



**Samba v Independent Electoral & Boundaries Commission & 2 others (Election  
Petition E003 of 2022) [2023] KEMC 4 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEMC 4 (KLR)

**REPUBLIC OF KENYA  
IN THE MOMBASA LAW COURTS  
ELECTION PETITION E003 OF 2022**

**VO ADET, PM**

**FEBRUARY 28, 2023**

**IN THE MATTER OF THE ELECTION OF THE MEMBER OF THE COUNTY  
ASSEMBLY UNDER ARTICLE 177(1) (A) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE ELECTION OF THE MEMBER OF THE COUNTY  
ASSEMBLY FOR TUDOR WARD, MVITA CONSTITUENCY IN MOMBASA COUNTY**

**AND**

**IN THE MATTER OF SECTION 75 (1A) (2) (3) (4) & (5) OF THE ELECTION ACT**

**AND**

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

**BETWEEN**

**TOBIAS OTIENO SAMBA ..... PETITIONER**

**AND**

**INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION .... 1<sup>ST</sup>  
RESPONDENT**

**RETURNING OFFICER, MVITA CONSTITUENCY ..... 2<sup>ND</sup> RESPONDENT**

**SAMIR GULAM ABBAS BALOO ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. By a petition dated the 7<sup>th</sup> day of September, 2022 and filed in court on the same date, the Petitioner is seeking for the following orders: -



- i. A declaration that the elections for the position of member of county Assembly for Tudor ward within Mombasa County as conducted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the 9<sup>th</sup> August 2022 did not comply with *the Constitution* of Kenya, 2010, the *Elections Act*, 2011 and the Regulations thereunder and did not meet the legal threshold and is therefore illegal, null and void.
  - ii. A declaration that the illegalities and irregularities exhibited and witnessed in the Elections held on 9<sup>th</sup> August 2022 for the position of Member of County assembly for Tudor Ward within Mombasa County affected the results and the validity of the said elections.
  - iii. A declaration that the election of the 3<sup>rd</sup> Respondent herein, Samir Gulam Abbas Baloo was not validly elected as Member of County Assembly for Tudor Ward in Mombasa County and the 2<sup>nd</sup> Respondent's declaration of the 3<sup>rd</sup> Respondent as elected is illegal, null and void and the said declaration be revoked, cancelled and nullified forthwith.
  - iv. A declaration that the 3<sup>rd</sup> Respondent herein, Samir Gulam Baloo committed election offence and the determination of this Honorable Court be transmitted to the Director of Public Prosecution for appropriate actions.
  - v. An order be issued directing the 1<sup>st</sup> Respondent to conduct fresh elections for the position of Member of County Assembly, Tudor Ward in Mombasa County in conformity with *the Constitution* of Kenya, the *Elections Act*, 2011 and the Regulations thereunder.
  - vi. A declaration that the 3<sup>rd</sup> Respondent having committed elections offences, be barred from participating in the fresh elections ordered by this Court.
  - vii. That the cost of the Petition be awarded to the Petitioner and to be paid by the Respondents jointly and severally.
2. The Petitioner Samba Tobias Otieno was one of the 6 candidates who vied for the Member of County Assembly Representative for Tudor Ward, Mvita Constituency, Mombasa County, on the election held on the 9<sup>th</sup> of August 2022; the other candidates were: -
- i. Baloo Samir Gulam Abass
  - ii. INyanje Kennedy M
  - iii. Kadenge Japheth Charo
  - iv. Kiema Phillip Mbithi
  - v. Malii David Mutua
3. Upon counting the votes, the 2<sup>nd</sup> Respondent declared the results of the said elections as follows: -
- i. Baloo Samir Gulam Abass of UDA Party 4587 votes
  - ii. Inyanje Kennedy M of JIBEBE Party 131 votes
  - iii. Kadenge Japheth Charo Of KADU Asili Party 228 votes
  - iv. Kiema Phillip Mbithi of KANU Party 119 votes
  - v. Malii David Mutua of WIPER party 1023 votes
  - vi. Samba Tobias Otieno of ODM party 3642 votes



4. Eventually, the 3<sup>rd</sup> Respondent Baloo Samir Gulam Abass was declared as the winner and duly elected as Member of County Assembly of Tudor Ward in the election held on the 9<sup>th</sup> day of August 2022 having garnered the highest number of valid votes cast. The petitioner emerged the second in the race as per the declared results, he felt aggrieved with the outcome on the ground that the Respondents were in the breach and that the subject elections did not comply with the provisions of the Constitution of Kenya 2010, the Elections Act, the Regulations thereunder and that the elections conducted was not free, accurate, verifiable, accountable and transparent specifically: -
  - a. The election was marred with violence and voter intimidation
  - b. Failure of KIEMS kits
  - c. Failure to extend voting time
  - d. Handling of the petitioner's agents
  - e. Voter bribery, influence and inducement
  - f. Failure to properly tally and verify results
  - g. Ballot stuffing
  - h. Failure by 1<sup>st</sup> and 2<sup>nd</sup> Respondents to ensure integrity of the voting process
  - i. Commission of election offences
5. The petition was supported by affidavits of the petitioner and his witnesses. As follows: -
  - a. Tobias Otieno Samba sworn and dated the 7<sup>th</sup> day of September 2022
  - b. Stephen Maina Mwangi
  - c. Fahima Mwatsau
  - d. Rozina Walegha Mwaasaru
  - e. Roselyne Anyango
  - f. Charles Andanbwa
  - g. Newton Havi
  - h. Mtoi Mwero Mtoi
  - i. Omar Salim Shee
  - j. Daniel Muli
  - k. Juma Rumba Kamanza
  - l. Geoffrey Ng'onde
  - m. Derrick Rioba
  - n. Charles Alex Munuve Njenga
6. The petition was opposed by the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents. In their joint response to the petition dated 30<sup>th</sup> September, 2022 and filed on 5<sup>th</sup> October 2022. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents jointly denied the allegations as contained in the Petition and specifically; allegations of violence and voter



intimidation, failure of KIEM kits, failure to extend voting time, handling of the petitioner's agents, voter bribery, influence and inducement, failure to properly tally and verify results and ballot stuffing. Instead, they in urge the court to find that the election for Member of County Assembly for Tudor was conducted in accordance with the provisions of *the Constitution* and the *Elections Act*, the Regulations made thereunder and that if there was any breach thereof the said breach did not contravene the provisions of *the Constitution*, the *Elections Act*, the Regulations made there under, or any other statute in declaring the 3<sup>rd</sup> Respondent as the member of County Assembly.

7. The 3<sup>rd</sup> Respondent was barred from participating in the Petition having failed to submit his response within the stipulated time pursuant to provisions of Rule 11(8) of the Election Petition Rules on the 13<sup>th</sup> October, 2022. By an application dated the 27<sup>th</sup> October, 2022 the 3<sup>rd</sup> respondent sought orders for review of the orders issued on the 13<sup>th</sup> October, 2022 which application was dismissed on the 23<sup>rd</sup> November, 2022.

