



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**ELECTION PETITION NO 1 OF 2017**

**BETWEEN**

**PHILIP KYALO KITUTI KALOKI.....PETITIONER**

**AND**

**I E B C.....1<sup>ST</sup> RESPONDENT**

**THE RETURNING OFFICER**

**(KIBWEZI EAST CONSTITUENCY)...2<sup>ND</sup> RESPONDENT**

**JESSICA NDUKU KIKO MBALU.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

**BACKGROUND**

1. On 8<sup>th</sup> August, 2017, Kenyans participated in the 2<sup>nd</sup> General Election after the promulgation of the Constitution of Kenya, 2010 to elect their leaders vying for various elective positions. One of the positions contested was the Member of National assembly for Kibwezi East Constituency.
2. In that election five candidates offered themselves sponsored by different political parties. The Petitioner and the 3<sup>rd</sup> Respondent were among the five candidates.
3. The voters of Kibwezi East Constituency exercised their democratic right and in the end, the various candidates for Member of National assembly position garnered votes as follows:-

<b>CANDIDATE'S NAME</b>	<b>VOTES</b>
<b>i. Philip Kyalo Kituti Kaloki (Petitioner)</b>	<b>13,192</b>
<b>ii. Jessica Nduku Kiko Mbalu (3<sup>rd</sup> Respondent)</b>	<b>26,131</b>
<b>iii. Katumo Muia</b>	<b>83</b>
<b>iv. John Kimeu Mukai</b>	<b>129</b>
<b>v. Nicholas Kitonga Mwilu</b>	<b>4,312</b>

4. Upon the conclusion of the election, the 2<sup>nd</sup> Respondent declared the 3<sup>rd</sup> Respondent as Member of National Assembly Elect for Kibwezi East constituency.
5. On 7<sup>th</sup> September, 2017, the Petitioner filed the petition herein to challenge the election of the 3<sup>rd</sup> Respondent as a Member of Parliament for Kibwezi East Constituency; in the 8<sup>th</sup> August 2017 elections. The Petitioner pleaded malpractices and irregularities allegedly to have occurred prior to voting, during voting, vote counting, vote tallying and declaration of results based on grounds set out herein below.
6. The Petitioner based his petition on the following grounds that;-

1. Failure to properly seal ballot boxes at Ndauni and Athi Kamuyuni polling stations.
2. The 1<sup>st</sup> and 2<sup>nd</sup> respondent employees misleading, intimidated, used abusive language against voters in Dwa Primary School Polling Station No. 1 and Polling Station No. 2.
3. The 3<sup>rd</sup> Respondent participated in voter bribery and campaigned beyond the prescribed period.
4. 1<sup>st</sup> and 2<sup>nd</sup> Respondent failed to train agents of the Petitioner and did not furnish the Petitioner with agent badges in time.
5. The employees of the 2<sup>nd</sup> Respondent did not provide form 35As to the Petitioner's agents to sign.
6. That Returning Officer and the Presiding Officer failed to sign result declaration forms.
7. KIEMS kits failed.

7. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed reply to the petition and affidavits in support of the reply to the Petition denying the allegations by the Petitioner. The 2<sup>nd</sup> Respondent tendered evidence rebutting the allegations and evidence by the Petitioner.

8. The Respondents (1 & 2) responded by stating that;

- i. The elections were conducted in a free and fair manner.
- ii. They denied there was intimidation and misleading of voters.
- iii. They denied allegations of malpractices illegalities, offences and irregularities alleged by the Petitioner.
- iv. They denied allegations in respect of failure to train agents and denial of agents' access to the polling stations.
- v. They also denied being aware of the allegations of bribery by the 3<sup>rd</sup> Respondent.
- vi. The failure of kiems kit was denied. *Inter alia*.

9. The 3<sup>rd</sup> Respondent also filed reply to the petition and denied allegations contained therein and called witnesses to testify in rebuttal of both allegations and evidence by the Petitioner. The 3<sup>rd</sup> Respondent in her reply,

- i. Denied Incidents of voter intimidation, misleading of voters.
- ii. Denied engaging in voter buying and voter bribery and campaigning beyond period set down for campaigns.
- iii. Regardless of lack of proper sealing of the ballot boxes from Ndauni Polling Station, all the votes and voting materials escorted by Petitioners agents were safely without any tampering delivered to Kambu tallying center.
- iv. That voting, vote counting and tallying was carried out in compliance of the Constitution and applicable laws, therefore the election was free fair transparent and reliable. *Inter alia*.

#### **SCOPE OF THE PETITION**

10. The Petitioner in his Petition makes various allegations as follows: voter bribery, collusion, exclusion of the Petitioner's agents from the electoral process by the Independent Electoral and Boundaries Commission (IEBC), failure of KIEMS kits, improper sealing of the ballot boxes, campaigning after the set deadlines, intimidation of voters and failure to assist illiterate voters *inter alia*.

11. These allegations are contained in paragraph 9 of the petition and paragraphs 9-15 of the petitioner's supporting affidavit.

12. It is trite that parties are bound by their pleadings. The apex courts of this country including this court have on numerous occasions stated so.

13. The Court of Court of Appeal in **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule** faulted the decision of the superior court for taking into consideration matters that had not been pleaded. The Court stated thus:

**Citing the case of ADETOUN OLADEJI (NIG) LTD Vs. NIGERIA BREWERIES PLC S.C. 91/2002, Judge Pius Aderemi J.S.C. expressed himself, and we would readily agree, as follows;**

***"...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the***

*pleadings goes to no issue and must be disregarded.”*

.....

*“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”*

*As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score (emphasis supplied).*

#### **PETITIONER’S PLEADINGS**

14. The Petitioner pleadings that is the petition and affidavit in support of the petition contains specific allegations touching specific polling stations and general allegations without naming polling stations affected by the said general irregularities or malpractices. The foundation of the Petitioners’ case is contained in paragraph 9(a),(b),(c),(d),(e),(f),(l),(j),(k),(m) and (n), and for supporting affidavit between paragraph 8 and paragraph 16 as summarized herein below;

#### **ITEM NO. Station Pleaded complaint Paragraph Are Results disputed in pleadings**

##### **1. - Dwa Primary Stream 1**

- Dwa Primary Stream 2

- Kilungu Primary school; Intimidation and/or misleading of voters vide Paragraph 9(c) of the petition.

##### **2. - Nzauni Polling station,**

- Nzayo polling station

- Mitooni Primary School; No agents for Petitioner signed form 35 A vide Paragraph 15 (e) of supporting affidavit to the petition.

##### **3. -Ndauni Primary.**

- Athi Kamuyuni Primary; Lack of proper sealing of boxes Paragraph 9(j) of the petition.

##### **4. -Kiambani Primary.**

- Mwangeni Primary

- Tisya Primary

- PCEA primary p s

- Ivolen primary; Variance of form 35A and 35B on rejected votes vide Paragraph 15 (a) (b) (c) (d) and (f) of the affidavit in support.

##### **5. NO specific PS; Agents denied access and not trained.**

##### **6. NO specific PS; Voter bribery and I.D buying.**

##### **7. NO specific PS; Appointment of the 2<sup>nd</sup> respondents.**

##### **Viii. No specific PS; variances of results of 6 elections held.**

15. During the pendency of this Petition, the Petitioner sought and was granted access to various Polling Station Diaries under article 35 of the Constitution and the Access to Information Act. Noteworthy, the issues raised concerning the entries in the Diaries were not pleaded in the Petition and affidavits, thus the court must decline to make any conclusions on their contents to the extent that they are not pleaded.

16. This court’s ruling in this petition dated 10<sup>th</sup> November 2017 at paragraph 58 ( page 32 of the proceedings), stated as follows;

*“Any prayer in the application that would seem to be an expansion of the case for the petitioner or which would in effect be a fishing exercise to procure fresh evidence not already contained in the petition would and must be rejected. See Raila 2.*

17. The import of the ruling is thus as follows that:

1. Parties cannot introduce matters not pleaded in the Petition;
2. The Petitioner having pleaded allegations relating to only thirteen polling stations, the petitioner cannot seek to call or give evidence beyond the Stations that the Petitioners had pleaded; and
3. The issue of alleged strangers signing polling station diaries was not pleaded and does not arise in the Petition.
4. The issue of the 3<sup>rd</sup> Respondent’s husband being a public officer was not pleaded.
5. The issue of the 3<sup>rd</sup> Respondent being mentioned in a tribunal was also not pleaded.

18. The Petitioners have nevertheless submitted on issues that are not pleaded and further expanded the Petition beyond its parameters. Indeed the Petitioners in their submissions have attempted to introduce a report which is not part of the record and neither is it a legal or judicial authority. An earlier attempt to cross-examine the 3<sup>rd</sup> Respondent on the alleged report was overruled by this Court. The Petitioner’s conduct in annexing the report to their list of authority is contemptuous of this Court and must not be excused. The said report is therefore expunged from the Court’s record.

