



**Gedi v Aden & 2 others (Election Petition E001 of 2022)
[2023] KEMC 2 (KLR) (24 February 2023) (Judgment)**

Neutral citation: [2023] KEMC 2 (KLR)

**REPUBLIC OF KENYA
IN THE GARISSA LAW COURTS
ELECTION PETITION E001 OF 2022
HM NYABERI, CM
FEBRUARY 24, 2023**

BETWEEN

MOHAMED FEISAL GEDI PETITIONER

AND

KOLOSHO HASSAN ADEN 1ST RESPONDENT

ABDULLAHI IBRAHIM ISAACK 2ND RESPONDENT

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 3RD
RESPONDENT**

JUDGMENT

1. The Petitioner Mohamed Feisal Gedi was a candidate for the Member for County Assembly elections for Fafi Ward together with other candidates namely; Aden Ahmed Mohamud, Ali Mohamed Hares, Dubat Mohamed Odowa, Kediye Abdirashid Sirat, Kolosho Hassan Aden and Maalim Diriye Ibrahim.
2. The 2nd Respondent upon receipt and announcement of the election results in Form 36As from all the 18 polling stations, tabulated and collated the same into Form 36B. Subsequently, the 2nd Respondent declared the 1st Respondent Kolosho Hassan Aden as the duly elected Member of the County Assembly for Fafi ward having attained a majority valid votes cast being 802 votes.
3. The Petitioner being aggrieved by the outcome of the election filed the instant petition dated 1st September, 2022 and filed in Court on 2nd September, 2022 seek the following orders:
 - a. A declaration that the election of the Member of County Assembly for Fafi Ward held on 9th August, 2022 was not conducted in accordance with *the Constitution* and the Applicable Laws rendering the declared result issued by the 2nd Respondent invalid, null and void.



- b. A declaration issue invalidating the election of the 1st Respondent as the Member of County Assembly of Garissa County representing Fafi Ward;
 - c. A declaration does issue that the Petitioner was duly elected as the Member of County Assembly representing Fafi Ward having attained the majority vote in Fafi Ward in the Election of the representative to the County Assembly of Garissa County.
 - d. This Honourable Court do direct the 2nd and 3rd Respondent and/or its agents to issue certificate of election of the Member of County Assembly for Fafi Ward to the Petitioner.
 - e. An Order for scrutiny and/or recount of votes be undertaken as pleaded in the petition.
 - f. Such election offences by the 2nd Respondent and/or agents of the 3rd Respondent as pleaded, disclosed, heard and determined by this Honourable Court be reported to the Director of Public Prosecutions for appropriate action;
 - g. In the alternative and without prejudice to (c) above, an Order directing the 3rd Respondent to organize and conduct a fresh election for Member of County Assembly representing Fafi Ward.
 - h. The Respondents be condemned to pay the Petitioners costs and incidentals to this petition and
 - i. Such further, other and consequential orders as this Honourable Court may lawfully make.
4. The petition is based on the averment that following the election held on the 9th day of August, 2022 the 2nd Respondent on 11th August, 2022 unlawfully and illegally declared the 1st Respondent the duly elected Member of County Assembly of Fafi Ward within the County of Garissa as having attained 802 votes without accurately collating, tallying and computing all the results from 18 polling stations within Fafi Ward. Subsequently, the declaration of persons elected as Members of the County Assemblies by the Chairperson of the 3rd Respondent on 19th August, 2022 the 1st Respondent was illegally and unlawfully named as the Member of the County Assembly elect of Fafi Ward based on the incorrect and illegally collated and tallied results from 18 polling stations within Fafi Ward.
 5. The Petitioner avers that the declaration of the 1st Respondent, as the duly elected Member of County Assembly of Fafi Ward was done in contravention of *the Constitution*, the Election Act and the Election Petitions Rules 2017.
 6. The incorrect and illegally collated results captured in Form 36B announced by the 2nd Respondent showed that the 1st Respondent had garnered 802 votes as against 720 votes for the Petitioner, 615 votes for Aden Ahmed Mohamud, 322 votes for Ali Mohamed Haress, 4 votes for Kethiye Abdirashid Sirat and 756 votes for Maalim Diriye Ibrahim.
 7. The Petitioner alludes that there were widespread, incorrect, unverifiable collation of results and voter results manipulation in the following polling stations:
 - a. At Hagadera Community Water Pan Polling Station 2 of 2, an extra 100 votes were added to the 1st Respondent making his totals 113 instead of 013. Form 36A clearly captures that the 1st Respondent has 13 votes but his tallies have been manipulated in his favour and illegally awarded 130 votes in Form 36B.
 - b. At Hagadera Community Water Pan Polling station 2 of 2, 100 votes were deducted from the Petitioner reducing the Petitioner's polling station totals from 130 to 030. Form 36A from the polling station clearly indicates that the Petitioner garnered 130 votes, however the Petitioner's



collated tallies in Form 36B prepared by the 1st Respondent have been manipulated and his votes reduced to 30.