### **The Petitioner's case**

8. The Petitioner testified and adopted his affidavit in support of the petition sworn on the 7<sup>th</sup> September, 2022 in line with the provisions of Rule 12 of the Elections (Parliamentary and County Elections) Rules, 2017 and in view of the directions taken during the pre-trial stage on the 23<sup>rd</sup> November, 2022, including all other witnesses. He however did not call all his witnesses whose affidavit were presented with the petition.
9. PW1 Tobias Otieno Samba the petitioner, testified in brief that, he was a registered member of the Orange Democratic Movement (ODM) party and was a candidate for the position of Member of County assembly for Tudor ward, Mombasa County in the General Elections held on the 9<sup>th</sup> August, 2022. Where the 3<sup>rd</sup> Respondent was declared as the duly elected Member of County Assembly for Tudor Ward Mombasa County having garnered 4587 votes, while he was second and garnered 3642 votes .
10. According to the petitioner he did not accept the election results declared by the 2<sup>nd</sup> respondent because the subject elections did not comply with *the Constitution*, Election Act and the Regulations further, the Petitioner and his agents were denied an opportunity, to witness the pallet breaking for Tudor Ward Member of County Assembly position denying them a chance to confirm the ballot papers for Tudor ward, which act was suspicious in the circumstance.
11. Further, that on 9<sup>th</sup> August, 2022 during the poll voting date, at around 8:00am he received a phone call from his Mobiliser Harry Suluhu Barasa that the 3<sup>rd</sup> Respondents agents/mobilisers namely Hassan, Usna, Saumu and Lugogo were giving voters masks branded Mombasa Cement at Tudor Village Hall Polling Station, that the 3<sup>rd</sup> Respondent was known to be an employee of Mombasa Cement.
12. Petitioner testified further that when he presented himself to vote at around 9:30 am he was unable to do so, since the KIEM kits for Polling station 6 of 6 (polling station No. 1006002701306) had failed since 7:00am and voting had stopped, at that time there was a long queue of voters who were becoming anxious and frustrated by the process and the efforts by the voters to make inquiry from the 2<sup>nd</sup> Respondent was not sufficient.
13. That while at the same polling station, he noticed some agents who were making loud noises where a commotion ensued on the other side of the Hall. And at around 10:30am after the Petitioner had left the polling station, his chief agent Ms. Roselyne Anyango informed her that chaos had erupted in the Hall and that the 3<sup>rd</sup> Respondent and one Omar Shallo his rival, the aspirant for the Member of County Assembly for Mvita Constituency had stormed into the Polling Station alleging that votes were being



stolen and chaos and violence erupted. In the melee Mr. Omar Shallo plucked the duplicate of the ballot papers and took them claiming that it was evidence of stealing. Meanwhile the 3<sup>rd</sup> Respondent agents went ahead to spray pepper spray inside the polling station causing the people present to run for safety.

14. According to the Petitioner, several electoral malpractices were reported at Makupa Police Station following the incidents that occurred at Tudor Village Hall Polling Station disrupting the voting process. The fracas led to the destruction of the IEBC property, including the IEBC seal No. WROO5-45949 which was replaced with seal number WROO545977.
15. Further, at 4:00pm Mike Mbuvi Sonko, Ali Mbogo and the 3<sup>rd</sup> Respondent arrived at the Polling Station- Tudor village Hall polling Station and forced their way in resulting into chaos and violence again, forcing the police to shoot in the air to restore order. The gunshots dispersed people present which included the voters who were yet to cast their votes, once again disrupting the voting exercise. Prompting the police to close the gate of the polling station denying further access to the polling station to voters who had not voted. That by closing the gate at 5:30pm locking out voters who were yet to vote from outside and not allowing an extension of voting to compensate for time lost was improper and irregular and further the 1<sup>st</sup> respondent deliberately neglected and or failed to instruct the police officers/security personnel who closed the gate to open and let voters who had been locked out and who were entitled to benefit from the extended time to vote.
16. According to the Petitioner: -
  - a. Tudor Hall village hall Polling Station is one of his strongholds in the entire ward where in 2017 elections the Petitioner garnered 731 votes out of 1420 votes cast and in 2022, in the same station he garnered 583 votes out of 1,524 valid casts translating to 51.84% and 38.25% respectively a difference of 13.23%.
  - b. The deliberation disruption of voting and the chaos caused by the 3<sup>rd</sup> Respondent and his agents affected the results and his general performance.
  - c. The 3<sup>rd</sup> Respondent directly and /or through his agents, servants, assigns bribed voters on the election day by giving the voters face masks branded with the tag Mombasa cement which is the 3<sup>rd</sup> Respondent's employer with sole intention of swaying and/or unduly influencing the voters.
  - d. The 3<sup>rd</sup> Respondent and/or his agents stuffed four(4) ballot boxes with marked ballot papers, deliberately stormed Tudor Village Hall Polling Station and in the ensuing melee, disruption and reigning chaos, sneaked in and/or caused to sneak in the stuffed ballot boxes with marked ballot papers at the said polling station which were counted and tallied in favour of the 3<sup>rd</sup> Respondent illegally.
  - e. The subject election was marred with massive irregularities;  
KIEMs kits failureBurhania Primary school Polling station 100600270901 the total number of votes for the Petitioner in Form 36A is 93 while the number of votes for the Petitioner in form 36B is indicated as 0(zero)Tudor primary School polling station 00110006002701501, the total number of rejected votes in Form 36A are 692 while the total number of rejected votes in form 36B is indicated as Zero.Tudor Primary School polling Station 001006002701502 the total number of valid votes cast is 336 while what is indicated in both Forms 36A and 36B is 344 votes.Tudor Primary School polling Station 001006002701501, the total number of valid votes cast was 358 yet it was indicated under the number of votes cast in favour of each candidate as 328.Fahari Primary School Polling Station 001006002701701, the total number of valid votes cast in Form 36A indicated 203 yet the total



number of valid votes cast in form 36B is 201. The total number of votes cast in all elective positions in a polling station ought not to vary, but that was the case in this situation where the total votes cast for the

1. Senate 9,877
  2. Member Of National Assembly 9,949
  3. County Woman Member Of National Assembly 10,117
  4. Member Of County Assembly 9,882
- Were in variance

That the election conducted on 9<sup>th</sup> August 2022 was not free, fair, transparent and verifiable. Denying his agents access to some polling centers as required by law and specifically the agents assigned to R.G Ngala Primary School polling station was irregularly re-assigned without his knowledge to Khamisi Primary School Polling station leaving the said polling station without his agents. That his agents at Tudor Village Hall Polling Station were ejected from the voting hall from more than one hour after the chaos erupted in the polling station and were only allowed back after the ballot boxes had been put back to place.

17. PW2 Omar Salim Shee testified that on the 9<sup>th</sup> August, 2022 at around 6:00 am, he met Godfrey Ouma alias Agwambo at mother Biggy's house who then informed him that there was deal and could be part of it if he only agreed to the terms. The strategic assignment turned out to be one for ferrying four stuffed ballot boxes to Tudor Village Hall Polling Station in Tudor ward. He agreed to undertake the assignment at an agreed payment of Kshs. 5,000/=, he had to look for a helper each was to pocket 5,000/=. A down payment was made of Kshs. 2,500/= upon delivery of the first two ballot boxes.
18. They had been instructed by Godfrey Ouma alias Agwambo that there would be a deliberate chaos at around 9am and thereabout at Tudor village hall polling station and on the ensuing chaos and melee, they would sneak in the ballot boxes since no one would be paying attention at that time. In this undertaking he was assisted by one Rashid Simba Abdalla. The first batch of the ballot boxes were ferried using a Toyota Probox to Tudor Village Hall where the same was handed over to an official who was waiting for them at the washroom. Later the other two ballot boxes were ferried at around 3:00pm where chaos erupted at 4pm giving them an opportunity to sneak the same as the previous ones. Upon completion there were instructed to see one German who was the driver of the Toyota Probox to collect the payment for the work done, however on reaching German's shop they were informed that he had gone to collect money from Samir Baloo the 3<sup>rd</sup> Respondent.
19. PW3 Juma Rumba Kamanza testified that he was a duly registered voter at Tudor Hall Polling Station in Tudor Ward. And that on 9<sup>th</sup> August 2022, at around 10:00 am he went to Tudor Village Hall Polling Station to vote and while queuing in the voting line when chaos and violence erupted involving Mr. Baloo Samir Gulam Abbas, Mr. Omar Shaloo and Mr. Mohammed Machele, amid the chaos someone sprayed pepper spray in the Hall forcing him to leave quickly and avoid the effects. Later at around 4:00pm when he went back to the polling Station in an attempt to cast his vote and while on the queue Mr. Mike Mbuvi Sonko, Ali Mbogo and Mr. Samir Baloo arrived at the polling station with other people and a fight broke out making him leave the Tudor Village Polling Station. His attempt later to try and cast his vote was thwarted for reason that the gate was locked and he was denied access to the polling Station by the General service Unit officers at the gate.
20. PW4 Newton Obayo Havi testified that he was a duly registered voter in Tudor Village Hall Polling Station in Tudor ward and on the 9<sup>th</sup> August 2022, he arrived at Tudor Village Hall Polling Station at