19. In the case of **Jackton Nyanungo Ranguma v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR**, the court, Hon Majanja J. held;

*“A petitioner is not permitted to make a case outside the pleadings and his affidavits and testimony must be consistent with and support the case pleaded. In Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and 2 Others SCK Presidential Petition No. 1 of 2017 [2017] eKLR, the Supreme Court quoted with approval the Supreme Court of India in ArikalaNarasa Reddy v Venkata Ram Reddy Reddygari and Another Civil Appeal Nos. 5710 -5711 of 2012[2014] 2 SCR where it stated that;*

*In absence of pleadings, evidence if any, produced by the parties, and cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.*

#### **OTHER LEGAL PRINCIPLES APPLICABLE IN ELECTION PETITIONS BURDEN & STANDARD OF PROOF**

20. The burden of proof is on a party that alleges the existence of a set of facts. He who alleges always has the burden of proof. A Petitioner in an election Petition accordingly bears the burden to prove the allegations he/she makes concerning an electoral process.

21. The Supreme Court in **Raila Amolo Odinga And Another -V- Independent Electoral And Boundaries Commission And 6 Others Presidential Petition No. 1 of 2017,(RAILA 2)** stated thus concerning the question of Burden of Proof:

**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.**

**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, 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.

#### **STANDARD OF PROOF**

22. Besides the burden of proof, the law also imposes a degree of proof required to establish a fact. The extent of the proof required in each case is what, in legal parlance, is referred to as “**the standard of proof.**” **Black’s Law Dictionary** defines it as “[t]he degree or level of proof demanded in a specific case” “**in order for a party to succeed.**”

23. It was settled by the Supreme Court in **Raila Odinga 2017 (RAILA2) (Supra)** that the standard of proof in election petitions is above a balance of convenience and below that applied in criminal cases-that is beyond reasonable doubt. The court held thus:

*“In many other jurisdictions including ours, where no allegations of a criminal or quasi-criminal nature are made in an election petition, it is 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’, which is applied. In such cases, this Court stated in the 2013 Raila Odinga (RAILA1) case that “[t]he threshold of proof should, in principle, be above the balance of probability, though not as high as beyond-reasonable-doubt....”*

This is the standard of proof that has been applied in literally all election petitions in this country. 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, and county or, in the case of a presidential petition, the entire nation.

The application of the criminal standard of proof of ‘beyond reasonable doubt’ arises as there are allegations of commission of criminal or quasi criminal acts made in this Petition. This is the standard the Supreme Court of India employed in the case of Shiv Kirpal Singh v. Shri V. V. Giri 1971 SCR (2) 197. 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.”*

24. This court thus adopts this standard of proof. In the 2013 Raila Odinga (RAILA 1) case, the Supreme 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.”*

25. Following this decision, in Khatib Abdalla Mwashetani v. Gideon Mwangangi Wambua & 3 others, Civil Appeal No. 39 of 2013, the Court of Appeal stated that:

*“Purely from the consequences that flow from the finding that a person is guilty of improper influence, we must conclude that improper influence is serious conduct that has attributes akin to those of an election offence. It is now settled beyond peradventure that the standard of proof where an election offence or such kind of conduct is alleged, is proof beyond balance of probabilities.”*

26. This is the standard of proof that has been applied in literally all election petitions in this country. For instance, in the case of M'nkiriaPetkay Shen Miriti v. Ragwa Samuel Mbae & 2 Others, Civil Appeal No. 47 of 2013; [2014] eKLR. The Court of Appeal observed that;

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

27. In Ramadhan Seif Kajembe v Returning Officer,Jomvu Constituency & 3 others [2013] eKLR the court held;

*“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.”*

28. The Supreme Court in Raila Odinga & Another v. IEBC & Others No. 1 of 2017 (supra) stated as follows:

*“...It is therefore obvious that they are matters of great public importance and the public interest in their resolution cannot be overemphasized. And because of this peculiar nature of election petitions, the law requires that they be proved on a higher standard of proof than the one required to prove ordinary civil cases.”*

## **ISSUES FOR DETERMINATION**

29. The issues for determination were framed by the Court and adopted by the Parties as follows: noting that the 6 issues agreed, Issue No. 5 was spent leaving 5 issues for determination)

- 1. Whether the elections of the Member of National Assembly for Kibwezi East was substantially conducted in accordance with the Law.**
- 2. Whether the election of the member of National Assembly Kibwezi East Constituency was marred with illegalities and irregularities that would warrant invalidation.**
- 3. Whether the 3<sup>rd</sup> Respondent committed electoral malpractices and offences.**
- 4. Whether the tally of votes in the election of the Member of National Assembly Kibwezi East Constituency was manipulated or consisted of such malpractices and irregularities that would substantially affect the integrity of the said**

results.

5. Who should bear the Costs of this Petition.

**ANALYSIS OF THE ISSUES**

30. **Issues** (a), (b), (c) and (d): Are on the alleged Electoral Malpractices and Failure to Comply with Constitutional Principles and other Laws relating to elections. These relate to whether the election was conducted in substantial compliance with the constitution and other relevant laws or whether there were irregularities and illegalities which would substantially render the said election null and void. The same issues also deal with whether there was manipulation of results which would substantially affect the integrity of the results.

**THE APPLICABLE LAW AND PROCEDURE GOVERNING ELECTIONS AND ELECTION PETITIONS.**

**Constitution.**

31. In answering the question of what are the applicable Constitutional Principles to be applied in an Election for parliamentary Position; the guiding law in this respect is **Articles 81 & 86 of the Constitution.**

32. **Article 81(e) of the Constitution** establishes the principle of free and fair elections and provides for some of the ingredients for free and fair elections.

33. In the case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others (2014) eKLR**, the Supreme Court of Kenya noted that the question as to the nature and extent of electoral irregularities, and their legal effect arises a number of times.

34. The Court further noted that the crisp (core) issue is: how do irregularities and related malfunctions affect the integrity of an election.

35. Under the **Elections Act and Regulations** there under are the Principles that apply in regard to determination as to the nullification of any Election and without which one cannot appreciate the Constitutional Principles established under **Article 81 and 86, thus Section 83 of the Election Act comes into play.**

36. **Section 83** of the E A provides,

*“No election shall be declared to be void by reason of noncompliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in the written law, or that the non-compliance did not affect the result of the election.”*

37. The essence of **Section 83 of the Elections Act** is that for elections to be nullified, it must be proved to the required burden and standard of proof that not only were there irregularities in the said elections, but that the irregularities substantially affected the results of that Election.

38. The Supreme Court in **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission and 2 Others, Presidential Election Petition No. 1 of 2017 (RAILA 2)** expounded on the meaning and application of **section 83 of the Act.**” And correctly interpreted **section 83 of the Elections Act** to be disjunctive. The court found: -

*“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.”*

39. The Court reiterated what it had stated in **Gatirau Peter Munya v Dickson Mwenda Kithinji and 2 Others SCK Petition No. 2B of 2014[2014] eKLR** that;

*“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 is be shown that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, and 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 .....*”

*By way of example, if there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial Court would not be justified, merely on account of such shortfalls, to nullify such an election. However, a scrutiny and recount that reverses an election result against the candidate who had been declared a winner, would occasion the annulment of an election. Examples of irregularities of a magnitude such as to affect the result of an election, are not however, closed. 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.”*

40. It is important to note that the Petitioner did not dispute the election Results in any of the 151 polling stations. Indeed, this Court in its Ruling dated 1st February 2018 at Paragraph 6 found as follows:

**“Rule 29(4) of the Elections (parliamentary & County Elections) Petitions Rules, 2017 (EPCE) provides that scrutiny should be confined to polling stations in which results have been disputed. It is noteworthy that no evidence was led disputing the results in any of the polling stations in Kibwezi East Constituency.”**

#### **ALLEGED IRREGULARITIES AND ILLEGALITIES**

41. I will now proceed to look at the particular allegations;

#### **Bribery and buying of Identity cards.**

42. The petitioner alleged that in numerous instances before and during the Election Day on 8<sup>th</sup> August 2017, the 3<sup>rd</sup> respondent and/or her agents engaged in bribery of voters and/or taking their National Identification cards and deceiving them that they were to be registered for relief food.

43. The petitioner submitted that **Section 64 of the Elections Act** defines bribery in a most detailed manner and makes it an election offence. This section was repealed. The relevant provision is **Section 9 of the Election Offences Act (No.37 of 2016)** which provides as follows;

#### ***(1) A person who, during an election period***

***(a) directly or indirectly offers a bribe to influence a voter to—(i) vote or refrain from voting for a particular candidate or political party;***  
***(ii) attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending support to or for a political party or candidate;***  
***(b) in any manner unlawfully influences the result of an election;(c) directly or indirectly, in person or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if they have become candidates, Commits an offence.***

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

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

44. PW1, the petitioner, testified that a man by the name Karisma was giving money to voters on 7<sup>th</sup> August 2017, a day before the elections. He said that he would call witnesses to elaborate the issue.

45. PW6, Reuben Wambua swore an affidavit on 06/09/2017 and stated that on 08/08/2017, he was going to vote when he met Musyoka who took him to a car that had been parked by the roadside. He met Mbalu Mutava, the 3<sup>rd</sup> respondent's husband who gave him Kshs 2,000 and told him to look for four people, give them Kshs 200 and ask them to vote for the 3<sup>rd</sup> respondent. He later recorded a statement at Kibwezi police station.

46. At this point, it is important to point out that as per the 3<sup>rd</sup> respondent's organogram on page 47 of the response, it is apparent that Joseph Mbalu Mutava was her financial manager; therefore, any bribery allegations proved against him would directly touch and implicate the 3<sup>rd</sup> respondent.

