



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
THE ELECTIONS ACT, 2011
ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017
ELECTION PETITION 3 OF 2017

BETWEEN

TIMAMY ISSA ABDALLAPETITIONER

AND

INDEPENDENT ELECTORAL AND BOUNDARIES

COMMISSION1ST RESPONDENT

ADAN ALI MOHAMED2ND RESPONDENT

FAHIM YASIN TWAHA3RD RESPONDENT

ABDULHAKIM ABOUD BWANA.....4TH RESPONDENT

J U D G M E N T

Introduction and Background.

1. The Petitioner herein, HON. TIMAMY ISSA ABDALLA participated in the General Election of 8th August, 2017, where he was a candidate in the gubernatorial race and was defending his seat as Governor of Lamu County, against gubernatorial candidates who included the 3rd Respondent.
2. In a petition dated 5th September, 2017 and filed in this court on even date, the petitioner is seeking to have the declaration made on 11th August, 2017 by the 2nd Respondent, the County Returning Officer of Lamu County, Adan Ali Mohamed, whereby the 3rd Respondent, FAHIM YASIN TWAHA was elected Governor for Lamu County and the 4th Respondent, ABDULHAKIM ABOUD BWANA, declared Deputy Governor, invalidated as per the Constitution of Kenya, 2010 and the Elections Act, 2011.
3. The 1st Respondent becomes a mandatory Respondent by virtue of Elections (Parliamentary and County Elections) Petitions Rules, 2017 and features in this petition as the County Returning Officer in charge of the management of the elections in Lamu County.
4. The Petitioner set out the declared results of the elections in his petition as per Rule 8 of the Elections

(Parliamentary and County Elections) Petitions rules, 2017 as follows;

<u>Candidate</u>	<u>Votes Garnered.</u>
1. Twaha Fahim Yasin	22,972
2. Timamy Issa Adbdalla	22,420
3. Swaleh Swaleh Salim	2,484
4. Abdalla Abdalla Mohamed	1,086
5. Kinuthia Eliud Ndungu	<u>365</u>
Total	<u>49,327</u>

THE PETITION.

5. The petitioner's case is that the 1st Respondent and its officials failed to manage the electoral process and conduct an election that could be free, fair and credible as required by the Constitution of Kenya, 2010, the Elections Act, 2011, the Elections (General) Regulations, 2012 and the Election (Parliamentary and County Election) Petitions Rules, 2017 ("the Rules"). He alleges that the election held on 8th August, 2017 in Lamu County was marred with irregularities which deprived the same from being free, fair and credible and consequently failed to meet the constitutional safeguards and statutory thresholds.

6. The petitioner enumerates instances he believes warrant the court to conclude likewise, invalidate the said elections and consequently nullify the declaration of the 3rd Respondent as the duly elected Governor for Lamu County then call for a fresh election for the gubernatorial seat in Lamu County as per the grounds set out at paragraphs 8 to 46 of the petition.

7. The petitioner in his petition documents that there were persons who were duly registered as voters but could not vote either because;

- (a) their names were completely missing from the voter register, or
- (b) they had been transferred to other polling stations where they had not been registered, or
- (c) could not be identified by the KIEMS kit and were turned away by the presiding officers.

He gave 85 names of such voters. According to the petitioner, this is a violation of Regulation 69 (1) (e) of the Elections Regulations and the law which states as follows;

“in case the electronic voter identification device fails to identify a voter the presiding officer shall;-

(i) invite the agents and candidates in the station to witness that the voter cannot be identified using the device;

(ii) complete verification form 32 A in the presence of agents and candidates;

(iii) identify the voter using the printed register of voters; and

(iv) once identified proceed to issue the voter with the ballot papers to vote”.

The petitioner concludes that due to the geographical topography of Lamu County which hinders free movement, the relocation or transfer of a voter without his or her consent, made it impossible for them to vote, hence they were disenfranchised.

8. The petitioner accuses the 4th Respondent of affording him an unfair advantage by being a running – mate of the 3rd Respondent, having been an employee of the 1st Respondent as the Lamu West Registration officer just prior to the elections, hence was fully aware of his strong holds in which the anomalies complained of were committed. He also complains that the 4th Respondent worked with the Lamu East Constituency Returning officer, Mr. Mbwana Japhet and the Lamu West Constituency Deputy Returning officer, one Khadija Mohamed Ahmed prior to the 8th August, 2017 general elections, which resulted in the impartiality and lack of transparency in the said election in Lamu County.

9. The Petitioner further bemoans that Khadija Mohamed Ahmed was gazetted to serve as Deputy Returning officer in Lamu East Constituency vide Gazette Notice No 4979 of 26th May, 2017 but served in Lamu West constituency in the same capacity without authority or support of any law to conduct elections in the said constituency. He also complains that one Abdul Issa Mohamed was gazetted as a Deputy Returning officer for Lamu west and not Lamu East Constituency where he served during the election of 8th August, 2017. In conclusion the petitioner stated that the conduct of the two officers was in utter disregard of the Regulation 3 (2) and (4) for the Elections (General) Regulations, 2012 which provide as follows;

Regulation 3 (2) provides;

“Prior to appointment under paragraphs (1), the commission shall provide the list of persons proposed for appointment to political parties and independent candidates at least 14 days prior to the proposed date of appointment to enable them make any representations”

Regulation 3 (4) provides;

“Every appointment under this regulations shall be done transparently and competitively and thereafter published in the Gazette and such other manner as the commission may be deem necessary in order to widely publicize the appointment”.

10. The petitioners other complaint is that in a number of polling stations, there were found pre-marked ballot papers. He went on to enumerate the said polling stations at paragraph 30 of the petition. According to the petitioner, the voters and agents in these stations complained about the pre-marked ballot papers to the presiding officer, who then decided to improvise and employed remedial measures which are alien and unknown in the election laws, hence the need for a scrutiny.

11. The Petitioner alleges that in a number of polling stations the presiding officers did not display the ballot papers to the agents for verification of the candidate in whose favour each vote was cast before proceeding to count. He enumerated 29 affected stations at paragraph 34 of the petition. He went on to state that there were a total of 797 rejected ballot papers in the election for the governor of Lamu County, which he suspected that majority were designed to affect him, hence reason for seeking scrutiny and recount of the said votes to establish their validity.

12. In some polling stations the petitioner complains that presiding officers allowed people to vote without verifying their identities through the KIEMS. He accused the 1st Respondent of flouting Regulation 69 of the Elections (General) Regulations, 2017 and sections 6 (i) (ii) and or (iii) of the Elections offences Act, 2016. He stated that in particular, at Kizingitini Secondary school one M/s Nafia Abbas allowed sixteen people to vote without verification and this was reported to the Kizingitini police station by the Lamu East Constituency Returning officer and the presiding officer of the said station and she was replaced. On the strength of this, the petitioner sought for an order of scrutiny and recount of votes at Kizingitini Secondary School polling station.

13. The Petitioner went on to complain that there were instances where the presiding officers failed to discharge their duties in regard to assisted voters by;

(a) refusing to assist the voters who needed assistance on the ground that their National ID cards had signature, hence said that such voters knew how to read and write;

(b) claiming lack of or availability of very few declaration forms (Form 32 A) to be filled by persons who were to assist the said voters to vote;

(c) barring agents from witnessing such voters being assisted to vote.

(d) telling assisted voters to vote for the 3rd Respondent;

(d) failing to read out the petitioners full names to the assisted voters and only reading out the name “Abdalla Issa while leaving out “Timamy” which is his known name, yet there were two candidates sharing the name “Abdalla”

(e) keeping assisted voters for unnecessarily long because of lack of the declaration forms to be filled by person who to assist them to vote.

He cited sixteen (16) polling stations where these malpractices happened and concluded that they violated the provision of Article 81 of the Constitution, 2010. It was befitting to enact the law prohibiting the malpractices so that as we proceed, we are clear in our mind of the responses the Respondents made out.

Rule 69 (i) € of the Election (General) Regulations 2012 states as follows;

“In the case the electronic voter identification devise fails to identify a voter, the presiding officer shall;

(i) invite the agents and candidates in the station to witness that the voter cannot be identified using the devise;

(ii) complete verification forms 32A in the presence of agents and candidates;

(iii) once identified proceed to issue the voter with the ballot paper to vote according to Article 81 of the constitution, 2010,

“The electoral system shall comply with the following principles-;

(a) freedom of citizens to exercise their political rights under Article 38;

The said Article 38 of the Constitution has provided for elaborate political choices freely available to citizens which include **“the right to free, fair and regular elections based on universal suffrage and free expression of the will of the electors (at sub Article (2))**

And at sub Articles (3), provides for “the right of the citizen to be;

(a) registered as a voter,

(b) to vote by secret ballot in any election or referendum

(c) to be a candidate for public offices, member of political party and if elected to hold office.”

14. The Petitioner wound up his complaints by levelling an accusation that the 1st Respondent’s officials at Lamu East Constituency collated and declared the results on form 36B meant for the declaration of the results for member of National Assembly and not a Form 37B which is meant for County Governor

Elections hence seeks the court to declare the same as illegal, null and void for all purposes.

15. Based on the grounds set out in his petition, the petitioner asks from this court to make a finding that the 1st and 2nd Respondents' conduct and management of the election of 8th August, 2017 at Lamu County resulted in an electoral process that was substantially flawed, neither open nor transparent and not in compliance with the constitution, Elections Act or Regulations made thereunder hence culminating in electoral results that are not credible or lawful.

16. The Petitioner therefore seeks from this court to grant him the following reliefs;

(a) An order for scrutiny and recount of votes in the disputed polling stations stated in paragraphs 30, 34, 36 37 and 43 in the petition, in accordance with rule 29 of the Elections (Parliamentary and County Elections) Petition Rules, 2017.

(b) An order for scrutiny and recount of all the rejected votes (totaling 797) for the purpose of establishing the validity or otherwise of the rejection.

(c) A declaration that from the evidence available and anomalies cited in the petition, the election for Governor and Deputy Governor respectively held on 8th August, 2017 in Lamu county was not conducted in accordance with the mandatory provisions and requirements of Articles 38,81 and 86 of the Constitution, the election Act, and Rules and Regulations thereunder and therefore invalid, null and void

(d) A declaration that the 3rd and 4th Respondents were not validly elected as Governor and Deputy Governor respectively of Lamu County in the general election that was held on the 8th August, 2017.

(e) An order that a fresh election be held for the position of Governor and Deputy Governor respectively in Lamu County.

(f) In the alternative to the prayers hereinabove and upon the results of the vote scrutiny and recount as sought in prayer (a) and (b) above, the honourable court be pleased to declare the petitioner as the validly elected governor of Lamu County;

(g) The costs of this petition be awarded to the petitioner and paid by all the Respondents;

(h) Any other order that the Honourable court may deem fit and just to grant.