- around 10:00am to vote and while on the queue he saw Mr. Baloo Samir Gulam Abbas going inside the Hall, and a few seconds later he heard commotion and rushed to see what was happening, he found people running outside the hall, and when he inquired he was informed that someone had sprayed pepper spray in the hall. He then decided to leave the polling station and go back to his safety for fear. He never voted on the 9<sup>th</sup> of August 2022. According to him he was prevented to vote due to the chaos.
21. PW5 Charles Kokoyo Andabwa testified that he was a duly registered voter at Tudor Village Hall Polling Station in Tudor ward. And that on the election held on 9<sup>th</sup> August 2022, he left his house to go and vote at around 4:00pm as he approached the polling station, he met people who were running away from the direction of the polling station. He inquired from them what was happening and was informed that chaos had erupted out of the polling station and people were not allowed to go around the polling station. He then decided to go back home. Later at 4:30pm he decided to go back to the polling station but did not vote because the gate for the polling station was locked and no one was allowed access to the polling station. According to PW5 he did not vote on the 9<sup>th</sup> August 2022, not because he did not want to vote, but was prevented from doing so because of the chaos and violence which erupted and the subsequent closure of the gate to the polling station at Tudor Village hall polling station.
  22. PW6 Daniel Muli stated that he was a duly registered voter at Tudor Village Hall Polling Station in Tudor ward. And on the 9<sup>th</sup> August 2022 at around 9:00am he left his home to participate in voting at Tudor village hall polling station and while queuing he was informed that the KIEMS kit had developed some technical problem especially for those whose names start with A-D. since he was an employed tuk tuk driver he chose to go back to work, later at 3:00pm when he came back and queued again in order to vote chaos erupted at the polling station involving Mr. Mike Mbuvi Sonko, Mr. Samir Baloo, Mr. Ali Mbogo, Abdulswamad Shariff Nassir and former governor Ali Hassan Joho. Since he was afraid, he decided to leave for fear that his tuk tuk would be destroyed.
  23. PW7 Rozina Walegha Mwaasaru testified that she participated in the general elections held on the 9<sup>th</sup> August 2022 as an agent for the Orange Democratic Movement (ODM) Party at Tudor Day Secondary school Polling station in Mvita constituency. And that she was a registered voter in Khamisi Secondary school Polling Station in Tudor Ward, Mombasa County. And that on 9<sup>th</sup> August 2022 at around 5:00am, she reported to Tudor day Secondary school Polling Station as the sole agent for the Orange Democratic Movement where voting commenced at 6:00am. At 1:00pm an agent reliever by the name Ashley was brought to her polling station by their coordinator in order to relieve her as she wanted to go and vote at Khamisi Secondary School polling station. That upon informing the Presiding officer about the same, Ashley was denied access since she did not have the party's badge.
  24. PW8 Roselyne Anyango testified that she participated in the general elections held on 9<sup>th</sup> August 2022 as a chief agent for the Member of County assembly under the Orange Democratic Movement (ODM) party at Tudor Village Hall polling Station in Mvita constituency, Mombasa County. She reported to the polling station at around 5:00pm on the 9<sup>th</sup> August 2022. However, they were not allowed access to the polling station as they did not have the official badges, later they were allowed once they presented their letters of appointment and the oath of secrecy form. Upon entry to the polling station, she noticed that the voting materials had already been arranged. While still inspecting the materials she noticed an agent affiliated to UDA taking photographs of the voting materials within the polling station which actions caused unrest, when others raised concern, the agent denied.
  25. According to PW8, voting began at around 7:00 am and at around 8:00am the KIEMS kits for stream 6 failed for over two hours. At 9:00am the KIEMS kit for stream 1 also failed but the functionality was restored within one hour.



26. Further, PW8 stated that around 10:30am UDA agents went to stream 2 and alleged that the votes were being stolen, they ended up plucking the duplicate of ballot papers and chaos erupted, this was followed by entry of Mr. Omar Shallo and Mr. Samir Baloo to the hall where chaos intensified and ballot boxes were thrown all over with papers strewn all over the place. UDA agents sprayed pepper spray in the hall causing people to scamper for safety. The police came and Mr. Omar Shallo and Mr. Samir Baloo and his agents were arrested and taken to police custody. As calm restored, they were instructed to leave the voting hall so that they could re-arrange the voting materials, this took around two hours when the Returning officer, the 2<sup>nd</sup> Respondent came and re-opened the voting process where he issued communication on the extension of the closing time from 5:00pm to 7:00pm in order to recover the time lost during the chaos.
27. That voting resumed smoothly according to PW8, till 4:00pm when Mr. Mike Mbuvi Sonko, Samir Baloo and other politicians arrived and chaos once again ensued thereby disrupting voting, this prompted the police to fire two gunshots in the air in order to stop the fights that were taking place. According to PW8, most voters dispersed and ran away and were therefore not able to vote, that upon resumption of voting despite communication that time would be extended and that voters would be allowed to vote, only voters locked within the polling station were allowed to vote until the voting was closed at 7:00pm, this was as a result of police officers and the 1<sup>st</sup> Respondent official agreeing to have the gates closed.
28. That the vote counting process began at 9pm and was concluded the following day, the 10<sup>th</sup> August, 2022 at around 12.00 noon. In view of her dissatisfaction on how the election was conducted she refused to sign form 36A.
29. PW9 Fahima Mwatsau testified that she was supposed to participate in the general election held on 9<sup>th</sup> August 2022 as a reliever agent for the Orange Democratic Movement(ODM) party at Tudor Village Hall Polling station in Mvita Constituency, Mombasa County, but when he arrived at the polling station at 3.00pm in company of her supervisor Annette Ndune, they approached the 1<sup>st</sup> Respondent's Official to inquire about the agent for the Orange Democratic Movement they were informed that she had left the station, her request to be allowed to relieve the agent were dismissed.
30. PW10 Geoffrey Ng'onde testified that he participated in the general elections held on the 9<sup>th</sup> August 2022 as an agent for the Orange Democratic movement (ODM) party at Tudor Village Hall Polling Station in Mvita Constituency, Mombasa County. He reported at the polling station at 4.40am, he gained entry to the polling station after 5.00am, and upon entry inspected the voting materials, he noted that one agent from the UDA was taking photographs of the KIEMS kit but was stopped.
31. According to PW10, voting began at around 7.00 am and at around 7.35 am an assisted voter came in and the deputy presiding officer accorded the voter some assistance and as usual he was called upon to bear witness as the deputy presiding officer was taking the assisted voter through voting at the voting booth. That this agitated some agents from UDA who raised concern which attracted the presiding officer's stream 6 attention, but the same was explained however, the agents were instructed to leave as they had started causing chaos for normalcy to return. And that later when he stepped out at around 10.30 am and came back, he found a huge commotion, upon inquiry he was informed that one of the agents had sprayed pepper spray in the polling station. Chaos escalated leading to the intervention of the police, UDA candidate for Member of County Assembly Samir Baloo and his counterpart Omar Shallo were arrested by the police. Voting resumed later at around 12:27 pm.
32. That voting went on well until 4.00pm when Mr. Mike Mbuvi Sonko, Samir Baloo, Ali Mbogo and other politicians arrived at the polling station, chaos ensued once again disrupting the voting process