47. In cross examination, PW6 denied knowing that he was being bribed. He stated as follows **“...I was not bribed but was given money”**. He however admitted that he went to the police station two weeks after receiving the money but did not have it as it was already spent.

48. In his affidavit, he talked of being taken to Mutava by Musyoka. Apparently, Mutava was in a car which had been parked by the roadside. In his evidence in Court, he stated **“...I was not taken by Musyoka to the person giving money”**. In further cross examination, he talked of being given Kshs 200.

49. It was incumbent upon the witness to give full details of the alleged car and to go a step higher and provide evidence to show that it was connected to Mutava or the 3<sup>rd</sup> respondent. That was never done. The process of obtaining the registration details of vehicles has been simplified a great deal by the e-citizen platform and the fees required are negligible.

50. The contradiction as to the amount of money given compounded the doubt. Was it Kshs 2,000 or 200?

51. In light of the seriousness of the allegation, the contradictions in his evidence are not minor. It is either he was taken to Mutava by Musyoka or he was not. If indeed he was taken by Musyoka, the inference to be drawn is that Musyoka was working in cahoots with Mutava and by extension, the 3<sup>rd</sup> respondent. Perhaps that would explain why Musyoka did not report the incident to the police and also, the reason why he did not testify for the petitioner despite being within reach (PW6 testified that Musyoka was his neighbor).

52. Be that as it may, it is not the Court's business to speculate. No evidence was adduced to establish a principal-agent relationship between the 3<sup>rd</sup> respondent and Musyoka. This allegation has not been proved to the required standard and thus fails.

53. PW13, Charles Onganyi also talked about bribery. He swore an affidavit on 06/09/2017. He stated that after voting, he called his friend by the name Joseph Akumu and asked him whether he (Akumu) had voted. Akumu told him that he was waiting for the 3<sup>rd</sup> respondent's money in order to go and vote.

54. In his statement to the police, he said that on his way to the polling station, he found a group of young people, most of them boda boda riders. He went closer and saw Katumu giving money (Kshs 50) to the others. I note that this information is not contained in his affidavit.

55. On cross examination, he stated that the boda boda riders were getting Kshs 100 each and that he was denied the money for being the petitioner's supporter.

56. In an election which had several candidates for the various positions and in the absence of evidence establishing a principal -agent relationship between the said Katumu and 3<sup>rd</sup> respondent, PW 13's testimony with regard to the issue of bribery did little to assist the Court.

57. PW9, Josephine Mbenzi Mairura swore her affidavit on 06/09/2017. She stated that on the Election Day while on her way to Usalama primary school polling station, she saw four men by the roadside talking to voters and giving them money. Among them was a man named Gregory who she knew to be the 3<sup>rd</sup> respondent's campaigner.

58. On cross examination PW9 stated that the men she saw at the roadside were three. She further stated that she didn't know whether Gregory had been sent by the 3<sup>rd</sup> respondent to convince people to vote. She agreed that Gregory was not an agent of the 3<sup>rd</sup> respondent. In her report to the police, she did not mention anything about Gregory giving money to voters. In my view, the threshold has not been met on that allegation.

59. She also stated that she saw the 3<sup>rd</sup> respondent giving money to one Michael Nyowe through the car window who then gave Kshs 200 to Susan Nduku. Upon enquiring why Michael Nyowe was bribing voters, he said that no one could bar them from treating voters.

60. She reported to the Assistant County Commissioner who arrested the two men (Nyowe & another) and escorted them to Kibwezi police station.

61. At this point it is important to look at what Nyowe (R3W9) said. He denied seeing the 3<sup>rd</sup> respondent on that day. He however confirmed being arrested at 11.00 a.m. on the Election Day. According to him, the complaint was about creating disturbance at Usalama polling station. This point was buttressed by the arresting officer, Vitalis Okoko Guru (PW 17). In re-examination, he stated as follows;

***“I arrested and booked the people I arrested. I booked them on creating disturbances. I left them for the officers to charge them.***

62. Further, PW17, confirmed that he did not see money changing hands at salama polling station.

63. It is interesting to note that the charges which were preferred by the investigating agencies, pursuant to the report made by PW9, did not touch on bribery. On cross examination, Nyowe was asked whether he had brought to Court an inventory of what was recovered at the police station and he said no. In my view, and with tremendous respect to the petitioner's Counsel, the burden of proof never shifted to Nyowe.

64. If there was anything recovered from Nyowe which the petitioner felt would have assisted the Court, it was upon him to present it. Of importance is that no evidence was adduced to establish a principal-agent relationship between Nyowe and the 3<sup>rd</sup> respondent. So if indeed Nyowe was involved in bribery, he should suffer the consequences alone. They cannot be extended to the 3<sup>rd</sup> respondent.

65. It however came out in evidence that Nyowe was actually charged with the offence of assaulting Teresiah Ndunge in Makindu CRC 255/2017. This case is still pending.

66. PW12, Naftaly Chomba Kabingo also talked about bribery. He swore an affidavit on 06/09/2017 and stated that on 08/08/2017, he was headed to the polling station when he saw one Eric Kyallo giving Kshs 200/= each to some youths.

67. On cross examination, he admitted that he did not see the 3<sup>rd</sup> respondent giving money neither did he witness her instructing people to do the bribing. He also admitted that he had no evidence to show that the money came from the 3<sup>rd</sup> respondent. Again, the principal-agent relationship was not established and this allegation fails.

68. PW17, Vitalis Okoko Guru is the one who arrested Michael Nyowe (R3W9). At the material time, he was the Assistant County Commissioner of Kibwezi East Sub-County.

69. I have carefully looked at his evidence and can safely conclude that it was all hearsay. I am alive to the obligation on security officers not to disclose informers however, even after visiting the alleged scene of bribery and making arrests, there was really nothing much in his testimony to aid the Court in determining whether the offence of bribery was committed and by whom.

70. In fact, it was his evidence that he visited more than 40 polling stations on the Election Day and having been trained on election offences,

I would expect him to identify them with a lot of ease.

71. PW10, Peter Musyoka Kioko swore an affidavit on 06/09/2017. He was a Jubilee Party Agent at Masongaleni ward. He stated that on 08/08/2017 he proceeded to Joyland hotel and found Munyae and Kisyula buying food and soup for voters. According to him, the two were well known supporters of the 3<sup>rd</sup> respondent. He also stated that he witnessed voter bribery at Mwanyani polling station and informed their agent, as the agent approached the group on his motor bike, they ran away.

72. On cross examination, he stated as follows;

***“I was informed of payment in Joyland by somebody. I did not witness. Page 14 of my affidavit talks of voter bribery. I have not mentioned who bribed or who was bribing”***

73. With regard to Munyae and Kisyula, the allegations against them would amount to ‘treating of voters’ which is no longer an offence. Even if it was, proving it would be a tall order. Joyland hotel being a public place, anyone was at liberty to walk in and order for whatever was being served. In fact he admitted not knowing who paid for the food. He expressed himself as follows;

***“Some food was ordered when I was there. I did not witness the payments. I left before payments. I called Petitioner who came.”***

74. Saying that there was unusual activity at the hotel would not suffice. There were no statistics that the Court could use to compare in order to arrive at that conclusion. In my view, PW10’s evidence on the issue of bribery was devoid of any substance.

75. PW14, Pascal Nzioki Kyumbe swore his affidavit on 06/09/2017. He stated that on 07/08/2017, a villager known as Moses informed him that there was ID buying at a plot near Miami lodge in Mtito Andei and the person in charge was Karisma (R3W8).

76. He proceeded to the scene and gave his ID to a man who was with Karisma. In return, he was given Kshs 500/=. He however did not leave his ID. In essence, he went there to lay a trap.

77. In re-examination, he stated as follows;

***“I saw ID being bought at Karisma plot Mtito Andei. Karisma is a teacher and a businessman. He is involved in politics.”***

78. In my view, this is a clear indication that Karisma was well known to him.

79. In his affidavit, he said that he gave his ID card to one man who was with Karisma and in return, he got Kshs 500/=.

80. On cross examination, he said that he did not give his ID to Karisma but to someone else. I looked at his statement to the police very carefully as I have done with all the others. I wish to reproduce it in part;

***“I then went to find out what was going on. I found people queuing and I went in front of the line and Karisma asked me whether I had an Identity card. I then gave him my Identity card and he checked my name with a computer he was having and also he asked for my voter’s card. He also asked whether I could bring my wife.”***

81. On his part, Japheth Muia aka Karisma (R3W8) admitted that there were 17 people in his compound on 07/08/2017 but contends that they had gone there to demand for relief food. This point is buttressed by PW15, Juliana Wavinya Musau who deponed, in her affidavit that she had gone to Karisma’s plot to get relief food. In her evidence in Court, she maintained that position.

82. It was paramount for PW14’s evidence to be credible in every material aspect. I say so because he is the only witness who testified as to having ‘sold’ his ID card.

83. Having found that he knew Karisma very well, it is hard to explain why his statement to the police does not tally. The voter buying allegedly occurred on 07/08/2017. He recorded a statement with the police on 22/08/2017 and he swore the affidavit on 06/09/2017. All these activities occurred within a month. In my view, it cannot be said that the passage of time was huge enough to cause him a memory lapse.

