Pri. Sch.	201	2	201	0	201

Illaiser Pri. Sch.	350	0	350	0	350
Sekerot Pri. Sch.	191	3	191	0	191
Oloonkabobok Pri. Sch	251	1	251	0	251
Olesito Pri. Sch.	471	5	471	0	471
Olesito Pri. Sch.	458	5	458	0	458
Entashata Nur. School	241	1	241	0	241
Nailogilog Pri. Sch.	409	4	409	0	409
Nailogilog Pri. Sch.	433	4	433	0	433
Kikuyan Pri. Sch.	323	1	323	0	323
Kikuyan Pri. Sch.	330	3	330	0	330
Nairagie Enkare Pri. Sch.	545	6	545	0	545

FORM 38B

FORM 38C

POLLING STATION	Total Valid Votes	Rejected Ballot	Total Valid Votes	Rejected Ballot	Votes Cast
Nairagie Enkare Pri. Sch.	536	9	536	0	536
Nairagie Enkare Pri. Sch.	528	15	523	0	523
Nairagie Enkare Pri. Sch.	501	4	501	0	501
Nairagie Enkare Pri. Sch.	532	7	532	0	532
Moshoro Pri. Sch.	375	3	375	0	375
Moshoro Pri. Sch.	369	0	369	0	369
Sintakara Pri. Sch.	303	0	303	0	303
Sintakara Pri. Sch.	293	1	293	0	293
Karuka Pri. Sch.	169	0	163	0	163
Oloikarere Pri. Sch.	448	2	448	0	448
Oloikarere Pri. Sch.	487	0	487	0	487
Nairagie Enkare Pri. Sch.	494	12	494	0	494
Olesharo Pri. Sch.	444	1	448	0	448
Olesharo Pri. Sch.	462	0	487	0	487

Olekoonyo Pri. Sch.	265	1	265	0	265
Ilkiremisho Pri. Sch.	616	0	605	0	605
Ole Punyua Pri. Sch.	311	2	311	0	311
Olaimutiai Pri. Sch.	595	0	595	0	595
Ole Nkomeeni Pri. Sch.	492	1	492	0	492
Kojonga Pri. Sch.	405	10	405	0	405
Kojonga Pri. Sch.	422	1	422	0	422
Olpura Pri. Sch.	428	0	428	0	428
Mosiro Pri. Sch.	557	0	557	0	557
Oloikumkum Nur. Sch.	294	1	294	0	294
Oloolturot Pri. Sch.	415	0	415	0	415
Empurkutia Nurs. School	271	0	271	0	271
Enoombarbali Pri. Sch.	422	0	422	0	422
Munanda Nursery Sch.	241	0	241	0	241
Ongata Naado Pri. Sch.	405	0	405	0	405
Ongata Naado Pri. Sch.	400	0	400	0	400
Nturumentu Pri. Sch.	438	0	438	0	438
Nturumentu Pri. Sch.	449	0	449	0	449
Tikako Pri. Sch.	527	3	527	0	527
Kormoto Pri. Sch.	130	0	130	0	130
Oloika Pri. Sch.	496	1	496	0	496
Koitiko Pri. Sch.	470	0	470	0	470
Ntulele Pri. Sch.	471	5	471	0	471
Ntulele Pri. Sch.	491	7	491	0	491

FORM 38B

FORM 38C

POLLING STATION

Total Valid Votes Rejected Ballot Total Valid Votes Rejected Ballot Votes Cast

Ntulele Pri. Sch.	505	1	505	0	505
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Oltanki Pri. Sch.	208	1	208	0	208
Oltepesi Pri. Sch.	432	0	432	0	432
Mpueti Pri. Sch.	536	2	536	0	536
Oloitip Nursery Sch.	155	2	155	0	155
Olasiti Pri. Sch.	362	1	362	0	362
Olasiti Pri. Sch.	373	1	373	0	373
Naakurto Lukuny Pri. Sch.	383	1	383	0	383
Enarupa Ongila Pri. Sch.	317	0	317	0	317
Empaash Pri. Sch.	387	4	387	0	387
Empaash Pri. Sch.	427	0	433	0	433
Empaash Pri. Sch.	434	0	434	0	434
Enariboo Pri. Sch.	604	0	604	0	604
Oloirowua Pri. Sch.	425	4	424	0	424
Oloirowua Pri. Sch.	427	0	427	0	427
Ilkirragarien Pri. Sch.	446	1	446	0	446
Ilkirragarien Pri. Sch.	438	0	438	0	438
Inkoirienito Pri. Sch.	503	1	503	0	503
Inkoirienito Pri. Sch.	484	10	484	0	484
Suswa	248	1	248	0	248
REPEATED POLLING STATIONS					
Saleita Pri. Sch.	349	5	349	0	349
Enooseyia Pri. Sch.	403	4	403	0	403
Enooseyia Pri. Sch.	405	0	405	0	405
Nambao Pri. Sch.	178	1	178	0	178
Sekerot Pri. Sch.	191	3	191	0	191
TOTAL	33,246	170	35,150		35,150

NAROK NORTH CONSTITUENCY**FORM 38B****FORM 38C**

POLLING STATION	Total Valid Votes	Rejected Ballot	Total Valid Votes	Rejected Ballot	Votes Cast
Olmarike Pri. Sch.	569	2	569	0	569
Olepolos Pri. Sch.	350	0	352	2	350
Olepolos Pri. Sch.	345	0	349	4	345