- prompting the police to fire two gunshots in the air in order to stop the fights that were taking place. The chaos was contained around 5:00pm, and only voters who were within the polling station were allowed to vote. The last person voted at around 6:35 pm. Other could not access after 5:00pm since the gate was locked. The voting process nonetheless closed at 7pm. Upon vote counting he refused to sign form 36A.
33. PW 11 Stephen Maina Mwangi testified that he participated in the general elections held on the 9<sup>th</sup> August 2022 as an agent for the Orange Democratic Movement (ODM) party at Tudor Village Hall Polling Station in Mvita Constituency, Mombasa County. Being an agent, he reported at the polling station at 5.45 am on the election date after some misunderstanding concerning identification of the agents, he was allowed to access the polling station after a brief encounter. According to him voting started at around 7.00 am and went on until 10.30 am when an UDA agent in stream 2(polling station 2 of 6) started shouting and alleging that votes were being stolen, after a short while an UDA aspirant for Member of County Assembly Mr. Omar Shallo arrived together with other three people and started causing commotion in the same stream. Shortly, Mr. Samir Baloo arrived in company of two men, they harassed the 1<sup>st</sup> Respondent officials, the National youth service officers and the police officers who were at the polling station. In the commotion one of the UDA agents sprayed pepper spray. Later police arrested Omar Shallo, Samir Baloo and other agents.
  34. According to PW11 voting resumed at 12.30 pm and at around 4.00 pm Mike Mbuvi Sonko and Samir Baloo and other politicians arrived and chaos once again ensued disrupting the voting prompting the police to fire two gunshots dispersing voters. The voting resumed at 5.00pm and the last person voted at 6.30 pm.
  35. PW12 Isaac Mambo Mulei testified that he participated in the general elections held on 9<sup>th</sup> August 2022 as the chief agent for Mr. David Mutua Malii who contested under the Wiper Democratic Movement (WDM-K) party for Member of County Assembly of Tudor Ward Mvita Constituency, Mombasa County. And while heading to the polling station on the voting date at around 7.00 am he met a group of people who were distributing face masks branded with the name and logo of Mombasa cement, and when he inquired from them, he was informed that it was under the instruction of the 3<sup>rd</sup> Respondent, according to him the 3<sup>rd</sup> Respondent was an employee of Mombasa Cement. He then reported the matter to the police who confiscated the masks, PW 12 took photographs of the incident.
  36. After the incident, PW12 proceeded to Tudor Village Hall polling station, and at 10.30 am while at the polling station the 3<sup>rd</sup> Respondent Mr. Omar Shallo together with other people forced their way into Tudor Village Hall Polling Station and caused a lot of chaos and commotion claiming that votes were being stolen. According to PW12, the situation got out of hand and turned chaotic and violent scene in the process of which voting materials including ballot boxes were strewn all over the hall. The 3<sup>rd</sup> Respondent agents attacked and hit a National Youth service officer Daniel Mochama with a baton, PW12 took a recording of the incident. As the commotion ensued a contingent of police officer came in as reinforcement where Mr. Omar Shallo was arrested. Thereafter the County Returning Officer instructed the voting materials be arranged well, then voting resumed at around 12.00 noon. Later at 4pm the 3<sup>rd</sup> Respondent accompanied by others stormed the same polling station again, this time the 3<sup>rd</sup> Respondent was accompanied by Hon. Mike Mbuvi Sonko and Hon. Ali Mbogo, again voting was disrupted for over one hour and this only enabled those who were in the voting hall to vote, the gates were locked and those who were outside were not allowed access to vote.
  37. Note that the court was privileged to be taken through the captured video and photographs by PW12.



### The 1<sup>st</sup> and 2<sup>nd</sup> Respondents case

38. RW1 Peter Otieno Magati testified that he was the Presiding officer appointed by the 1<sup>st</sup> Respondent for Tudor Village Hall Polling Station 6 of 6 in Tudor ward, Mvita Constituency. According to RW1, on 9<sup>th</sup> August 2022 there was a brief scuffle at Tudor village Hall which was as a result of misunderstanding among the candidates' agents which was adequately dealt and managed by the security personnel deployed by the 1<sup>st</sup> Respondent who restored normalcy and calm at Tudor Village Hall Polling Station. And the same did not in any way disrupt and/or affect the voting process at the polling station.
39. Further RW1 states that: -
- a. It is true that the KIEMS kit for Tudor Village Hall polling station 6 of 6 failed but was immediately replaced and voting resumed.
  - b. The voting time in all the Tudor Village Hall Poling Station was extended beyond 5:00 pm to allow voters who were in the queue to vote.
  - c. Only authorized agents, observers, candidates, media personnel, police officers on duty poll officials were allowed access to the polling station.
  - d. All agents with prerequisite documents were allowed to access the polling station together with duly authorized person too were allowed to observe and comment on the elections process in order to ensure transparency in the elections.
  - e. The allegations of ferrying four stuffed ballot boxes are couched in generality, lack of specificity for failure to mention the particular polling station in Tudor Village Hall Polling Station and particularly the 1<sup>st</sup> Respondent's official who received the stuffed ballot boxes.
40. RW2 Maszha Sudi Mwakulonda testified that he was the Returning officer for Mvita Constituency in the general elections held on the 9<sup>th</sup> August, 20222 and upon performing his duties he declared the 3<sup>rd</sup> Respondent as the duly elected Member of County Assembly having garnered 4587 votes.
41. According to RW2: -
- a. The commotion witnessed at Tudor Village Hall polling station on the 9<sup>th</sup> August 2022 did not intimidate voters and the scuffle that ensued was adequately dealt and managed by the security personnel deployed by the 1<sup>st</sup> Respondent.
  - b. That only authorized persons were allowed access to Tudor Village Hall Polling station.
  - c. That voting time was extended beyond 5:00pm to allow those who were prevented by reasons of the scuffle to vote.
  - d. That the total number of votes cast in favour of the Petitioner at Burhania Primary School Polling station 1 of 3 in both form 36A and form 36B is Zero (0) contrary to claims that he garnered Ninety (93) votes in Form 36A and Zero(0) in Form 36B as well as in Tudor Primary school Polling station 1 of 3.
  - e. That the allegations of ballot stuffing are not backed by any evidence and further palate breaking ceremony was performed in full glare of the media
42. RW3 Irene Ayo Onyango testified that she was a presiding officer appointed by the 1<sup>st</sup> respondent for Tudor Village Hall polling station 1 of 6 in Tudor Ward, Mvita Constituency, Mombasa County. And that on the 9<sup>th</sup> August 2022, there was a brief scuffle at Tudor Village Hall which was as a result of



misunderstanding among the candidates' agents, which scuffle was adequately dealt and managed by the security personnel deployed by the 1<sup>st</sup> Respondent who restored normalcy and calm.

43. According to RW3;-
- a. The scuffle at Tudor Village Hall Polling station did not disrupt the voting process at all.
  - b. The KIEMS kit for Tudor Village Hall Polling Station 1 of 6 experienced some technical glitches and hanged for a brief moment on the election day. The same was swiftly rectified by the Information Communication Technology(ICT) personnel of the 1<sup>st</sup> Respondent and voting resumed immediately.
  - c. That only authorized persons were allowed access to Tudor Village Hall Polling station.
  - d. That voting time was extended beyond 5:00pm to allow those who were prevented by reasons of the scuffle to vote.
  - e. That the allegations of ballot stuffing are not backed by any evidence.

### **Submissions**

44. The parties agreed to put in written submissions and thereafter highlighted their submissions. The parties also framed list of agreed issues dated the 24<sup>th</sup> October, 2022. The List of agreed issues are as hereunder: -
- a. Whether there was disenfranchisement, intimidation and suppression of voters in the election for Member of County Assembly for Tudor Ward.
  - b. Whether there were electoral malpractices, illegalities and irregularities committed in respect of the elections for the position of Member of County Assembly for Tudor Ward and whether the same affected the results and validity of the said elections.
  - c. Whether the election for Member of County Assembly, Tudor Ward held on 9<sup>th</sup> August, 2022 was conducted in accordance with the principles laid down in *the Constitution* and in conformity with the provisions of the *Elections Act* and the Regulations made thereunder and all other relevant laws.
  - d. Whether there was a commission of electoral offences during the election of the Member of the County Assembly for Tudor Ward.
  - e. What consequential declarations, orders and reliefs should this Honourable Court grant?
  - f. Who should bear the costs of this Petition?