- c. At Diiso Primary School Polling Station 2, the 1st Respondent garnered 144 votes as exhibited in Form 36A. However, the 1st Respondent tallies in Form 36B been manipulated and illegally awarded extra 30 votes making his totals 174 instead of 144.
- d. At Diiso Primary School Polling Station 2 of 2 another candidate Maalim Diriye Ibrahim has been illegally awarded 42 in Form 36B instead of 7 votes obtained as exhibited in Form 36A. One Kethiye Abdirashid Sarat has been illegally awarded 8 in Form 36B collated tallies instead of 20. Another candidate Aden Mohamed Mohamud was illegally awarded 8 votes in the Form 36B collated tally instead of 20 votes.
- e. At Diiso Primary School Polling Station 1 of 2, the results for Maalim Diriye Ibrahim have been manipulated and he was illegally awarded 42 votes instead of 8.
- f. At Fafi Primary School, the results for one candidate, Maalim Diriye Ibrahim were incorrectly tabulated and collated in Form 36B as 42 votes instead of 52 votes.
- g. At Borehole 5 Mobile Polling Station 1 of 2, one Maalim Diriye Ibrahim was illegally and incorrectly awarded 42 votes in Form 36B collated tallies instead of 108 votes exhibited in Form 36A obtained at the polling station.
- h. At Borehole Mobile Centre Polling Station 2 of 2, one Maalim Diriye Ibrahim was illegally and incorrectly awarded 42 votes in Form 36B collated tallies instead of 177 exhibited in Form 36A from the Polling Station.
- i. Hagarbul Community Centre, one Maalim Diriye Ibrahim was illegally and incorrectly awarded 42 votes in Form 36B collated tallies instead of 9 exhibited in Form 36A obtained from the polling station.
- j. Elhumo ECD Centre Polling Station, the Petitioner was incorrectly awarded 5 votes in the Form 36B collated tallies instead of 8 votes obtained at the Polling Station as exhibited in Form 36A. At the same polling station, Maalim Diriye Ibrahim votes have been incorrectly collated and awarded 42 in Form 36B instead of 33 votes obtained at the Polling Station as exhibited in Form 36A.
- k. At Mathamarub Primary School Polling Station, votes for Maalim Diriye Ibrahim incorrectly collated in Form 36B as 42 votes instead of 52 votes obtained at the polling station as shown in the Form 36A from said Polling Station.
- l. At Laago Primary School Polling Station, votes for Maalim Diriye Ibrahim incorrectly collated in Form 36B as 42 votes instead of 43 votes obtained at the polling station as shown in the Form 36A.
- m. At Hagadera Community Water Pan Polling Station 1 of 2, the results in Form 36A for one candidate to wit Maalim Diriye Ibrahim is 45 votes. The same has been manipulated and illegally collated in Form 36B as 42.
- n. At Yumbis Primary School Polling Station, the results for one candidate Dubat Mohamed Odowa who gathered 0 vote as indicated Form 36A was incorrectly collated and illegally to indicate 1 vote in Form 36B.



- o. At Fafahjin Primary School Polling Station, votes for Maalim Diriye Ibrahim incorrectly collated in Form 36B as 42 votes instead of 18 votes obtained at the polling station as exhibited in Form 36A.
 - p. At Iftin Primary School, the results in Form 36A for one candidate; Maalim Diriye Ibrahim is 17 votes as found in Form 36A. The same has been manipulated and illegally collated and more votes added to him in Form 36B and indicated as 42.
 - q. At Dela Sagaar Polling Station, one Maalim Diriye Ibrahim was illegally and incorrectly awarded 42 votes in form 36B collated tallies instead of 2 votes as exhibited in Form 36A obtained from the polling station.
 - r. At Upendo Primary School Polling Station, Maalim Diriye Ibrahim obtained 28 votes but the collated tallies in Form 36B incorrectly indicate 42.
 - s. At Diiso ICT Centre, Maalim Diriye Ibrahim obtained 1 vote but the collated tallies in Form 36B incorrectly indicate 42.
 - t. At Daddera Primary School Polling Station, Maalim Diriye Ibrahim obtained 0 vote as per Form 36A but the collated tallies in Form 36B incorrectly indicate 42 votes.
 - u. That one Maalim Diriye Ibrahim collated tallies in form 36B indicate 42 votes obtained in each of the polling stations contrary to the figures in Form 36A for each and every Polling Station. A scrutiny of Forms 36As and 36B attached to the petition is probative of the content of the petition herein.
 - v. That the votes distribution per Form 36B is higher than the total casts votes captured in Form 36A. The votes distribution in Form 36B across each Polling Station does not tally or match with the total votes cast. For example, in Hagadera Community Pan Polling Station 1, Form 36B entry indicate total valid votes of 249 but the total votes distribution across adds to 246. The manipulation of entries in Form 36B is across all Polling Stations which is inconsistent with the primary results indicated in 36A.
8. The Petitioner further avers that in view of the inaccurate and unverifiable collation of Forms 36As by the 2nd and 3rd Respondents, the Petitioner would seek scrutiny of votes confined to polling stations;
- a. Scrutiny of votes confined to the following stations;
 - i. Hagadera Community Water Pan Polling Station 1
 - ii. Hagadera Community Water Pan Polling Station 2 of 2
 - iii. Diiso Polling Station 2.
 - iv. Diiso Primary School Polling Station 1.
 - v. Borehole 5 Mobile Polling Station 1.
 - vi. Iftin Primary School Polling Station.
 - vii. Fafahjin Primary School Polling Station.
 - viii. Yumbis Primary School Polling Station.
 - ix. Laago Primary School Polling Station.
 - x. Matharub Primary School Polling Station.



