



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

ELECTION PETITION NO. 10 OF 2017

IN THE MATTER OF: THE ELECTION FOR THE MEMBER OF NATIONAL

ASSEMBLY FOR GANZE

AND

IN THE MATTER OF: THE ELECTIONS ACT, 2011

AND

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

BETWEEN

MBARAKA ISSA KOMBE.....PETITIONER

VERSUS

INDEPENDENT ELECTORAL &

BOUNDARIES COMMISSION (IEBC).....1ST RESPONDENT

WAFULA CHEBUKATI.....2ND RESPONDENT

D. KOMBE HILLARY.....3RD RESPONDENT

TEDDY NGUMBAO MWAMBIRE.....4TH RESPONDENT

JUDGMENT

1. The Election Petition herein dated 5th September, 2017 was filed by the Petitioner who disputes the election of the 4th Respondent as the member of national assembly for Ganze Constituency during the elections held on 8th August, 2017.
2. The Petitioner was a voter and Chief Agent for Jubilee Party during the said elections while the 1st Respondent is the body mandated to carry out and supervise elections in the country and is responsible for the acts and omissions of its officers and subordinates.
3. The 3rd Respondent was the Constituency Returning Officer for the GANZE Parliamentary Election and is joined in these proceedings by reason of his conduct and the conduct of some of electoral officers who worked under him.
4. The 4th Respondent was one of the candidates in the Parliamentary elections for Ganze Constituency and was declared to be the successful candidate in the said elections.
5. The Petitioner alleges that during the elections held on 8th August, 2017, the following were the Parliamentary seat candidates:

a) Peter Safari Shehe

- b) Teddy Ngumbao Mwambire
- c) Kingi Edward Kahindi
- d) Joseph Kingi Kahindi
- e) William Chengo Kenga
- f) Anderson Kenga Mueni

The Petitioner claims that the 3rd Respondent declared the 4th Respondent as the successful candidate in the said election having garnered 14,703 votes.

6. However, the Petitioner contends that the 4th Respondent was not validly elected as the member of national assembly for Ganze Constituency. The Petitioner claims that the election for the member of national assembly Ganze Constituency was badly conducted and administered by the 1st Respondent that it failed to comply with Articles 1, 2, 10, 38 (2) (3), 81 (a) (e), 82, 86, 88(4), 165 and 249 of the Constitution, and as a result the said election was not verifiable.

7. The Petitioner alleges that there were massive irregularities and illegalities perpetrated by the Respondents and other persons affiliated to the Orange Democratic Movement Party.

8. On the alleged specific violations, the Petitioner avers that the data and information recorded in Forms 35A at the polling stations were not accurately entered into the KIEM kit and subsequently into Form 35B in contravention of Article 81 (e) (iv) (v) of the Constitution and Sections 39, 44 and 44A of the Elections Act. Further, the Petitioner states that the 1st Respondent selectively manipulated, engineered and deliberately distorted the votes cast in favour of the Jubilee party aspirant, or inflated the votes cast in favour of the 4th Respondent thereby distorting the final results tallied.

9. The Petitioner alleges that in a significant number of polling stations, the votes cast were not counted, tabulated and accurately tallied as required under Article 86(b) and 86(c) of the Constitution. Additionally, the Petitioner states, the results entered into Forms 35A were different from those entered into Form 35B.

10. The Petitioner alleges that there was mishandling and disenfranchisement of assisted voters. To support this assertion the Petitioner claims that that Presiding Officers did not record in the polling station the names of assisted voters and the reason for assistance and that these voters were only assisted by party agents belonging to the Orange Democratic Movement Party. The Petitioner contends that when this category of voters were assisted their choice of candidate was not respected but rather the agents who were offering the assistance voted for their preferred candidate.

11. The Petitioner also alleges that the following violations also occurred: bribery and treating of voters; intimidation and ejection of Jubilee Party agents; illegal campaigns on Election Day; conducting of campaigns by public officers; voter suppression and intimidation; and mishandling of voting materials.

12. It is the Petitioner's case that the election of the member of national assembly Ganze constituency as conducted on 8th August, 2017 was invalid and a nullity due to the above alleged violations and electoral malpractices and the declaration of the 4th Respondent as the winner subverted the will and intention of the Ganze constituents. For these reasons, the Petitioner prays for the following orders:

- a) A declaration that the election of Ganze Constituency Member of National Assembly held on the 8th day of August, 2017 was not conducted in accordance with the Constitution and the applicable law rendering the declared result invalid, null and void;**
- b) A declaration that the 4th Respondent was not validly declared as the Member of National Assembly for Ganze Constituency and that the declaration is invalid, null and void;**
- c) An order directing the 1st Respondent to organize and conduct a fresh election for the member of national assembly Ganze Constituency in strict conformity with the Constitution and the Elections Act;**
- d) A declaration do issue that the degree and extent of electoral offences and malpractices perpetrated by and/or attributable to the agents of the Respondents in the Ganze Constituency member of national assembly election of 8th August, 2017 invalidated the said election;**
- e) A declaration do issue that the degree and extent of electoral offences and malpractices perpetrated by and/or attributable to the agents of the Respondents in the Ganze Constituency member of national assembly election of 8th August, 2017 were in breach of, and violated Article 86 of the Constitution;**
- f) A declaration that each and all of the Respondents jointly and severally committed election offences, malpractices and/or irregularities;**

g) Costs of the Petition; and

h) Any other orders that the Honourable Court may deem just and fit to grant.

The Responses

The 1st and 3rd Respondents

13. The 1st and 3rd Respondents responded to the Petition by way of a Statement of Response and affidavit in support of statement of response filed on 9th October, 2017.