### **Petitioner's submissions**

45. In his submissions on the 1<sup>st</sup> issue, the petition argues that there were electoral malpractices, illegalities and irregularities committed in the subject elections which affected the results and the validity of the elections. He described the elements of the same and states that the electoral process was marred with chaos and violence, there was voter bribery by the 3<sup>rd</sup> Respondent and ballot stuffing. He further argues that the integrity of the election materials and the voting process as a result of the melee and the confusion was immensely compromised. He attributes the same to the 3<sup>rd</sup> Respondent who he argues deliberately instigated and caused chaos and violence at Tudor Village Hall Polling Station. He referred



to the case of Francis Wambugu Mureithi v Owino Paul Ongili Babu and 2 Others [2018] eKLR. This case involved violence and the, the court stated: -

“ 63. Secondly, the other issue which is related to the issue I have just determined is whether or not there was violence which rocked Soweto Social Hall polling centre. Having considered the evidence tendered by the petitioner and the 2<sup>nd</sup> respondent and having taken into account the report on the scrutiny of the polling station Daily Diary in respect of the above polling centre I am convinced that the polling centre was marred by violence. The evidence shows that the voting exercise had to be adjourned in some instances for hours. In fact, it is noted that the security personnel had to be called in to restore law and order. The incidences of violence and fracas were attributed to the voters and youths...

67. Arising from the above findings, the question which need to be addressed is whether or not the election was adversely affected. A careful reading of Article 81(e) (ii) of *the Constitution* of Kenya, 2010, is that one of the parameters to be considered to determine whether an election was free and fair is whether the election was free from violence, intimidation and improper influence. I have already identified from the evidence that there was violence which took place at Soweto Social Hall polling centre. Though the violence cannot be attributed to the 1<sup>st</sup> respondent, the truth of the matter is that the election in the entire polling centre was affected.”

46. On the 2<sup>nd</sup> issue he argues that there was disfranchisement, intimidation and suppression of voters because of the following reasons; there was violence and threat of voters, failure of KIEMS kit and failure to extend voting time.

47. On the 3<sup>rd</sup> issue the Petitioner argues that the elections subject of this petition did not comply with Articles 38(2), 38(3) (b), Article 81 of *the Constitution* of Kenya and section 3 of the *Elections Act*, 2011 because of the violence and chaos witnessed on the voting day unreasonably restricted and denied many voters the opportunity to vote thereby breaching their right to vote without unreasonable restriction and freedom to exercise their political right.

48. Further, that 1<sup>st</sup> and 2<sup>nd</sup> Respondent failed to keep order at the polling station, specifically, that they breached Regulations 62, 63, 64, and 66 of the Elections(general) Regulations, 2012.in reference to Regulations 66(6)

“(6) The power conferred on a presiding officer and a police officer under sub regulation (5) shall not be limited to the area covered by the polling station only but shall extend to a radius of not more than four hundred meters from the centre of the polling station.”

In buttressing this point failure to observe voting time denied some voters opportunity to exercise their constitutional right to vote he relied in the case of Sarah Mwangunda Kai v Mustafa Idd & 2 others [2013]eKLR. The court stated as follows:

“I am satisfied that the failure of the 3<sup>rd</sup> Respondent’s officials to observe voting time as stipulated by the law denied some voters of the opportunity to exercise their constitutional right to vote for their preferred candidate.”



49. He also urged the court to find that there were commission of electoral offence by the 3<sup>rd</sup> Respondent who stormed into the polling station and caused chaos. He also concluded by stating that the breaches of *the Constitution* and the statute as described herein which resulted into violation of the voters' constitutional rights go to the core of the elections and the results should not be allowed to stand. The only way to cure the remedies is to grant the orders sought in the petition and order for fresh elections. The elections were simply not free and fair and the same did not comply with the laid down constitutional and statutory edicts. They must be nullified.

### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondents submissions**

50. In line with the issues the 1<sup>st</sup> and 2<sup>nd</sup> Respondents argued that the chaos and the violence experienced the same was contained by the police officers and calm was restored. In buttressing this point they relied in the case of Court of Appeal in the case of Owino Paul Ongili Babu –vs- Francis Wambugu Mureithi & 2 Others, Election Petition Appeal No. 18 of 2018 pronounced itself on the same and aptly stated as follows;

“It is not enough to find that there were some forms of violence in a given station then proceed to nullify the result of an election. There has to be a demonstration that the violence affected not only the voting but the final result of the election; for example, that the violence disenfranchised some voters and/or gave an undue advantage to one of the parties.”

51. The Court of Appeal in the case of Julius Makau Malombe –vs- Charity Kaluki Ngilu & 2 Others (2018) eKLR further grappled with the issue of violence during elections and stated as follows:

“We have considered the allegations on violence and intimidation of voters. Proof of violence per se cannot vitiate the results of an election. To vitiate the results, the violence must inter alia be widespread. In English dictionary, widespread means extending over a wide area, to a large extent or to a great extent. In Dickson Mwenda Kithinji -v- Gatirau Peter Munya & 2 others [2013] eKLR, Meru High Court Election Petition No. 1 of 2013, it was stated that in electoral context, widespread violence can only be taken to mean a systematic, planned or organized infliction of injury, harm, damage or loss on any person because they have voted in a particular way or to induce them to vote in any particular way. There must be evidence to prove the widespread violence. Widespread violence may also include indiscriminate violence...”

52. Lastly, the High Court in the case of Justus Gesito Mugali M'mbaya –vs- IEBC & 2 Others (2013) eKLR, Hon. Justice E. K. O. Ogola addressed the issue of violence during an election and stated as follows:

“The Petitioner's case finally hinged on two limbs. First, the violence meted out against him on the eve of the elections, which the Petitioner considered an electoral offence by the 3<sup>rd</sup> Respondent itself enough to nullify the elections. I have analyzed this issue in all its perspectives. My finding is that there was indeed violence as alleged. However, that violence was not traceable to anybody, leave alone the 3<sup>rd</sup> Respondent. I have also found that the violence was isolated and had no effect on the voting. Indeed, in all the surrounding polling stations, near the scene of the attack, there were high voter turn-out and the verdict by all the Presiding Officers was that the elections were peaceful. This isolated and unfortunate incident, which is not traceable to the 3<sup>rd</sup> Respondent, cannot be a ground upon which to base a decision to nullify an otherwise credible electoral result. If a single act of violence,



which is not widespread and which does not affect the voting process, either in one or several polling stations, were to be a basis of nullifying elections, then what would stop a rogue candidate, upon sensing defeat, from self-inflicting violence with the hope that the ensuing results would be nullified? The Court cannot allow this to happen.”

53. On the issue of failure of KIEM kits they argued that failure of a KIEMS without more, cannot be a ground of an election Petition and suppress voters as alleged by the Petitioner. That the Petitioner assertion that the voters were disenfranchised on account of failure of the KIEMS kits had not been backed by any evidence. No witness testified to the effect that he or she was turned away on account of failure of the KIEMS kits. *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others* [2013] eKLR
54. Regarding illegalities and irregularities, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent argued that the crust of the Petitioner’s Petition is premised on electoral malpractices, illegalities and irregularities alleged to have been committed during the elections held on 9<sup>th</sup> August 2022. According to 1<sup>st</sup> and 2<sup>nd</sup> Respondents the Petitioner took the position that the said illegalities, irregularities and malpractices were so grave and of such a nature that the same compromised and affected the outcome of the election. The Respondents relied on this case to buttress the point, the case of *Owino Paul Ongili Babu –vs- Francis Wambugu Mureithi & Others*, Election Petition Appeal No. 18 of 2018, the Court of Appeal quoted with approval Odek, JA in his Book – “Election Technology Law and The Concept of: Did the Irregularity Affect the Result?” where it was stated:
- (63) “For an election irregularity to vitiate the result, the result must be affected. Which result must be affected? There is only one result that must be affected - the result that “A” is the winner of the election. “Result” means the success of one candidate over another and not merely an alteration in the number of votes given to each candidate. For an election petition to succeed, evidence must be led to prove that the result and conclusion that “A” is the winner of the election is affected by the irregularities or non-compliance with the constitutional principles and electoral law. The evidence led must demonstrate that the irregularities or non-compliance raise doubt as to whether “A” is the winner and better still that the irregularities or non-compliance prove that “A” is not the winner...”
- (64) In *Independent Electoral And Boundaries Commission V Maina Kiai & 5 Others* [2017] EKLR, this Court held that the primary source of results in a Parliamentary election is the ballot box, whose results are recorded in Form 35A at each polling centre, before tallying is done and the results obtained from the various polling centres are captured in Form 35B. There were no complaints regarding the results in Forms 35A and as we have stated earlier...”
55. Further, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent argued that it is clear from the Petitioner’s Petition and Submission that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have not committed any electoral offence, and none has been alleged as against any of the officials of the Commission. The Petitioner has specifically accused the 3<sup>rd</sup> Respondent of allegedly committing bribery, ballot stuffing and causing chaos.
56. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have maintained that they have complied with all constitutional, legal and regulatory requirements and affirmed the sovereign will of the Tudor Ward electorates as expressed on 9<sup>th</sup> August, 2022 in the election for Member of County Assembly. Accordingly, the elections were free and fair and the same complied with the laid down constitutional, statutory and regulatory edicts.