17. To buttress his claim, the petitioner swore and filed a fifty-five (55) paragraphs supporting affidavit setting out substantially the same matters raised in the petition and attached documentary proof of his allegations marked as "TIA1 to "TIA9 (a) (b) (c) (d) (e) and (f). I shall not reenact the same but will revisit paragraphs of interest in my analysis of the case. The petitioner also filed affidavits of 140 witnesses but because of time constraints presented 107 of them to stand by their affidavits.

18. The 1st and 2nd Respondents filed their joint response to the petition on 20th September, 2017 in which they denied all the allegations in the petition.

According to the 1st and 2nd Respondents, they conducted the election on 8th August, 2017 in accordance with the law and that their management of the process was above- board, hence the results thereof being fair, verifiable and a reflection of the will of the electorate at Lamu County.

19. The 1st and 2nd Respondents confirmed the candidates for the gubernatorial election of Lamu Count and the results each garnered as follows;

Name of candidate

Vote Garnered

1 Abdalla Abdalla Mohamed	1,086
2 Kinuthia Eliud Ndungu	365
3 Swaleh Swaleh Salim	2,484
4 Timamy Issa Abdalla	22,420
5 Twaha Fahim Yasin	22,972

And the 2nd Respondent declared the 3rd respondent as the duly elected Governor for Lamu County, having garnered the largest number of votes.

20. The 1st and 2nd Respondents assert that an elaborate electoral management system supported by various electoral laws and multiple layers of safeguards were provided by the 1st Respondent to ensure an open, transparent, participatory and accountable system to protect the integrity of the vote and guarantee a free and fair election, so that the irregularities alleged by the petitioner were inconsequential (if at all) and could not affect the true outcome, therefore reflected the overall will of the people of Lamu County.

21. The 1st and 2nd Respondents specifically deny the allegations by the petitioner. With regard to the first ground of the petition, the 1st and 2nd Respondents averred that the allegations were false as the voters who were registered to vote in any particular station and turned out to vote were allowed to exercise their right to vote while for those who could not be identified measures were in place to ensure that parties knew where their names were registered, how to lodge a complaint, and were accorded an opportunity to transfer from one polling station to another during the mass voter registration which ran from January to 19th February, 2017. The first respondent also provided a period of verification of the voter register which ran from 11th May, 2017 to 9th June, 2017. Further, a platform was created with Safaricom for voters to counter check by sending an sms to confirm where they had registered as voters and other details. They contend that it was incumbent for every voter to be first identified before being allowed to vote. And this was either through the biometric verification by the KIEMS kit or where this failed, through alphanumeric system using a voter's identification card. They denied that the 85 voters listed in paragraph 10 of the petition actually turned up to vote and or they were denied their right to vote or turned away from the station where they had been registered as voters.

22. As for the allegations of unfair advantage with regard to the 4th Respondent being cleared to contest in the August, 8th General election as a running mate for 3rd Respondent, despite having previously worked for the 1st Respondent, the 1st and 2nd Respondents blame the petitioner for making sweeping statements. They go on to explain that the 4th respondent resigned from public service as required and within the timelines provided for by the law. They contended that there is no law that bars persons who work for the 1st respondent from participating as candidates in an election as long as they resign within the time permitted by the law. In conclusion, the 1st and 2nd Respondents stated that the participation of the 1st and 2nd Respondents' officers in the election and yet were former workmates or close associates of 4th Respondent, did not accord him any favouritism or advantage over the petitioner.

23. In response to the allegation of the swapping of the Deputy Constituency Returning officers, the 1st and 2nd Respondent stated that it was properly done in good faith and neither has been shown to have done anything unfair, illegal, irregular or impartial so as to cause the petitioner any prejudice and vitiate the outcome of the elections.

24. There was the allegation of pre-marked ballot papers whose existence and their use by any of the voters is denied by the 1st and 2nd Respondents. In fact they denied ever receiving any complaint or at all of there having been pre-marked ballot papers at any polling station in Lamu County.

25. The 1st and 2nd Respondents also denied that there was shrouded secrecy during the sorting and counting of votes as this would be in breach of Regulations 70 and 80 of Election (General) Regulations, 2012 which provided the counting, and redress in the event that there is a dispute during the process of counting. They then averred that all the agents signed forms 37As signifying that the record therein reflected the outcome of the voting so that there was no basis for scrutiny and recount as sought.

26. Further, with regard to the claim that there were rejected votes which had been marked in favour of the petitioner, the 1st and 2nd Respondents claimed that the rejected votes had been properly isolated and excluded from the valid votes. The criteria behind this being that they do not reflect which candidate they had been cast in favour of.

27. There are claims in the petition that voters were allegedly allowed to vote without verification and assisted voters not being properly and transparently assisted to vote. This, the 1st and 2nd Respondents opposed and asserted that there was no failure of transparency and disregard of procedure during the voting process as to result into a sham gubernatorial election in Lamu County to defeat the will of the people by frustrating assisted voters and allowing voters to vote without verification.

28. On the sticky issue of results for the gubernatorial election in Lamu East constituency having been collated on form 36 B instead of form 37 B, the 1st and 2nd Respondents admitted that the results were collated in form 36 B instead of Form 37B's that had been provided, the said forms, were destroyed in the printer resulting into the use of an alternative form which was signed by all the agents including the petitioners chief agent. They also explained that the cumulative results are those that had been drawn from forms 37A s being a tally from all the polling stations of Lamu East constituency.

29. The 1st and 2nd Respondents explained the variance of votes cast for various elective positions in Lamu County as being a true reflection of stray votes, spoilt votes and rejected ballots. They denied that voters were given less ballot papers hence the variance. In conclusion, the 1st and 2nd Respondents stated that the elections for Governor of Lamu County were conducted in an open, transparent, impartial and accountable manner, so that the said elections can be said to have been free, fair as to reflect the overall will of the people of Lamu County.

30. In the resultant, the 1st and 2nd Respondents sought the court's intervention by urging it to dismiss the petition with the following orders;

(a) The Respondents were not in breach of and did not contravene the provisions of the constitution, the Elections Act or of any other statute;

(b) The gubernatorial election was conducted in accordance with the constitution and the Elections Act and all other relevant statutes and a valid declaration of the outcome of the election made;

(c) The 3rd Respondent was validly elected as the governor of Lamu County;

(d) The Petition lacks merit and should be dismissed; and

(e) The petitioners should bear the costs of the petition.

31. To buttress their responses and prayers sought, the 1st and 2nd Respondents swore an affidavit and filed affidavits of five (5) witnesses being Mwaruwa Chikophe Abdalla , Mbwana Japhet Omara, Khadija Mohamed Ahmed, Peter Karimi Meme and that of the 2nd Respondent ,Adan Ali Mohamed.

32. The 3rd and 4th Respondents chose to file a joint response to the petition on 21st September, 2017 in which they substantially adopted the responses of the 1st and 2nd Respondents. They too concluded that the election of Governor of Lamu County was free, fair, and conducted in accordance with the principles

laid down in the constitution, the Elections Act and the Regulations thereunder. They averred that any minor deviations or departures from any written law or regulations relating to the election, which they deny did occur, did not affect the results of the elections. They prayed that the court dismisses the petition with cost and to make the following orders;

- (a) The 1st Respondent Fahim Yasin Twaha and 2nd Respondent Abdulhakim Aboud Bwana were validly elected as the County Governor and Deputy Governor respectively of Lamu County respectively;**
- (b) A fresh election should not be conducted for election of the governor and Deputy Governor Lamu county**
- (c) scrutiny and recount of votes should not be allowed in any polling stations in Lamu County;**
- (d) A scrutiny and recount of all rejected votes be denied;**
- (e) The petition be dismissed with costs.**

33. The 3rd and 4th Respondents supported their joint response with their sworn affidavits dated 19th September, 2017 together with annexed supporting documents marked “FYT-1” to “FYT-4” and “AAB-1” to “AAB-5”.

They also filed affidavits sworn by forty four (44) witnesses. They called Thirty (30) of them to stand by their affidavits due to time constraints.

34. Simultaneously, the petitioner filed a notice of motion application dated 26th September, 2017 seeking that:

- (a) The application be certified as urgent and fixed for hearing on a priority basis.**
- (b) The petitioner be allowed to place additional seals on all the ballot boxes used on 8th August, 2017 in the election of governor for Lamu County.**
- (c) The petitioner be allowed to place additional locks in the premises or place where the ballot box used on 8th August, 2017 in the election of the governor for Lamu County are stored.**
- (d) The 1st Respondent to avail and furnish to court all the election materials including documents, devices, KIEMS kits and equipment used on 8th August, 2017 in the election of governor for Lamu County for storage and safe keeping pending hearing and determination of the petition.**
- (e) There be a scrutiny and recount of votes cast in all the 167 polling stations in Lamu County in the elections of Governor held on 8th August, 2017.**
- (f) The recount and scrutiny to include the examination of;**
 - (i) The written statements made by the Presiding officers and Returning Officers under the Elections Act;**
 - (ii) The printed copy of the register of Voters used in the election sealed in tamper proof envelopes;**
 - (iii) The original forms 37 As’ in the ballot boxes containing the election results for all**

the 167 polling stations;

(iv) The written complaints of the candidate and their representatives;

(v) The packets of spoilt ballot papers and stray ballot papers in all the 167 polling stations;

(vi) The marked copy of register;

(vii) The packets of counterfoils of used ballot papers;

(viii) The packets of counted ballot papers in all the 167 polling stations;

(ix) The packets of rejected ballot papers in all the 167 polling stations;

(x) All the rejected ballot papers;

(xi) The system and technology used by the 1st Respondent in the gubernatorial election in Lamu County including access for purposes of inspection to the 1st Respondent's KIMS kits, ICT Logs, servers, website and portal;

(xii) The scanned and transmitted forms 37 As containing the results from the 167 polling stations, scanned and transmitted from the 167 polling stations to the constituency tallying centers as well as the county tallying center;

(xiii) Costs of the application in the cause.

35. On 3rd October, 2017, the counsel to all parties consented to having the petitioner allowed to place additional locks on the premises or place where the ballot boxes used on 8th August, 2017 in the election of the governor for Lamu County are stored, hence preservation of evidence was dispensed with at pre-trial stage.

The application was urged by all counsel and court suspended prayers (e) and (f) (i) to (xii) for:

(e) a scrutiny and recount of votes cast in all the 167 polling stations in Lamu County in the election of governor held on 8th August, 2017;

(f) the recount and scrutiny to include the examination of (i) to (xii)

The court was to consider the said prayers either in the course of trial or after the parties have tendered their evidence and where in its opinion there would be unresolved issues or those which need clarification, as per the provisions under sections 80 (4) and 82(1) of Elections Act and rules 28,29 and 33 of the Elections Parliamentary and County Petition's Rules, 2017

36. After the close of pleadings, counsel for all the parties agreed on 30th October, 2017;

(a) to file separate issues within fourteen (14) days from that day;

(b) that the affidavits of evidence of witnesses filed by all parties herein be deemed as the evidence in chief and for the deponents of each affidavit to be cross examined and re-examined on the basis of the said affidavits filed.