14. The 1st and 3rd Respondents aver that the elections for Member of National Assembly Ganze Constituency were conducted with adherence to the provisions of the Constitution specifically Article 81 and 86 of the Constitution, the Election Act and the Independent Electoral and Boundaries Commission Act. To support this assertion, the Respondents pointed out that the votes cast were counted at the polling stations by the Presiding Officers in the presence of candidates and/or agents who verified the process by signing Forms 35A and the Polling Station Diaries (herein after to be referred to as the PSDs). It is the results entered into Forms 35A that the Respondents alleges were transferred to Form 35B and later declared by the 3rd Respondent.

15. With regard to the allegation of mishandling of election materials, the Respondents aver that the ballot boxes with the counted votes were safely sealed after counting of the votes in the presence of the candidates and/or agents and transported to the Tallying Center while accompanied by security officers. At the Tallying Center, the Respondents state that the ballot seals were confirmed to be unbroken and the seal numbers recorded in the PSDs and the same verified by the candidates and/or their agents.

16. The 3rd Respondent disputes the alleged electoral malpractices by the Petitioner and avers that no electoral malpractice was reported to him. Further, the 3rd Respondent states that no electoral malpractice was reported to the Presiding Officers as there was no record of the same in the PSDs.

17. The 3rd Respondent avers that he discharged his mandate impartially and independently and was never at any time under the control of any person or authority.

18. The Respondents state that the candidates and/or their agents were made aware of their right to refuse to sign Forms 35A and Form 35B in case they witnessed any electoral malpractice, and to record their reasons for their refusal to sign in the aforementioned forms, but the right was not exercised by any of the agents or candidates.

19. The Respondents deny the allegation that votes cast were inflated for the 4th Respondent, or that the Jubilee candidate's votes were reduced. The Respondents state that the votes cast were counted in the presence of candidates and/or their agents and entries made into Form 35A and there were no complaints of manipulation of the votes cast by any person.

20. As to the allegation of disenfranchisement of voters, specifically assisted voters, the Respondents aver, that candidates and/or their agents were not allowed to assist illiterate voters in marking ballot papers but were rather required to witness as the Presiding Officer or the Deputy Presiding Officer assisted the voters.

21. In relation to the polling stations where the alleged violations were said to have occurred, for insistence at Bale Primary School, Palakumi Primary School, Mangororo Primary school, Jila Primary School and Mikuluni Primary School, the Respondents allege that there were Jubilee agents present at these polling stations and they did not complain of any violations.

22. It is the 1st and 3rd Respondents' case that the election of the member of national assembly Ganze Constituency held on 8th August, 2017 was free, fair and transparent.

The 4th Respondent

23. The 4th Respondent responded to the Petition by way of a Response to the Petition dated 21st September, 2017.

24. The 4th Respondent states that the whole electoral process conducted in Ganze Constituency including pre-election, polling day activities, counting tabulation, transmission and of announcement of the results were conducted in accordance with the law.

25. The 4th Respondent alleges that the allegations of breaches or malpractices stated by the Petitioner are too general and lack particularization, thus the same ought to be considered as incurable and misleading. The 4th Respondent contend that the allegations should be supported by relevant and specific particulars for the court to evaluate before making its decision.

26. The 4th Respondent denies the participation of any public official in the campaigns, specifically the Chief of Palakumi Location who is alleged to have conducted campaigns on behalf of the Orange Democratic Movement Party Candidate.

27. The 4th Respondent denies that the 1st and 2nd Respondents deliberately distorted the votes cast during counting in favour of the 4th Respondent and against the Jubilee Party candidate. The 4th Respondent states that the votes cast were accurately counted, tabulated and

collated as required by the law.

28. It is the 4th Respondent's case that the election was conducted in accordance with the law and the 4th Respondent was thus validly elected as the member of national assembly Ganze constituency.

Hearing

29. The Petition came up for hearing on 25th July, 2018. A total of three (3) witnesses testified for the Petitioner.

30. **PW1, Mbaraka Issa Kombe**, the Petitioner, adopted his statement filed by way of an affidavit sworn on 5th September, 2017 as his evidence in Chief.

31. Upon cross examination, PW 1 admitted that it was the responsibility of the agents to report any malpractices and/or violations to the police. He further admitted that although he alleged that the 4th Respondent conducted campaigns at polling stations and bribed voters, he did not report these alleged violations to the police.

32. PW1 testified that Jubilee Party agents made entries into the PSDs. However, he admitted that none of the entries related to the irregularities that the agents had witnessed. On being shown some of the Forms 35A, PW 1 admitted that all party agents were present in all polling stations, for instance in Miriini Polling Station No. 1 there was no ODM party agent.

33. PW 1 testified that some of the entries made in Form 35B were wrong. However, PW 1 was not able to point out the wrong entries. PW1 further admitted that he did not sign Form 35B as a Jubilee Party agent and did not complain about the same.

34. PW1 admitted that he had no letter of appointment to show that he had been appointed as a Jubilee party agent. PW 1 testified that he did not witness the violations complained of but was informed of the same by his agents.

35. Upon re-examination, PW 1 testified that police officers were present at the polling stations therefore there was no need to report the incidences of voter bribery as the police officers had witnessed the offence taking place. PW 1 stated that he was the Jubilee party agent at the tallying center yet he was not given the Form 35B to sign. The witness claimed Jubilee Party agents at the polling stations were not given Forms 35A. Further, PW1 claimed that Form 35B did not have a column for registered voters.

36. **PW2, Paulina Peter Karisa**, adopted her affidavit sworn on 5th September, 2017 as her testimony in chief.