FORM 38B**FORM 38C**

POLLING STATION	Total Valid Votes	Rejected Ballot	Total Valid Votes	Rejected Ballot	Votes Cast
Kamurar Pri. Sch.	581	1	582	1	581
Olpusimoru Pri. Sch.	574	0	574	0	574
Olpusimoru Pri. Sch.	577	8	577	0	577
Oleng'ape Pri. Sch.	378	0	379	1	378
Oleng'ape Pri. Sch.	396	0	397	1	396
Shapaltarakwa Pri. Sch.	464	1	465	1	464
Shapaltarakwa Pri. Sch.	443	0	443	0	443
Ololongoi Pri. Sch.	395	0	396	1	395
Ololongoi Pri. Sch.	410	2	611	1	610
Kukenik Pri. Sch.	228	0	228	0	228
Oloonamuka Pri. Sch.	276	1	276	0	276
Olopirik Pri. Sch.	4	0	11	7	4
Olemeisi Pri. Sch.	367	0	367	0	367
Nkololani Pri. Sch.	477	0	478	1	477
Nkololani Pri. Sch.	480	0	480	0	480
Olokurto Pri. Sch.	498	0	498	0	498
Olokurto Pri. Sch.	519	0	519	0	519
Olokurto Pri. Sch.	508	0	508	0	508
Sasimuani Nursery School	115	0	116	1	115

Olopirik Pri. Sch.	336	0	336	0	336
Olopirik Pri. Sch.	339	0	339	0	339
Ilpolton Pri. Sch.	567	0	567	0	567
Enarau Pri. Sch.	328	0	328	0	328
Enarau Pri. Sch.	311	2	315	2	311
Naituyupaki Pri. Sch.	454	1	454	1	454
Naituyupaki Pri. Sch.	466	0	472	0	466
Medungi Pri. Sch.	408	0	408	0	408
Entiyani Pri. Sch.	353	0	523	2	521
Entiyani Pri. Sch.	361	0	361	0	361
Ilmolelian Pri. Sch.	404	0	404	0	404
Ilmolelian Pri. Sch.	412	0	413	1	412
Olenoosiria Pri. Sch.	390	0	390	0	390
Olenoosiria Pri. Sch.	396	0	396	0	396
Purko Pri. Sch.	442	1	442	0	442
Purko Pri. Sch.	441	1	441	1	441
Katakala Pri. Sch.	609	1	609	0	609
Masikonde Pri. Sch.	484	1	484	0	484
Masikonde Pri. Sch.	484	5	484	0	484

FORM 38B

FORM 38C

POLLING STATION	Total Valid Votes	Rejected Ballot	Total Valid Votes	Rejected Ballot	Votes Cast
Masikonde Pri. Sch.	491	6	491	0	491
Masikonde Pri. Sch.	484	2	484	0	484
Masikonde Pri. Sch.	470	14	472	2	470
Masikonde Pri. Sch.	514	10	514	0	514
Masikonde Pri. Sch.	452	0	454	2	452
Masikonde Pri. Sch.	504	8	507	3	504

Masikonde Pri. Sch.	475	2	475	0	475
Masikonde Pri. Sch.	488	3	493	5	488
Masikonde Pri. Sch.	502	0	503	1	502
Masikonde Pri. Sch.	484	6	484	0	484
St. Peter Primary School	458	3	461	3	458
St. Peter Primary School	468	2	468	0	468
St. Peter Primary School	449	7	453	4	449
St. Peter Primary School	485	3	485	0	485
St. Peter Primary School	475	5	479	4	475
St. Peter Primary School	448	1	448	0	448
St. Peter Primary School	467	7	469	2	467
St. Peter Primary School	456	1	466	10	456
Nairasirasa Pri. Sch.	545	0	546	1	545
Olooltoto Pri. Sch.	647	0	649	2	647
Nkairamiram Pri. Sch.	359	1	362	3	359
Nkairamiram Pri. Sch.	376	0	379	3	376
Ilmashariani Pri. Sch.	486	3	487	1	486
Ilmashariani Pri. Sch.	518	6	524	6	518
Ilmashariani Pri. Sch.	525	0	528	3	525
Ilmashariani Pri. Sch.	516	0	517	1	516
Ilmashariani Pri. Sch.	490	1	492	2	490
Pulunga Pri. Sch.	300	0	301	1	300
Pulunga Pri. Sch.	305	0	306	1	305
Wildlife Nursery Sch.	308	0	315	7	308
Wildlife Nursery Sch.	337	5	339	2	337
Limanet Pri. Sch.	613	0	613	0	613
Empopongi Pri. Sch.	457	1	459	2	457
Olkinyei Pri. Sch.	106	1	106	3	106

E.C.D. Nursery Sch.	430	1	430	0	430
E.C.D. Nursery Sch.	442	1	442	0	442
E.C.D. Nursery Sch.	435	3	436	1	435
Olesakale Pri. Sch.	381	0	382	1	381