- xi. Elhumo ECD Centre Polling Station.
 - xii. Upendo Primary School Polling Station.
 - xiii. Fafi Primary School.
 - xiv. Dela Sagaar Polling Station
 - xv. Daddera Polling Station.
- (b) Recount of votes or examination of tallying confined to 3 polling stations to wit; -
- i. Hagadera Community Water Pan Poling Station 2 of 2;
 - ii. Diiso Polling Station 2 of 2 and
 - iii. Elhumo ECD Centre Polling Station.
9. The Petitioner pleads further that if proper, correct and accurate collation and tallying of the results from all the 18 polling stations, the 2nd Respondent would have found that the Petitioner received the majority votes of 823 votes; and, he is the legitimate and bona fide winner of the elections for Member of County Assembly representing Fafi Ward.
 10. The Petitioner pleads further that the 2nd Respondent did not accurately and properly tally all the results from the various Forms 36As before announcing the results for Fafi Ward Member of County Assembly Elections. The collation, errors and illegalities made by the 2nd and 3rd Respondent fundamentally and substantially affected the results of the election. There are a number of Forms 36As whose results do not match those on the Form 36B which results were used to declare the 1st Respondent.
 11. Together with the petition, the Petitioner annexed his supporting affidavit accompanied with various annexures and witness affidavits of Abdi Nuro Gure, Mohamed Yunis Hassan and Abdirahman Mohamed Ibrah.
 12. In Response to the petition, the 1st Respondent entered appearance and filed his response to the petition together with a replying affidavit.
 13. The 1st Respondent avers that the Petitioner is a registered Refugee of Somali origin and was not eligible to compete in the election. The tallying, collation and computation of results in Form 36B as was received from all 18 polling station was done publicly, accurately and verified from 18 Forms 36A.
 14. The Respondent further avers that in Hagadera Community Water Pan Station 2 of 2, the 1st Respondent did not increase his tally to 130 from 13 and at the same time the 2nd Respondent did not reduce the Petitioner tally from 130 to 30.
 15. The 1st Respondent pleads that the 1st Responent garnered 174 votes at Diiso Primary School polling station 2 and it was the same result that was announced by the Presiding Officer. The form 36A relied by the Petitioner is false as it misses essential features of election declaration form and its fundamentally different from the one presented by the 2nd and 3rd Respondent. The veracity of Form 36A produced by the Petitioner having been questioned cannot be relied upon to discredit Form 36B issued by the 2nd Respondent. The 1st Respondent further avers that one candidate Maalim Diriye Ibrahim was indicated to have garnered 42 votes constantly in all polling stations. The 2nd Respondent admitted to have made an error and corrected it using an amended Form 36B with the correct results. Further, an amendment was made for Elhumo ECD Polling Centre by issuing Form



- 36B which reflected the Petitioner's correct tally of 8 votes and not 5 votes. The 1st Respondent further avers that in Yumbis Primary School, Form 36A produced by the Petitioner is different from the one produced by the 2nd Respondent and cannot be relied to discredit the results collated in Form 36B. That the Petitioner is relying on forged Form 36As instead of the amended Form 36B. There was no intentional manipulation, interference with the results but negligible arithmetical errors due to human imperfections that do not affect the integrity of the vote.
16. The 1st Respondent in addition to his response to the petition filed a replying affidavit reiterating the averments in his response and annexed various documents to buttress his depositions in his response.
 17. The 2nd and 3rd Respondent entered appearance and filed a joint response to the petition. The 2nd and 3rd Respondent avers that the final results of the 18 polling stations were accurately tallied and the results captured in Form 36B were based on the figures from respective Form 36As which were transmitted to the 2nd Respondent by the 18 Presiding Officers of Fafi Ward and could not be altered even at the Constituency Tallying Centre by the 2nd Respondent. The Form 36A for Hagadera Community Water Pan Polling Station 2 of 2, the Petitioner garnered 30 votes contrary to the claim that he garnered 130 votes. The 1st Respondent contrary to the allegation that he garnered 113 votes contrary to the allegation that he garnered 13 votes.
 18. The 2nd and 3rd Respondent further avers that the result for Diiso Primary School Polling Station 2 of 2 as presented in Form 36A by the Presiding Officer were announced without any alteration. The result for Maalim Diriye Ibrahim at Yumbis Primary School Polling Station was corrected after the anomaly was discovered. The 2nd and 3rd Respondent maintain that the 1st Respondent was validly elected as Member of County Assembly for Fafi Ward. In support of their response, the 2nd Respondent filed a supporting affidavit and a supplementary affidavit sworn on 25th October, 2022.
 19. When the Petition came up for pre-trial direction, the Petitioner filed a Notice of Motion application dated 5th October, 2022 seeking orders for scrutiny and or recount of votes in the following stations namely: -
 - (i) Hagadera Community Water Pan Poling Station 2 of 2.
 - (ii) Diiso Polling Station 2 of 2.
 - (iii) Elhumo ECD Centre Polling Station.
 20. The parties filed their responses to the application and the Court issued directions that scrutiny and or recount of votes was to be conducted at the tail end after the main petition had been heard.

Petitioner's Case

21. The Petitioner Mohamed Feisal Gedi, PW1 testified on Oath by adopting his affidavit to the petition sworn on 1st September, 2022 and a further affidavit sworn on 24th October, 2022 as his evidence in chief. He alludes that there was no objection for his candidature. That during the voting process, it was smooth, peaceful without any issue of bribery and or violence. He testified that the issue he is raising is the tallying of votes in the polling station of Hagadera Stream 2 and Diiso polling Station 2. That in Hagadera Stream 2, he garnered 130 votes as evidenced in Form 36A attached to his supporting affidavit contrary to the form issued by the 3rd Respondent showing that he obtained 30 votes. For Diiso Polling Station 2, he garnered 3 votes whereas the 1st Respondent garnered 144 votes. However, Form 36B by the 3rd Respondent show that he obtained 3 votes whereas the 1st Respondent obtained 174 votes. The Petitioner therefore make a claim against the 1st Respondent that at Hagadera Stream 2, 100 votes were added to the 1st Respondent to make a total of 113 votes whereas his votes were reduced



by a similar figure. At Diiso Primary Stream 2, the 1st Respondent was given 174 votes instead of 144 votes. Thus, 30 votes were added to him.

22. In cross examination, he deposed that his Form 36A is not stamped and its serial number differs from that of the Returning Officer. The last name is overwritten. He maintained that he would not fault the 3rd Respondent from clearing him as he was a Kenyan citizen holding ID No. 37342527. He raised a concern of the constant figure of 42 votes for one Maalim Diriye Ibrahim but the error was amended and was satisfied accordingly.
23. In re-examination, he alluded that if there was proper tallying of votes, he would have garnered 823 votes whereas the 1st Respondent would have garnered 672 votes. He urges the Court to nullify the results and direct the Returning Officer to issue a certificate of election to him.
24. PW2, Abdi Nuro Gure an agent for the Petitioner at Hagadera Water Pan Polling Station Stream 2. He testified that there was no violence at all. When votes were counted, the Petitioner obtained 130 votes whereas the 1st Respondent obtained 13 votes and signed Form 36A Serial Number 12959. On cross examination, he alluded that 100 votes were deducted from the Petitioner. That there is an overwriting by rubbing number one in Form 36A for the result of the Petitioner.
25. Whereas Abdirahman Mohamed Ibrahim, PW3 recounted that he was an agent for the Petitioner at Diiso Primary School Polling Station 2. He deposed that the Petitioner garnered 3 votes whereas the 1st Respondent secured 144 votes and signed Form 36A. He took a photograph of the results for Form 36A after the Presiding Officer informed them to take photograph of Form 36A. In cross examination, he alluded that Form 36A he presented as evidence is not stamped with IEBC stamp and its serial number differs from that of the 3rd Respondent. He went on to denounce the signature appearing on the 2nd and 3rd Respondent Form 36A. He explained that although the appointment letter was issued by the Governor. The Petitioner and the Governor were from the same party and he was an agent for both.