37. On cross examination, PW 2 testified that she was the Jubilee Party agent at Bala Primary School. She stated that she arrived at the polling center at 4.15 am on 8/08/2017 and that the voting and counting of the votes went on smoothly. Later and after she signed Form 35A and was given a copy of the same. She claimed that one Kassim Chachala, a supporter of ODM party, met with other ODM supporters on the eve of the elections and directed them on how to bribe voters so that they would vote for the ODM candidates and on the voting day, the same ODM supporters assisted illiterate voters to vote. She stated that she complained to the Presiding Officer one NAOMI JUMA but she did nothing. However, PW 2 admitted that she did not report the alleged voter bribery to the police. PW2 admitted that she had not attached any documents to her affidavit to prove that she was appointed by Jubilee Party as an agent.

38. On re-examination, PW2 stated that although she did not have any accreditation she was an agent for Jubilee Party. Upon being shown the Form 35A for Bala Primary School, PW2 claimed that it is not the one that she signed as the Form 35A has no name for the Jubilee agent. PW2 claimed that at the tallying centre ballot papers were being marked inside a room.

39. **PW3, Wilson Kenga Katoi** adopted his affidavit sworn on 5th September, 2017 as his testimony in chief. On cross examination, PW 3 testified that he was the coordinator of Jubilee Party in the region although he was not an official agent of the party. He claimed that he voted on 8/08/2017 and left the polling station. However, he stated that the Presiding Officer had asked those who were illiterate to step aside from the queue. He claimed that these voters got annoyed and left the polling station without voting. PW3 admitted that he did not know the names of those who left the polling station without voting.

40. Upon re-examination, PW3 testified that he was a coordinator of John Kombe who was a Jubilee Party candidate. He indicated that he personally saw illiterate women leaving the polling station without voting.

41. **PW4, Patos Baya Charo** and **PW5, Samson Kahaso Chengo** denied signing their respective affidavits sworn on 5th September, 2017. As a result the affidavits were expunged from the record.

42. **DW1, Naomie Jumwa Birya**, testified that she was the Presiding Officer at Bale Primary School Polling station No. 2 during the elections held on 8/08/2017. She adopted her affidavit sworn on 28th September, 2017 as her testimony in chief.

43. Upon cross examination, the witness admitted that she retained a copy of Form 35A after distributing the original Form 35A to the Returning Officer, pasting a duplicate of Form 35A on the wall of the polling station, and placing another duplicate inside the ballot box. She stated that according to the PSD she was given two red pens and two black pens. However, she admitted that some entries on Form 35A were made using a black pen. She also admitted that PW2 did not sign Form 35A and as the Presiding Officer she did not give reasons for the agent's refusal to sign Form 35A.

44. DW1 denied that campaigns were conducted within the polling station on the polling day. She also refuted claims that voters in the

polling station were threatened and/or intimidated.

45. On re-examination, DW1 testified that despite the fact that some entries in Form 35A were made using a black pen, the entries therein were nonetheless, correct.

46. **DW2, Hillary K.O. Kombe** testified that he was the Returning Officer for Ganze Constituency. He adopted his affidavit sworn on 28th September, 2017 as his testimony in Chief. On cross examination, DW2 stated that upon receiving the PSDs from the Presiding Officers he sealed them in their respective ballot boxes. However, DW2 admitted that the process of sealing the ballot boxes is not witnessed by party agents. In relation to the Forms 35A deposited in court, DW2 admitted that some of the Forms 35A were duplicates, some were not signed by the respective Deputy Presiding Officers, some were not signed by party agents and some entries in the Form 35As were made using a blue pen. DW2 further admitted that Form 35B used to declare the results had some anomalies. For example, Form 35B did not have a column for registered voters. DW2 also admitted that no Jubilee Party representative signed Form 35B and he did not indicate in the Form 35B the reasons for the refusal. DW 2 stated that no issues of bribery, intimidation of voters and mishandling of illiterate voters were reported to him.

47. On re-examination, DW2 clarified that although some of the Forms 35As submitted to court were duplicates, the information therein can be confirmed in the respective PSDs. Further, DW2 testified that despite the anomalies in Form 35B the said form substantially complies with the law as it has all the information required for declaration of election results.

48. On cross examination by the court, DW2 stated that the omission of the column for the registered voters in the Form 35B was an oversight but the same did not affect the results declared.

49. **DW3, Japheth Kahindi Kitsao**, testified that he was the Presiding Officer at Jila Primary school. He adopted his affidavit sworn on 28th September, 2017 as his testimony in chief.

50. Upon cross-examination, DW 3 stated that he followed the laid down procedure in law in assisting illiterate voters. DW3 testified that as at 5.00pm 360 voters had voted while 87 voters were still on the queue. However, DW 3 admitted that according to Form 35A, 362 votes were cast. DW3 stated that there was a Jubilee agent one, Josphat C. Kalama, at the polling station who signed the Form 35A and did not report any irregularities or illegalities.

51. On re-examination, DW3 clarifies that 362 votes were cast and any anomalies in the number were due to fatigue.

52. **DW4, Kasim Mohamed** testified that he was a registered voter at Bale Primary School. He adopted his affidavit evidence as his testimony in chief. Upon cross-examination, DW4 testified that the allegations levelled against him by PW2 were untrue. He clarified that the animosity between him and PW2 was brought up by an incident that occurred on 6/08/2017 when a truck brought relief food to PW2's residence for distribution to the community. DW4 stated that he prevented the food from being distributed before the elections were conducted.

53. **DW5, Jackson Mtawali**, claimed that he was an agent of ODM party at Jila Primary School. He adopted his affidavit sworn on 21st September, 2017 as his evidence in chief.