FORM 38B

FORM 38C

POLLING STATION	Total Valid Votes	Rejected Ballot	Total Valid Votes	Rejected Ballot	Votes Cast
Olesakale Pri. Sch.	383	8	384	1	383
Olesakale Pri. Sch.	356	3	360	4	356
Lenana Pri. Sch.	441	1	443	2	441
Lenana Pri. Sch.	452	1	453	1	452
Lenana Pri. Sch.	442	0	444	2	442
Lenana Pri. Sch.	450	6	452	2	450
Nkareta Pri. Sch.	362	3	363	1	362
Nkareta Pri. Sch.	368	2	368	0	368
Nchora Eshumata Pri. Sch.	461	0	461	0	461
Nchora Eshumata Pri. Sch.	470	1	473	3	470
Nchura Eabori Pri. Sch.	576	0	576	0	576
Olokuseroi Pri. Sch.	515	0	516	1	515
Olorroito Pri. Sch.	374	3	374	0	374
Olorroito Pri. Sch.	394	0	394	0	394
Mutenkwar Nursery Sch.	533	2	535	2	533
Naisoya Pri. Sch.	599	0	599	0	599
Onsongoroi Pri. Sch.	180	0	180	0	180
Oimeru Pri. Sch.	371	0	372	1	371
Oimeru Pri. Sch.	329	0	331	2	329
Olopito Pri. Sch.	396	2	396	2	396
Olopito Pri. Sch.	338	1	338	1	338
Enelerai Pri. Sch.	329	0	329	0	329

Enelerai Pri. Sch.	334	0	335	1	334
Oloikirikirai Pri. Sch.	374	6	374	0	374
Oloikirikirai Pri. Sch.	392	1	393	1	392
Oloikirikirai Pri. Sch.	392	0	392	0	392
Enabelibeli Pri. Sch.	440	2	440	2	440
Olorpa Pri. Sch.	391	0	391	0	391
Kisiriri Pri. Sch.	443	2	448	5	443
Kisiriri Pri. Sch.	407	0	407	0	407
Kisiriri Pri. Sch.	394	4	394	0	394
Rotian Pri. Sch.	305	0	305	0	305
Moi Pri. Sch.	483	1	483	0	483
Enabelibeli Pri. Sch.	565	1	565	0	565
Enetepisi Nursery School	67	0	68	1	67
Olesikoe Pri. Sch.	314	0	318	4	314
Oloirien Lekule Pri. Sch.	399	0	399	0	399
Ololoiboti Pri. Sch.	151	0	151	0	151
Empatipati Pri. Sch.	332	0	338	6	332

FORM 38B

FORM 38C

POLLING STATION	Total Valid Votes	Rejected Ballot	Total Valid Votes	Rejected Ballot	Votes Cast
Empatipati Pri. Sch.	340	0	342	2	340
Olorropil Pri. Sch.	524	1	524	1	524
Olorropil Pri. Sch.	522	0	522	0	522
Enabatat Pri. Sch.	546	0	550	4	546
Kiluli Pri. Sch.	359	0	359	0	359
Maripet Nursery School	369	2	369	0	369
Oloisonkoyo Pri. Sch.	603	0	603	0	603

Topoti Pri. Sch.	420	0	421	1	420
Topoti Pri. Sch.	427	0	427	0	427
Narianta Pri. Sch.	197	2	197	2	197
Enengeitia Pri. Sch.	521	5	524	3	521
Siyiapei Pri. Sch.	462	0	466	4	462
Olkeri Pri. Sch.	141	0	141	0	141
Murua Pri. Sch.	430	1	430	0	430
Rokonka Pri. Sch.	301	3	301	0	301
Sonkor Pri. Sch.	387	0	390	3	387
Olenkasurai Pri. Sch.	181	1	186	5	181
Entiak Nursery School	158	0	160	2	158
Sanaet Pri. Sch.	420	0	424	4	420
Olompoori Pri Sch.	205	0	208	3	205
Oledeem Pri. Sch.	248	2	253	5	248
Olchorro Pri. Sch.	424	0	424	0	424
Olchorro Pri. Sch.	446	1	446	0	446
Olemwanik Pri. Sch.	356	0	357	1	356
Iltorobo Pri. Sch.	406	0	406	0	406
Nairenke Pri. Sch.	319	3	507	188	319
Ole Ntimama Ridge Pri. Sch.	314	0	314	0	314
Entoltol Pri. Sch.	368	0	368	0	368
Entoltol Pri. Sch.	375	0	375	0	375
Erusiai Pri. Sch.	434	1	434	0	434
Olelusie Pri. Sch.	328	0	328	0	328
Oloorten Pri. Sch.	487	0	487	0	487
Ilkarambuni Pri. Sch.	373	1	373	0	373
Olosho Le Ratia Pri. Sch.	262	0	262	0	262
Kimondi Pri. Sch.	307	0	307	0	307

Entinki Pri. Sch.	457	1	457	0	457
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FORM 38B

FORM 38C

POLLING STATION	Total Valid Votes	Rejected Ballot	Total Valid Votes	Rejected Ballot	Votes Cast
Sakutiek Pri. Sch.	412	2	412	0	412
Sakutiek Pri. Sch.	409	0	409	0	409
Enesampulai Pri. Sch.	376	0	376	0	376
Enesampulai Pri. Sch.	371	2	371	0	371
Enaibor Ajjik Pri. Sch.	352	1	352	0	352
Enaibor Ajjik Pri. Sch.	409	0	415	0	415
Olturoto Pri. Sch.	420	7	420	0	420
Mukulit Pri. Sch.	292	1	292	0	292
	65,845	217	66,591	377	66,219

185. Therefore, returning to the question of **Narok South Constituency**, my view is that **RW1** must have discovered the errors relating to **Narok South Constituency** after the declaration, or more specifically if we believe her, after being served with petition. As I observed earlier, it is inconceivable that on 9th August, 2017, **RW1** only noted and corrected errors relating to the excessive voters regarding **Narok South Constituency**. It is a fact that the columns for votes and valid votes were properly completed in the I.E.B.C. Form 38C.