## Issues analysis and determination

57. As stated earlier in this judgment the parties by way of consent determined the list of agreed issues, at the pre-trial stage, the same is dated the 24<sup>th</sup> October, 2022. The List of agreed issues are as hereunder: -
- a. Whether there was disenfranchisement, intimidation and suppression of voters in the election for Member of County Assembly for Tudor Ward.
  - b. Whether there were electoral malpractices, illegalities and irregularities committed in respect of the elections for the position of Member of County Assembly for Tudor Ward and whether the same affected the results and validity of the said elections.
  - c. Whether the election for Member of County Assembly, Tudor Ward held on 9<sup>th</sup> August, 2022 was conducted in accordance with the principles laid down in *the Constitution* and in conformity with the provisions of the *Elections Act* and the Regulations made thereunder and all other relevant laws.
  - d. Whether there was a commission of electoral offences during the election of the Member of the County Assembly for Tudor Ward.
  - e. What consequential declarations, orders and reliefs should this Honourable Court grant?
  - f. Who should bear the costs of this Petition?
58. I have looked at the 1<sup>st</sup> and 2<sup>nd</sup> issues and will handle them together.

**1<sup>st</sup> Issue: Whether there was disenfranchisement, intimidation and suppression of voters in the election for Member of County Assembly for Tudor Ward.**

**2<sup>nd</sup> Issue: Whether there were electoral malpractices, illegalities and irregularities committed in respect of the elections for the position of Member of County Assembly for Tudor Ward and whether the same affected the results and validity of the said elections.**

59. Disenfranchisement is defined in the black's Law dictionary 11<sup>th</sup> edition as the act of taking away the right to vote in a public election from a citizen or a class of citizens. The right of every citizen to participate in free, fair and regular elections based on universal suffrage is indeed a right guaranteed by Article 38 of *the Constitution*. The right to vote is not a right to be trifled with. It signifies the power of the people to pick those they desire to lead them for a given period of time. Not one single vote is more important than the next vote.
60. The meaning of the term "illegalities" and "irregularities" was captured in the case of *Rishad Hamid Ahmed v Independent Electoral & Boundaries Commission & 2 others* [2018] eKLR which quoted the Supreme Court at paragraph 304 of the presidential Petition No. 1 of 2017 thus:

"Illegalities refer to breach of the substance of specific law while irregularities denote violation of specific regulations and administrative arrangements put in place."

The court went ahead to state:

"42. The Court then went ahead and explained under what circumstances illegalities and irregularities can lead to the nullification of an election. The Court stated that:



“[371] It is our view however, that elections, are all these things. None of the factors highlighted by the parties can be viewed in isolation. For by doing so, we run the risk of cannibalizing a sovereign process. Elections are the surest way through which the people express their sovereignty. Our Constitution is founded upon the immutable principle of the sovereign will of the people. The fact that, it is the people, and they alone, in whom all power resides; be it moral, political, or legal. And so they exercise such power, either directly, or through the representatives whom they democratically elect in free, fair, transparent, and credible elections. Therefore, whether it be about numbers, whether it be about laws, whether it be about processes, an election must at the end of the day, be a true reflection of the will of the people, as decreed by *the Constitution*, through its hallowed principles of transparency, credibility, verifiability, accountability, accuracy and efficiency.

(372) It is in this spirit, that one must read Article 38 of *the Constitution*, for it provides inter alia, that every citizen is free to make political choices, which include the right to “free, fair, and regular elections, based on universal suffrage and the free expression of the will of the electors...”. This “mother principle” must be read and applied together with Articles 81 and 86 of *the Constitution*, for to read Article 38 in a vacuum and disregard other enabling principles, laws and practices attendant to elections, is to nurture a mirage, an illusion of “free will”, hence a still-born democracy. Of such an enterprise, this Court must be wary.

(373) It is also against this background that we consider the impact of the irregularities that characterized the presidential 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.

(374) In view of the interpretation of Section 83 of the *Elections Act* that we have rendered, this inquiry about the effect of electoral irregularities and other malpractices, becomes only necessary where an election court has concluded that the non-compliance with the law relating to that election, did not offend the principles laid down in *the Constitution* or in that law. But even where a Court has concluded that the election was not



conducted in accordance with the principles laid down in *the Constitution* and the applicable electoral laws, it is good judicial practice for the Court to still inquire into the potential effect of any irregularities that may have been noted upon an election. This helps to put the agencies charged with the responsibility of conducting elections on notice.”

61. The Petitioner states in his evidence that due to chaos, violence and the failure of KIEMS kits, most of the voters failed to vote. That when chaos and violence broke at 10.00am at Tudor Village Hall Polling Station which was instigated by the 3<sup>rd</sup> Respondent Omar Hamud Mohammed Shallo and Abdul Wasi Mohamed made the voting process interrupted for over two and half hours, the violence displaced the voters from the queue and some had to leave the polling station for fear of being harmed. Similarly at 4.00pm, the 3<sup>rd</sup> Respondent accompanied by other well-known persons including the former Governor Mike Sonko Mbuvi and Ali Mbogo stormed the polling station and caused chaos and violence for the second time. This made the voters who had queued scattered interfering with the queue disrupting the voting process and at the end the gate to the voting compound was locked, locking out people who had come to vote. And further, the voting time was not extended despite much time having been wasted as a result of the interruptions caused by chaos and failure of KIEM kits.
62. According to PW3 while queuing in the voting line when chaos erupted involving Mr. Baloo Samir Gulam Abbas, Mr. Omar Shaloo and Mr. Mohammed Machele, amid the chaos someone sprayed pepper spray in the Hall forcing him to leave quickly and avoid the effects. Later at around 4:00pm when he went back to the polling Station in an attempt to cast his vote and while on the queue Mr. Mike Mbuvi Sonko, Ali Mbogo and Mr. Samir Baloo arrived at the polling station with other people and a fight broke out making him leave the Tudor Village Polling Station. His attempt later to try and cast his vote was thwarted for reason that the gate was locked and he was denied access to the polling Station by the General service Unit officers at the gate.
63. PW4, he arrived at Tudor Village Hall Polling Station at around 10:00am to vote and while on the queue he saw Mr. Baloo Samir Gulam Abbas going inside the Hall, and a few seconds later he heard commotion and rushed to see what was happening, he found people running outside the hall, and when he inquired, he was informed that someone had sprayed pepper spray in the hall. He then decided to leave the polling station and go back to his safety for fear. He never voted on the 9<sup>th</sup> of August 2022. According to him he was prevented to vote due to the chaos.
64. PW5 went to vote at around 4:00pm as he approached the polling station, he met people who were running away from the direction of the polling station. He inquired from them what was happening and was informed that chaos had erupted out of the polling station and people were not allowed to go around the polling station. He then decided to go back home. Later at 4:30pm he decided to go back to the polling station but did not vote because the gate for the polling station was locked and no one was allowed access to the polling station. According to PW5 he did not vote on the 9<sup>th</sup> August 2022, not because he did not want but was prevented from doing so because of the chaos which erupted and the subsequent closure of the gate of the polling station.
65. PW6 left his home to participate in voting at Tudor village hall polling station and while queuing he was informed that the machines had problem especially for those whose names start with A-D. since he was employed a tuk tuk driver he chose to go back to work, later at 3:00pm when he came back and queued chaos erupted at the polling station involving Mr. Mike Mbuvi Sonko, Mr. Samir Baloo, Mr. Ali Mbogo, Abdulswamad Shariff Nassir and former governor Ali Hassan Joho. Since he was afraid, he decided to leave for fear that the tuk tuk would be destroyed out of the violence.