54. Upon cross-examination, DW5 testified that uneducated voters were assisted by the Presiding officer while the agents witnessed the process. However, DW5 indicated that he did not know the number of assisted voters. DW5 admitted that Form 35A was signed by an ODM agent one, Chengo Mangi and that his name does not appear in the PSD.

55. On re-examination, DW5 stated that his name appears in the PSD as an agent of Ford Kenya. He clarified that Ford Kenya was part of the NASA Coalition.

56. **DW6, Fikirini Jacobs**, claimed to be the Chief Agent of the 4th Respondent. He adopted his affidavit filed on 21st September, 2017 as his testimony in Chief. Upon cross examination, DW6 stated that his duties included recruiting agents for the 4th Respondent. However, DW6 admitted that he did not know who recruited DW5. DW6 indicated that Form 35B was signed by three ODM agents including himself and he did not find anything wrong with three agents from the same party signing the Form 35B. DW6 testified that there were other parties' agents at the tallying center such as agents from KADU Asili and SPL parties.

57. On re-examination, DW6 stated that all accredited party agents were allowed access to the tallying center. He reiterated that he did not witness any bribery, harassment or intimidation of voters. According to DW6 the results declared were true reflection of the will of the people of Ganze Constituency.

General Principles Governing Elections

58. Article 38 makes provisions for political rights including the right to free, fair and regular elections. Political rights also embody the right of every adult citizen to be registered as a voter; to vote by secret ballot in any election or referendum; and to be a candidate for public office, or office within a political party of which the citizen is a member and, if elected, to hold office unless there are reasonable restrictions to limit the right.

59. The elections in this country are conducted by the Independent Electoral and Boundaries Commission which is established under Article 88(1) of the Constitution. The Commission is tasked with ensuring that the election is free and fair as expressed in Article 38 above. To this end Article 81 provides that the Commission shall conduct free and fair elections which comprise of the election being held by way of a secret ballot; free from violence, intimidation, improper influence or corruption; conducted by an independent body; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner.

60. Article 86 of the Constitution enumerates the principles of voting that the IEBC has to adhere to. These are:

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

61. Apart from the aforementioned principles embodied in the Constitution, other principles on the electoral process and electoral disputes are provided in the Elections Act and its Regulations, the Election Offences Act, the Political Parties Act, and the Independent Electoral and Boundaries Commission Act.

62. To establish whether the election process and in turn the election of a particular person to an elective position was valid, the court has to examine whether the principles embodied in the various statutes and the Constitution have been met.

63. What then is the standard of proof in election petitions? Election petitions are regarded as special suits. While the standard of proof in criminal cases is that of beyond reasonable doubt and that of civil suits, balance of probability, the standard of proof in election cases is referred to as an intermediate. This means that the standard of proof in election cases is that above that of balance of probability in civil cases but below beyond reasonable doubt in criminal cases. This was the position in **Raila Odinga & Another v. IEBC & 3 others, Presidential Petition No. 1 of 2017** where the Supreme Court held as follows:

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

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

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

64. However, as the Apex court found above, the standard of proof may shift to that of beyond reasonable doubt where there are allegations of commission of electoral offences. This is because electoral offences are not special offences but ordinary criminal offences whose standard of proof remains that of beyond reasonable proof.

65. Having dealt with the issue of standard of proof, the next question to address would be who bears the burden of proof in election petitions? Section 107 of the Evidence Act provides that where a person alleges the existence of a fact, the burden lies with that person to prove that indeed the fact arises. In election petitions it is the Petitioner who moves the court on the notion that various illegalities and irregularities occurred that affected the election process and ultimately the results as declared. The burden of proof, therefore, squarely lies with the Petitioner to prove his or her allegations to the satisfaction of the court. However, the burden of proof can shift to the Respondents where the Petitioner effectively discharges his or her burden, and the Court is left to question who would lose if no further evidence is adduced. In **Raila Odinga & Another (supra)** the Supreme Court rendered itself on this issue as follows:

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

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

66. Upon hearing both parties, in making its determination the court stands guided by Section 83 of the Elections Act which reads as follows:

“No election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written

law or that the non-compliance did not affect the result of the election.”

67. According to this provision an election may be voided if the election was not conducted in accordance with the principles laid down in the Constitution or if the non-compliance with the principles affected the result of the election. Therefore, petitioner(s) in an election suit only have to prove one limb of Section 83 and not both. The Supreme Court in **Raila Odinga & Another case (supra)** discussed Section 83 of the Elections Act as follows:

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

68. However, in applying the provisions of Section 83 disjunctively caution should be taken to ensure that mere non-compliance or mere irregularities do not lead to invalidation of an election. In **Peter Gatirau Munya vs. Dickson Mwenda Githinji and 2 others [2014] eKLR** the Supreme court held as follows:

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

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

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

Also in the said **Raila Odinga & Another case (supra)**, the Supreme Court pronounced itself as follows:

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

69. As I stated in the case of **Rashid Juma Bedzimba v. Ali Menza Mbogo & 2 others, Mombasa High Court Election Petition No. 2 of 2017**

“People spend hours on queues to exercise their democratic right to vote. This right should not be trivialized by a court upsetting an election due to mere irregularities and errors. The irregularities and non-compliance with the law, if any, should be of such a magnitude that mandates the court to find that the election was significantly compromised”.