186. Reviewing all the evidence before me, the only reasonable conclusion is that the results in respect of **Narok South Constituency** as contained in the I.E.B.C. Form 38C were altered after the declaration or even later, possibly to counter the grounds raised in the petition regarding the errors purporting that the votes cast exceeded registered voters. This was **PW2's** surmise: that the manipulation was aimed at defeating the Petition. The inference is not farfetched at all.

187. It is striking that despite the adjustments made in respect of **Narok South Constituency**, the gross totals for the County, notwithstanding the alterations are similar. This makes no sense at all, because the entries in columns for votes cast and valid votes were different for **Kilgoris Constituency**, **Emurua Dikirr Constituency**, **Narok East Constituency**, **Narok North Constituency** and **Narok West Constituency**. The entries are therefore incompatible with the subsequent postings relating to **Narok South Constituency** where different columns were used. The subsequent correct postings in corresponding columns for **Narok South Constituency**, being in a different pattern must of necessity affect the totals in previous columns. Only **RW1** can tell the court how this chaotic state of affairs came to be. Her silence on this aspect was loud.

188. Suffice to say that on the material before, I am satisfied that the impugned declaration of 10th August, 2017 was based on the Petitioners' Form 38C, and not the I.E.B.C. Form 38C, the latter which in my view, is a bold attempt to patch up the messy tallying work that had already gone awry. That is the only explanation for the fact the former was signed by **RW1** on 10th August, 2017. She could not have done so having discovered errors on the previous day! Further, I find that in light of the numerous discrepancies contained in both the I.E.B.C. and Petitioners Form 38C as compared to the Forms 38B, it is not believable that **RW1** had used the Form 38B's while preparing the Form 38C especially the Petitioners' version.

189. Possibly, and this is borne out by the relatively accurate and posting and tally of candidates votes except for the 1st Petitioner's, **RW1** relied on non-prescribed sources to complete Form 38C. The I.E.B.C. has repeatedly submitted that all that matters is the candidates' results. That could explain **RW1's** apparent lack of concern regarding other details as to votes cast, rejected and valid votes. The design of Form 38C is consistent with the requirement in Regulation 87 (2) of Elections (General) Regulations. Transparency, accuracy, verifiability and accountability are underlying principles to this Regulation. It is not enough to indicate the votes garnered by respective candidates. Numbers alone are worthless where the process is flawed through flagrant disregard for constitutional principles and the law.

190. Certainly, with regard to **Narok South Constituency**, the Form 38B was not ready until the afternoon of 10th August, 2017 when **RW2** handed it over to **RW1** at about 3.00pm. It is not clear therefore what sources **RW1** used to prepare and have a Form 38C ready for signature by the agents on 9th August, 2017. **RW1** said she had not relayed results by way of transmission.

191. The 3rd Respondent's suggestion was that the cells in respect of the 1st Petitioners' votes must have been manipulated after the

document (Petitioner's Form 38C) had been created, as the entries did not change the total results. But that is true of very many others entries in this case, for instance **Emurua Dikirr constituency** where votes cast and valid votes remained equal despite entries showing rejected votes. This error is in the Form 38C owned by the I.E.B.C. Similarly in **Narok East Constituency**, the votes cast and valid votes were equal because rejected votes reflected in Form 38B were not posted. However, the totals in the I.E.B.C. Form 38C and the respective Form 38B compare well. It is not lost in the court that main protagonists in this case were the 1st Petitioner and the 3rd Respondent who considered **Narok South Constituency** and **Narok East Constituency** respectively as their main political bases.

192. According the I.E.B.C. Form 38C total registered voters in **Narok East Constituency** was 35,559 while **Narok South Constituency** had 67,772 registered voters, albeit only 53,427 in the latter turned up to vote. It is evident that tallying in respect of both these constituencies presented serious questions. The court thus had moved itself *suo motu* to order scrutiny of election materials in respect of **Narok South Constituency**.

193. The findings of the Deputy Registrar are contained in her report to this court, dated 12th February, 2018. The report was correctly confined to the examination of specific documents and I cannot understand what more Mr. Marete for the Petitioner had expected to be covered.

194. While the report in some instances appears to be incomplete or contradictory, for instance as regards the Form 38A's examined, it is illustrative enough. For my part, I think one of its limitations concerns

the absence of description of the state of the ballot boxes, seals etc. In light of the dispute arising from **Narok South Constituency**, and my findings with regard to alteration made to the final declaration, the issue of the integrity of the seals and boxes loomed large. Perhaps due to the absence of a definite order in that regard by this court, the Deputy Registrar did not address specifically her mind to those matters.

195. Nevertheless, the examination of the candidates' votes in the 130 polling stations more or less confirms the entries in the Form 38B which, **RW1** ought to have relied on. There was no evidence of votes exceeding registered voters or valid exceeding votes cast there being no record of such discrepancy. Nor was there any question as to the number of registered voters in the given polling stations. Regarding the availability of the original Form 38A and candidate tally sheets, the results can be summarized as follows:-

	<u>Polling Station</u>	<u>Original Form 38A</u>	<u>Candidate Tally Sheet</u>	<u>Remarks on Form 38A Original & Copies</u>
1.	Morloo Ole Kasale Primary School	Original & Carbon copy available	All missing	Original & Carbon copy similar
2.	Ogilai Osupuko Primary School	Missing	Missing	
3.	Koseka Nursery School	Missing		
4.	Kuntai Primary School 1		Missing for Thomas Maitai	
5.	Ilchoroi Primary School		All missing	