84. In the circumstances, there is doubt as to whether PW14 is telling the truth. Voter buying being a criminal offence, the standard of proof has not been met and this particular allegation therefore fails.

85. PW5, Muia Wambua alleged to have been bribed by Benjamin Kyallo Nyamai (R3W11) in order to change allegiance and vote for the 3<sup>rd</sup> respondent. He annexed an Mpesa statement showing that he received Kshs 500 from Benjamin on the Election Day. He denied having ever worked for Benjamin. He however said that he had known Benjamin for long before 2013. He further expressed himself as follows;

***“We used to talk politics with Benjamin whenever we met. Same political debates still continue whenever we meet. It is only political debate and peaceful. We are still friends despite political differences. We even had political differences even before elections.”***

*In February 2017 he sent me money. This year, Benjamin has sent me money. He is well up financially. When we meet he buys things such as tea. He sent me money. He lives in Nairobi. I know his number. I got it 2017. I would call him.*

*I have met 3<sup>rd</sup> Respondent. I usually greet her. She knows me. I don't know her relationship with Benjamin. I have no evidence 3<sup>rd</sup> Respondent sent Benjamin to give me money. I don't know whether she was talking to Benjamin over the money he was giving me.*

*I know professor. He was persuading me to shift my political stand. I never got phone from 3<sup>rd</sup> Respondent telling me to change political position/stand or from anybody else”*

86. On his part, Benjamin admitted that he sent the Kshs 500 via Mpesa. He however denied that it was a bribe and contended that it was payment for some work done on his shamba. Further, he said that he had known PW5 since they were born and that he had been giving him money for a long time, even when he was financially down.

87. On cross examination, he stated that there was no transaction between him and PW5 before 24/04/2017. He also denied being the 3<sup>rd</sup> respondent's agent.

88. Upon being shown the Polling Station Diary (PSD) for Wande primary school, he agreed that his name, ID number, telephone number and signature were present. He also admitted to have received Kshs 12,000/= from Joseph Mutava, the 3<sup>rd</sup> respondent's husband. He said that Joseph Mutava was his friend.

89. It is evident that PW5 and Benjamin had been friends for quite some time. They would even meet and have tea which would be paid for by PW5. Benjamin had his number and would call him at times. Benjamin admitted that he never got a call from the 3<sup>rd</sup> respondent or anybody else telling him to change his political stand. Most importantly, this incident was not reported anywhere.

90. In my view, this issue turns on paragraph 9 of PW5's statement where he said that upon receiving the money from Benjamin, he called to ask him (Benjamin) about it and was told that the money was intended to make him (PW5) ensure that people voted for the 3<sup>rd</sup> respondent. Was that call actually made? It was important to erase any doubt in the mind of the Court. PW5 ought to have provided the relevant phone records. This was never done. Bribery being a criminal offence, this doubt is exercised in favour of Benjamin and by extension, the 3<sup>rd</sup> respondent.

91. Further, the details in the PSD of Wande primary school show that Benjamin was an agent for wiper –DMK. In my view, this does not automatically mean that he was an agent of the 3<sup>rd</sup> respondent because she was a Wiper-DMK candidate.

92. It is in the public domain that several candidates for the various electoral positions were under the Wiper-DMK umbrella.

93. It would therefore be presumptuous and unsafe to assign Benjamin to the 3<sup>rd</sup> respondent in the absence of cogent evidence e.g. an appointment letter. The totality of the foregoing is that this allegation has not been proved to the required standard.

94. The petitioner referred the Court to the case of **Musikari Nazi Kombo v Moses Masika Wetangula & 2 others [2013] eKLR** where the Court of Appeal dismissed the Appellant's contention that bribery was not proved because it was not reported to the police. The court of appeal opined: -

*“Despite the fact that those witnesses did not report that incident to the police, we nonetheless believe their evidence.”*

95. The petitioner submitted that the narrative in the present dispute is a little different because the witnesses did report the matter to police stations where they recorded statements and produced copies of the same in court.

96. In the **Musikari Kombo case (supra)**, the witnesses who had been called gave succinct accounts of what had transpired, their evidence was devoid of contradiction and they corroborated each other in every material aspect. The same cannot be said about the witnesses in this case and to that extent, the **Musikari Kombo case (supra)** is distinguishable from the instant case.

97. Reporting to the police and recording statements does not constitute 'proof beyond reasonable doubt' as required in criminal cases. The test to be applied is; if a prosecutor presented the authors of those statements in Court and failed to adduce any further evidence, would the various charges of bribery be sustainable? Certainly not.

98. In the case of **Simon Nyaundi Ogari & Another-v-Hon. Joel Omagwa Onyancha & 2 Others(2008)KLR** the court held as follows:

*“Clear and unequivocal proof is required to prove an allegation of bribery. Mere suspicion is not sufficient. It is true that it is not easy to prove bribery, more especially where it is done in secrecy. In such cases, perhaps bribery may be inferred from some peculiar aspects of the case but when it is alleged that bribery took place publicly and in the presence of many people, the court cannot be satisfied by anything less than the best evidence which is always direct evidence given first hand.”*

99. In the case of **Mohamed Ali Mursal-v-Saudia Mohamed and others-Garissa Election Petition No. 1 of 2013(unreported)** Mutuku J described bribery in the context of an election petition as follows:-

***“Bribery is an electoral offence. It is also a criminal offence in ordinary life. Being such, proof of the same must be by credible evidence and in my view, nothing short of proving this offence beyond reasonable doubt will suffice. There is no distinction as far as I am concerned, and rightly so, between bribery in a criminal case and one in an election petition. Bribery involves offering, giving, receiving, or soliciting of something of value for the purpose of influencing the action of the person receiving. Under the Act, bribery is an election offence under section 64 and both the giver and the taker of a bribe in order to influence voting are guilty of this offence upon proof.....”***

### **Agents barred from accessing polling stations**

100. The petitioner has not particularized the polling stations where his agents were barred. The evidence on record shows the converse. Jubilee agents were present at DWA (1), Tisya, Ngwata 1, Ndauni, Nzauni, Ngokolani, Mitooni, Athi Kamunyuni, Muusini polling stations among others. In cross examination, PW1, the petitioner stated that his agent in Ndauni polling station signed form 35A. In fact, it was his evidence that only 27 out of 151 form 35A's were not signed by jubilee agents. The inference to be drawn from this is that Jubilee Party (JP) agents were able to access 124 polling stations.

101. An agent as defined under **Section 2 of the Elections (General) Regulations, 2012** (herein after referred to as ‘**the general regulations**’) is a person duly appointed by a political party or independent candidate and includes a counting and tallying agent. **Regulation 2 of general regulations** defines an agent as a person appointed under **Section 30 of the Elections Act**. The agents are required to take an oath of secrecy prescribed in the third schedule to the Act.

102. **Regulation 62(1) of the general regulations** provides that **only authorized agents were to be allowed into polling stations**. Further **Regulation 62(4) of the general regulations** requires such agents to display their official badges supplied by the commission.

103. **Regulation 74(1) of the general regulations** requires candidates and political parties to submit the names and letters of appointment of the agents to polling stations. At the tallying Centre, only authorized agents are allowed to enter pursuant to the provisions of **Regulation 85(1)(e) of the general regulations**.

104. As such, to be an authorized agent and therefore liable to be admitted to a polling station or tallying Centre, one must demonstrate that:

- 1. The person was duly appointed as an agent of a candidate or party and has a letter of appointment.***
- 2. The person must have sworn an oath of secrecy.***
- 3. The person must have been issued with a badge by the 3rd Respondent.***

105. PW2, Simon Kilaki was the Chief Agent of the Jubilee Party (JP). He testified that he was also a chief agent of the petitioner. He however did not have an appointment letter from the petitioner. It came out in evidence that the chief agent delayed in picking the IEBC badges and as a result, he was not able to distribute them to the other agents on time.

106. The petitioner submitted that they were denied access to most of the 151 polling stations owing to failure to possess IEBC badges till late in the day. Further, that they were not informed in advance that they were the ones to collect the badges from the 1<sup>st</sup> Respondents office and distribute them to their agents. According to the petitioner, it is the legal responsibility of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to supply the badges.

107. In his evidence, the petitioner said that they provided a list of 151 agents to IEBC on 8/8/2017. This list was not attached to the petition and this essentially means that no evidence was adduced to prove that the petitioner had his own agents, independent of those appointed by the Jubilee Party.

108. The question which begs is; if indeed the petitioner provided his list of agents on the day of the elections, how would the 1<sup>st</sup> respondent have informed him in advance to collect the badges? In my view, failure to provide the list of agents in advance would have entitled the 1<sup>st</sup> respondent to assume, and rightly so, that the petitioner had no agents.

109. On cross examination, PW2 stated as follows:

***“I was to pick badges previous day before election on 08/08/2017. I picked badges on 08/08/2017 in the morning together with Petitioner at Kambu. I collected badges at 7.00 a.m. The polling station opened at 6.00 a.m. I knew polling stations (same) were opened even at 5.00 a.m. in the morning”***

110. Being the chief agent for the JP party, this must be taken to mean that PW2 was referring to badges for the JP agents. Clearly, he was aware that he was to pick the badges in advance in order to ensure that the agents would have all the relevant materials on time.