EVIDENCE

37. To support his case, the petitioner called a total of One Hundred and seven (107) witnesses.

On the allegation that there were voters whose names were missing from the manual register, the petitioner called evidence of twenty one (21) witnesses including himself.

In his sworn affidavit which was adopted as his evidence in court, the petitioner who testified as Pw1 listed names of voters he alleges that their names were missing in the register of particular polling stations where they were registered. He gave three reasons for this, being;

- (a) that their names were completely missing from the voter register, or
- (b) that they had been transferred to other polling stations where they had not registered to vote, or
- (c) that they could not be identified by the KIEMS and were turned away by the presiding officers without voting albeit being registered voters.

38. Pw3, Salim Mohamed Busaidy, the chief agent of Amani National Congress Party in Lamu County had his affidavit sworn on 2nd September, 2017, adopted as his evidence in court. At paragraph 4 of this affidavit, Pw3 stated that he saw so many voters who were turned away from the polling stations and also gave the three reasons given by Pw1.

39. Pw37, at paragraph 6 and 7 of his affidavit, adopted as his evidence, stated that he went to vote at Lamu Girls Secondary school polling station and upon producing his ID card, he was told that the KIEMS kit could not identify him. He was then asked to leave the polling station. At paragraph 9 of the same affidavit, Pw 37 deponed;

“ THAT I saw more than 20 people at Lamu Girls Secondary school polling station being denied the right to vote because their names were missing in the KIEMS”.

A similar averment was carried at paragraph 3 of the affidavit of Pw 39, also adopted as his evidence, where he alleged that neither the KIEMS kit nor the register had his name and he believed that it had deliberately been removed. This was the same evidence deponed to by PW 41, PW46, Pw 54, Pw 55, Pw 56, Pw 57, Pw 61, Pw68, Pw 70, Pw95, Pw98 to Pw 105 in their affidavits which were also adopted as evidence in support of the petitioner's case and they were cross examined and re examined on them in court.

40. It is worth noting that there are star witnesses in the petitioner's case who testified on every allegations of the irregularities levelled against the 1st Respondent (IEBC), For instance, Pw1 set the pace and deposed on every allegation. The momentum was then taken up by Pw3 who also traversed all the allegation. Other star witnesses who followed were Pw4, Pw5, Pw6, Pw 7, Pw8, Pw9, Pw10 and Pw11.

41. When put under cross examination, the testimony of all these witnesses revealed that their sole purpose or aim was to achieve or obtain an order for scrutiny, which they believed would confirm their evidence.

42. On the allegations of the KIEMS kit failing to identify voters the petitioner availed the same witnesses but expanded the list with regard to this to 31. In particular, PW 11 who deposed that he was an agent for Chap Chap Maendeleo party MCA, and at paragraph 4 of his affidavit stated that while at Mikundini primary school polling station, he witnessed ten (10) voters who were turned away without voting because the KIEMS kit failed to identify them. When cross examined, he admitted that he did not name any of the ten (10) votes who were turned away.

The particular witnesses who testified that they could not be identified by the KIMS kit were Pw36, Pw38, Pw39 Pw45, Pw55, Pw57, Pw70, Pw71, Pw80, Pw96, Pw100, PW101 and Pw105. Pw33, Pw35, Pw37, Pw41, PW43, Pw49, P50, Pw54, Pw56, Pw58, Pw59, Pw61, Pw68, P69, Pw95, Pw85, Pw99 and 102 and Pw 103. They also testified to having witnessed other people being turned away by presiding officers without voting because their names could not be identified by the KIEMS kit and the manual register was not checked to confirm their names.

43. There was evidence by Pw1,Pw 3,Pw 10,Pw 11, Pw 13, Pw 33, Pw 36,Pw 46,Pw 47,Pw 38,Pw 54,Pw 64, Pw 68,Pw 71,Pw 72,Pw 73, Pw 74,Pw 79, Pw 81, Pw 85,Pw 87, Pw 88, Pw 89, Pw90 Pw 91,Pw 93,Pw 95, and Pw 106,that the 1st Respondent transferred voters to other polling stations without their consent or application on their part. In fact most of these witnesses alleged that they were victims of this. According to the evidence of Pw1 and these witnesses, a voter has a right to register and vote in a polling station of his or her own choice, and cannot be transferred to any other polling station without their own application, as this would be in breach of the provision of section 7 (1) of the Election Act.

44. There was evidence by Pw1 and Pw3 that there were other voters who had failed to be transferred to other polling stations but the 1st respondent failed to do so. The affected voters who testified to confirm this were Pw 45, Pw 47,Pw69 and Pw 70.

45. To support all these allegations some of the aforementioned witnesses annexed the acknowledgement slips. They alleged had been issued to them by 1st Respondent and copies of ID card to their affidavits.

46. According to Pw1, (the petitioner) such voters were disenfranchised by the actions of the 1st Respondents which violated the principles laid down in the Constitution, the Election laws and Regulations made thereunder.

47. Pw 1 and Pw3 testified that the 4th Respondent contested in an election in an area where he had worked as a Registration officer and Constituency Election Coordinator. It was also in their testimony that the persons who were in charge of the elections were his former workmates and close associates. This, according to the petitioner resulted into lack of fairness, impartiality, transparency and neutrality.

48. There was also evidence that Khadija Mohamed Ahmed (Dw2) was appointed as the Deputy Constituency Returning officer for Lamu East for the Election of 8th August, 2017 vide gazette Notice No 4979 dated 26th May,2017 but did not work there. She instead worked in Lamu West constituency where she had not been gazetted to work .This was the same case with Abdul Issa Mohamed, who was also gazetted to work in Lamu West as a Deputy Constituency Returning Officer vide Gazette Notice No 4979 of 29th May,2017 but instead worked in Lamu East Constituency where he had not been gazetted to work. According to the petitioner, the two IEBC officials swapped their work stations without authority and this undermined the integrity, neutrality, fairness, impartiality and transparency of the elections since the two illegally presided over the process of elections where they had not been gazetted for.

49. The Petitioner together with Pw 3, Pw6,Pw7, Pw9, Pw10, Pw12, Pw13 Pw26, Pw28, Pw30, Pw31, Pw 50 testified that there were pre-marked ballot papers which were used in polling stations he has listed at paragraph 30 of the petition. It was further evidence that when the voters and agents complained of this to the presiding officer , they were , for instance at Mapenya primary school, stream 1 and 2, ordered to vote using the said pre-marked ballot papers after the agents and presiding officers drew an agreement, which is a process the petitioner says is unknown in law.

50. With regard to failing to sufficiently display ballot papers to agents, so they could verify who they had been cast in favour of, the petitioner tendered evidence that this happened at the polling stations enumerated at paragraph 34 of the petition. His evidence was supported by that of Pw 13, Pw 14,Pw 16,Pw 18, Pw 19,Pw 21,Pw 22,Pw 23, Pw 24,Pw 26,Pw 27,Pw 28, Pw 30, pw 32, Pw 35, Pw 45, Pw 62, and Pw 63 who claim to have been agents at these polling stations and witnessed this.

51. The Petitioner together with Pw 2 and Pw 52 tendered evidence that an IEBC clerk by the name Nafia Abass allowed 16 people to vote without verification at Kizingitini secondary school polling station. That a report to this effect was made at Kizingitini police station and a copy of OB. No 7 of 8th August, 2017 was annexed to the affidavit of Pw2 as evidence.

52. With regard to the ground that presiding officers failed to discharge their duties as required by the law in respect of assisted voters, evidence to this effect was adduced by the petitioner, (Pw1),Pw 14,Pw 15, Pw 16, Pw 17,Pw 22, Pw 23, Pw 29, Pw 35, Pw 41, Pw 43, Pw 50, Pw 51, Pw 53, Pw 56, Pw 57, Pw

59, Pw 60, pw 762, and Pw 107. This, they said happened at the polling stations enumerated at paragraph 42 of the petition.

53. The petitioner together with Pw 7, Pw 14, Pw 18, Pw 19, Pw 24, Pw 26, Pw 30, Pw 37, Pw 59 and Pw 60 testified that in some polling stations, presiding officers rejected valid votes which had been cast in favour of the petitioner. They mentioned the affected polling stations as Sese primary school, Mkunumbi primary school, Sinambio primary school, Mapenya primary school, Matondoni primary school, lake Amu primary school, Shella primary school polling station 2, Bahari primary school 2, and Kizingitini primary school. That this is what resulted to 797 ballot papers being rejected in the whole of Lamu County. They also testified that the presiding officers in some of these stations did not indicate on the forms 37As the reason for rejecting the said ballot papers.

54. It was the evidence of Pw 1, Pw 12, Pw 29, Pw 30, Pw 52 and Pw 107 that there were polling stations such as Kizingitini secondary school polling station 2, Lake Kenyatta primary school polling station 1, Kizingitini primary school 1, Mikinduni primary school polling station 1 and Mbwajumwali primary school where voters were either issued with more or less or no ballot papers for the election of the governor.

55. The 1st and 2nd Respondents presented five (5) witnesses to respond to the petition and testify on matters deposed to in their affidavits which were adopted as evidence.

56. Dw1 Mwarua Chikophe Abdalla in his affidavit sworn on 20th September, 2017 and adopted as evidence in this case, stated that he was the Constituency Returning officer for Lamu West and that due process was followed to the letter during the elections of 8th August, 2017 in the said constituency. He annexed a spread sheet of the pattern of voting for all the positions and what happened to the ballot papers. He also annexed extracts of the Polling Station Diaries (PSDs) which explained the voter variances for different elective positions in the Constituency.

57. Dw2, Mmbwana Japhet Omara, also had his affidavit adopted as his evidence in this case and he deposed that he was a Constituency Returning officer for Lamu East and also resident of Lamu. He explained that transfers in IEBC were an internal matter and that his association with the 4th Respondent was not in anticipation of his candidature as a running mate for the 3rd Respondent. In cross examination, he denied that his work in Lamu East conferred any advantage to the 4th Respondent by the mere fact that they were once associates at work. He also denied any irregularities or complaints with regard to KIEMS kits failing to identify voters having been made to them. He said that all the agents signed the Form 37As indicating that they had agreed with the results and concluded that the voting was conducted in accordance with the laws and Regulations governing elections.

58. DW 3, Khadija Mohamed Ahmed deposed that she was the Deputy Constituency Returning officer at Lamu West Constituency. She admitted that she swapped with her counterpart who agreed to work in Lamu East in the same capacity long before the August 8th, 2017 election. At paragraph 6 of her affidavit, she explained the reasons for the swap as security and transport challenges (logistical concerns) and annexed proof of prior communication with the Senior Officers of the 1st Respondent who agreed to the change of stations. In cross examination, she clarified that only the Presiding officers had access to the KIEMS kits while all other technical matters were handled by the Constituency ICT officers. She said that her role being logistical, she would not have had an opportunity to interfere with the results or be placed directly in contact with the voters so as to give her an opportunity to interfere with the voting process at the polling stations. In conclusion, she stated that the allegations against her were false and that the elections in Lamu West were conducted in accordance with the law.