	<u>Polling Station</u>	<u>Original Form 38A</u>	<u>Candidate Tally Sheet</u>	<u>Remarks on Form 38A Original & Copies</u>
6.	Oloisusho Primary School	Original & Carbon copy available	Polling station 1 and 2 missing	Original and carbon copy similar
7.	Osutuo Primary School	Original & Carbon copy same	Missing for Ledama Ole Kina and Thomas Maitai	Original and carbon paper match
8.	Iltriben Primary School	Original & Carbon copy available	All missing	
9.	Olonini Primary School	Original & Carbon copy available	All missing except for Thomas Maitai	Matching

10.	Olgilai Ololulunga Primary School	Original & copy available	Carbon	Missing for Albert Kiplangat and Thomas Maitai	Matching
11.	Olmekenyu Primary School	Original & copy available	Carbon	All missing	
12.	Enoosokon Primary School	Original & copy available	Carbon	All missing	
13.	Enkutoto Primary School	Original & copy available	Carbon	All missing	
14.	Olemegili Primary School	Original & copy available	Carbon	All there but for Ledama shows 74 votes	Matching except for discrepancies on Ledama's votes
15.	Isinantet Primary School	Original & copy available	Carbon	All there except for Thomas Maitai	Matching
16.	Olengapune Primary School	Missing		All missing	
17.	Olpusare Primary School	Original & copy available	Carbon	All missing	Matching
18.	Entasekera Primary School	Original & copy available	Carbon	All missing	Matching

	<u>Polling Station</u>	<u>Original Form 38A</u>	<u>Candidate Tally Sheet</u>	<u>Remarks on Form 38A Original & Copies</u>	
19.	Osinantei Primary School	Original missing	All missing		
20.	Kone Primary School	Original & copy available	Carbon	All there except for Albert Kiplangat	Matching
21.	Enkaroni Primary School 1	Original & copy available	Carbon	All missing	Matching
	Enkaroni Primary School 2	Original missing		All there but for Thomas Maitai reads 7 votes and Form 38 – 77 votes	
22.	Naisudori Primary School 2	Original & copy available	Carbon	All missing	Matching
23.	Sogoo Primary School	Original & copy available	Carbon	All missing	Matching
24.	Kichapa Primary School	All missing		All missing	
25.	Kapkater Primary School	Original & copy available	Carbon	All missing	Matching
26.	Marinua Primary School 1	Carbon copy missing		All missing except for Albert Kiplangat	Matching
	Marinua Primary School 2	Original & copy available	Carbon	All missing	Matching

27.	Tumuyot School 1	Primary	Original & Carbon copy available	All missing except for Albert Kiplangat	
	Tumuyot School 2	Primary	Missing	All there except for Thomas Maitai	
28.	Minet School	Primary	Missing	All there except for Nkoidila Ole Lankas	

	<u>Polling Station</u>	<u>Original Form 38A</u>	<u>Candidate Tally Sheet</u>	<u>Remarks on Form 38A Original & Copies</u>	
29.	Kewet School 1	Primary	Both carbon and original missing	All missing	
	Kewet School 2	Primary	Original & Carbon copy available	All missing	Matching
30.	Sitotwet School	Primary	Original & Carbon copy available	All missing except for Albert Kiplangat	Matching
31.	Tendwet School 1	Primary	Original missing	No tally sheet for Ledama Ole Kina and Thomas Maitai	
32.	Kebenet School 1	Primary	Original missing	No tally sheet for Ledama Ole Kina and Thomas Maitai	
	Kebenet School 2	Primary	Original missing	All missing	
33.	Kalyet School	Primary	Original and carbon Copy for Ledama Ole Kina shows 7 votes	For Ledama Ole Kina shows 6 votes	Discrepancy of 1 vote
34.	Sagamian School 2	Primary	Votes for Thomas Maitai 0	Photocopies Votes for Thomas Maitai reads 1 vote	

196. The scrutiny also highlights some discrepancies between Form 38B and the Forms 38C presented by the I.E.B.C. and the Petitioners. The court conducted its own further comparison of documents in order to get a precise idea of the state thereof. A quick survey of the Form 38As tendered by the I.E.B.C. (NKA 4) through RW1's affidavit reveals the following anomalies:-

NAROK SOUTH FORM 38A

	<u>Highlighted Carbon Copies/Plain Carbon and copies of Carbon Copies</u>	<u>Altered Writings</u>
1.	Olenkuluo Primary School	Engare Ngiro
2.	Engare Nairowua Primary School	Kuntai Primary School 1
3.	Olepolos Primary School	Kuntai Primary School 2
4.	Iladoru Primary School	Enkutoto Primary School 2
5.	Olosiyoi Primary School	Olmisakwa Primary School 2
6.	Oсотua Primary School 2	Nkoben Primary School

7.	Masantare Primary School 2	Ololulunga Primary School
8.	Olmekenyu Primary School 2	Masantare Primary School 1
9.	Olengapune Primary School 2	Olgilai Ololulunga Pri. Sch. 1
10.	Osintatei Primary School 1	Olmekenyu Primary School 3
11.	Nkokirdinga Nur Primary School	Olmekenyu Primary School 3
12.	Enkaroni Primary School 1	Enooson Primary School 2
13.	Enkaroni Primary School 2	Enoosokon Primary School 3
14.	Kewet Primary School 2	Ilubi Primary School
15.		Olengajinabo Primary School
16.		Olmukonge Primary School
17.		Tendwet Primary School 2
18.		Sagamian Primary School 2

197. Evidently, the Deputy Registrar's report does not clearly state in some instances whether the Form 38 A was proffered and if it was an original. Further, she did not take into account the alterations in the original and copies which I have highlighted. There is a relatively high absence of **Form 33** – the Candidate Tally Sheet, which under Regulation 76 (3) ideally serves the role of a counterpart to the Form 38A, being the first document prepared and subsequently retained with other election materials. Nevertheless, these are irregularities that cannot in my view affect the margin of results between the two leading candidates, which on the whole were confirmed by the scrutiny.