111. PW4, Kisilu Matheka, was a JP agent at Mitooni primary school polling station. In re-examination he stated as follows;

***“I was allowed to enter polling station at 10.00 a.m. I was denied entry because I had no IEBC badge”***

112. Similarly, PW7, Simon Kanyulu Musau, a JP agent accessed the polling station late because he did not have a badge. He stated as

follows:

***“I did not have badge but I had the other 2 papers. I got letter of appointment and oath on 7<sup>th</sup> night August 2017. I got badge later... I entered polling station at 10.00 a.m.”***

113. In my view, none of the agents called to testify was barred from accessing the polling stations for invalid reasons. Further, none of them was employed directly by the petitioner. The petitioner seemed to be relying on the agents employed by the JP party. In fact, he confirmed that he was aware of the requirement to provide a list of agents 14 days before elections but did not provide the same.

114. The duty to ensure that an agent is authorized must remain with the candidate and/or party and the petitioner cannot transfer blame to the 1<sup>st</sup> respondents' officers for locking out agents who did not have the requisite authorization.

115. So, what is to be made out of the fact that some agents were temporarily locked out of some polling stations for lack of authorization?

116. **Regulation 62(3) of the general regulations** provides;

117. **Regulation 97 of the general regulations** provides;

*i. The absence of agents shall not invalidate the proceedings at a polling station.*

*ii. Where in these Regulations expression is used requiring, authorizing, or implying that, any act is to be done in the presence of the candidates or agents, that expression shall be regarded as reference to the presence of such candidates or agents as may be required or authorized to attend.*

*iii. The mere non-attendance of any candidate or agents at the time and place as contemplated under sub-regulation (1) shall not, if any act is otherwise lawfully done, invalidate that act.*

118. In my view, the law is clear that, in the absence of proof of an unlawful act, the mere absence of an agent cannot invalidate the act or proceedings in or at which the agent was required to participate.

119. In Election Petitions **Nos 1 & 2 of 2005, Joho v Nyange & another (4) [2007] e KLR** the court (Maraga J as he then was) stated that it would be foolhardy to allege that an agent was excluded from the electoral process yet they signed the declaration forms.

120. It was therefore incumbent upon the petitioner to demonstrate unlawful acts in the polling stations where the agents were temporarily locked out of the polling station.

#### **Form 35A: unstamped, unsigned by PO/DPO**

121. The issue of unstamped form 35A's was not specifically pleaded by the petitioner, however, during the hearing; it came out in evidence that several forms were unstamped. A perusal of the declaration forms attached to the pleadings revealed there were 32 unstamped form 35A's.

122. The petitioner submitted that the results declared by the 2<sup>nd</sup> respondent were not authentic and or verifiable as there were several forms 35As which were neither signed by the Presiding Officers nor their respective Deputies and others which were not stamped with the 1<sup>st</sup> Respondents official stamp.

123. **Regulation 79 of the general regulations** requires that the statutory form be signed by the presiding officer.

124. **Regulation 5 of the general regulations** provides as follows;

***The Commission shall transparently and competitively appoint a presiding officer for every polling station and may similarly appoint such number of deputy presiding officers as may be necessary.***

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

125. My interpretation of this provision is that the Presiding Officer (PO) includes the PO and Deputy Presiding Officer (DPO) appointed by the IEBC. Therefore, a statutory form is valid once it is signed by the PO, both the PO and DPO or by either of them. This position applies to the statutory forms 35As; in Mito Andei Primary School(2), Mitasyano Primary school and Kithingiisyo Primary School(2) where the DPO did not sign. Further it applies to Liani primary school where the PO did not sign.

126. Having perused all the declaration forms attached to the pleadings, I came across only three polling stations where form 35A's were unsigned by both the PO and DPO i.e. Ndauni primary school (452 votes), Mito Andei stream1 (465 votes) and Kithiiani primary school (229 votes). The combined votes from the three polling stations amounted to 1,146. In my view, these results were invalid and should not be included in the overall results.

127. In the case of Ahmed Abdullahi Mohamad & another v Mohamed Abdi Mohamed & 2 others [2018] eKLR (ELECTION PETITION NO. 14 OF 2017) the court held as follows: -

***“From the foregoing, it is clear that while the non-signing of the statutory form by a candidate or his agent is excused under Regulation 79 (6), it is not so for the presiding officer or the returning officer. It is a criminal offence for any of those officers to fail to sign the statutory forms under section 6 (j) of the Election Offences Act. Statutory Forms that are not signed by the said officers are but worthless pieces of paper whose contents would not count in the final tally of results. It is the signing of those statutory forms by the said officers that gives the forms credence and make the results therein accountable and verifiable. Failure to sign a statutory form is not a mere error, it is a grave irregularity that destroys the credibility and authenticity of the results contained therein”***

128. So, does the exclusion of those results affect the results announced? Certainly not.

129. With regard to the 29 PS (Ndauni, Mtito Andei (1) & Kithiani excluded) on unstamped forms, my view is that, yes it is important but lack of it does not invalidate the form or the results therein. I agree with the sentiments of Justice Richard Mwangi in Nairobi High Court Election Petition No 5 of 2017: Elizabeth Ongoro Amollo –vs- Francis Kajwang Tom Joseph & 2 others where he expressed himself as follows;

***“Clearly, Form 35A is not a ballot paper in respect of which the rubber stamp of IEBC is legally required to be affixed by an election officer, and I have not been shown any written law or constitutional edict that makes it unlawful or irregular for an election officer not to stamp Form 35A”***

130. Furthermore, all the 29 unstamped forms were signed by agents and this signifies approval. Further perusal revealed that only 6 forms were not signed by JP agents i.e. Kambu, Ngwata Youth Polytechnic (2), Kyusani (3), Mulu Mutisya, Kavungwa and Mitasyano polling stations. The results in these particular polling stations were not disputed.

#### **Form 35A: unsigned by agents, copies not supplied to agents**

131. It was alleged that the petitioner’s agents were not allowed to sign form 34A’s in 34 polling stations.

132. My understanding of **Regulations 62, 79 and 97** of the general regulations is that, the mere failure by an agent to be present at a polling station or to sign the statutory forms does not negate or invalidate the results of an election.

133. It was therefore incumbent upon the petitioner to demonstrate that there was a deliberate effort by the respondents either jointly or individually to prevent the petitioner’s agents from signing the forms.

134. The petitioner called a few witnesses to talk about this issue.

135. PW3, Julius Mbithi Mwina was Muungano party agent in Kilungu Primary School polling station. He testified that the presiding officer was either coercing the agents or denying them an opportunity to sign the declaration forms.

136. A document was showed to him to read during cross examination and he said he couldn’t because he did not have his glasses. In re-examination however, another document was showed to him by his Counsel and suddenly, he could read. In my view, this single act impeached his credibility. Be that as it may, the evidence on record shows that he actually signed form 35A.

137. Further, PW3 went to the tallying Centre and on cross examination, he admitted that the votes counted at the polling station were the same ones tallied.

138. PW4, Kisilu Matheka was a JP agent at Mitooni polling station. In his affidavit sworn on 06/09/2017, he stated that after the counting exercise, the PO informed them that only two people would sign the declaration form. He was not given the opportunity to sign the form.

139. On cross examination, he stated as follows;

***“I witnessed counting. There was no problem in counting votes. Before I entered polling station, I did not know what had happened. When I entered, I did not see any problem...Results were announced in my presence. I had no reason to doubt the results”***

140. In re-examination, the witness he stated as follows;

***“Those who voted were 105 and registered voters were 134. I did not sign form which had that figures. I was not satisfied with voting. Presiding officer said only 2 people (agents) were to sign”***

141. This witness was blowing hot and cold at the same time. In cross examination, he had no reason to doubt the elections, in re-examination; he was not satisfied with voting yet, results are announced after the voting exercise. Again, this witness cannot be taken seriously.

142. PW5, Muia Wambua was a JP agent at Muusini primary school polling station. On cross examination, he stated as follows;

***“I witnessed the counting. The counting was done well. I did not see any problem in counting of the votes. I signed form 35A confirming there was no problem in counting”***

143. The petitioner submitted that the respondents had no explanation as to why they did not allow the petitioners agents in 34 polling stations to sign the declaratory forms 35As.

144. In my view, before the respondents (1&2) could be called upon to explain anything, the petitioner was duty bound to demonstrate that indeed he had assigned agents to those polling stations. There is no evidence to that effect. It would also have been prudent for the petitioner to call the particular agents as witnesses so that their testimonies could be tested in cross examination.

145. This allegation has not been proved to the required standard.

**Failure to assist voters, Intimidation, harassment and/or misleading of voters.**

146. In DWA (1), PW 11, Deus Allan was one of the petitioner’s agents. In re-examination he confirmed that **“the people assisted were many”**. He also stated that **“...we were allowed to witness the assistance of those voters”**.

147. In cross examination, the petitioner stated that he could not tell who wanted to vote for him but changed his mind due to harassment/intimidation etc. Further, the petitioner confirmed that he did not know how many people were harassed or intimidated.