59. DW 4, Peter Kirimi Meme swore an affidavit on 20th September, 2017, where he denied in toto the existence of pre-marked ballot papers and the allegations in the evidence of Christine Adhiambo Osio Agutu (Pw 65), who was also a presiding officer at Mapenya polling station stream 1, while he was a presiding officer at stream 2. He annexed a document which was prepared by IEBC officials and agents after reaching a consensus that the marks on the ballot papers were printing errors and resolved that the

same be ignored and the papers be used to vote so as to move the exercise forward. The said Christine Adhiambo Osio Agutu was not one of the signatories to this document though.

60. Dw 5, was the 2nd Respondent, Adan Ali Mohamed. In his affidavit sworn on 20th September, 2017 and adopted as evidence, denied any wrong doing by any of the officers who worked under him during the 8th August, 2017 election in Lamu County. His evidence was that the gubernatorial election in Lamu County was conducted in accordance with the law. He repeated the assertions in the response to the petition and attached all the forms 37As and 37Bs for Lamu West and Lamu East constituencies as evidence of this. His prayer to court is for it to find that the gubernatorial elections for Lamu County were conducted in accordance with the constitution, and relevant statutes so that a valid declaration of the outcome of the election was made.

61. In a nutshell, the testimony of the 1st and 2nd Respondent's witnesses led to the conclusion that they conducted the election in accordance to the law and procedures relating to elections in Kenya, hence achieved the threshold of transparency, free, fair and verifiable results. Their prayer is that the election of the 3rd and 4th Respondents be upheld.

62. The 3rd and 4th Respondents called thirty (30) witnesses to with them testify in support of their sworn statements. The conclusion in their evidence was that the conduct and management of the election was above board as there were no malpractices attributable to them. Their evidence rebutted the evidence of the petitioners witness, most of whom were just agents like some of them. Their prayer was that the election of the 3rd and 4th Respondents be upheld by the court.

63. At the close of the trial, the petitioner's counsel urged the court to consider prayers No. (e) and No. (f) (i) to (xii) of the Notice of Motion application dated 26th September, 2017, in which they were seeking orders for scrutiny and recount, and the same had been suspended by the court. The counsel for the 1st and 2nd Respondent, Mr Munyu urged the court to dismiss the application with costs for lack of merit and indicated that they were relying on their replying affidavit dated 16th October, 2017, submissions and list of authorities dated 5th October 2017 together with the evidence so far adduced in court.

Mr Kilonzo, counsel for the 3rd and 4th Respondents, while associating himself with the submissions of Mr Munyu, counsel for the 1st and 2nd Respondent, also indicated that he was relying on their replying affidavit dated 6th October, 2017, submissions and provisions of the law he filed on even date. He also urged the court to dismiss the application as the petitioner did not have any grievances against them and neither had he laid any basis to warrant the grant of those prayers.

64. The court considered the application with regard to the evidence on record and relevant law and allowed limited scrutiny to certain polling stations to verify certain issues, validity of votes and disputed forms vide its order dated 2nd February, 2013. The court directed and on 9th February 2018, a complete report on the said scrutiny was filed by the Deputy Registrar of this court Hon. Wandia Nyamu, who supervised the same. The court then proceeded to direct the parties to submit on the said report during the highlighting of their written submissions respectively.

ISSUES FOR DETERMINATION.

65. The parties filed written submissions in compliance with the court's directions together with list of authorities. They proceeded to highlight the same on 12th February, 2018.

66. During pre-trial, the parties had agreed, and they filed statements of issues for consideration separately. However having considered the pleadings on record, the evidence of witnesses and the written submissions by the learned counsel, I will draw the issues for determination from the eight grounds upon which the petition is founded and what the parties filed. The issues are as follows;

(a) whether the August,2017 gubernatorial election in Lamu County was conducted in accordance to the principles laid down by the Constitution, the Elections Act, 2011 and the Regulations thereunder.

(b) whether there were any irregularities and or illegalities in the conduct of the Lamu County gubernatorial election which would have affected the outcome of the same.

(c) whether any registered voters irregularly and illegally deprived of their right to vote contrary to the provisions of the Constitution of Kenya, 2010, the Election laws, and the Election (General) Regulations 2017;

(d) whether irregularities and or non compliance with the law, if at all, materially affected the results;

(e) whether the petitioner has discharged the burden of proof as required of him in the instant petition against the Respondents;

(f) what orders and reliefs should the court grant, if any;

(g) who shall bear the costs of the petition and to what extent.

GENERAL PRINCIPLES APPLICABLE:

67. The law governing elections in Kenya finds its efficacy in the Constitution of Kenya, 2010. Articles 81, 82, 83, 84, 85, 86, and 87 of the constitution cover the active implementation of an election in this country..

Article 81 as read with **Article 38 of the Constitution,2010** set down all the principles of an electoral system. An electoral system must comply with;

(a) the freedom of citizens to exercise their political rights under Article 38 which provides;

“(1) Every citizen is free to make political choices. Which includes the right –

(a) to form , or participate in forming, a political party;

(b) to participate in the activities of, or recruit members for , a political party; or

(c) to campaign for a political party or cause.

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

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

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

(3) Every adult citizen has the right, without unreasonable restrictions-

(a) to be registered as a voter;

(b) to vote by secret ballot in any election or referendum; and

(c) to be a candidate for public office, or office within a political party of which he citizen is a member and, if elected, to hold office

- (b) the two third gender rules
- (c) fair representation of persons of disability.
- (d) universal suffrage based on the aspirations for fair representation and equality of vote.
- (e) free and fair elections which are;
 - (i) by secret ballot;
 - (ii) free from violence, intimidation, improper influence or corruption;
 - (iii) conducted by an independent body;
 - (iv) transparent and;
 - (v) administered in an impartial, neutral, efficient, accurate and accountable manner.

Article 82 of the constitution empowers parliament to enact legislation that cover all aspects of an electoral system.

Article 83 of the Constitution sets out the threshold for one to be registered as a voter.

Article 84 of the Constitution makes it mandatory for all candidates and political parties to comply with the code of conduct prescribed by the Independent Electoral and Boundaries Commission.

Article 85 of the Constitution provides for the threshold to be observed by the Independent Electoral and Boundaries Commission so as to achieve;

- (a) whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;**
- (b) the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;**
- (c) the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and**
- (d) appropriate structures and mechanisms to eliminate electoral malpractice and put in place, including the safekeeping of election materials.**

Article 87 of the Constitution empowers parliament to enact legislation to establish mechanisms for timely settling of electoral disputes and has gone further to provide for strict timelines to be adhered to by all parties or persons.

68. The above exposition clearly shows that all other laws that govern the electoral system are creatures of the constitution and their breach results into stiff sanctions. The Election Act, 2011, the Elections (General) Regulations 2012 as amended by L.N 72 of 2017, the Elections (General Amendment) Regulations 2017, the Elections (Parliamentary and County) Petitions Rules, 2017 together with evolving case law derive their validity from the constitution.

69. The application of these laws is triggered by the actions of the players during an election process.

70. The petitioner in this instant petition has accused the 1st and 2nd Respondents that they did not carry out their duties in accordance with the law and he therefore seeks this court's intervention to nullify the election and grant him the prayers he has sought herein.

He also alleges that the 4th Respondent's position as a former employee of the 1st Respondent prior to the said election, occasioned him an unfair advantage. The 3rd Respondent's victory is challenged since he would directly be affected by the outcome of this petition.

71. The standard of proof is set out by section 83 of the Elections Act 2011 (un amended) and it provides that;

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

This section is stated in negative terms so that it is prohibitive in order to fully protect the will of the electorate and define the standard of proof so as to be in line with the provisions of Article 86 of the Constitution as set out herein. This section is meant to guide a party on the quality of the evidence he/she is required to offer so as to elicit a proper response from the other party. It is this that will then invite the jurisdiction of a court to interfere with election results.

72. Two decisions have brought this debate to rest. In the case of **RAILA ODINGA AND 5 OTHERS - V- IEBC AND OTHERS (2013** (Consolidated); the Supreme Court in determining the burden of proof held a follows:

“(195)there is apparently a common thread in the fore- going comparative jurisprudence on burden of proof in election cases. Its essence is that an electoral cause is established much in the same way as a civil cause, the burden rests on the petitioner, but depending on the effectiveness with which she or he discharges this, the evidential burden keeps shifting. Ultimately of course, it falls to the court to determine whether a firm and unanswered case has been made”.

73. The above findings applied to the pleadings, and oral testimonies of parties in this realm of situations, the function of a court will be to approach the complaints raised and the answers given as an umpire watching a game of volleyball where one scores when he or she over whelms the other side and the ball rests there, thus being on the receiving end.

74. By applying this elimination method, the question of how many irregularities and or malpractices (illegalities) alleged in the case remain un answered is what the Judges of the supreme Court were referring to in their judgment. It is the petitioner who should in the first instance prove that indeed the irregularity did happen. The respondent's duty then will be to show that he/she was either within the law or that the law permitted what happened so that the right of the voter is in turn protected.

75. With regard to the standard of proof, the court went on and pronounced itself as follows;-

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

76. The burden of proof has remained an issue, and in the recent case, being, the Presidential petition No.1 of 2017, the Supreme Court again vindicated itself a follows;

“Thus, a petitioner who seeks the nullification of and election on account of non- conformity with the law on this basis of irregularities must adduce cogent and credible evidence to prove the grounds to the satisfaction of the court”

Further, this court went on to state and hold that;

“(132) Though the legal and evidential burden of establishing the facts and contentions which will support a parties case, is static and remains constant throughout the trial with the

plaintiff, however, depending on the effectiveness which she or he discharges this, the evidential burden keeps shifting, and, its position at any time is determined by answering the question as to who would lose if no further evidence were introduced?”

The court continued to state that;

“(133) It follows therefore that once the court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not contravened, then the evidentiary burden shifts to the respondent in most cases, the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or if the ground is that of irregularities, that they didn’t affect the results of the election”.

77. The Honourable court then concluded according to the provision of section 83 of the Elections Act, 2011 (Un-amended), the two limbs should be applied disjunctively such that a petitioner who proves to the satisfaction of the court either limb can void an election.

78. The Honourable court also discussed the fines one should achieve in assessing evidence. The principles established by the RAILA case are far reaching and clarify the required standard of evidence that one should tender in order to succeed in an election petition. A casual presentation of evidence would therefor result in the loss of a petition and costs.