1st Respondent's Case

26. Hassan Aden Kolosho, RW1 testified on Oath by adopting his response to the petition and affidavit sworn on 13th October, 2022 as his evidence in chief alongside the annexures thereof.
27. In cross examination, he alludes that he was not the maker of the document marked KHA-4 from UNHCR, but he obtained it from Dadaab Refugee Camp upon request in writing. He alluded further that he did not raise any objection to IEBC that the Petitioner was a refugee. He confirmed that there were other agents at the polling station but one agent signed Form 36A. He went on to testify that he garnered 174 votes at Diiso Primary School Stream 2 and not 144 votes. While at Hagadera stream 2, he obtained 113 votes and not 13 votes. He maintained that if at all the ballot box was to be opened and scrutinized, 113 votes would be found therein.
28. On further cross examination, he denied the allegation that he was given more votes at Diiso Primary Polling Station 2. He went on to testify that he wrote a letter to UNHCR which he did not attach to his documents that the Petitioner was a resident of Ifo Refugee Camp. He further stated that he cannot blame IEBC for clearing the Petitioner to run for an election position.

2nd and 3rd Respondent Case

29. RW2 is Muhumed Salid Kuno, a Presiding Officer of Hagadera Community Water Pan Polling Stream 2. He testified on how he was recording Polling Station Diary (PSD) and entering of results without rubbing. He confirmed that there was no rubbing of a number for the results for the Petitioner who



had garnered 30 votes. He further testified that the voting exercise ended without any allegation of violence and or bribery. The 5 agents signed Form 36A without raising any complaint.

30. Whereas RW3 Abdurahman Omar Abdullahi alluded that he was the Presiding Officer for Diiso Primary School Polling Station 2. The voting process was peaceful. At the conclusion of the election, votes were counted and the 1st Respondent obtained 174 votes and one agent who was present signed Form 36A.
31. RW4 is Abdullahi Ibrahim Isaack, the Returning Officer for Fafi Constituency. In his testimony, he alluded that the Petitioner produced the original national identity card, a registered voter card and therefore he was eligible to vie and was cleared since there was no objection. He further testified that he had not seen the UNHCR document before he cleared him. He deposed that there was no election violence. He confirmed that when the results for Hagadera were projected, the Petitioner objected. Later, he announced it after consultation and amendment. He testified that pursuant to the results presented by the Presiding Officer, the Petitioner garnered 30 votes whereas the 1st Respondent garnered 113 votes.

Notice of Motion Application dated 5th October, 2022

32. At the close of the hearing of the petition, and pursuant to the Court directions, the learned counsels for the parties highlighted their arguments and after this Court being satisfied that sufficient reasons had been laid, directed that scrutiny and recount be limited to Hagadera Community Water Pan Polling Station 2 and Diiso Primary School Polling Station 2.
33. In compliance with the Court directive issued on 10th January, 2023, the Court Administrator carried out the vote scrutiny and recount on 11th January, 2023 in the presence of the parties advocates and agents. The report was accordingly filed which I will make reference hereunder shortly.
34. The parties consequently filed their respective submissions which I confirm I have carefully gone through as well as the authorities thereof.

Analysis and Determination

35. From the Petition, response to the petition, list of issues filed, submissions by the parties and recount and or scrutiny report, the following issues arise for the Court determination: -

(i) Whether the Petitioner was eligible to participate in the election?

36. The learned counsel for the Petitioner Mr. Akello submits that the Petitioner was eligible to participate in the election and has demonstrated that he is a Kenyan citizen by annexing a copy of his National Identity Card, birth certificate and a passport. Besides, the allegation has been overtaken by event.
37. The learned counsel for the 1st Respondent Mr. Nyaga did not make any submissions on this issue. Whereas the learned counsel Mr. Mohamud for the 2nd and 3rd Respondent submits that the Petitioner submitted his nomination papers to the 2nd Respondent on 4th June 2022 namely: -
 - i. A copy of his National Identity Card
 - ii. Certificate of Nomination from Orange Democratic Movement (ODM) dated 6th April, 2022.
 - iii. IEBC acknowledgement slip which confirmed that he was a registered voter at Borehole 5 Mobile Centre.
 - iv. Duly filled Form 18