198. However, with regard to the Form 38C, the position is that there are two results for the same election, one disowned by I.E.B.C. as discarded, and the other rejected by the Petitioners as a manipulation. I have already stated my inferences thereon. The existence of two rival declaration forms is not anticipated by the Constitution and the electoral law which emphasise accuracy and accountability *inter alia*. The existence of the dual Form 38C is *prima facie* a negation of the of the principles in Article 81 and 86 of the Constitution and further given effect in Section 39 (1)B of the Election Act and Regulation 87 (2) of the Elections (General) Regulations, the latter which prescribes the method to be used in the last lap of the election process.

199. Regulation 87 (2) of the Elections (General) Regulations provides as follows:-

“(2) The county returning officer shall upon receipt the results from the constituency returning officers as contemplated under regulation (1)-

(a) tally and announce the results for the county governor, senator and county woman representative to the National assembly;

(b) complete Forms 37C, 38C and 39C set out in the Schedule in which the country returning officer shall declare, as the case may be, the-

i) name of the respective electoral area;

ii) total number of registered voters;

iii) votes cast for each candidate or referendum side in each polling station;

iv) number of rejected votes for each constituency;

v) aggregate number of votes cast in the respective electoral area; and

vi) aggregate number of rejected votes; and

(c) sign and date the relevant forms publicly and declare the results for the position of-

(i) County Governor

(ii) Senator; and

(iii) county woman representative to the National Assembly; and

(d) issues certificates to persons elected in the county Governor, Senator, county woman representative to the National Assembly in Forms 37C, 38C and 39C respectively set out in the Schedule.”(Emphasis added)

200. In my view, had **RW1** observed the principles in Article 86 of the Constitution and particularly sub-Article 86 (d) and Section 39 1(B) of the Elections Act and Regulation 87 (2) of the Elections (General) Regulations, the outcome would have been accurate and the end product would have been a single, accurate verifiable and accountable result. Her admitted and proven actions in this case fly in the face of the constitutional command and Section 39 (1) B of the Elections Act as well as Regulations thereunder.

201. Matters are compounded by the apparent alterations to some of the Forms 38A in respect of **Narok South Constituency**. Some of the originals were missing and tally sheets for 30 odd polling stations in **Narok South Constituency** could not be traced. Tally sheets are essentially counterparts to Form 38A and are not worthless as the Respondents have submitted. The creation of two different forms for the same race put to doubt the accuracy of tallying and declaration process and by extension, the integrity of the election at that point. Moreover both documents are replete with egregious errors.

202. Therefore the argument that multiple errors on both the forms 38C are merely administrative and inconsequential cannot avail to the Respondents. The errors, as seen earlier, affect every constituency and demonstrate, particularly with regard to **Narok South** a deliberate attempt to alter and manipulate results after the declaration had been made publicly. Errors affecting other constituencies suggest that the Form 38B may not have been used to post figures – a serious dereliction of duty.

203. The question that falls to be determined is what the consequence of the chaotic records in respect of the tallying and declaration process ought to be. That question must of necessity be answered in the context of the voters’ right under Article 38 of the Constitution to give free expression of their will in a free and fair election. In **Maina Kiai** the Court of Appeal reiterated the sanctity of the ballot at the lowest voting unit, the polling station. The court observed that:

“Accuracy of the court is fundamental in any election. Voter turnout determines the outcome of any electoral contest. Numbers are therefore not only unimpeachable, but they are everything in an election. The lowest voting unit and the first level of declaration of presidential election results is the polling station. The declaration form containing those results is a primary document and all other forms subsequent to it are only tallies of the original and final results recorded at the polling station.”

204. At the same time, no person including the I.E.B.C. officials can exclude any part of the election process from the operation of the principles encapsulated in Article 81 and 86 of the Constitution and the Elections Act with regard to free and fair elections. The principles and the relevant legislation govern the entire election process from nomination to the final declaration. The decision in **Maina Kiai** arose from a constitutional petition filed to challenge *inter alia*, the constitutionality of Section 39 (2) and (3) of the Elections Act and Regulation 87(2) c and 83 (2) of the Elections (General) Regulations.

205. The Court of Appeal confirmed the decision of the High Court that had declared the provisions unconstitutional, to the extent that they provided that the results declared in respect of the presidential elections by the chairman of the **I.E.B.C.** were provisional, and that results received by the Chairman from the respective counties were subject to verification by the Chairman of the **I.E.B.C.** The Supreme Court in **Hassan Ali Joho & Another -Vs- Suleiman Said Shabhal & 2 Others [2014] eKLR** delineated the various declarations made in the course of an election, starting with the polling station to the final declaration at the County.

206. In my own view, it amounts to a perversion of the ratio in **Maina Kiai’s case**, and is contrary to the ratio in **Raila 2017** to suggest that the manner in which declarations are arrived at and made after the primary declaration does not matter. Because, in live election petitions the potential factual permutations and legal consequences are infinite. Besides, **Maina Kiai** cannot be used as a shield for the blatant disregard of the Constitution and the law in the processes subsequent to the polling station.