148. Intimidation, harassment and/or misleading of voters falls under ‘undue influence’; under section 10(3) E O A, where it states that;

***“A person who directly or indirectly by duress or intimidation—(a) impedes, prevents or threatens to impede or prevent a voter from voting; or (b) in any manner influences the result of an election, commits an offence.***

***(4)A person who directly or indirectly by duress, intimidation or otherwise compels or induces any voter who has already voted at an election—(a) to inform that person or any other person of the name of the candidate or political party for which the voter has voted; or (b) to display the ballot paper on which the voter has marked his vote, commits an offence”***

149. PW7, Simon Kanyulu Musau was a JP agent at Athi Kamunyuni polling station. He testified that he saw an agent by the name Mutiso Kariithi misleading voters. In cross examination however, he admitted that voting was being done secretly. In my view, the evidence of this witness was shaky because despite witnessing the alleged malpractice, he signed form 35A which in my view is an indication that he was satisfied with the results at the polling station.

150. Further, it was his evidence that he saw 3 people being misled and even gave their names to the petitioner; however, they were not called as witnesses. Finally, he testified that the said Mutiso was a wiper agent but no evidence was adduced to establish a nexus between Mutiso and the 3<sup>rd</sup> respondent. It is my considered view that this allegation was not substantiated.

151. In Kilungu Primary School, PW3, Julius Mbithi Mwania, an agent of Muungano Party testified that he witnessed 5 votes belonging to the petitioner being stolen. It was his further evidence that upon the issue being raised with the presiding officer, the votes were eventually counted in favour of the petitioner. He stated as follows;

***“The presiding officer was announcing votes as he counted. The 5 votes which he (PO) had put in the 3<sup>rd</sup> Respondent side were counted in Petitioner’s favour. The 5 votes were among the total of Petitioner’s votes. The 3<sup>rd</sup> Respondent got 126 and Petitioner 116 votes respectively”***

152. Apart from this incident, there was no evidence of other malpractices in the polling station.

153. In Nzayo, Mitooni and Nzauni primary school polling stations No evidence was produced by the Petitioner to support allegations of voter intimidation, misleading of voters, refusal to assist voters etc. On cross examination, PW 8 Stephen Mulwa Joel a JP agent stated as follows;

***“There was no problem at Nzayo polling station. I was Jubilee Party agent. The voting was smooth. All people who wished to vote voted”***

154. PW13, Charles Onganyi was a voter. He testified that the lady who was assisting voters shouted at him and asked him whether he was voting NASA or Jubilee. She told him that he should have gone to school. He got annoyed and almost left without voting. However, another *mzee* at the polling station convinced him to vote. In my assessment, this was a credible witness and the lady who shouted at him committed a malpractice.

155. There was however no evidence adduced as to where this occurred (polling station). Further, apart from saying that the lady who shouted was the one assisting voters, it was not clear as to whether she was an employee of the 1<sup>st</sup> respondent. I say this because I am alive to the fact that people assisting illiterate and aged voters were also being allowed into the polling stations.

156. PW19, Dickson Wycliffe Ogweno Okello was a JP agent. In cross examination, he stated as follows;

***“I did not witness a voter being forced to vote for Jessica. No voter was sent away by saying he would vote the Petitioner. Nobody was forced to vote for any candidate. I did not see any voter who left without voting”***

157. The Returning Officer (RO), Francis Waita (R2W1) swore an affidavit on 18/09/2017. At paragraph 22, he stated that;

***“Instances where voters required assistance, the same was done with decorum and as per the regulations and I did not receive any reports of any challenges with illiterate voters who were being assisted in marking their ballot papers”***

158. With regard to assisted voters; **Regulation 72** provides as follows;

***(2) Where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such voter, in the presence of the agents.***

***(5) The following shall apply with respect to a person who assists a voter under this regulation—***

***(a) the person shall, before assisting or supporting the voter, make a declaration of secrecy before the presiding officer in Form 32 set out in the Schedule;***

***(b) a person who breaches his or her declaration commits an offence under the Act;***

***(c) the person shall assist or support only one voter at that election and have a mark as proof of assisting or supporting a voter.***

***(6) Where a presiding officer grants the request of a voter under this regulation, the presiding officer shall record in the polling station register against the name of the voter the fact that the voter was assisted and the reason for the assistance.***

159. Going back to PW11's evidence, by saying that the people assisted were many and that they were allowed to witness the assistance of those voters, the inference to be drawn from this is that the assistance was being offered by the presiding officers. A PO is not required to make a declaration of secrecy (form 32) before assisting a voter.

160. The petitioner submitted that Regulation 72 was flouted especially with regard to breach of secrecy. In my view, it was incumbent upon the petitioner/and or his agents to adduce evidence that indeed some voters came with their own assistants and that those assistants did not sign form 32 otherwise, this allegation remains unsubstantiated.

#### **Lack of proper sealing of ballot boxes.**

161. The petitioner alleged that the ballot boxes in multiple polling stations including but not limited to Ndauni and Athi Kamunyuni primary school were not properly sealed.

162. On cross examination, PW7, the JP party agent at Athi Kamunyuni maintained that there were only two seals on the ballot box. He however admitted that his name, ID number, phone number and signature were appearing on form 35A. Apart from the issue of sealing, this witness also testified that the declaration form 35A was only signed by two agents as per the instructions of the presiding officer. I have looked at the said form and it indicates that 6 agents signed.

163. I am aware that the parties under the supervision of the Deputy Registrar (DR) conducted a resealing exercise on all the ballot boxes. The report of the DR indicates that the ballot box for Athi Kamunyuni had 5 seals. This is in tandem with the information contained in the polling station diary. It is my considered view that PW7 was not a credible witness and his evidence should be disregarded.

164. With regard to Ndauni Primary school, PW18, James Ndambuki Mulandi, a JP agent stated as follows;

***“I know Petitioner's garnered 70 votes in Ndauni p/s. I did not agree with that result. I have not put in affidavit that I disputed it. But I reject the results. I signed form 35A. I signed voluntarily without intimidation or coercion. I never requested for the recount of the votes...The problem noted was on issue of seals not being enough after vote counting... I don't know whether Petitioner lost any vote for improper sealing”***

165. The totality of PW18's evidence in my view is that he was satisfied with the voting process as well as the votes garnered by the petitioner. As rightly submitted by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, sealing of ballot boxes is a procedure that comes after vote counting, declaration of results and preparation of form 35A .

166. Further, the results on form 35A were reflected on form 35B which infers that despite the improper sealing, the votes were not interfered with in the course of transportation from the polling station to the tallying Centre. Be that as it may, the issue of Ndauni has been settled where I held that the results from that polling station ought to be disregarded because form 35A was unsigned by both the PO and DPO.

#### **Appointment of the 2<sup>nd</sup> respondent**

167. The petitioner alleged that the appointment of the 2<sup>nd</sup> respondent as the RO of Kibwezi East constituency was illegal as it was contrary to the guidelines and directives of the 1<sup>st</sup> respondent. Further, that the parties were not informed before his appointed as is required under Regulation 3 General Regulations.

168. It is not in dispute that the 2<sup>nd</sup> respondent was gazzetted. As rightly submitted by the 2<sup>nd</sup> respondent, the petitioner did not demonstrate that he had challenged the gazette through either an administrative process or through the Court.

169. The petitioner submitted that the issue of appointment of returning officers was substantively dealt with by Justice Odunga in **Republic v Independent Electoral and Boundaries Commission Ex Parte Khelef Khalifa & another (2017) e KLR** where he found out that the Returning officers were irregularly appointed. According to him, despite the stay from the Court of Appeal the appeal is yet to be determined on merit and therefore as things stand the decision by my Brother Judge is still valid and applicable in this matter. I respectfully disagree. The stay order maintains the status quo *ante* that is before the trial judge decision.

#### **Alleged failure of KIEMS**

170. In paragraph 9(m) of the petition, the petitioner alleged that in several polling stations, KIEMS stopped working for some time but that time was not compensated by increasing the time within which voting would end. Again, the petitioner did not particularize the polling stations where failure occurred.

171. In his sworn affidavit, PW18, James Ndambuki Mulandi stated that both the voting and counting exercise at Ndauni Primary School polling station was well conducted. In his statement to the police, he stated that KIEMS failed to work for about an hour.

172. On cross examination, he stated as follows;

***“I said in statement machines failed to work. In affidavit I said voting went as smoothly. Both affidavit and statement are true.***

***...the Ndauni polling station was closed at 7.30 p.m. to 8.00 p.m. People were still voting. Some people were closed out and did not vote. I do not know whether it was noted that KIEMS temporarily failed.***

***...I witnessed voting at Ndauni from beginning to the end. Nobody was denied chance to vote”***

173. This witness was not consistent. Infact, the PSD for Ndauni Primary School polling station at page 24 indicates that voting hours were extended. His statement to the police was written in August 2017, he swore the affidavit in September 2017 yet the issue of KIEMS did not feature anywhere in the affidavit. This is very curious. This leads to the irresistible conclusion that the issue of KIEMS was an afterthought and the statement to the police was probably backdated.

174. PW10, Peter Musyoka Kioko also talked about KIEMS. He was a JP agent at Masongaleni ward. On cross examination, he stated as follows;

***“There are 26 polling stations I was covering. I visited about 7 polling stations. I visited Miumoni at 10.30 a.m., Mitunguni at 11.30 a.m., Ndauni at 12.30 to 1.00 p.m., Mwanyani at 2.00 to 5.00 p.m., Muema and Tisya polling stations.”***

175. In his affidavit sworn on 06/09/2017, he stated that KIEMS failed to operate for one hour and that voting ended at exactly 5.00 p.m. Consequently, two people were denied a chance to vote in his presence. Despite saying that he visited about seven polling stations, he did not name the particular polling station where two people were denied a chance to vote. Again, this is very curious.