- v. Tax compliance certificate
 - vi. Higher Education Loan Board compliance certificate
 - vii. Certificate of Good Conduct
 - viii. Credit Reference Clearance Certificate.
38. The 2nd and 3rd Respondent further submits and maintain that the issue of eligibility of the Petitioner is a pre-election dispute which ought to have been heard and determined by the 3rd Respondent prior to the election. Therefore, this court lacks jurisdiction to entertain pre-election dispute.
39. This Court is guided by the authority in the case of Mohamed Abdi –Vs- Ahmed Abdullahi Mohamed & 3 others, Ahmed Ali Muktar- Interested Party (2019) eKLR. The Court made the following principles: -
- i. All pre-election disputes, including those relating to or arising from nominations, should be brought for resolution to the IEBC or PPDT, as the case may be, in the first instance;
 - ii. Where a pre-election dispute has been conclusively resolved by the IEBC, PPDT, or the High Court sitting as a Judicial Review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution*, such dispute shall not be a ground in a petition to the election Court;
 - iii. Where the IEBC or PPDT has resolved a pre-election dispute, any aggrieved party may appeal the decision to the High Court sitting as a Judicial Review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution*; the High Court shall hear and determined the dispute before the elections, and in accordance with the Constitutional timelines;
 - iv. Where a person knew or ought to have known of the facts forming the basis of a pre-election dispute, and chooses through any action or omission, not to present the same for resolution to the IEBC or PPDT, such dispute shall not be a ground in a petition to the election Court.
 - v. The action or inaction in (iv) above shall not prevent a person from presenting the dispute for resolution to the High Court, sitting a Judicial Review Court, or in exercise of its supervisory jurisdiction under Article 165 (3) and (6) of *the Constitution*, even after determination of an election petition.
40. This Court is therefore satisfied that the issue of eligibility is a pre-election issue of nomination and eligibility to participate in an election. This court lack jurisdiction to entertain the dispute of nomination to participate in an Election.

(ii) Threshold for proof of an Election Petition?

41. At the outset, I wish to restate the threshold for burden of proof of an election Petition. In this regard, I will be guided by the holding in the case of Odinga & 16 others v Ruto & 10 others; Law Society of Kenya & 4 others (Amicus Curiae) (Presidential Election Petition E005, E001, E002, E003, E004, E007 & E008 of 2022 (Consolidated)) [2022] KESC 56 (KLR) (Election Petitions) where the Supreme Court State at paragraph 32: -

“(32) Suffice to stress that the Court has been consistent that a petitioner who seeks the nullification of elections for alleged non-conformity with *the constitution* or the law or on the basis of irregularities, has the duty to offer cogent and



credible evidence to prove those grounds to the satisfaction of the Court. Once the Court is convinced that the petitioner has discharged that burden, then the evidentiary burden shifts to the respondent (who in most election-related cases is IEBC), to present evidence by way of rebuttal of the assertion.”

42. In the 2017 Raila Odinga Case, the supreme Court stated at paragraph 152 of its majority decision that: -

“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. Consequently, we dismiss the petitioners’ submissions that the Court should reconsider the now established legal principle, as discussed above, and find that the standard of proof in election petitions is on a balance of probabilities.”

43. In view of the above holdings, the standard of proof in Election Cases is above a balance of probabilities but below the one for Criminal Cases of beyond reasonable doubt.

(iii) Whether the 2nd and 3rd Respondent conducted a free and fair election?

44. The Petitioner in his petition averred widespread incorrect and unverifiable collation of results and voter results manipulations in the Polling Stations of Hagadera Community Water Pan Polling Station 1 and 2, Diiso Polling Station 2, Diiso Primary Station 1, Borehole 5, Iftin Primary, Fafahjin Primary, Laago Primary, Matharub Primary, Elhumo ECD, Upendo Primary, Fafi Primary, Dela sagaar and Daddera.

45. During the hearing, the Petitioner abandoned all the claims save for claims in Hagadera Community Water Pan Polling Station 2 of 2 and Diiso Primary School 2 of 2.

46. The Petitioner’s witnesses and the 1st, 2nd and 3rd Respondent witnesses in their evidence alluded that the voting was carried out in Hagadera Polling Station and Diiso Polling Station without any incidence of bribery, violence and or intimidation. In other words, the election was smooth and peaceful. I therefore arrive at the findings that elections in the two contested polling stations were held as per Article 81 (e) (i), (ii) and (iii). This leads me to the next issue; -

(iv) Whether the tallying and collating of votes was transparent verifiable, accurate and accountable at Hagadera Community Water Pan Polling Station 2 and Diiso Primary School Polling 2?

47. During the hearing of the petition, the Petitioner narrowed scrutiny and recount for 2 polling stations of Hagadera stream 2 and Diiso primary stream 2. The Court granted the prayers for scrutiny and recount limited to the 2 polling stations after hearing all the parties’ arguments pursuant to an application filed by the Petitioner.

48. The learned counsel Mr. Akello for the Petitioner submit that at Hagadera Community Water Pan Polling Station 2, 100 votes were deducted from his votes reducing the Petitioner’s votes from 130 votes to 30 votes. Form 36A issued to the agent at the polling station clearly indicates that the Petitioner garnered 130 votes. However, Form 36B prepared by the 2nd and 3rd Respondent had been manipulated and his votes were indicated as 30 while adding the 1st Respondent with 100 votes to make it 113 votes.

49. The learned counsel further submits that the impugned amended Form 36B dated 11th August, 2022 produced by the 2nd and 3rd Respondent in the affidavit of RW4 Abdullahi Isaack sworn on 28th



September, 2022 captures incorrect and inaccurate results for Hagadera Water Pan 2 and Diiso Primary School 2.

50. The learned counsel for the Petitioner further submits that the Scrutiny and Recount Report dated 16th January, 2023 confirmed that the number of votes for Hagadera stream 2, the Petitioner obtained 130 votes and the 1st Respondent received 13 votes as indicated in Form 36A annexed to the petition. The scrutiny exercise also confirmed that at Diiso Primary School Polling Station 2, the 1st Respondent garnered 144 votes and not 174 votes as illegally captured in the amended Form 36B. The Petitioner submits that Form 36As for the two Polling Stations were manipulated.
51. The Petitioner contends that the petitioner has demonstrated that if correct tabulation and collation of results from the two polling stations were done, then, the petitioner won the election by majority votes of 823 followed by the 1st Respondent who came second with 672 votes.
52. Therefore, the non-compliance of the law by the 2nd and 3rd Respondents or the Presiding Officers substantially affected the accuracy of the collated results. The Petitioner place reliance in the Presidential Election Petition No. 102 of 2011 Rtd Col Kizza Besigye –Vs- Yoweri Kaguta Museveni & Electoral Commission Mulenga JSC explained the meaning of the phrase “affected the result of the election in a substantial manner” as follows:

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

53. The learned counsel Mr. Nyaga for the 1st Respondent submits that the scrutiny report is not conclusive and creates more doubt on the credibility of ballot cast at Hagadera in the following ways:
 - i. Whereas there are 246 plucked ballot papers from the counterfoil, only 243 ballots are accounted for. The remaining were not in the ballot box and as such could not be accounted for. Might they have been issued in other polling stations?
 - ii. The scrutiny report did not explain how it came to the conclusion that the cast ballots were plucked from the counterfoils, there was no actual comparison of the ballots and the counterfoil as evidenced by the fact that the report does not tell us the serial numbers of the missing ballot papers.
 - iii. During the exercise of affixing additional seals, it was noted that one seal was missing. This finding was not included in this report. The report is thus not credible as it has left out a crucial finding.
 - iv. The scrutiny report does not include the serial number of the seals that were used to secure the ballot box after the voting exercise, it only includes the seals placed by the Judiciary. This points to a skewed exercise because no particular reason is given for this deliberate omission.
 - v. Finally, the report does not indicate the number of votes garnered by Dubat Mohamed Odawa as per the Form 36A.
 - vi. With regard to Diiso Polling Station 2 of 2, the report disclosed that there was no Form 36A that was inside the ballot box. The case of James Omingo Magara –Vs- Manson Onyango



Nyamweya page 9 where the Court observed that Form 17A which is equivalent to Form 36 in our case was not properly filled and thus people could not know the exact result. The same applies to our case. Form 36A for Diiso Primary Polling Station 2 was not found inside the ballot boxes after a recount was done and we can equally argue that we do not know the exact results and who won in the said Centre.

The 1st Respondent place reliance in the case of James Omingo Magara –Vs- Manson Onyango Nyamweya.

54. The learned counsel Mr. Mohamud for the 2nd and 3rd Respondent submits that the Polling Stations is the true locus for free exercise of the voters will. The results announced at the Polling Station by the Presiding Officers are final and cannot be interfered with by the Returning Officer at the Constituency Tallying Centre. They further submit that the declaration, tallying, computing and collating of the results for Fafi Ward was carried out in accordance with the law. That the 2nd Respondent relied on the contents of Form 36As submitted to him by the various Presiding Officers.
55. The 2nd Respondent submit that he did not in any way or form change, interfere with or manipulate the contents of Form 36As.
56. In view of the parties' submissions, it is the view of this Court that the sub-strum of the Petitioner's case is whether in the process of counting and capturing votes garnered by the candidates in Form 36A were correctly tallied and collated by the 2nd Respondent and or whether the figures were manipulated to affect the final results of the election in a substantial manner.
57. The Petitioner testified that the 1st Respondent obtained 13 votes at Hagadera Polling Station 2 of 2 whereas he obtained 130 votes as per the results contained in Form 36A issued to his agent after the announcement by the Presiding Officer. His evidence was collaborated by PW2 Abdi Nuro Gure, the Petitioner's agent at Hagadera Water Pan Polling Station 2. He testified that the results contained in Form 36B by the 2nd Respondent was manipulated as there appeared a deletion or eraser of digit one (1).
58. PW3 Abdirahim Mohamed Ibrahim was the Petitioner's agent at Diiso Primary School Polling Station 2. He alluded that the Petitioner garnered 3 votes whereas the 1st Respondent obtained 144 votes. He strongly denies the results contained in Form 36B issued by the 2nd Respondent which reflects that the 1st Respondent obtained 174 votes. He alluded that he took a photograph of Form 36A which he presented in Court.
59. The Presiding Officers for the two impugned Polling Stations namely PW2 Muhumed Salid Kuno for Hagadera Community Water Pan Polling Station Stream 2 of 2 and RW3 Abdirahman Omar Abdullahi testified that they were the authors of Forms 36As annexed to their affidavits. They further confirmed the total number of votes garnered by each candidate as a true reflection of Forms 36B.
60. This Court gave directions that scrutiny and recount be limited to Hagadera Community Water Pan Polling Station 2 of 2 and Diiso Primary School Polling Station 2. The report was presented and filed by the Court Administrator. The findings were as follows: -
 1. Scrutiny of Hagadera Community Water Pan Polling Station 2 of 2
 - i. Scrutiny of Ballot box

The ballot box was to be scrutinized to establish the integrity of the same from the end of counting after polling on 9th August, 2022 to the time of scrutiny.

It was expected that the serial number of the Ballot Box delivered to Court and its Seals correspond with the serial number of the Ballot Box and Seals as recorded in the Polling



Station Diary. The seals were also expected to match with the seals recorded during the placement of additional seals (which was done on 29.11.2022).

Findings:

- a. All the seals had IEBC prefix;
- b. The ballot serial number and seals all matched with seals recorded on 29.11.2022;
- c. Seals in the ballot box were similar to seals recorded in PSD; and
- d. No discrepancy was noted.

ii. Opening of ballot box

The ballot box for Hagadera Community water pan polling station 2 of 2 was opened and items namely: carbon copy of the original Form 36A with Serial Number CA012951, counterfoil, wrapped candidates ballot papers, unused ballot papers were found in the box.

iii. Scrutiny of form 36A

Findings

- a. Form 36A with serial number CA012951 was a carbon copy of the original form;
- b. Form 36A was signed by the Presiding Officer and Deputy Presiding Officer and with remarks;
- c. Four (4) agents signed the Form by indicating their names, ID numbers, political parties, contact, signature and date;
- d. The form had security features namely: IEBC Logo, IEBC Stamp and QR code; and
- e. No alteration was noted in Form 36A.

iv. Scrutiny of Counterfoil

The counterfoil was sealed in a tamper proof envelope, it had Serial numbers running from serial Nos. CA02121550 to CA02121795. Ballot papers were checked with a view to establish whether the used ballot papers were actually plucked from the same counterfoil. The counterfoil had 246 plucked sheets.