207. In the instant case, there was undisputable non-compliance with the Constitution and the law regarding the final declaration of the elections in **Narok South Constituency** in respect of which errors in the Form 38C used to declare the winner were surreptitiously “corrected”. The form still retained other substantive errors. In addition, original Forms 38A in respect of several polling stations were missing. Candidate tally sheets in respect of 30 polling stations were also missing.

208. The Deputy Registrar’s report does not specifically indicate whether original Form 38A in respect of 16 (sixteen) polling stations were availed.

1. Kuntai

2. Ilchoroi

3. **Oсотua**
4. **Olmekenyu**
5. **Olengapune**
6. **Osinantei**
7. **Enkaroni (Stream 2)**
8. **Kichapa**
9. **Marinua (Stream 1)**
10. **Tumuyot (Stream 1)**
11. **Minet**
12. **Kewet**
13. **Sitotwet**
14. **Tendwet**
15. **Keбенet (Stream 1 and 2)**
16. **Sagamian**

209. My own examination of the Form 38As availed by the I.E.B.C. in their response to the Petition indicates that with regard to the polling stations at **Kuntai, Oсотua, Olmekenyu, Olengapune, Enkaroni, Kewet, Tendwet and Sagamian Primary Schools**, the Form 38As bore alterations that were not countersigned, or were carbon copies highlighted seemingly to enhance the contents, while others were plain carbon copies.

210. Notwithstanding the anomalies in the final declarations and Form 38A with regard to **Narok South Constituency** in particular, and indeed the entire Narok County, it is evident that by and large the votes reflected as garnered by the candidates **Olekina, Kiplangat and Maitai** in Forms 38C, 38B and 38A were generally accurately captured. As for the 1st Petitioner his supposed votes in the Form 38C upon which he has based this petition are not supported by the scrutinized Forms 38A and 38B for **Narok South Constituency**, both which indicate that the leading candidate was the 3rd Respondent.

211. It did not appear to me that the Petitioners herein raised any serious contest with regard to the respective votes assigned to them in the Forms **38A and B** of the County. Moreover, a perusal of these forms reveals that on the whole, the 3rd Respondent garnered majority of the votes cast in all the constituencies with the exception of **Narok South Constituency** and **Emurua Dikirr Constituency** where the 2nd Petitioner emerged with the highest number of votes.

212. In so far as **Narok South Constituency** is concerned, the court takes a dim view of the alterations made in the Form 38C after the final declaration, the fact that some of the original Forms 38A were either unavailable, altered or highlighted, and the inexplicable loss of the Candidate Tallying Sheets. These anomalies create serious doubt regarding the election results in **Narok South Constituency** and in my view, the entire constituency results are liable to be disregarded in the final tallies for the County of Narok.

213. Whereas the most serious defect was the unlawful alteration of the first County declaration, contrary to the constitutional principles and the law, and this is not merely an irregularity as the Respondents have submitted, (relying on the Supreme Court decision in **Zacharia Okoth Obado -Vs- Edward Akong'o Oyugi & 2 Others [2014] eKLR**) the correct question to ask is whether the errors in both Form 38C before the court and the unlawful alterations affected the integrity and or results of the election as a whole. This is the point at which the interplay between Articles 38, 81 and 86 of the Constitution with Section 83 of the Elections Act must be addressed.

214. Section 83 of the Elections Act has been the subject of many judicial pronouncements, including the recent one by the Supreme Court in **Raila's case** in 2017. In the decision the Supreme Court gave an extensive interpretation of the section which has been viewed as overturning its earlier edict on the Section in **Raila 2013**. (Actually in **Raila 2017**, the Supreme Court did also reiterate the Court's decision in **Munya's case** which touched the subject). Unsurprisingly therefore, the opposing parties in this case sought to hinge their submissions on the interpretation that best suited their position. This court is bound by the majority decision of the Supreme Court in **Raila 2017**.

215. Section 83 of the Elections Act states:

“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.”

216. The Supreme Court in **Raila 2017** considered jurisprudence from other jurisdictions as well as traced the evolution of the subject section in our own legal system and emphasized that Articles 38, 81, 86 and 88 *inter alia* must be read together, in order **“to effectuate the purposes of electoral processes in our country.”** Having determined that the two limbs of Section 83 ought to be read disjunctively rather than conjunctively, the Supreme Court quoted with approval the decision of the English Court of Appeal in **Morgan -Vs- Simpson** as follows:-

“[204] Even in the English Court of Appeal decision in Morgan v. Simpson, which has extensively been cited and applied in many cases in this country, both Lords Denning and Stephenson were of the clear view that notwithstanding the use of the word “and” instead of the word “or” in their provision, the two limbs of the section should be applied disjunctively. In his words, Lord Denning asserted:

1. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected.

2. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or mistake at the polls-provided that the breach or mistake did not affect the result of the election.”

217. The court continued by observing that:-

“[207] Be that as it may, the issue as to how Section 83 of the Elections Act ought to be interpreted by a court of law in determining the validity or otherwise of an election, was later authoritatively settled by this Court in Gatirau Peter Munya v. Dickson Mwenda Githinji and 2 Others (2014) eKLR.

[208] We are surprised that none of the counsel who canvassed this issue, made any reference to this case. This Court, was never in any doubt as to the disjunctive character of Section 83. The 7-judge bench was categorical, when stating thus:

“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 elections... If it should be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such election is not to be invalidated only on ground of irregularities. Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection, are not enough, by and of themselves, to vitiate an election...Where an election is conducted in such a manner as demonstrably violates the principles of the Constitution and the law, such an election stands to be invalidated.”