79. With regards to this petition ,it is also important to understand what **illegality** and **irregularity** are;

The supreme court in **RAILA (2017)** at paragraph 304 of the Presidential Petition No 1 of 207 held as follows;

(304) Illegality refer breach of the substance of specific law where irregularities denote violation of specific regulations and administrative arrangements put in place”

In Gatirau Peter Munya v Dickson Mwenda Githini & 2 others (2014) e KLR, the supreme court interpreted section 83 of the Elections Act as follows;

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

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

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

“(220) 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:

See also the holdings by the Supreme court at paragraphs 371-274 in RAILA, 2017)

ANALYSIS OF THE EVIDENCE

80. I now proceed to evaluate the evidence that was adduced in this case to determine the issues that have arisen within the aforementioned principles.

The deprivation of the right to vote

81. It is the petitioner's case at paragraphs 9,10,11,and 12 of the petition that there were persons in various polling stations in Lamu County , who having been duly registered as voters were not able to cast their votes in these stations, which is contrary to Article1, 38 and 81(a), all of the Constitution. He listed 84 persons as some of those persons at paragraph 10 of the petition and some of them were presented as witnesses, having filed affidavits which were adopted as their evidence to this effect by the court and they testified. Their evidence in summary was that:

(a) their names were omitted from the voter register;

(b) the electronic system known as KIEMS kits were not functioning and the presiding officers did not use the manual registers as an alternative means of identifying the voters but instead turned them away;

(c) that they were registered in certain polling stations such as Shella primary school but on the day of voting found that their names were appearing in other polling stations in the county;

(d) that they had applied to be transferred to a polling station from another but on the day of voting found the transfer had not been effected.

82. While confirming that the Constitution of Kenya, 2010 under Article 38 guarantees every citizen of this country the right to vote once he or she is registered as a voter and their name appears in the register, the Respondents submitted that neither the petitioner nor the witnesses who testified to these allegations adduced any proof to support the same. It came out during cross examination of these witnesses that they were relying on their ID card or acknowledgment slips to prove that they had registered as voters. Regulation 13A specifies the manner in which one registers as a voter. For a complaint to be sustained one is under a duty to produce a copy of evidence in form A that he /she applied to be registered as a voter. Failure to do so is fatal and the claim cannot be sustained in law.

83. It also came out that the 1st Respondent had put in place an elaborate system through which person could verify if they were duly registered as voters, including verification through the SMS service that was provided before the August, 8th 2017. It is note worthy that none of the witnesses adduced evidence to confirm they did this. I agree with the counsel for 3rd Respondent as a voter can only be verified by way of inspecting the voter register and not merely by the production of an identification card or acknowledgment slip as sought by petitioners witness.

84. I find the claims and or allegations on the issue of registered voters having been denied the right to vote and therefore having been disenfranchised, intertwined. For a petitioner to succeed on such ground, he or she ought to have sought to have a copy of Registers of voters or poll registers to be supplied to him after filing the pleadings so as to prove that the names of the voters he has listed at paragraph 10 of his petition appear there, or could have been checked , confirmed and voter allowed to vote, or that the name of the voter was totally unavailable. In any case, an allegation that one registered as a voter in a particular registration center is the jurisdiction of the IEBC and application of such nature would have been invoked so as to elicit a reply.

85. Under Article 35 of the Constitution every citizen is guaranteed the right to access information more so when such information is required to protect a fundamental right such as the right to vote. A poll register is a public document as per the election regulations and there is no evidence that the petitioner applied for it and was denied access to it. Section 4 of the Elections Act deals with the register of voters and it provides;

“ There shall be a register to be known as the Register of voters which shall comprise of –

(a) poll register I respect of every poling station;

- (b) a ward register in respect of every ward;
- (c) a constituency register in respect of every constituency
- (d) a County register in respect of every county; and
- (e) a register of voters residing outside Kenya.

(2) The commission shall compile and maintain the Register of votes referred to in sub section (1)

(3) The register of voters shall contain such information as shall be prescribed by the commission.

86. In the course of cross-examining the petitioner and his witnesses by the Respondents, it clearly came out and the same was not controverted that there were several means of confirming whether one is a registered voter and at which station or center. The 1st Respondent informed all that after the close of mass registration, there was a period allowed for inspection of registers after which there was the electronic means whereby one would send an sms to number 70000 and all details about one being a registered voter and where to vote would be available. A formal complaint, in case one found their name missing from the poll register would then be lodged and form 32 A would then be used to allow voting by such a person. Under section 6 A of the Elections Act, 2011, verification of the Biometric data is meant to be open not less than 90 days before the date of the general election for anyone to verify their data.

87. There is no single witness who claimed this irregularity happened, who tendered quality evidence to support this claim. And neither was their evidence that they had verified with the Biometric data and changed or requested to update objection to. Of worth-noting is a witness like Pw3, the chief Agent of the ANC party who testified that he saw many voters being turned away from polling station but did not give the name of any of them or even those from the list given by the petitioner at paragraph 10 of the petition. In fact when most of the witnesses were put under intense cross examination, it clearly came out that their sole purpose was to achieve obtaining an order for scrutiny. Most of them pointed to the ballot boxes as the only ones holding the truth, making their testimonies remain an on-slaught to obtain an order for scrutiny.

88. It is also worth noting that it was not for the 1st Respondent or any of the Respondents to provide such information or evidence as there was no basis for them to do so. It was the petitioner's case and the reaction elicited from the 1st Respondent was that all persons who were registered voters and turned up at respective polling stations and voted. In fact a number of witnesses during cross-examination and the record of Forms 37 As attached to the affidavit of the 2nd respondent confirmed or showed that the voting took place and a majority of voters voted. The "Remarks column" on the polling station Diaries (PSD) indicated no remarks to the effect that any voters were turned away without voting or that the KIEMS kit device failed. No agent recorded or reported such incidents, which appear to have been of such high magnitude.

89. In view of the foregoing, this court finds that the evidence of the petitioner (Pw1), Pw 2, Pw 3, Pw 11, Pw 33, Pw 35, Pw 37, Pw 38, Pw 39, Pw 41, Pw 46, Pw 47, Pw 49, Pw 50, Pw 54, Pw 55, Pw 56, Pw 57, Pw 58, Pw 59, Pw 61, Pw 67, Pw 68, Pw 69, Pw 70, Pw 95, Pw 96, Pw 98, Pw 99, Pw 100, Pw 101, Pw 102 and Pw 103 failed to meet the required standard of prove with regard to failure by registered voters to vote, registration, failure of KIEMS kit to identify votes, transfer of votes or appearance at the polling stations. Clearly, the burden of proving all these allegations was upon the petitioner, but he failed to do so by failing to obtain copies of all the poll registers used during the elections during the filing of the petition to corroborate his evidence and that of these witnesses. He therefore failed to discharge his burden.

90. As regards to the evidence of unauthorized transfer of voters, the law under section 7 of the Election Act, 2011 requires that one notifies the commission in a prescribed manner within 90 days before the date of the General Election of the intention to transfer to another polling station. Regulation 14 of the

Elections (Regulations of voters) Regulations, 2012 provides for the procedure and the same ought to be made in Form C. What this means is that a party complaining should state that he or she was registered in a particular area, inspected the register, then applied for change and produce Form C thereof in order to elicit a response from the 1st Respondent. The witnesses who swore affidavits and testified with regard to this were Pw1, Pw 3, Pw 10, Pw 11, Pw 13, Pw 33, Pw 36, Pw 4, Pw 47, Pw 48, Pw 49, Pw 54, Pw 64, Pw 68, Pw 73, Pw 74, Pw 75, Pw 76, Pw 79, Pw 81, Pw 85, Pw 86, Pw 87, Pw 88, Pw 89, Pw 90, Pw 91, Pw 92, Pw 93 and Pw 95 and neither of them produced such form nor stated that they ever inspected the register to confirm their registration as voters. The 1st Respondent's response to these allegations was based on these regulations. Even Pw 86, Mohamed Hassan Ali who was contesting for the position of MCA produced a letter dated 11th July, 2017 and addressed to the chairman of the 1st Respondent in which he was alleging that he was a registered voter at Shella primary but during the voter verification exercise in May, 2017 he found that his name appearing in Mkomani ward. He did not adduce any evidence that he formally made an application to be retransferred to Shella ward as per the Regulations. It was also submitted by the Respondent that under section 5 and 7 of the Elections Act, and Regulations 15 of the Election (Regulations of voters) Regulation, 2012, this witness submitted his complaint too late in the day for any changes to be effected.

91. For these reasons this court finds and holds that the evidence deposed to in witnesses affidavits and what was adduced during the examination of these witnesses in court regarding this irregularity has also failed to meet the required standard of proof and is rejected.

92. In the course of interrogating witnesses who alleged in their testimonies that they had been denied their right to vote, it has been submitted by the Respondent and I confirm the same, from the evidence that was adduced before me during examination of some of these witnesses, that;

- (a) Some witnesses such as Pw 94, Nasser Ahmed Mohammed, had an opportunity to vote where they had been registered as voters but he voluntarily failed to do so;
- (b) some witnesses such as Pw 103 Rukiya Abbas said stubbornly that they refused to confirm their name in all the polling station at the center where they were to vote.
- (c) other witnesses testified that they had verified their status as voters via sms but conveniently had their phones either lost, stolen or forgotten at home by the time they came court to testify.
- (d) some admitted had they gone to the stations here their names were shown to appear in the poo register, they would have voted for the governor or their candidate of choice.

And as submitted by the respondents, it is speculative for the petitioner to presume that the 85 person or some of them would have voted for him in view of the procedure of voting in Kenya being by way of secret ballot. I find that the allegations by the petitioner that registered voters were denied to vote fails for want of proof.

Alleged lack of impartiality, transparency, fairness, neutrality and improper influence of the part of the 4th Respondent.

92. The petitioner (Pw1) alleged that he faced an unfair advantage in the gubernatorial election where he was defending his seat as governor of Lamu County due to the fact that the 4th Respondent was a former employee of 1st Respondent, IEBC, where he served as a Constituency Returning officer and Elections Coordinator in Lamu County, just prior to his resignation so he could run for an elective post, which is as the running mate of the declared winner, the 3rd Respondent. In his petition and affidavit, the petitioner deposed that the 4th Respondent was working as the Lamu West Registration officer at the time when the people he has cited at paragraph 10 of the petition were registered as voters in the respective areas and was all along aware that this was his (petitioner) strong holds and this is where the anomalies complained of were committed.

94. It has not been denied by the respondent, both in their responses and submissions, that the 4th Respondent was an employee of the 1st Respondent as the Elections Coordinator, having been gazetted as a Registration officer in Lamu West by a Gazette Notice dated 12th February, 2016. It is also not denied that the 4th Respondent resigned from employment and his resignation accepted by the 1st Respondent. so he could run for an elective post in Lamu County. What is denied is the petitioner's allegations that there was lack of impartiality, transparency, and undue influence in the conduct of the gubernatorial elections, of 8th August 2017 due to the 4th Respondent participation, as a running mate to 3rd Respondent in the said election. This is because the petitioner was put to task during cross examination to show to this court in which way the 4th Respondent was involved in the voter registration, voter verification and or tampered with the voter register or interfered with the elections officials or process so as to affect the results of the election. In fact, the petitioner was also questioned on when he got to know of the 4th Respondents intention to run for an elective office and why he did not raise any objection or complaint with either the IEBC or Political Parties Tribunal. He stated that he got to know this in 2016 but gave him the benefit of doubt believing he would conduct himself in a fair and partial manner.