Issues for Determination

70. I have carefully considered the Petition before the court. I have also carefully considered the submissions of Counsel together with the cited judicial authorities and case law. In my view, the following issues arise for determination by this court:

- a) Whether the election for the Member of Parliament-Ganze Constituency was conducted in accordance with the Constitution and other electoral laws and whether there were any irregularities and illegalities that affected the validity of the results.
- b) Whether the Form35 B used to declare the results was a valid document.
- c) Whether the 4th Respondent was validly elected as the Member of Parliament for Ganze Constituency.
- d) Who shall bear the costs of this Petition.

a) Whether the election for the Member of Parliament-Ganze Constituency was conducted in accordance with the Constitution and other electoral laws and whether there were any irregularities and illegalities that affected the validity of the results.

(i) Bribery and illegal campaigns

71. The Petitioner averred in his petition that the 4th Respondent through his campaigners committed the offence of bribery, and therefore the elections could not be termed as free and fair. In support of this assertion PW 2 testified that on the day of the election one, KASIM CHACHALA, DW4, a supporter of ODM party, was openly campaigning for ODM party and bribing voters as they entered the polling station with Kshs. 1,000/= note. PW 2 testified that the voters who were given the money were instructed to vote for ODM candidates for all the elective positions. Further, PW 2 testified that DW4 met with other ODM supporters on the eve of the elections and directed them on how to bribe voters so that they could vote for the ODM candidates.

72. The Respondents refuted the Petitioner's allegations. They claimed that the allegation of bribery was refuted by DW 4 who gave a detailed explanation as to the acrimony between himself and PW2. Also, the Respondents faulted the Petitioner for relying on hearsay evidence on the ground that PW2 was not present at the alleged meeting of ODM party that occurred on the eve of the elections.

73. Section 9 of the Election Offences Act No. 37 of 2016 makes provisions for the offence of bribery. It reads as follows:

(1) A person who, during an election period—

(a) directly or indirectly offers a bribe to influence a voter to—

(i) vote or refrain from voting for a particular candidate or political party;

(ii) attend or participate in or refrain from attending or participating in any political meeting, march, demonstration or other event of a political nature or in some other manner lending support to or for a political party or candidate;

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

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

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

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

74. It is important to reiterate that this allegation, being a criminal offence, the standard of proof is that of beyond reasonable doubt. In **Moses Masika Wetangula v. Musikari Nazi Kombo & 2 others [2014] eKLR** the court observed as follows:

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

75. According to the above provision the intention of bribery of a voter is to influence the voter to vote or refrain from voting for a particular candidate or political party. In this case the Petitioner alleged that voters were bribed by DW4 to vote for ODM candidates. Has the Petitioner met the threshold of proof? In my view, I think not. The Petitioner has merely made allegations of bribery but has not substantiated his claims. PW2 who testified in support of this assertion did identify the alleged perpetrator of the act, but did not identify the persons who were actually bribed. To complete the offence of bribery of voters, the said voters must be identifiable so as to impute the aspect of influencing the said voters to vote or refrain from voting for a particular party or candidate. In essence, there should be proof of a guilty mind in both the giver and the receiver of the bribe. The court should be left with no doubt that indeed money was offered to voters with the intention to influence how the said voters would vote. In **Richard Kalembe Ndile & another v Patrick Musimba Mweu & 2 others [2013] eKLR**, Majanja, J expressed himself as follows regarding the offence of bribery:

“Evidence of bribery needs to be reasonably precise and capable of being quantified if it is to be considered to affect the results. For instance, how many votes were procured as a result of bribery; were they two, ten or a whole polling station or what number? If it were even to be assumed that such amorphous crowd was bribed to either vote in a particular way or abstain from voting, aside from the criminal aspect of it, what number is the court to attribute to such illegal conduct in order to say that such conduct affected results of the election?” (emphasis added)

After due consideration of this issue, this court finds that the allegation of bribery has not been proved to the extent required in law The allegation is therefore dismissed.

(ii) Illegal campaigns

76. As to the issue of illegal campaigns, the same was merely alleged but no prove was tendered to support the allegation. It is indeed true that the campaign period was to end on 6th August, 2017 as expressed by the Petitioner. However, the Petitioner has failed to show that

campaigns were conducted beyond that date, specifically on the election date. For this reason, this ground of the Petition must also fail.

(iii) Handling of illiterate voters

77. The Petitioner alleged that illiterate voters were not properly handled by the 1st Respondent. The Petitioner's assertion was grounded on the testimony of PW3 who testified that after voting he heard the presiding officer ask illiterate voters to step away from the queue. He claimed that the said voters were annoyed with that direction and they consequently left the polling station. The Respondents on their part challenged that testimony saying that the testimony of PW2 was refuted by that of DW3, the presiding officer at Jila Primary School who testified that the proper procedure was followed in assisting illiterate voters.

78. I have carefully considered the testimony of both sides. DW3 did indeed give a detailed account of how illiterate voters were assisted at the polling station where he was the presiding officer. Illiterate voters fall under the category of assisted voters. Regulation 72 of the Election (General) Regulations, 2012 states as follows regarding assisted voters:

(1) On the application of a voter who is, by reason of a disability or being unable to read or write, and therefore unable to vote in the manner prescribed in these Regulations, the presiding officer shall permit the voter to be assisted or supported by a person of the voter's own free choice, and who shall not be a candidate or an agent.

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

(3) The presiding officer may make such necessary and respectful inquiry in order to establish that the voter and the person the voter has chosen to assist him or her satisfies the provisions of this regulation.

(4) The person chosen by the voter is not required to be qualified to vote but is required to have attained the age of eighteen years.

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

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

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

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

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

(7) No person other than a person acting under this regulation shall be present in a compartment of a polling station while a voter is in the compartment for the purpose of marking his or her ballot paper and any person who contravenes this sub regulation commits an offence.