66. PW8, 10 and 11 also confirms the said allegations, according to them the KIEMS kit failed in polling station 1 of 6 and 6 of 6 for 1 hour and 2 hours respectively violence was also experienced caused and instigated by 3<sup>rd</sup> Respondent and his cohorts. PW12 took the video of both the incidents, which also captured an injured NYS officer DANIEL MOCHANA as a result of the chaos and violence.
67. RW1 confirms that there was failure of the KIEMS kit at Tudor village Hall Polling station 6 of 6 he could not remember the exact time he then called the Constituency Returning Officer who called an ICT guy who arrived after around 30 minutes. He also confirms the two incidences where there was chaos at round 10.00am to around 11.00am and the second one which happened at 4.00 pm which involved political aspirants Shallo who was a candidate and Baloo and that the same interrupted the voting process. RW2 also confirms that the 3<sup>rd</sup> Respondent stormed Tudor Village Hall in company of other leaders and chaos broke out. According to RW2 and RW3 the commotion interrupted the voting, voting stopped for some time, the morning incident went over one-hour whereas the afternoon incident did not take long, he had to call the County Returning Officer and the County Police Commandant for normalcy to be restored. Further in his cross examination he indicated that factors that may lead low voter turnout as experienced in Tudor Village Hall polling station would be as a result of voter apathy, security or insecurity and frustration of voters. From the video(A) he confirmed that there were several people in the Hall where chaos had erupted, and could see someone kicking a ballot box, some ballot boxes were unmanned, an officer injured out of the violence.
68. RW2 also identified the 3<sup>rd</sup> Respondent in the video clip that was played and viewed before court as one of the persons who stormed Tudor Village Polling Station and caused Chaos. RW3 explained that from the video (A) played that the video depicted what actually happened at the polling station, and during the 1<sup>st</sup> incident where there was violence the voting process had to be stopped for close to 1 hour and 30 minutes.
69. In respect to ballot stuffing PW2 narrated how he was given a deal to ferry stuffed ballot boxes to aid the 3<sup>rd</sup> Respondent. This according to him was to be done at the polling station when chaos has been instigated, his demonstration was that at 10.00am when chaos erupted, they handed over the stuffed ballot boxes to 1<sup>st</sup> Respondent official who sneaked them to the hall, the subsequent ballot boxes were sneaked in when the second limp of chaos erupted.
70. It is not in dispute that there was failure of the KIEMS kits at Tudor village Hall polling station 1 of 6 and 6 of 6. The failure of the KIEMS kit interrupted and affected the voting process in the two polling stations, which took several hours before the order would be restored by the ICT experts of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. It is not evident whether the wasted time was compensated by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
71. It is also not in dispute that there was violence and chaos experienced at Tudor village hall polling station. The Violence that erupted affected the 6-polling station at Tudor village hall polling station. Violence was experienced at Tudor village Hall on two instances, this were at 10.00am and the other at 4.00pm. the 1<sup>st</sup> incident happened inside the polling station/polling station hall, from the evidence of all the witnesses, it greatly interrupted the voting process and the voting materials. The court had the privilege of watching the video and confirmed the evidence of the witnesses. Its evident that the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents officers were not in control of the polling station when this particular incident happened, not even the officers deployed there, from the evidence of the Respondents witnesses reinforcement had to be sent to calm the situation, leading to the arrest of the 3<sup>rd</sup> Respondent together with his cohorts.



72. It is also evident that the 3<sup>rd</sup> Respondent was arrested for an election offence emanating from Tudor Village Hall Polling Station on the 9<sup>th</sup> August, 2022, and subsequently charged at Mombasa chief Magistrates Court Election Offence Case No. E002 OF 2002.
73. The court had the privilege of viewing the video admitted, save for the much-hyped tiktok that was expunged from the record, which exhibited the extent of the violence that took place at Tudor Village Hall Polling Station, interrupting the voting exercise in the 6 polling Stations in Tudor Ward. Court also noted the upset of voting materials, unattended to and some being kicked by persons not authorized, including destruction.
74. It is also admitted by the Respondents as alleged by the Petitioner, that after the second incident of violence, the doors and gates to the Tudor Village Polling Stations were closed and only those who were inside the building were allowed to vote. The video presented and viewed by the Court also indicates as explained by RW12 confirms the violence and the door to the polling station locked.
75. In respect to ballot stuffing, in as much as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are dismissing the allegations, the narration by PW2 shows an orchestrated move, well planned and choreographed move and conspiracy that cannot just be wished away, of course where there is smoke definitely there would be fire.
76. On bribery allegations, the offence of bribery in election petition was well articulated in the case of Twaher Abdulkarim Mohammed vs Mwathethe Adamson Kadenge & 2 Others Malindi High Court Election Petition Appeal No.1 of 2014 the Court citing Halsburys Laws of England 4th Edition Vol 15 at paragraph 780 which states:
- “One proof of a single act of bribery or with the knowledge of the candidate or by his agents, however insignificant that act may be, is sufficient to invalidate an election. The judges are not at liberty to weigh its importance nor can they allow any excuse. Whatever the circumstances may be, as such they can allow in certain conditions in cases of treating or undue influence by agents. For this reason, clear and unequivocal proof is required before a case of bribery will be held to have been established. Suspicion is not sufficient and the confession of the person alleged to have bribed is not conclusive. Bribery, however, may be implied from the circumstances of the case, and the court is not bound by the strict practice applicable to criminal cases, but may act on uncorroborated testimony of an accomplice... the court has always refused to give any exhaustive definition on the subject, and has always looked to the exact facts of each case to discover the character of the transaction. A corrupt motive in the mind of the person bribed is not enough. The question is as to the intention of the person bringing him. Where there is evidence as to bribery consist merely of offers or proposals to bribe, strong evidence will be required. A general conversation as to a candidate’s wealth and liberality is not evidence of an offer to bribe. General evidence may, however, be given to show that what the character of a particular acts has presumably been.”
77. To succeed in invalidating an election based on the commission of the offence of bribery, not only must there be proof to the required standard, but evidence must also demonstrate a relationship between a candidate and the offender and the impact of the offence on the election, see the case of Arthur Papa v Oku Edward Kaunya & 2 others. Busia High Court Election Petition No. 2 of 2017.
78. It is alleged that during the campaign period the 3<sup>rd</sup> Respondent conducted his campaign using items marked Bamburi cement which formed part of his identity. And that the 3<sup>rd</sup> Respondent is known to be an employee of Bamburi cement. And that on the election date, masks containing symbols and written Bamburi cements were supplied to voters entering the polling station just close to Tudor Village



Polling Station, this in effect was to sway and influence the electorates to vote for the 3<sup>rd</sup> Respondent amounting to an act of Bribery according to the Petitioner. The 3<sup>rd</sup> Respondent having been limited to participate in the proceedings had no chance to respond to the said allegations, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents however, stated that no proof was laid before this court to support this assertion.

79. The election malpractices alleged by the Petitioner, that is, violence(including pepper spray) interruption of the voting process, destruction of voting materials, ballot stuffing are all attributed to the 3<sup>rd</sup> Respondent. The court in viewing the videos evidence produced noted from the examination of PW12 that during both incidences where violence was shown the 3<sup>rd</sup> Respondent was present and participated. The fact that he was arrested and charged by the police is prima facie evidence that he was involved in the violence that rocked Tudor Village Hall Poling Station.
80. It is already identified from the evidence that there was violence which took place at the six (6) Polling Stations at Tudor Village Hall Polling Station. Though the violence cannot be attributed to the 1<sup>st</sup> respondent and 2<sup>nd</sup>, the truth of the matter is that the election in the entire polling station was affected, they failed to protect and secure the polling station and the election materials as required, thus affecting the integrity of the outcome. They also failed to rebut that indeed voters were never locked out or restrained to vote as a result of Chaos and failure of the KIEMS kit, as they did respond on other issues by providing proof and submitting all necessary documents. The Polling Station Diary would have aided their rebuttal.