95. From the responses, evidence and submissions by the Respondent, like any other citizen of this country, the 4th Respondent had the right to vie or participate in a political contest as provided for under Article 38 of the Constitution, as long as he complied with the requirements provided for under section 43 (5) of the Elections Act that requires a public officer who intends to contest in an election to resign from such office at least seven months before the date of the election. Which is what has been confirmed happened in the case of the 4th Respondent.

96. Another claim by the Petitioner with will regard to alleged unfair advantage is on account of the 4th Respondent contesting in an election in an area where he had worked as a Registration officer and Constituency Elections Coordinator with the persons who were in charge of the conduct of election there having ben his former workmates and close associates. It was alleged that Khadija Mohamed Ahmed (DW 3) served as the Deputy Constituency Returning officer of Lamu West in the said election and yet she had worked as an Assistant Registration officer under the 4th Respondent. The petitioner also testified that the 4th Respondent and one Mmbwana Japheth Omar worked together as Registration officers and Constituency Elections Coordinators in Taita Taveta from 2010 to 2015 and yet during the August 8th, 2017 general election, the said Mmbwana Japheth worked as the Lamu East Constituency Returning Officer. According to the Petitioner this vitiated fairness, impartiality, transparency, neutrality and integrity of the said election contrary to the provisions of Article 81 (e)(ii) (iii) (iv) and (v) of the Constitution and section 28 (e) and (h) of the Independent Electoral and Boundaries Commission Act.

97. On this, the Respondent severally responded and submitted that the petitioner and his witnesses did not demonstrate in which way the 4th Respondent influenced the said officials to the extent that the petitioner suffered unfair advantage.

98. In the finding of this court, these allegations by the petitioner with regard to bias and unfair advantage are based on unfounded fears and suspicions which cannot be substantiated or relied on by this court. These allegations having been found so, the same are rejected and subsequently struck out.

97. At paragraphs 19,20,21,22,23,24,25,26,27,28, and 29 of the petition, the petition has put forth an issue that Constituency Returning Officers, whereby Khadija Mohamed Ahmed and Abdul Issa Mohamed were gazetted to serve as such at Lamu East constituency and Lamu West constituency respectively. However, according to the petitioner and his witnesses, the two officers did not work in the said areas for which they had been gazetted by the 1st Respondent but swapped places without any authority. He felt that this was irregular and wanted the court to find that anything and everything that was done by the two officials in connection with the August 8th 2017 election declared illegal, null and void, since it vitiated the integrity of the election.

100. The Respondent did not dispute the swapping of the two Deputy Constituency Returning officers and called the said Khadija (Dw 2) to testify and explain why and how they swapped and by whose authority. She produced a copy of an email dated 28th September, 2017 which she wrote to the Regional Coordinator, Amina H Soud to make the request to be retransferred to Lamu West and the same was allowed.

And even then I find that when the petitioner, was cross examined he did not show in which way the conduct of the election, the results of the election and the right of the voters was affected or vitiated in Lamu County. Again, this claim is found lacking in merit and is dismissed accordingly.

Ondunga, J in Director of Public Prosecutions V Samuel Kimuchu Gichuru & Another (2012)eKLR held that:

*"(.....) the role of gazettment in executive appointments. My research has led me to only one case on the object of gazettment and it is the Tanzania Court of Appeal decision in **Catholic Diocese of Mooshi vs. Attorney General (2000) 1 EA 25 (CAT)**, where it was held that the requirement that administration and remission orders made by the Minister under to statutory provisions(section 7(1) of the Customs Tariff Act of 1976(Act 12 1976), and section 28(1) of the Sales Tax Act of 1976 (Act 13 of 1976), being administrative acts with no legislative effect whatever, be given publicity in the Gazette was no more than directory. The failure to comply with the directive, it was held, did not affect the validity of the orders since the whole objective behind such publication is to bring the purport of the order concerned to the notice of the public or persons likely to be affected by it, thereby making the legal maxim "ignorance of the law does not excuse" more rational, in view of the growing stream of delegated legislation.*

*In my view, unless the instrument in question expressly provides that an appointment thereunder is effective on gazettment, the gazettment is merely directive and the failure to gazette the appointment does not necessarily nullify the appointment. I also agree with Mwilo, J's decision in **Alice Muthoni Wahome vs. James Maina Kamau & Others Nairobi High Court Election Petition No. 20 of 2008** that where there is no requirement for gazettment, a reference in a gazette notice to an incorrect provision of the law under which a power is exercised does not invalidate the action.*

*....the decision of the Court of Appeal in the **Julius Kamau Mbugua v Republic(2010) eKLR** in which the Court cited with approval the decision of **Emukule J in Republic vs. David Geoffrey Gitonga, Criminal Case No. 79 of 2006 (Meru) (unreported)**. In the latter case the Learned Judge expressed himself as follows:*

"I am aware that contrary opinions have been expressed by others in this court, I do not share those views. I hold the considered view that such trial is not a nullity at all. These are my reasons. Firstly, the principle of nullity presupposes that the process of trial is void either because it is against public policy, laws, order, and indeed, nullity is non-curable. Secondly, for a trial to be void in law it must be shown either that the offence for which the accused is being tried is non-existent, or that the authority or court seized of the matter has no authority to do so. it is a public policy of all civilized states that offenders be subjected to due process in respect of defined offences, and by duly competent courts or tribunal...A trial will be a nullity where the offence is non-existent or there is lack of jurisdiction. To say otherwise would be against both public policy and the law. The court will not act against the law nor will it go against public policy."

In the above cases the Courts were dealing with serious allegations of breach of constitutional rights to fair hearing by reason of delay in bringing the accused to court contrary to the provisions of the law. In this case, the only issue taken is the omission by the authorities concerned to gazette the appointment of Mr. Kiage. It is not alleged that he was not authorized to prosecute. There is evidence that he had in the past been duly gazetted to carry out the said duties.

Looking at the larger picture, it is my considered view that it would be a travesty of justice to hold that all the actions taken by Mr. Kiage prior to the raising of the objection should be expunged. Whereas I find that there was an irregularity in his appointment the Court must weigh the consequences of nullifying his actions against the prejudice alleged. The only prejudice that the respondents stand to suffer is that they may be subjected to a second trial if it turns out that the trial was conducted by a person who was not legally empowered to do so. However, the irregularity in gazettment of Mr. Kiage, in my considered view, though deplorable, is in the peculiar circumstances of this case curable under Article 159(2)(d) of the Constitution."

Abuohdha, J in *Mundia Njeru Geteria v Embu County Government & 3 Others (20130eKLR*

*"(10.) Regarding the issue of gazettment of the appointment, the Court of Appeal, albeit indirectly, recently dealt with the issue in the case of **Nderitu Gachagua vs Dr. Thuo Mathenge & 2 others Civil Appeal No. 14 of 2013 (Nyeri)**. The question there was whether the requirement by section 76(1) of the Election Act which requires election results to be gazetted for them to be valid was inconsistent with article 87*

(2) of the Constitution. While holding that the provision was not unconstitutional, the court observed that the Gazette is an official document of the Government of Kenya in which official matters including official notices by the Government are published. Any notice published in the Gazette is deemed as notice to the general public and one is barred from pleading ignorance of the same.

*Besides section 85 of the Evidence Act provides (in paraphrase) that **"...the production of a copy of the Gazette containing any notice purporting to be made in pursuance of a written law...shall be prima facie evidence in all courts and for all purposes whatsoever of making and tenor of such ...notice."***

What this implies is that, in absence of proof to the contrary, the Gazette notice becomes a formal expression of the existence of the notice or law in question. The Gazette does not as it were constitute the notice or the law itself but rather the official announcement of its existence or coming into force. Such that the validity or otherwise of a law or notice is not resident in the Gazette but the persons or bodies tasked with the responsibility to make such laws or issue such notices in accordance with the law and the Constitution. The Gazette merely confers a seal of authority or officialdom to existence of the notice or the law."

The use of pre marked ballot papers

101. The petitioner pleaded at paragraph 30 of the petition that at ten (10) polling stations, pre -marked ballot papers are used by voters in the election for Governor in Lamu County. He cited the following polling stations;

- (i) Mapenya primary school polling stations-1;
- (ii) Mapenya primary school -2;
- (iii) Lake Kenyatta primary school, (all the five polling stations.)
- (iv) Mpeketoni youth Polytechnic polling stations, 1 and 2.
- (v) Sinambio primary school
- (vi) Lake Amu primary school 1;
- (vii) Hongwe primary school 2;

(viii) Muhamarani Dispensary polling station 1 and 2 .

(ix) Bahari primary school-1;

(x) Umoja primary school.-1;

102. Pw 3, pw 6, pew 8,pw 9,pw 11, pw 12,pw 24,pw 26,pw 28,pw 30, pw 31, and pw 48 testified as the agents who witnessed this happen. Pw 8,pw 10 ,pw 24 are voters who testified that they were issued with such ballot papers with Pw 10 claiming that the same was marked in favour of the 3rd Respondent.. Pw 24, an agent, told court that he proceeded to vote on the said ballot paper which was pre-marked. Pw 65, who was a presiding officer at Mapenya polling station stream 2 told court that she saw these pre -marked ballot papers at the polling station where she worked.

103. Dw4 told court that he received information that there were ballot papers with printing errors and they had affected the Presidential ballot papers. Dw5 confirmed that this was the information he obtained from both constituencies . Dw8, Nasa Chief Agent in Lamu said he got information of ballot papers with printing errors at Mapenya while Dw21 who was at the said station said he witnessed the pre-marked ballot papers but they affected the Presidential ballot papers. Dw9, the PNU chief agent told court that he received information from his agents that there were some pre-marked ballot papers but a memorandum of understanding had been entered by the IEBC officials and agents on how to use them. Dw35, a JP agent at Umoja primary said he saw them on the presidential ballot papers. Dw 16, a PJ agent discounted Pw31's account of this at Lake Kenyatta polling station 3 and 4 and so did Dw19 and Dw20 for Sinambio primary school.

104. In response to the said allegations, the respondents denied the same and submitted that what was witnessed on these ballot papers were printing marks and not pre-marks, and that they were mainly manifest on the Presidential ballot papers. In fact both respondents' counsel submitted that it was at Mapenya primary school polling station where such a complaint was made by various witnesses. And for purposes of verifiability and transparency, the Lamu West Returning officer, Dw4 was consulted and an agreement between the IEBC officials and agents was entered to facilitate the use of the ballot papers for the voting process to proceed. And at the end of voting and counting of the votes, the agents present for all the candidates signed form 37A for the said polling station to confirm the results.