79. The Petitioner took issue with the 1st Respondent allowing agents to be present when the assisted voters marked their ballots. The Petitioner claimed that this was a breach of the voters' right to secrecy and in turn Article 38 (3) (b) of the Constitution. Regulation 72 (2) above is clear that **"where the person who applies to be assisted is not accompanied by a person who is qualified to assist him or her, the presiding officer shall assist such voter, in the presence of the agents"**. In my view, the agents need to be present so as to confirm that the presiding officer diligently assists the voter without influencing the voter to vote for a particular candidate. If anything, the presence of the agents is meant to protect the vote of the voter thus giving the electoral process integrity and credibility. I do not find that the assisted voters' right of secrecy was breached. Further, the Petitioner neither identified the assisted voters who were improperly handled, nor called them to testify. Their evidence, in my view, would have been crucial to substantiate the Petitioner's claim as it would have been direct evidence.

80. However, a clear distinction must be drawn between the two ways that an assisted voter may be assisted. First, an assisted voter who is accompanied by a person qualified to assist him will be assisted by that person and not the presiding officer. The qualified person who assists the voter must make a declaration of secrecy before the Presiding Officer in Form 32. Second, an assisted person who is not accompanied by a person qualified to assist him or her will be assisted by the Presiding Officer in the presence of agents. In all the two scenarios the Presiding Officer must record in the polling station register against the name of the voter, the fact that the voter was assisted and the reason for the assistance. This court notes that DW3 whose testimony refuted the claims that assisted voters were not properly handled did not state whether he did record that the said voters were assisted and the reasons for the assistance. Be that as it may, the Petitioner did not bring up the issue, therefore, the court cannot hold this against the Respondents. For the foregoing reasons, this ground of the Petition must also fail.

(iv) Discrepancies in Forms 35A

81. The Petitioner raised various issues as relates to Forms 35A. The Petitioner alleged that 38 Forms 35A were filled using a blue pen instead of a black pen; 31 Forms 35A were partly filled with a blue pen; 2 Forms 35A were not signed by the Presiding Officers; 6 Forms 35A were not signed by the Deputy Presiding Officers; and 4 Forms 35A were not signed by any candidate or agent.

82. The 1st and 3rd Respondents submitted that the non-signing of the Forms by the Presiding officers or their deputies was a non-issue as the exclusion of the votes from these polling stations could not affect the overall results declared by the 3rd Respondent. The 4th Respondent submitted that the above issues on discrepancies of Forms 35A were not raised by the Petitioner in his pleadings. Further, the 4th Respondent contended that allegations about the Forms 35A were not tested as the Court rejected the Petitioner's prayer for scrutiny.

83. This Court notes that the issues raised on Forms 35A were not specifically pleaded by the Petitioner. However, this Court in its ruling dated 22nd June, 2018 while rejecting the prayer for scrutiny by the Petitioner, ordered that all Forms 35A and 35B be deposited in court. The Court will therefore address these issues.

84. On the issue that some Forms 35A were filled using a blue pen while some were filled using partly blue pen and partly black pen, I do agree with the Petitioner that the Presiding Officers were not supplied with blue pens but were rather given black and red pens. The Petitioner has alleged that use of blue pens is proof that the Forms were filled after the results were declared at the polling stations. I disagree. In my view, the use of blue pens to fill Forms 35A on its own cannot be a ground to invalidate the results declared therein. The important question to ask would be how the use of the said blue pens affected the results that were declared in the affected polling stations. The Petitioner has not led any evidence to answer this question. This court is unable to hold that the use of the blue pens did in any way affect the results in the said polling stations.

85. The Petitioner also alleged that some Forms 35A were not signed by the Presiding Officers and others were not signed by the Deputy Presiding Officers. The Petitioner identified Forms 35A from Sokoke Secondary School and Doponi polling Station as having not been signed by their respective presiding officers, while Forms 35A from Ganze Primary School Polling Station 1, Nzovuni Primary School Polling Station 1, Kathoroni Nursery School, Sita Nursery, Boga Machuko Primary School and Kangamboni were not signed by the respective deputy Presiding Officers. The 1st and 3rd Respondents contended that the Form 35A from Sokoke Secondary School was signed by both the Presiding and deputy Presiding officers, while the Form 35A from Doponi was signed by the Deputy Presiding Officer. I have carefully examined the Forms 35A from these two stations. With regard to Sokoke Secondary School Polling Station No. 1 of 2, the Form 35A was signed by both the presiding officer and the deputy presiding officer; Sokoke Secondary School polling station No. 2 of 2, the Form 35A is signed by the Deputy Presiding Officer only; while for Boponi Centre Polling Station (stated by the Petitioner as Doponi) neither the Presiding Officer nor the Deputy Presiding Officer have signed the Form 35A. Be that as it may, Regulation 79 (1) of the Election (General) Regulations, 2012 requires the presiding officer, the candidates or agents to sign the declaration in respect of the elections. It is therefore the duty of the Presiding Officer to sign the declaration form which in this case is Form 35A. The basis for this Regulation is to ensure credibility of the results. The Presiding Officer attests to the correctness of the results declared therein by signing the Form 35A. The question therefore is what happens when a Presiding Officer fails to sign Form 35A. Should that failure invalidate the results declared therein? In **Abdikam Osman Mohamed & Another v. Independent Electoral & Bounseries Commission & 2 others [2013] eKLR**, Mabeya J. was faced with a similar issue, which the learned Judge addressed as follows:

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

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

86. The Petitioner in this case did not lead any evidence to show that the alleged non-signing of the Forms 35A by the Presiding Officers affected the results declared in the respective polling stations. On the issue of non-signing of Forms 35A, I note that there is no mandatory requirement under the law that the Deputy Presiding Officer must sign Form 35A. However, in my view, good practice dictates that they should sign the said forms to increase credibility and verifiability of the results. Despite this, I find that the principles that apply in non-signing of the forms by Presiding Officer also apply to non-signing by Deputy Presiding Officer. Therefore, this Court finds that the non-signing of the Forms 35A identified above by the Presiding Officers and Deputy Presiding Officers did not affect the results declared in the respective polling stations. This allegation is therefore dismissed.