After comparison, it was established that the cast ballot papers were plucked from the same counterfoil book.

v. Re-count votes

Votes for each candidate were as indicated in the table below.



S/No.	Name of candidate	No. of votes in Form 36A	Number of votes re-counted	Difference
1.	Aden Ahmed Mohamud	013	013	None
2.	Ali Mohamed Hares	028	028	None
3.	Dubat Mohamed Odawa	-	000	None
4.	Kediye Abdirashid Sirat	002	002	None
5.	Kolosh Hassan Aden	13	013	None
6.	Maalim Diriye Ibrahim	057	057	None
7.	Mohamed Feisal Gedi	130	130	None
Total number of votes		243	243	None

Findings:

- a. Number of votes in form 36A matched with number of votes after re-count;
 - b. Form 36A indicated 001 rejected votes although the rejected ballot was not found in the box. Entry for rejected votes in the PSD indicated 000.
- vi. Rejected votes
- Form 36A indicated 001 as rejected ballot paper but the Polling Station Diary indicated 000. No physical rejected ballot paper was found in the box.
- vii. Examination of Polling Station Diary
- It was noted that the Polling Stations Diary (PSD) indicated the serial number of the Box that contained the Electoral Materials at the end of counting and the serial numbers of the Seals used to close the box.
- viii. Sealing of the Ballot Box
- Upon the completion of the scrutiny and the recount of votes for Hagadera Community water pan polling station 2 of 2, the following IEBC materials namely;



Ballot Papers, Counterfoils, Un-used ballot papers, used broken seals, form 36A were all returned into the box and the ballot box was sealed with new seals of serial numbers IEBC 2891996, IEBC 3616682, IEBC 3616681 and IEBC 361668.

2. Scrutiny of Diiso Primary Polling Station 2

i. Ballot Box

The ballot box was to be scrutinized to establish the integrity of the same from the end of counting after polling on 9th August, 2022 to the time of scrutiny.

It was expected that the serial number of the Ballot Box delivered to Court and its Seals correspond with the serial number of the Ballot Box and Seals as recorded in the Polling Station Diary. The seals were also expected to match with the seals recorded during the placement of additional seals (which was done on 29.11.2022).

Findings:

- a. All the seals had IEBC prefix;
- b. The ballot serial number and seals all marched with seals recorded on 29.11.2022;
- c. Seals in the ballot box were similar to seals recorded in PSD; and
- d. No discrepancy was noted.

ii. Opening of ballot box

The ballot box for Diiso Primary Polling Station 2 was opened and items namely: counterfoil, non-wrapped candidates ballot papers, unused ballot papers were found in the box.

iii. Scrutiny of Form 36A

Form 36A was not available for scrutiny.

iv. Scrutiny of Counterfoil

The counterfoil was sealed in a tamper proof envelope, it had Serial numbers running from serial Nos. CA02125341 to CA02125534. Ballot papers were checked with a view to establish whether the used ballot papers were actually plucked from the same counterfoil. The counterfoil had 194 plucked sheets.

After comparison, it was established that the cast ballot papers were plucked from the same counterfoil book.

v. Re-count of votes

Votes for each candidate are as indicated in the table below.



S/No.	Name of candidate	No. of votes in Form 36A	Number of votes re-counted	Difference
1.	Aden Ahmed Mohamud	-	012	-
2.	Ali Mohamed Hares	-	000	-
3.	Dubat Mohamed Odawa	-	000	-
4	Kediye Abdirashid Sirat	-	020	-
5.	Kolosho Hassan Aden	-	144	-
6	Maalim Diriye Ibrahim	-	007	-
7	Mohamed Feisal Gedi	-	003	-
Total number of votes		-	186	-

Findings:

Total number of counted votes was 186 whereas the number of sheets in the counterfoil was 194.

vi. Rejected votes

There were no rejected ballot papers.

vii. Examination of Polling Station Diary

It was noted that the Polling Stations Diary (PSD) indicated the serial number of the Box that contained the Electoral Materials at the end of counting and the serial numbers of the Seals used to close the box.

viii. Sealing of the ballot box

Upon the completion of the scrutiny and the recount of votes for Diiso Primary Polling Station 2, the following IEBC materials namely; Ballot Papers, Counterfoils, Un-used ballot papers, used broken seals were all returned into the box and the ballot box was



sealed with new seals of serial numbers IEBC 2601023, IEBC 3616656, IEBC 2601022 and IEBC 2891997.

61. Following the evidence adduced by the Petitioner and his witnesses visa avis the examination Report of Scrutiny and Recount filed in court by the Court, it's quite apparent that the Petitioner has plainly and concisely on a balance of probability demonstrated that at Hagadera Polling Station 2, the Petitioner garnered 130 votes and not 30 votes as reflected in Form 36A by the 2nd and 3rd Respondent. Again, the Petitioner has also demonstrated that at Diiso Polling Station 2, he garnered 3 votes whereas the 1st Respondent garnered 144 votes. Unfortunately, Form 36A by the 2nd and 3rd Respondent was not found inside the ballot box. Be it as it may, it is quite apparent from the results of the recount that if they were accurately tallied and collated by the 2nd Respondent, the results thereof would have substantially affected the outcome of the election and the victory of the 1st Respondent would have been in doubt. The missing Form 36A cannot affect the outcome as all other essential accountable documents such as PSD, counterfoils, ballot papers, un used ballot papers and were found inside the ballot box and were compared accordingly as indicated in the recount and scrutiny report.

(v) Whether to annul the election?

62. Section 80 (4) of the Election Act No.24 of 2011(Rev. 2022) provides that: -

“An election Court may by order direct the Commission to issue a certificate of election to a President, a member of Parliament or a member of a county assembly if-

- a. Upon recount of the ballots cast, the winner is apparent; and
- b. That winner is found not to have committed an election offence.”

63. In view of the findings from Scrutiny and Recount, the Petitioner submits that the court should nullify the election and direct the 2nd and 3rd Respondent to issue a certificate of election on the basis that the Petitioner is an apparent winner of the election and he has not committed any election offence to necessitate fresh election. That there were no irregularities that affected the voting process.