105. It is such evidence that caused this court to order for a scrutiny in limited number of polling station, including Mapenya primary school polling stations 1 and 2. The results of the scrutiny showed that from the polling station Diaries (PSDs) of these stations, and form 37 As, the voting was without incident and no presiding officer including Pw 65, made any remarks with regard to the presence of pre-marked ballot papers at Mapenya primary school polling station 1. Also Form 37 A for stream 2 was signed by agents and the presiding officer. There were also no comments or remarks by the agents, candidates or the presiding officers including Pw 65 and Dw1. The only incident which was recorded was that, the marks on the ballot papers were as a result of printing ink.

106. It is also worth noting that during cross examination ,the presiding officer of Mapenya primary school stream 1 (Pw65) and her team agreed to make note of the marks and accept the ballot papers as properly marked not withstanding the marks, after consulting with the Lamu West Returning Officer , Mr Mwarua Chikophe (Dw4). It is further noted that this officer was on oath of office while performing her duties at this polling station as a presiding officer, and by swearing a second affidavit on a fact she knew was not correct, I find she committed perjury and recommend that the matter be investigated by the County Director of Criminal Investigations in Lamu and thereafter, if found culpable, the matter be referred to the Director of Public Prosecution for appropriate action recommendation or guidance. This recommendation is made so as to serve as a warning against such officers who take up responsibility and for reasons only known to them, turn against the very institutions they swore to serve and sabotage the process they would be managing. The action is also meant to protect the future integrity of the electoral system.

For the foregoing findings, I hold that the petitioner proved that there were no pre-marked ballot papers

used and dismiss this ground accordingly.

Lack of transparency during the sorting and counting of votes.

107. It was the petitioners pleading at paragraph 33 of the petition that the presiding officers did not display ballot papers to the agents for verification during the sorting and counting process which is in breach of articles 81 and 86 of the Constitution and regulation 76 (2) of the Regulations. This allegation was made in respect to 29 polling stations as set out in paragraph 34 of the petition. He submitted that this process of displaying ballot papers to agents is important because it enables them to ascertain the vote in terms of its validity and in whose favour it has been cast for.

108. The petitioner called witnesses such as Pw 3, Pw 8, Pw 13, Pw 15, Pw 19, Pw 20, Pw 23, Pw 25, Pw 27, Pw 28, Pw 29, Pw 30, Pw 34, Pw 42, Pw 47, Pw 48, Pw 62, and Pw 63 who were agents for various parties. They claimed that the presiding officers would not properly display the ballot papers and in particular Pw 4 who stated that the agents were kept far from the counting table and they were therefore unable to verify the ballots.

109. On this issue, the 3rd and 4th Respondents called Dw 20, Dw 22, Dw 22, Dw 23, Dw 24, Dw 25, Dw 26, Dw 26, Dw 27, Dw 28, Dw 29, Dw 30, Dw 31, Dw 33, Dw 34, Dw 36, and Dw 37 who testified and stated that the presiding officer properly displayed the ballot papers.

110. Counsel for the respondents submitted that the petitioner was not specific on which polling station this irregularity is said to have occurred, which rendered his evidence insufficient. The evidence was generalized. They also submitted that no single complaint was documented by any of the agents in Form 37 As to confirm this allegation and neither was there evidence of a report having been made by any of the agents over such irregularity. They pointed out that the existence of a declaration in Form 37 A which was signed by the agents states as follows.

“We the undersigned being present when the results of the county were announced do hereby declare that the results shown above are true and accurate count of the ballots inpolling station.....”

And by so doing, an agent is therefore precluded from complaining over any issues above the results announced after the counting. Counsel for 3rd and 4th Respondent specifically pointed out about twenty two (22) polling stations where agents who testified against this issue signed Form 37 As to confirm they agreed with the results. This was not controverted or explained satisfactorily by the petitioner. I wish to associate myself with the finding of Justice T. W. Cherere in the case of GRACE ADHIAMBO V IEBC & 2 OTHERS (2018) e KLR, where a similar subsisted, that has been cited by counsel for 3rd and 4th Respondents. (ref to page 51 of the 3rd and 4th respondents' submissions”.

111. I wish to state that by the signing of forms 37 As by the various agents for the petitioner, without raising such a complaint, it is clear that the validity of the results was confirmed and the irregularity complained of had no impact on the outcome of the elections. I find this ground also not proved to the required standard and dismiss the same.

Voters allegedly allowed to vote without verification.

112. At paragraph 37 of the petition the petitioner put forth and rendered evidence that at Kizingitini Secondary School polling station, 2, an IEBC clerk by the name NAFIA ABBAS allowed sixteen (16) people to vote without verification of their identities through the KIEMS kit, which he stated was contrary to Regulation 69 of the Elections (General) Regulations, 2013, Election Rules and Section 6 (j) (i) and (iii) of the Election Offences Act. Apart from his evidence, the petitioner also called Pw 2 and Pw 52 to support his evidence they are alleged to have been at the said station when the incident happened.

113. The petitioner submitted that Dw2, stated in cross examination that he knew the anomaly was a violation of the law and so he reported the matter to the police at Kizingitini police station for investigations into whether the law had been violated.

114. Also in his submissions, the petitioner stated that what happened at Kizingitini primary school polling station was in contravention of the Constitution and breach of the law hence affected the results.

115. In their submissions, the 1st and 2nd Respondents counsel, Mr Munyu explained that Dw2, the Constituency Returning officer of Lamu East had testified to confirm that what the said clerk had done was failing to validate the said voters but not verification as indicated in the OB which the petitioner was relying on. It was also confirmed that the witnesses had reported the matter to the police for investigations.

116. In their submissions, through Mr Kilonzo, counsel, the 3rd and 4th Respondents confirmed what Mr Munyu, counsel for 1st and 2nd Respondent stated in submissions but went on to point out the contradictions in the evidence of pw2 and Pw 52, who alleged to have been at the said polling station when the incident happened but gave different narratives. While Pw 2 testified that he saw an IEBC clerk allow persons to vote without verification, Pw52 testified that he saw an IEBC clerk issue a voter with more than 2 ballot papers for the same election, which incident she confirmed in cross examination she never reported to anyone despite it being an election offence, which as an agent, she was aware of what action to take in such instances.

117. While it is confirmed that an IEBC clerk by the name Nafia Abass had an issue of either having failed to validate or verify voters, I would say that the this allegation has not been conclusively established because;

(a) the petitioner, it will be noted was not at the said station when the incident occurred and the two witnesses who he presented to support his evidence adduced contradicting evidence;

(b) Dw3 confirmed that he reported the matter to Kizingitini police station for investigations into the said allegations but up to the time of this petition, there was no report as to what the said investigations had revealed;

In view of this, I find that this is not a ground, as it stands, that would be used to invalidate an election. After all, the petitioner, while he alleges this, has not shown this court what the investigations by police revealed and how the said incident affected the results of the election at Kizingitini primary school where it has even been shown he won. This ground is also found wanting of proof and it is therefore dismissed.

Alleged failure to assist Assisted voters.

118. At paragraph 41 of the petition, the petitioner has alleged that presiding officers did not discharge their duties as required by the Constitution and the law in regard to assisted voters and enumerated the way in which they failed to do this.

119. The Petitioner has also enumerated the particular polling stations he alleges this irregularity happened. He tendered evidence of a number witnesses to confirm this to court.

For instance Pw 6, Pw 49, and Pw 51 are agents who claimed that presiding officers exhibited a rushed manner when assisting such voters.

120. Pw 25 and Pw 51 stated that at Mkunumbi polling station, the presiding officer declined to assist voters whose identity cards bore signatures classifying them as literate persons and yet as testified by the petitioner some of the votes were old and with poor vision.

Dw 23 and Dw24 who were Jubilee agents at the said Mkunumbi polling station, testified that the presiding officers and agents had reached a consensus with agents that such voters would be regarded

literate and would not need assistance to vote.

121. Pw 7,Pw 16,Pw 27,Pw 28,Pw 34,Pw 40,Pw 57,Pw 68, were agents who testified that they were barred from witnessing assisted voters being assisted to vote. Pw 16 in particular testified that presiding officers assisted the assisted voters to vote without the agents, which was discounted by Dw16 who stated that the presiding officer would call two agents at a time to witness such voting because of the limited space at the voting booth.

122. Pw 40 on the other hand stated that the presiding officer would only summon Jubilee party agents to witness the voting process. Dw 8, the NASA Chief Agent in Lamu claimed that none of his agents reported to him of such occurrence and hence discounted this account. This was also the evidence of Pw 28,Pw 34,Pw 40, and Pw 62.

123. According to witnesses such as Pw 8, Pw 14, Pw 17,Pw 42,Pw 48,Pw 60, and Pw 107, the IEBC clerk Elijah Njuguna Kariuki specifically told voters to vote for the 3rd Respondent, which was rebutted by Dw 7 saying that she knew Pw 17 personally and that she was not at the polling station and neither did she hear the said clerk tell voters as alleged.

124. Pw 14, the ANC agent at Ngui primary school told court that while assisting some assisted voters to vote, the presiding officer never read out the name “Timamy” for their benefit but only read out the name of the 3rd Respondent while explaining to them that he was their former MP at Lamu West constituency. This was the same evidence by Pw 48, Pw 14 Pw 6,Pw 21,and Pw 22.

125. Pw 107, an agent at Mbwajumwali Nursery school claimed that the presiding officer would deliberately spoil the vote where such voter had expressed the desire to vote for the petitioner.

126. It was the evidence of Pw 7, 33 and Pw 60 that there was either a shortage or lack of declaration form to be filled by persons assisting assisted voters to vote.

Pw 7, an agent at Mapenya polling station said that only fifteen (15) copies of declaration forms were available to them. Pw 13 on the other hand testified that the presiding officer allowed persons assisting assisted voters to do so without signing the requisite declaration forms.

127. All these were rebutted by Dw 23 who testified in cross examination that there were more than enough declaration forms that they were left over although she could not tell how many they were.

128. In their responses to the written submissions and evidence of their witnesses, all the respondents denied this allegations and deposed that all assisted voters were accompanied by a person to assist them in voting where by a declaration form would be duly issued for signing by the said person before he voter proceeds to vote. And that where an assisted voter was not accompanied, the presiding officer would assist such a voter in the presence of party agents.

129. With regard to the claim that presiding officers would determine the level of literacy of the votes against their signed ID cards, the respondent submitted that this was done in accordance with regulation 72(3) which entitles him or her to make such necessary and respectful inquiries into a voter’s IQ to establish that he or she qualifies to be an assisted voter.

130. And for the issues of the presiding officer directing assisted voters to vote for the 3rd Respondent, instead of the petitioner, it was submitted by the respondents’ counsel that there were key symbols such as the name of the candidate, party symbols, colored photographs, which a voter, unless blind would be able to identify who to vote for. Furthermore, it is submitted that the petitioner having been the immediate former Governor of Lamu County, prior to the August 8th,2017 general election, it cannot be alleged that he could be mistaken by most voters.