87. Turning to the issue that 4 Forms 35A for Ganze Primary School Polling Station 3; Murima Wa Ndege Primary School Polling station 2; Sita Nursery School and Kangamboni; were not signed by a candidate or agent, Regulation 79 (6) of the Elections (General) Regulations, 2012 is clear that the refusal or failure of a candidate or an agent to sign a declaration form under subregulation (4) or to record the reasons for their refusal to sign as required under this regulation shall not by itself invalidate the results announced under subregulation (2)(a). This position was reiterated in **Kakuta Maimai Hamisis v. Peris Pesi Tobiko & 2 others [2013] eKLR**. The court observed as follows:

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

88. Also, in **Odalo Makojwando Abuor V. Dalmis Otieno Anyango & 2 others (2013) eKLR**, the court found that the forms 35A are meant to be signed by all agents. The refusal by agents to sign or give reasons coupled with the failure of the presiding officers to provide reasons for the agents refusal to sign, do not invalidate the form. I therefore dismiss this allegation for lack of merit.

89. In addition, the Petitioner alluded that the discrepancies/omissions in the Forms 35A in their totality affected the overall results declared in the constituency. The Petitioner submitted that the total votes in the affected polling stations was 27,237 while the difference in votes between the 4th Respondent and the candidate who came second was 7,602 votes, hence, the irregularities on the Form 35As may have affected the results. While this appears to be a valid argument, the Petitioner did not adduce any evidence to support this allegation. It was incumbent upon the Petitioner to demonstrate that the irregularities may have led to inflation of votes in favour of the 4th Respondent or deflation of votes of other candidate, again in favour of the 4th Respondent.

b) Whether the Form 35B used to declare the results was a valid document

90. The Petitioner alleged that the Form 35B that was used to declare the results for the Ganze Constituency was irregular. The Petitioner submitted that the Form 35B did not have the registered voters column and included a column on wards which is not included in the prescribed form found in the schedule to the Election (General) Regulations. The Petitioner contended that the column for registered voters is important as it helps the Returning Officer know whether the total valid votes are more than the registered voters.

91. The 1st and 3rd Respondents in response to the Petition submitted that the omission of the registered voters column was properly explained by DW2, who is the 3rd Respondent, in his testimony. DW2 in his testimony stated that it was an inadvertent omission on his part not to include the registered voters column.

92. According to the Elections (General) Regulations, 2012 Form 35B should have the following columns; polling station code; name of polling station; registered voters; names of candidates; total valid votes; and rejected ballots. I have carefully perused the original Form 35B deposited in court. A cursory perusal of the form shows that the registered voters column is missing. Further, the Form 35B includes a column on wards which is not a necessary column according to the Regulations.

93. DW2 attributed the omission of the registered voters column to human error. Is this plausible? Several courts including the Supreme Court in **Raila Odinga & Another (supra)** have reiterated that no election can be perfect and that errors, especially human errors, are likely to occur in any electoral process. This court takes cognizance of the fact that electoral officers work long hours, some even going more than two days without sleep, the result of which is fatigue that may lead to commission of mistakes. However, the important question to answer is whether the omission of the column affects the validity of the results declared in Form 35B.

94. The Petitioner argued that the form 35B indicates at the voter turnout section the total number of registered voters as 54,760 but one cannot tell where the figure came from. However, it is clear that the figure of 54,760 can be easily obtained by aggregating the number of registered voters indicated in each Form 35A. It is clear therefore that Form 35B, despite the missing column, did not add or subtract any votes. Although the column for registered voters was missing, the total number of registered voters for Ganze constituency was indicated in the voter turnout section of the form. However, the Petitioner opines that the requirement for the registered voters column is a mandatory statutory requirement, which must be met failure whereof the results must be declared invalid. The Respondents contended that the omission of the registered voters column can be cured under Section 26 (2) of the Statutory Instruments Act, which provides that “**where any form has been prescribed by or under any legislation, a document or statutory instrument which purports to be in such form shall not be void by reason of any deviation there from which does not affect the substance thereof or which is not calculated to mislead**”. The Petitioner disputed the interpretation of this Section claiming that the said Section is not applicable to the issue as a form may deviate in form, but not in content. The Petitioner insisted that Rule 83 of the Elections (General) Regulations 2012 requires conformity with content of the form. Rule 83 reads as follows:

(1) Immediately after the results of the poll from all polling stations in a constituency have been received by the returning officer, the returning officer shall, in the presence of candidates or agents and observers, if present—

(a) tally the results from the polling stations in respect of each candidate, without recounting the ballots that were not in dispute and where the returning officer finds the total valid votes in a polling station exceeds the number of registered voters in that polling station, the returning officer shall disregard the results of the count of that polling station in the announcement of the election results and make a statement to that effect;

(b) in the case of an election, publicly announce to persons present the total number of valid votes cast for each candidate in respect of each election in the order provided in regulation 75(2);

(c) complete Form 34 and 35 set out in the Schedule in which the returning officer shall declare, as the case may be, the—

(i) name of the respective electoral area;

(ii) total number of registered voters;

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

(iv) number of rejected votes for each candidate in each polling station;

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

(vi) aggregate number of rejected votes; and

(d) sign and date the form and—

(i) give to any candidate, or agent present a copy of the form; and

(ii) deliver to the Commission the original of Form 34 and 35 together with Form 36 and Form 37 as the case may be.