176. On further cross examination, he stated as follows;

***“Paragraph 12; “the KIEMS failed.....” I was not in station but I was told”***

177. Evidently, this is an open contradiction of paragraph 12 of his affidavit and. It automatically impeaches his credibility.

178. On re-examination, he was referred to the PSD for Makutano polling station on KIEMS which read;

***“Our KIEMS started hanging. 8.03 a.m. still awaiting ICT officer by 9.00 a.m. At 11.00 a.m. and KIEMS hanging still waiting for ICT. KIEMS replaced at 12.34 p.m.”***

179. The evidence on record shows that the voting time at this particular polling station was extended. In my view, no prejudice was occasioned to the voters. Of importance is that, neither the petitioner nor the agents raised any particular complaint about the polling station. Further, no witness was called to testify that he/she was prevented from voting due to failure of KIEMS.

180. Having alleged that KIEMS failed in various polling stations, the petitioner called only two witnesses who in my considered view were not credible. This translates to only 2 out of 151 polling stations. The minor issue of KIEMS hanging at Makutano polling station was satisfactorily remedied.

181. Technological hitches were alluded to in **Petition No. 5 of 2013 (Raila 1)** where the Supreme Court held that, electronic technology has not yet achieved a level of reliability as far as Kenya’s electoral history is concerned. The court further observed that such technology is yet to be considered a permanent or irreversible foundation for the conduct of the electoral process. The court declined to nullify the presidential election on grounds of failed technological devices.

182. It has been demonstrated that the KIEMS kits were used to identify voters in the entire constituency and where there were delays the voting time were extended to allow them to vote.

183. Furthermore, the reading exercise conducted on 30<sup>th</sup> November 2017 and 5<sup>th</sup> December 2017 indicated that the results tallied. The electronic kits were used to relay results and they were read in order to tally results at the constituency tallying centers. Such use of electronic technology plays a supplementary role. In any event, the Petitioners did not challenge the primary declaration material being form 35As.

184. The Returning Officer (R1W1) confirmed that wherever the KIEMS kits mal-functioned they were replaced by the ICT Personnel who were on standby. Further, he confirmed that manual register was never used.

185. Concerning the failure of the BVR kits in Ndauni polling station, R3W10, Nicholas Wambua Kalalya testified that the polling continued to 8:00 p.m. in order to cover for the time lost and allow all voters to vote. He also testified that this affected all other contests including presidential, gubernatorial and senatorial.

#### **Variations between forms 35A and 35B**

186. Paragraph 15 of the petitioner's supporting affidavit highlights the following polling stations where there were variations between form 35A and 35B;

187. In Muangeni Primary School polling station, Form 35A indicates that Nicholas Kitonga Mwilu had 6 votes but Form 35B indicates that he had 0 votes.

188. In Tisya primary school polling Station, Form 35 A indicates that there were two rejected ballot papers but Form 35B indicates that there were 0 rejected votes.

189. In PCEA Primary School polling station, form 35A indicates that the total valid votes were 474 but form 35B indicates that the total valid votes were 471.

190. In Ivoleni primary school polling station, form 35A indicates that the valid votes cast are 320 but form 35B indicates that the total valid votes are 318.

191. In kiambani Primary school polling station, Form 35A indicates that there are 0 rejected votes whereas Form 35B indicates 1 rejected vote.

192. The petitioner submitted that these variations show that the election for Kibwezi East Member of National Assembly fell short of the Constitutional principles of accuracy and verifiability.

193. He referred the Court to **Article 86 (c) of the Constitution** which provides that:

**At every election, the Independent Electoral and Boundaries Commission shall ensure that the results from the polling stations are openly and accurately collated and promptly announced by the returning officer.**

194. He also referred the Court to the case of **Mohamed Ali Mursal v Saadia Mohamed & 2 Others [2013] e KLR** where the Court expressed itself as follows;

**“It is the view of this court that some errors cannot be excused. For instance it cannot be explained how figures from Forms 35 could not be transmitted correctly to Forms 36 or why all forms do not have statutory declarations. Returning Officers had the responsibility of correctly transmitting all the data from all Forms 35 to the Constituency Form 36 without errors or with minimal errors. Kenya is coming from the history of lack of confidence by the citizens in some of the organs of the Government including the 2nd Respondent and especially its predecessor, the ECK. I think it was time for this institution to rise above board in order to give the electorate confidence that their political rights will be protected.”**

195. A keen look at the highlighted polling stations reveals that the variations affected less than 20 votes. It is not shown that the 3rd respondent benefited from the said variations or whether the petitioner lost any votes.

196. It is common ground that after counting of votes, the results are recorded in form 35A which are final in the election of a member of National Assembly. The petitioner did not dispute the validity and accuracy of the results in form 35A's in all the highlighted polling stations. Breach of the Constitutional principle of accuracy was not demonstrated.

197. In my view, the variations were transposition errors when posting results from forms 35A to 35B and can be attributed to human imperfection, fatigue or even lack of diligence.

198. In my view, the circumstances in the **Mohammed Ali** case (supra) do not accord to the petition herein. The petitioner did not discharge his duty of establishing the effect of the highlighted variations on the outcome of the election being challenged. In any case, the cited authority acknowledged the possibility of minimal errors.

#### **Discrepancies in the 6 elections**

199. The Petitioner also alleged that the tallies for the different races were different. This is found in Para 16 of the Supporting Affidavit of the Petitioner. However, there was no analysis that was used to demonstrate how the same affected the credibility of the elections.

200. In the case of **MERU ELECTION PET NO 3 OF 2017 MOHAMED TUBI BIDU VS IEBC AND OTHERS** relying on the **Presidential Election Petition No 1 of 2017** the court held;

**“Votes cast for all positions need not necessarily be uniform. There could be various reasons which would account for any difference that may be realized. Therefore, unless cogent evidence is adduced, mere difference of numbers in votes cast in various positions is not per se proof of electoral malpractice. Except, where the difference is so huge that it cannot be said to be a result of a mistake or error, or it is incapable of any explanation, questions abound and backed with other evidence it may be a profitable argument in an election petition”**

201. In the case of **Francis Mwangangi Kilonzo v Independent Electoral and Boundaries Commission & 2 others [2018] eKLR** Muchelule J stated(at Paras 32 and 33) thus concerning variances in the different elections:

**“Were the KIEMS kits intended to be produced to prove the claim in paragraph 9(j) of the petition? That each of the 6 elections produced different results, and therefore the election was not verifiable! ... As a candidate he knew the registered voters in each polling station. He did not claim that in any polling station more people, than those registered, voted... In an election petition, it is upon the petitioner to prove, using cogent and credible evidence, all the allegations of irregularities, malpractices or breaches of the law and the Constitution cited in the petition. The court cannot interfere with the results of the election unless it has been demonstrated to the required standard that the irregularities, malpractices and breaches of the Constitution and the election law complained of in the petition have rendered the election invalid”**

#### **Alleged Campaigning after hours**

202. The petitioner alleged that the 3<sup>rd</sup> Respondent was involved in campaigning exercise beyond the campaign period. However neither the Petitioner nor any of his witnesses led evidence to show that either the 3<sup>rd</sup> Respondent or any person within her campaign structure campaigned in any manner after close of the official campaign period.

203. In her testimony, the 3<sup>rd</sup> Respondent was categorical that she finished her campaigns at Ulilnzi Market in Masongaleni Ward. She testified that she did this in full awareness of the closure of the campaign period. The third respondent submit that in the event that the date entered in the court record is 6<sup>th</sup> August 2017 and not 5<sup>th</sup> August 2017, then the date was inadvertently but erroneously captured and the court should treat it as such.

204. It is further submitted that the date entry in and by itself cannot be relied upon to prove, beyond reasonable doubt, that the 3<sup>rd</sup> Respondent campaigned beyond the campaign period. The Petitioner needed to place before the court cogent evidence of actual campaigns on 6<sup>th</sup> August 2017 so as to sustain that allegation, which evidence he did not tender before the court.

205. The court is in agreement with the said submission and holds that the petitioner was to discharge evidential burden before same shifted upon the third respondent as required by law and precedents.

206. According to the petitioner, the car hire agreement between the 3<sup>rd</sup> respondent and Japheth Muia (RWW8) was an indication that she campaigned after the set deadline.

207. In light of the standard of proof required in election petitions, the petitioner ought to have led cogent evidence to establish this allegation. As rightly submitted by the 3<sup>rd</sup> respondent, the dates entered in the Agreement needed not fit exactly to the official campaign period. This allegation was not proved to the required standard.

208. In the case of **Wilson Mbithi Munguti Kabuti & 5 others-v-Patrick Makau Kingola and Another (2013) eKLR**, the court dealt with similar allegations of bribery and campaigning out of time. The court observed as follows;-

**“The second schedule of the Elections Act specifically provides that any misconduct can and should be reported by any person to the Electoral Code of Conduct Enforcement Committee, which committee will liaise with government security agencies in the constituency and report suspected malpractices. Failure therefore to report the campaigning out of time, alleged bribery and vote buying cannot be remedied by this court unless there is concrete proof.”**

209. In the case of **Moses Masika Wetangula –Vs- Musikari Kombo (Supreme Court No. 12 of 2014)** .The court held that a party that alleges an election offence in a petition must proof the offence by the standards of beyond reasonable doubt.