131. Having listened to the evidence by the petitioner and his witness with regard to the issues of the irregularities that are alleged to have occurred in cases of assisted voters, I agree with the counsel for the

Respondents that these allegations required to be proved by the evidence of such assisted voters especially for those who can communicate and comprehend the process despite their advanced age or illiteracy. This was not done as only agents, who have even been shown to have signed Forms 37As to confirm the election was properly conducted and made no remark in respect of what they came to tell court, testified.

Rejected votes

132. At paragraph 38 of the petition, the petitioner averred there were a total of 797 rejected ballots, majority of which had been marked in his favour.

Pw2, who testified in support of the petitioner's allegation that rejected votes had been cast in his favour, pointed out that the malpractice occurred in Lamu East. Pw7 an ANC agent at Mapenya stream 1 also testified in support of the allegation that rejected votes were those valid votes cast in favour of the petitioner and also that some votes cast in favour of the petitioner were allocated to the 3rd Respondent. They called for a scrutiny of the ballot box so that this irregularity would be revealed. Pw 29 Nurani Ali Made was an ANC agent a Kizingitini primary school polling station and she gave evidence that on checking, rejected votes at the said station found on checking that all had been cast in favour of the petitioner. She protested about this but was ignored. She however went on to sign form 37 A

133. And because of the evidence of these witnesses, this court ordered for a scrutiny in the polling stations mentioned and the same was conducted under the supervision of Hon. Wandia, The Deputy Registrar of this court and a report filed. From the findings noted in the scrutiny report, none of the irregularities raised were recorded and or detected by the Deputy Registrar in these stations. Furthermore, it was noted that petitioner's agents did not raise or register any objection, to the rejected ballot papers during the process of counting.

Use of forms 36 B in Lamu East constituency.

134. The petitioner at paragraph 44 of his petition alleged that the Returning Officer at Lamu East constituency collated and declared results in form 36 B which is meant for the member of the National Assembly and instead of Form 37B meant for county governor elections. This according to the petitioner was illegal, hence the results null and void. Pw1 in his testimony said that the 1st and 2nd Respondents did not dispute that form 36 B was used to announce the results from Lamu East constituency. He gave evidence that the 1st and 2nd Respondent admitted that form 37 B was destroyed in the printer. He also discredited the form by stating that it lacked security features. He summed up his evidence that Form 36B is used to announce results for Member of Parliament.

135. In reply the 1st and 2nd respondents stated that the Returning Officer for Lamu East is the one who collates the results and that the instrument that declared the results was Form 37 C. The court in its own wisdom after listening to the witnesses and having regard to the pleadings ordered for a scrutiny of forms 37s for Lamu East Constituency.

136. The exercise covered the scrutiny of all form 37 A's from Lamu East in forty (40) stations. In all the them, it was established that the presiding officers, agents of candidates and parties signed on them without noting any negative comments while the other comments did indeed confirm that the election was "free and fair". It was also confirmed from the scrutiny exercise that the total numbers tallied were the same as the ones reflected in the said form in form 36 B. It is worth noting that the law with regard to the protection of the will of the people has shifted from the Returning officers at all levels and transferred to the polling stations. The Presiding Officers are deemed to be the ones in contact with the voters and consequently what they announce as the result has to be protested at the polling center. (Refer to the court of appeal decision in Maina Kiai's case) where the court held this position to be correct. All in all, the scrutiny report filed by the Deputy Registrar, Hon Nyamu revealed very minor errors in very few aspects which in fact did not affect the outcome of the election as recorded on form 37 As of the polling stations where scrutiny was conducted.

Alleged variance in vote tallies for various elective positions:

136. At paragraph 47 of the petition, the petitioner stated that there were discrepancies in the total vote tally for the various elective positions, that is, the Presidential, Senatorial Gubernatorial, and Women Representative in Lamu County. It was the evidence of the petitioner and some of witnesses that some voters were given more or less ballot papers, which caused this disparity in the number of voters who voted against the number of votes cast for each elective post. Pw 12 said that he saw a voter vote without being identified through the KIEMS kit at Mikinduni primary school polling stations 2 where the total number of votes recorded was more by one vote.

Pw 29, Abdalla Hemed Mohamed said that he saw a polling clerk at lake Kenyatta primary school station 1 issue a voter with more than two ballot papers for the governor's election. This was the evidence of Pw 30 and Pw 52 with regard to Kizingitini Primary School polling Station 1 and Kizingitini Secondary School Station 2. Pw 17 said that he saw voters who were not issued with ballot papers for the election of governor and 2 voters who were issued with two ballot papers for this election.

138. The explanation by the Respondents with regard to this issue was that;

- (a) the presidential position had an extra polling station being Hindi prison which had 17 registered voters who voted only for the presidential position;
- (b) the stray votes for different elective positions were not reflected in Form 37 As;
- (c) there was a difference in the number of rejected votes between various elective posts

The respondents submitted that if indeed some voters were issued with more or less ballot papers, this is a criminal act which ought to have been reported to the authorities but there was no evidence to this effect by any of the petitioner's witnesses.

139. I have considered the allegations by the petitioner and his witnesses and the explanation by the Respondents with regard to the alleged variances or discrepancies in the vote tally for different elective posts, and I am convinced by the Respondents explanation that this can be caused by stray ballots, rejected votes, or even errors in the recording of votes cast in the statutory forms. I also wish to note that the number of said votes has not been specified for this court to determine whether it was so huge or small so as to make a difference in the result. Again, the petitioner's evidence in this regard has not been substantiated effectively. In fact, the voters, who according to Pw 107 were not issued with ballot papers should have been called to testify to confirm this allegation if at all they were there because his amounts to depriving them a right to vote.

140. In the course of trial, the following issues arose when witnesses were examined;

- (a) ejection of agents from the polling and tallying centers for unjustifiable reasons.
- (b) the issues of excess or less ballot papers
- (c) collating and tallying issues;
- (d) discrepancies in the content of the polling station Diaries (PDS)
- (e) chaos and or commotions in some centers;
- (f) presence of unauthorized person at the polling stations and tallying centers;
- (g) abdication of duty by the IEBC officials
- (h) claim of discrimination of voters on account of tribe;

(i) voter bribery.

141. I wish to point out that these issues were not pleaded in the petition by the petitioner. It is trite law that a petitioner's case ought to be confined within pleadings in his petition, and the petitioner cannot make a case out of that which he has not pleaded.

In the case of **Raila (2017)**, the Supreme court cited with approval the decision by the Supreme court of India case, **Arikala Narasa Reddy & Venkata Ram Reddygari & another, Civil Appeal No 5710 – 5711** of 2012 that;

“In absence of pleading, evidence if any produced by the parties cannot be considered. It is also 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 I note with appren....that although witnesses were occasionally.....cross examined over these issued, the petitioner’s counsel did not make any submissions in respect of these matters seeking to have the court consider them.”

Conclusion

142. Ultimately, the question is whether the burden of proof has been discharged to the required standard to warrant the Lamu county Gubernatorial election conducted on 8th August , 2017 nullified and a fresh election ordered.

Having considered the evidence in view of my findings on every issue that was raised in the petition, I find that the petitioner raised irregularities or malpractices or breaches which were not substantive enough to affect the integrity of the process or results of the election of the governor of Lamu County, to result in the nullification of the same. (Refer to **Francis Mwangangi Kilonzo V IEBC & 2 others (2018) e KLR at paragraph 33; Raila 2017** case (Supra); Gatirau Peter Munya case (2014) e KLR at paragraph 216-220; and case of Joho V Nyange (Supra).

In conclusion, I find that the petitioner having failed to discharge the burden of proof with respect to the allegations he set out in his petition by failing to demonstrate how the irregularities and malpractices raised affected the process of the election or results, the 3rd Respondent and 4th Respondent were validly elected in the General election held on 8th August, 2017 in Lamu County. The petition therefore stands dismissed with costs to the Respondents.

COSTS.

143. In awarding costs, an election court is empowered by section 84 of the Elections Act which states;

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

The court’s jurisdiction to determine the costs is further provided for by Rule 30 (i) of the Election Petition Rules, 2017 which states;

“The court Election court may at the conclusion of an election petition, make an order;

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

(2) When making an order under sub rule (1), the election court may

a) Disallow any prayer for costs which may, in the opinion of the election court, have been caused by vexatious conduct, unfounded allegations or unfounded objections, on the part of either the Petitioner or the Respondent; and

b) Impose the burden of payment on the party who has caused an unnecessary expense, whether such party is successful or not, in order to discourage any such expense.

(3) The abatement of an election petition shall not affect the liability of the Petitioner or of any other person to the payment of costs previously incurred.”

In awarding costs the court is guided by the principle that was laid down in the **Kalembe Ndile and another V Patrick Msimba and others, Machakos** HCEP No. 1 and 7 of 2013 e KLR, that

“Costs awarded should be fairly adequate to compensate work done but at the same time should not be exorbitant as to unjustly env...the parties or cause unwarranted dent on the public purse or injure the body politics by under missing the principles of access to justice ens.in Article 48 of the Constitution”.

144. Although the issues in this petition are not unique and complex, I wish to point out that this is one of the longest petition, where a total of one Hundred and forty seven (147) witnesses were called to testify. The hearings lasted for twenty one (21) days and on each day, hearing would extend beyond the normal working hours, that is, up to and between 9-10.00 pm. On the last day of hearing, which was the 21st of January, 2018 and a weekend, the hearing ended at 12.30 am. Over and above this, I have considered the costs of legal representation, the time spent strain that must have been experienced in the preparation and perusal of pleadings, applications, research, and submissions and expenses incurred in court attendances. I award a sum of Kshs Twelve Million (12 million) whereby Ksh 6,000,000 will go to 1st and 2nd Respondents and the other Ksh 6,000,000 to the 3rd and 4th Respondents.

ORDERS.

Accordingly, I order

(a)The petition be and is hereby dismissed.

(b) The respondents are awarded costs on the following terms;

(i) the instruction fee for the 1st and 2nd Respondents are applied at Ksh 6,000,000

(ii) the instruction fee for the 3rd and 4th Respondents are applied at Ksh 6,000,000’

(c) The costs shall be taxed and total costs certified by the Deputy Registrar of this court.

(d) The certified costs awarded shall be paid out of the security deposit on pro-rate basis

(e) A certificate of the determination in accordance with section 86 (1) of the Election Act, 2011 shall issue to the Independent Electoral and Boundaries Commission and the speaker of the bench.

Dated and delivered at Malindi this 2nd day of March, 2018.

HON. LADY JUSTICE D. O. CHEPKWONY

In the presence of;

Mr Aboubakar ,Mr Okoth –Odero and Mr Mwasa, counsel for the Petitioner

Mr Munyu, counsel for 1st and 2nd Respondents

Mr Kilonzo, counsel for the 3rd Respondent

C/clerk- Mwanaidi