(2) The results of the presidential election in a constituency shown in Form 34 shall be subject to confirmation by the Commission after a tally of all the votes cast in the election.

(3) The decisions of the returning officer on the validity or otherwise of a ballot paper or a vote under this regulation shall be final except in an election petition.

It is my belief that the Petitioner was referring to Rule 83 (1) (c) above. I am persuaded by the Respondent's submissions. In my view, the 3rd Respondent neither deliberately omitted the column for registered voters nor did he commit the omission in a bid to deceive the electorates. Further, I do not believe that the omission went into the substance of the Form thereby affecting the results declared therein.

95. The Petitioner also in his submissions contended that Form 35B indicated the total number of voters who turned out to vote as 38, 270 yet the total valid votes from the form is 37, 935 which figure while added to the rejected votes 331 brings the total to 38, 266 and not 38, 270. The discrepancy being 4 votes. This Court notes that this issue was never raised in the Petition. In the Petition, with regard to Form 35B, the Petitioner only faulted the 1st and 3rd Respondents for failure to include a column on registered voters in the Form 35B. It is trite law that a party is bound by its pleadings and parties are not allowed to go beyond their pleadings on a fishing expedition. The justification for this principle is to create fairness in a trial. The Petitioner should not be seen to be ambushing the Respondents at the tail end of the proceedings with new issues as this may gravely prejudice the Respondents who may not have adequate time to respond to the new allegations. This was the position in **David Sironga Ole Tukai v. Francis Atap Muge & 2 others [2014] eKLR**, where the Court of Appeal observed as follows:

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

96. This Court cannot delve into the issue of total number of votes cast vis a vis the total number of valid votes and rejected votes as this issue was not raised in the Petitioner's pleadings. If this were done, the Respondents would be greatly prejudiced as the court will not have afforded them an opportunity to respond to the Petitioner's allegations.

97. While this Court acknowledges that the original Form 35B deposited in court did not follow the prescribed format provided by law as it did not include a column for registered voters, the Petitioner did not lead any evidence to show that the non-inclusion of the registered voters column affected the results that were declared therein. It is the finding of this Court that that the non-conformity of the Form with the requirements of the law did not affect the results that were declared therein. I reiterate the holding of the Supreme Court in **Raila Odinga & Another (supra)** on the effect of irregularities to an election:

“At the outset, we must re-emphasize the fact that not every irregularity, not every infraction of the law is enough to nullify an election. Were it to be so, there would hardly be any election in this country, if not the world, that would withstand judicial scrutiny. The correct approach therefore, is for a court of law, to not only determine whether, the election was characterized by irregularities, but whether, those irregularities were of such a nature, or such a magnitude, as to have either affected the result of the election, or to have so negatively impacted the integrity of the election, that no reasonable tribunal would uphold it”.

It is the finding of this Court that the Form 35B used in the declaration of results the subject matter of this Petition was valid, and so also were the declared results valid.

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

98. Section 83 of the Elections Act provides that no election shall be declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in the written law or that the non-compliance did not affect the result of the election. Articles 83 and 86 of the Constitution set out principles for a free and fair election. The election should be verifiable, transparent, accurate, impartial and accountable.

99. As stated earlier, the Petitioner must prove to the satisfaction of the Court at least one limb of Section 83, either that the election was void for non-compliance with any written law or that the non-compliance did affect the results of the election. The key word in Section 83 is “if it appears”. In my view, this term means that the Petitioner must substantially demonstrate that the Respondents did not comply with the provisions of any written law. Not every mere breach of the law will be sufficient to invalidate an election. As it was stated in **Raila Amolo Odinga Case (supra)** citing Lord Stephenson and Prof. Ekirikubinza an election fails the test of compliance with the law if it is “*a sham or travesty of an election*” or “*a spurious imitation of what an election should be*”.

100. In the instant Petition, the Petitioner has indeed proved that there were certain irregularities in the conduct of the election. However, the Petitioner failed to show that those irregularities had any impact on the results of the elections. This court is satisfied that the said irregularities were not occasioned by any substantial non-compliance with the provisions of written law, or that the non-compliance affected

the results of the election. Similarly, the said irregularities did not affect the results that were declared. I do find that the 4th Respondent was validly elected as the member of National Assembly for the Ganze Constituency.

d) Who shall bear the costs of this Petition

101. Rule 30 (1) of the Elections (Parliamentary and County Elections) Petitions Rules, 2017 states that at the end of a petition, an election court may make an order on the total amount of costs payable, the maximum amount of costs, the person who shall pay the costs and how the costs shall be payable. Sub-rule (2) further states that an election court may impose the burden of costs on a party that may have caused unnecessary expense whether or not that party is successful.

102. In this case, I find that the Petitioner should bear the burden of costs bearing in mind that the Respondents did not cause any unnecessary expense in this matter. Taking into account the amount of documents filed and the work done in preparing the same, and in the spirit that justice should be accessible to all, I do find a total amount of Kshs.2.5 million to be sufficient. The said amount shall be paid by the Petitioner to the Respondents as follows; Kshs. 1,500,000.00 to the 1st and 3rd Respondents and Kshs. 1,000,000.00 to the 4th Respondent.

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

Dated, Signed and Delivered in open court in Malindi this 15th day of November, 2018.

E. K. O. OGOLA

JUDGE

In the presence of:

Mr. Omwancha holding brief Mr. Aboubakar for Petitioner

Mr. Ole Kina for 1st and 3rd Respondents

Mr. Oduor for 4th Respondent

Mr. Kaunda Court Assistant