218. At paragraph 208 of the majority decision, the Supreme Court read in the word ‘substantially’ into the section as follows:-

“[209] 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.

[210] Contrary to the submissions for the Law Society of Kenya, we

entertain no doubt whatsoever that Section 83 of the Elections Act applies to the presidential election petitions as it does to all other election disputes. As stated, guided by the principles in Articles 10, 38, 81 and 86 as well as the authorities referred to above, we therefore disagree with the respondents, the 2nd interested party as well as the Attorney General that the two limbs in Section 83 of the Elections Act have to be given a conjunctive interpretation.

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

219. For the purpose of the present case, the exhortation by Supreme Court that the courts ought to look **“at the conduct of the whole election, be satisfied that it substantially breached the principles”** of the Constitution, the Elections Act and other electoral legislation is a useful one.

220. This court while gravely disturbed by the unlawful alterations to the final declaration (Form 38C) and other anomalies identified is not

persuaded that the entire senatorial election was a “**sham or travesty of an election**” or a “**spurious imitation**” of what an election ought to be. Also pertinent in this regard is the consideration of the reality that no election is perfect, and the potential danger posed to the right of franchise if elections were to be nullified willy-nilly.

221. In **Munya’s case**, the court quoted a passage from a **Ghanian case** in affirming that the legal requirement is that an election be conducted “substantially” in accordance with the principles of the Constitution and the law by stating:

“[215] In Nana Addo Dankwa v. John Dramani Mahama, the Supreme Court of Ghana thus remarked:-

An election being a process as opposed to it being an event, where all the stages have been gone through and therefore the elections could be said to have been substantially held in accordance with the regulations, to nullify the results on this ground per se, would amount to putting in the power of some unscrupulous presiding officer in some polling station to nullify the solemn act of the whole constituency by his single act of omission.” (Emphasis added)

The latter mischief is what election courts must be wary of.

222. The Supreme Court in **Munya’s case** highlighted the observation in the Canadian case of **Opitz C -Vs- Wrzesnewskys (2012) 3 S.C.R 76** that elections should not be lightly overturned, especially where, neither a candidate nor the voters have engaged in wrong doing. Although the **Opitz case** involved mere irregularities the Canadian court had clearly signaled the danger posed by easy nullification of results by stating inter alia that:

“If elections can be easily annulled on the basis of administrative errors, public confidence in the finality and legitimacy of election results will be eroded. Only irregularities that affect the result of the election and thereby undermine the integrity of the electoral process are grounds for overturning an election.” (Emphasis added)

223. This could also be said of non-compliance with the electoral law or principles of the Constitution which do not appear to undermine the integrity of the entire election.

224. In **Raila 2017** the Supreme Court also considered the countervailing argument offered by the Respondents thereon that the court ought to uphold, the will of the people in that case. The Court cited the Indian Case of **Ponnala Lakshmaiah –Vs- Kommuri Pratap Reddy & Others Civil Appeal No. 4993 of 2012** as follows:-

“There is no denying the fact that the election of a successful candidate is not lightly to be interfered with by the Courts. The Courts generally lean in favour of the returned candidates and place the onus of proof on the person challenging the end result of an electoral contest. That approach is more in the nature of a rule of practice than a rule of law and should not be unduly stretched beyond a limit. We say so because while it is important to respect a popular verdict and the courts ought to be slow in upsetting the same, it is equally important to maintain the purity of the election process.

An election which is vitiated by reason of corrupt practices, illegalities and irregularities.....cannot obviously be recognized and respected as the decision of the majority of the electorate. The Courts are therefore, duty bound to examine the allegations whenever the same are raised within the framework of the statute without being unduly hyper-technical in its approach and without being oblivious of the ground realities. Experience has shown that the electoral process is, despite several safeguards taken by the Statutory Authorities concerned, often vitiated by use of means, factors and considerations that are specifically forbidden by the statute.” (Emphasis added).

225. Thus, this court having considered the election as a whole found that the election albeit besmirched by the alteration of the final declaration, and multiple errors therein, was substantially conducted in accordance with the constitutional principles and electoral laws; and further finding neither candidates nor the voters are guilty of any wrong doing, and that the discernible will of the majority of the people is that they preferred the 3rd Respondent over his adversaries in the disputed and non-disputed constituencies, the court must uphold the electorate’s choice and the impugned election. The court therefore finds that the 3rd Respondent was validly elected as Senator, Narok County.

226. In the circumstances, the Petition must fail and is accordingly dismissed with costs. Costs are capped at Shs 2 million subject to taxation by the Deputy Registrar. Of the net taxed sum, the I.E.B.C. will bear 50%, because in many ways, acts of omission and commission by the **I.E.B.C.** officials occasioned this Petition.

227. The requisite certificate shall issue to the I.E.B.C., and the corresponding notification to the Speaker of the Senate in terms of Section 86 of the Elections Act. With regard to the serious questions raised by the creation of two different Forms 38C both replete with errors, and unlawful alterations thereto, in respect of Narok County and this court’s findings thereon, this court determines in terms of Section 87 of the Elections Act that a malpractice of a criminal nature may have occurred and directs that such determination be transmitted to the Director of Public Prosecutions.

Delivered and Signed at **Naivasha** this **1st** day of **March, 2018**.

In the presence of:

Mr. Marete for the Petitioners

Mr. Mwangi for the 1st & 2nd Respondents

Mr. Kariuki and Mr. Otwal for the 3rd Respondent

Court Clerk – Miss Quinter Ogutu

.....

C. MEOLI

JUDGE