64. The learned counsel Mr. Nyaga for the 1st Respondent submits that the Court cannot declare the Petitioner the winner of the impugned election after a partial recount. This can only apply after a recount of all ballot boxes. He placed reliance in the case of Abdirahman Ibrahim Mohamud –Vs- Mohamed Ahmed Kolosh & 2 Others (2018) eKLR, Zebedeo John Opore –Vs- John Oroo Oyioka & 3 Others Civil Appeal No. 44 of 2013 and Richard Kalembe Ndile and Another –Vs- Partick Musimba Mweu & 2 Others (2013) eKLR.

65. The learned counsel for the 2nd and 3rd Respondent submits that Section 83 of the Election Act forbids an election Court from nullifying an election due to trivial errors or irregularities that have not substantially affected the results.

66. This Court is very much alive to the fact that there are other considerations the Court should take into account other than scrutiny and recount. It has been shown through recount that the votes garnered by the Petitioner substantially affected the results. Among other factors to be considered are laid down under Article 81 (e) (iv) and (v) which provide for a transparent election administered in an impartial, neutral, efficient, accurate and accountable manner. To achieve the above tenents, the 2nd and 3rd Respondent is required to comply with Section 83 of the Election Act. It is the view of this court that noncompliance by the 2nd and 3rd Respondent by failing to put form 36A into the ballot box cannot substantially affect the results of the election as all other accountable documents were found in the ballot box.



67. This court also finds from all the witnesses that there were no incidence of bribery or violence. That the election was smooth and peaceful.
68. This Court has considered the authority cited by the learned counsel for the 1st Respondent in the case of Abdirahman Ibrahim Mohamud –Vs- Mohamed Ahmed Kolosh & 2 Others (2018) eKLR where the court of appeal court observed that: -
- “We are therefore quite clear in our minds that only by a recount covering all polling stations and all votes cast can the will of the electorate in a particular election be conclusively determined. It would be a strange thing, bizarre even, to alter the outcome of an election on the basis of a limited recount and declare the result thereof a reflection of the will of the voter as Mohamud sought to persuade the court.”
69. In the above cited authority, the supreme court in Petition No. 26 of 2018 (Abdirahman Ibrahim Mohamud –Vs- Mohamed Ahmed Kolosh & 2 Others (2018) eKLR), overturned the decision of the court of Appeal and affirmed that an election court can declare the winner without the need for a fresh election pursuant to section 80(4) of the Election Act.
70. In conclusion, I am satisfied above balance of probabilities that:
- i. The results contained in Form 36A for Hagadera Polling Station 2 of 2 was not properly collated into Form 36B.
 - ii. The missing of Form 36A for Diiso Polling Station did not affect the accuracy and transparency of the results during the Recount and Scrutiny as all other accountable document were found in the ballot box.
 - iii. In Hagadera Polling Station 2, the 100 votes irregularly added to the 1st Respondent in Form 36B if reduced from his collated tally will result to 702. And, if the same votes are added to the Petitioner, the petitioner collated tally will result to 823. Again, if the 30 votes irregularly added to the 1st Respondent at Diiso Polling Station 2 are deducted, the collated tally for the 1st Respondent will reduce further to 672.
 - iv. The Petitioner apparently won the election with a margin of 151 votes and therefore carries the will of the people of Fafi Ward.
- (vi) Who bears costs?
71. The Petitioner submits that the 2nd and 3rd Respondent jointly and severally do pay costs capped at 4 million owing to the deliberate actions and or attempts by agents of the 3rd Respondent to interfere with the results of the election contrary to *the Constitution* and Election Act. The 1st Respondent did not make submissions on this issue. Whereas the learned counsel for the 2nd and 3rd Respondent submit that costs follow the event and owing to the unfounded allegations, they should be awarded costs. The Petitioner and 1st Respondent cannot be faulted.
72. I have considered the petition and extent of time the parties have put into this matter as guided by various recent awards in Election Petitions determined to date. In the premise, I award the Petitioner full costs capped at Kshs. 300,000/= . The 1st respondent to get full costs capped at 300,000/= The costs for Mr. Akello and Mr. Nyaga are each capped at Kshs. 250,000/=.
73. Final Orders



- a. A declaration is hereby issued invalidating the election of the 1st Respondent as the Member of County Assembly of Garissa County representing Fafi Ward;
- b. A declaration is hereby issued that the Petitioner was duly elected as the Member of County Assembly representing Fafi Ward having attained majority valid votes in Fafi Ward in the Election of Member of County Assembly of Garissa County.
- c. This Honourable Court hereby direct the 2nd and 3rd Respondent and/or its agents to issue certificate of election of the Member of County Assembly for Fafi Ward to the Petitioner within five days.
- d. The 3rd Respondent shall bear the costs of the petition as follows:
 - i. The Petitioner to get full costs of the petition capped at Kshs. 300,000/=
 - ii. Mr. Kolosho Hassan Aden to get full costs of the petition capped at Kshs. 300,000/=
 - iii. Mr. Akello's costs and Mr. Nyaga's costs each is capped at Kshs. 250,000/=.
 - iv. The costs will be borne by the 3rd Respondent.
- (f) Deposit paid into Court as security shall be released to the depositor forthwith.

**JUDGMENT DELIVERED VIRTUALLY VIA TEAMS MICROSOFT PLATFORM AT GARISSA,
DATED AND SIGNED THIS 24TH DAY OF FEBRUARY, 2023**

HON. H. M. NYABERI (MR.)

CHIEF MAGISTRATE, GARISSA LAW COURT.

In the presence of:

Mr. Akello advocate for the Petitioner

Mr. Mugwe Nyaga advocate acting alongside with Mr. Kimanza Rodgers for the 1st Respondent

Mr. Oduor holding brief for Mr. Mohamud advocate for the 2nd and 3rd Respondent