#### **Failure to train petitioner’s agents**

210. The petitioner complained that the respondents 2 failed to train his agents. The 2<sup>nd</sup> respondent stated that he sent messages to candidates and chief agents and pinned circulars for agent training in markets within the constituency notifying the date and venue of agents training on 6<sup>th</sup> August 2017.

211. The court takes notice that training of agents was according to the national elections timelines as set to be on 6<sup>th</sup> August 2017 which

was in public domain. Instead, the petitioner seems to have chosen to train his own agents 70 of them on the same day in a venue close to where the IEBC was conducting the training. Deus Allan confirmed that attended training as an agent by the 2<sup>nd</sup> respondent on 6<sup>th</sup> august 2017. The ground was thus not proved to the required standards.

**Declaration of winner of MNA vide form 35c before form 35B was signed.**

212. The Petitioner complained that, the 2<sup>nd</sup> Respondent also declared the results in Form 35C on 10<sup>th</sup> August 2017 clearly before preparing and signing form 35B on 11<sup>th</sup> August 2017 in essence making the declaration a nullity and invalid for the results were declared in contravention to the provisions of Regulation 83 (1) of the Elections (General) Regulations, 2012.

213. The regulation prescribes that;

**“immediately after results of polling stations of a constituency have been received, by the R O, the RO shall in presence of the candidate or agent and observers if present-(e) complete relevant form in case of MNA position, 35B....**

**(g) Issue certificate to person elected in the MNA position in form 35C.....**

214. The record shows that upon receipt of all results for the MNA position in the Kibwezi E C subject in the instant matter, the RO declared the 3<sup>rd</sup> respondent winner on 10/08/2017 and signed form 35C before signing form 35B which contained the final tally of the MNA position.

215. However the petitioner never demonstrated how that anomaly affected the results. Ultimately the results in the 35A were entered in the form 35B which was signed by the R O on 11/08/2017 and form 35C reflected same results which were unchallenged or undisputed.

**CONCLUSION**

216. The ultimate question is whether or not the illegalities and irregularities highlighted above can warrant invalidation of the election. The Supreme Court in **Raila Amolo Odinga v Independent Electoral and Boundaries Commission (petition No. 1 of 2017)** correctly interpreted section 83 of the Elections Act to be disjunctive. The court found: -

**“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.”**

217. In the celebrated case of **Morgan & Others-v-Simpson and Another (1974) 3 All ER 772**, Lord Denning laid down the following principles;-

- 1. If the election was conducted so badly that it was not substantially in accordance with the law as to election, then the election is vitiated, irrespective of whether the result is affected or not;**
- 2. If the election was conducted substantially in accordance with the law it cannot be vitiated by a breach of the rules or a mistake at the polls, provided that the breach or mistake did not affect the result of the election;**
- 3. If the election was conducted substantially in accordance with the law but there is a breach of the rules or a mistake at the polls which affect the result, then the election is vitiated.**

218. From the foregoing, it is my view that the primary consideration in an election dispute is;-

- 1. Whether the election was conducted in accordance with the law and to what extent;**
- 2. Whether the will of the electorate was affected by irregularities in the conduct of the election.**

**THE PHRASE ‘AFFECTED THE RESULT’ IN SECTION 83 OF THE ELECTIONS ACT**

219. From emerging jurisprudence, this term is now referred to as the materiality test.

220. It was discussed by the High Court of **Tanzania in Mbowe V Elilifoo [1967] EA 240, 242** where Georges CJ stated as Follows:-

**“In my view in the phrase “affected the result,” the word “result” means not only the result in the sense that a certain candidate won and another candidate lost. The result may be said to be affected if after making adjustments for the effect of proved irregularities the contest seems much closer than it appeared to be when first determined. But when the winning majority is so large that even a substantial reduction still leaves the successful candidate a wide margin, then it cannot be said that the result of the election would be affected by any particular non-compliance of the rules.”**

221. In col. **Kizza Besigye v Yoweri Kaguta Museveni & Election Commission Presidential Election No.1 of 2001**, Mulenga JSC explained the meaning of the phrase “affected the result of an election in a substantial manner” as follows:-

*“To my understanding therefore, the expression non-compliance affected the result of the election in a substantial manner as used in section 58(6)(a) can only mean that the votes candidates obtained would have been different in a substantial manner, if it were not for the non-compliance substantially. That means that to succeed the Petitioner does not have to prove that the declared candidate would have lost. It is sufficient to prove that the winning majority would have been reduced. Such reduction however would have to be such as would have put the victory in doubt.”*

222. In the case of **Dickson Daniel Karoba-v-John Ngola Kariuki(2010)eKLR**, the court held that in determining whether non-compliance with or contravention of electoral laws affected the results of an election in a substantial manner, the court has to apply either quantitative or qualitative tests or both depending on the circumstances and facts of each case. The quantitative test is relevant where the numbers are in issue. The qualitative test is used where the quality or standard of an election on the whole is in issue.

223. In the present case, the numbers appear not to be in issue and as such, the qualitative test would apply.

224. I must cite the case of **Joho v. Nyange (No.4) (2008) 3 KLR 500, (supra)** where it was stated that:-

*“Error is to human. Some errors in an election are nothing more than what is always likely in the conduct of human activity. If the errors are not fundamental, they should be excused or ignored.”*

*“It is not every non-compliance or every act in breach of the election regulations or procedure that invalidates an election for being non-compliant with the law. As I have said minor breaches will be ignored.”*

*“...the result of an election is affected when the cumulative effect of the irregularity reverses it.”*

225. In my considered view, this does not necessarily mean that the electoral process must be perfect. Mistakes are bound to occur and what the court has to consider is the extent to which the law was or was not complied with and whether the mistakes tilted the will of the electorate. Where the election was conducted substantially in accordance with the law, the court must strive to give effect to the will of the electorate.

226. At this stage, I am also constrained to cite what was stated in the case of **WANGUHU NGANGA & ANOTHER vs. GEORGE OWITI & ANOTHER, ELECTION PETITION NO. 41 OF 1993**, that:-

*“...election petitions should not be taken lightly. Generalized allegations as the ones made in this petition are not the kind of evidence required to prove election petitions. As I said, they should be proved by cogent, credible and consistent evidence.”*

227. After going through the evidence on record and the parties submissions, and guided by the constitution, Elections Act and the rules and regulations there under, plus galaxy of cited authorities, I find that the petitioner failed to prove the mounted grounds in support of the petition to the required standards, and thus the petition herein fails and is hereby dismissed. The court finds that the 3<sup>rd</sup> Respondent was validly elected as MNA for Kibwezi E C.

228. On costs two pieces of law are relevant. **Section 84 of the Act** which provides that:-

*“An election court shall award the costs of and incidental to a petition and such costs shall follow the cause.”*

**And Rule 30 (1) of the Election Petition Rules which provide as follows:-**

**30 (1) The Court shall, at the conclusion of an election petition, make an order specifying –**

- a) The total amount of costs payable; and**
- b) The person by and to whom the costs shall be paid.**

229. From these provisions, it is discernible that: (1) In the exercise of court’s discretion to award costs in an election petition, the court shall be guided by the rule of thumb thereto that costs shall follow the cause: And (2) the election court has the power to cap the costs awarded.

230. Costs awarded should be fairly adequate to compensate for work done but at the same time should not be exorbitant as to unjustly enrich the parties or cause unwarranted dent on the public purse or injure the body politic by undermining the principle of access to justice enshrined in Article 48 of the Constitution. See the case of **Kalembe Ndile and Another v Patrick Musimba and Others Machakos HC EP No. 1 and 7 of 2013 [2013] e KLR**.

231. On my part, this petition was not complex and the issues were fairly straight forward. I have taken into account the number of counsels each set of the respondents employed and labour and material availed in the instant matter and the trial period taken. Accordingly, I will cap instruction fee at Kshs. 1, 500, 000 for 1<sup>st</sup> and 2<sup>nd</sup> Respondents, and Kshs. 2,500,000 for the 3<sup>rd</sup> Respondent. The costs shall be taxed and

certified by the Registrar.

**APPRECIATION**

232. [95] Before I close, I wish to thank all counsels herein for their industry and service to the court. I also wish to thank the court staff for acting in accordance with their duties and oath of office in service to the consumers of justice.

**FINAL ORDERS**

233. The final orders of the court are as follows;

- 1. The petition is hereby dismissed.**
- 2. The respondents are awarded costs on the following terms:**
- 3. Instruction fees for 1<sup>st</sup> and 2<sup>nd</sup> respondent are capped at Kshs.1, 500,000.**
- 4. Instruction fees for the 3<sup>rd</sup> respondent are capped at Kshs.2, 500,000.**
- 5. (The costs shall be taxed and the total costs certified by the Deputy Registrar of this court.**
- 6. The money deposited as security herein shall be applied in the payment of taxed costs on a pro-rata basis.**
- 7. A certificate of this determination in accordance with section 86(1) of the Elections Act, 2011 shall issue to the Independent Boundaries and Electoral Commission and the Speaker of the National Assembly.**

Orders accordingly.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 2<sup>ND</sup> DAY OF MARCH 2018.**

.....

**C. KARIUKI**

**JUDGE**