**3<sup>rd</sup> Issue: Whether the election for Member of County Assembly, Tudor Ward held on 9<sup>th</sup> August, 2022 was conducted in accordance with the principles laid down in *the Constitution* and in conformity with the provisions of the *Elections Act* and the Regulations made thereunder and all other relevant laws.**

81. According to the Petitioner, the elections conducted at Tudor Village Hall Polling stations did not comply with Articles 38(2), 38(3) (b) and Article 81 of *the Constitution* of Kenya, 2010 and section 3 of the *Elections Act*, 2011 because of the violence and chaos witnessed on the voting day unreasonably restricted and denied many voters the opportunity to vote thereby breaching their right to vote without unreasonable restrictions and freedom to exercise their political right.
82. Further, regulations 62 and 63 (1) and (5) of the Elections (general) Regulations, 2012 was not adhered to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent admitted persons who did not fall in the category mentioned in regulations 62. According to the Petitioner 1<sup>st</sup> and 2<sup>nd</sup> Respondent allowed Mike Sonko, Ali Mbogo and Abdul Wasi Mohammed to access the polling station, in addition, it was the duty of the presiding officer to keep order at the polling station under Sub regulation (6) thereof to cover up to a radius of 400 meters. Therefore, the chaos that took place in the afternoon although did not happen within the voting hall, were in the compound of the school where the polling stations were which is within 400meters
83. On this particular issue the case of Ernest Ogesi Kivai v Independent Electoral & Boundaries Commission & 2 Others [2013] eKLR quoting In the Nigerian case of Buhari -VS- Obasanjo [2005] LLR 7K, the supreme court stated:

“The burden is on the petitioner to prove that non-compliance has not only taken place but also has substantially affected the result...there must be clear evidence of non-compliance, then, that the non-compliance has substantially affected the election”.

40). In the Raila Odinga -VS- I.E.B.C & Others Petition No. 5 of 2013, the supreme court on the same point of burden of proof had this to say:



“Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there had been non-compliance with the law, but that such failure of compliance did affect the validity of the election. It is on that basis that the respondent bears the burden of proving the contrary. This emerges from a long-standing common-law approach in respect of alleged irregularity in the acts of public bodies “omnia praesumuntur rite et solemniter esse acta,”. Acts are presumed to have been done rightly and regularly. So, the petitioner must set out by raising firm and credible evidence of the public authorities’ departures from the prescription of the law”.

84. Section 83 of the *Elections Act* is the law applicable when an Election Court is faced with the question whether to nullify an election or not. Section 83 provides thus:

“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 noncompliance did not affect the result of the election.”

85. The interpretation of this section was settled by this Court in *Gatirau Peter Munya v. Dickson Mwenda Githinji and 2 Others* (2014) eKLR, and recently affirmed in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR, thus:

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

“It is clear to us that an election should be conducted substantially in accordance with the principles of *the Constitution*, as set out in Article 81(e). Voting is to be conducted in accordance with the principles set out in Article 86. The *Elections Act*, and the Regulations thereunder, constitute the substantive and procedural law for the conduct of elections... If it should be shown that an election was conducted substantially in accordance with the principles of *the Constitution* and the Election Act, then such election is not to be invalidated only on ground of irregularities. Where however, it is shown that the irregularities were of such magnitude that they affected the election result, then such an election stands to be invalidated. Otherwise, procedural or administrative irregularities and other errors occasioned by human imperfection are not enough, by and of themselves, to vitiate an election...Where an election is conducted in such a manner as demonstrably violates the principles of *the Constitution* and the law, such an election stands to be invalidated.”

86. The Court proceeded on to state as follows:

“[209] Therefore, while we agree with the two Lord Justices in the *Morgan v. Simpson* case that the two limbs should be applied disjunctively, we would, on our part, not take Lord Stephenson’s route that even trivial breaches of the law should void an election. That is not realistic. It is a global truism that no conduct of any election can be perfect. We will also go a step further and add that even though the word “substantially” is not in our section, we would infer it in the words



“if it appears” in that section. That expression in our view requires that, before vitiating it, the court should, looking at the conduct of the whole election, be satisfied that it substantially breached the principles in *the Constitution*, the *Elections Act* and other electoral law. To be voided under the first limb, the election should be what Lord Stephenson called “a sham or travesty of an election” or what Prof. Ekirikubinza refers to as “a spurious imitation of what elections should be.”

87. (83) On the disjunctive nature of Section 83, the Court rendered itself thus:

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

88. In *Peter Gichuki King'ara v IEBC and 2 others* Civil Appeal No. 31 of 2013, the court of appeal gave the following general guidelines on the consideration to be made before the annulment of the election:

- a. Whether there had been substantial compliance with the law and principle;
- b. The nature, extent, degree and gravity of non-compliance;
- c. Whether the irregularities complained of adversely affected the sanctity of the election;
- d. After taking into account all the foregoing factors, whether the winning majority would have been reduced in such a way as to put the victory of the winning candidate in doubt.

89. Similarly, in *In Gitarau Peter Munya v Dickson Mwenda Kithinji and 2 other* Supreme Court Petition No 2B of 2014 the court summarized the law on nullification of elections as follows: -

- a. An election should be conducted substantially in accordance with the principles of *the Constitution*, as set out in Articles 81(e) and 86;
- b. If it will 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 invalidated only on grounds of irregularities;
- c. Where however, it shows that the irregularities were of such magnitude that they affected the election result, then such an election stands invalidated;
- d. Procedural or administrative irregularities and other errors occasioned by human Imperfection, are not enough, by and of themselves to vitiate an election.

90. Art.38(2)); and (iii) the right to be registered as a voter, to vote by secret ballot and to be a candidate for public or political office, without unreasonable restrictions (Art. 38(3)). For purposes of the issue



at hand, the relevant parts of that Article are Clauses (2) and (3) thereof which guarantee the right to vote in the following terms:

“(2) Every citizen has the right to free, fair and regular elections based on universal suffrage and the free....

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

a) .....

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

91. The dimensions of this right, and the corresponding obligations to effectuate it, have been extensively set out locally and in other comparative jurisdictions. In the case of *Moses Masika Wetangula v. Musikari Nazi Kombo & 2 Others*, Supreme Court Petition No. 12 of 2014, [2015] eKLR this Court held [at para 112] that:

“The overriding objective of the *Elections Act* is to functionalize and promote the right to vote. This requires a broad and liberal interpretation of the Act, so as to provide citizens with every opportunity to vote, and to resolve any disputes emanating from the electioneering process....”

92. The Constitutional Court of South Africa echoed a dimension of this right in *New National Party v. Government of the Republic of South Africa and Others* (CCT9/99) [1999] ZACC 5; 1999 (3) SA 191; 1999 (5) BCLR 489 (13 April 1999), in the following terms:

“(11) *The Constitution* effectively confers the right to vote for legislative bodies at all levels of government .... But the mere existence of the right to vote without proper arrangements for its effective exercise does nothing for a democracy; it is both empty and useless.

“[12] ...This means that the regulation of the exercise of the right to vote is necessary so that ... deviations can be eliminated or restricted in order to ensure the proper implementation of the right to vote.

“[13] *The Constitution* recognizes [the necessity] to regulate the exercise of the right to vote so as to give substantive content to the right....”

93. As to who should guarantee the right to vote, Article 21(1) of *the Constitution* requires the State and State Organs to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. *The Constitution* and statute law charge the IEBC, a State Organ established under Article 88 of *the Constitution*, with the responsibility of safeguarding and guaranteeing the enjoyment of the political rights of the Kenyan people.

94. This is the position in other jurisdictions as well. In the case of *Minister of Home Affairs v. National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* (CCT 03/04) [2004] ZACC, the Constitutional Court of South Africa thus observed:

“The right to vote by its very nature imposes positive obligations upon the legislature and the executive... this right which is fundamental to democracy requires proper arrangements to be made for its effective exercise. This is the task of the legislature and the executive



which have the responsibility of providing the legal framework, and the infrastructure and resources necessary for the holding of free and fair elections.”

95. It is not left to the State and State organs to guarantee the right to vote. The obligation equally binds the voters themselves. Thus, in the case of *Gatirau Peter Munya v. Dickson Mwenda Kithinji & Others*, S.C. Petition No. 2B of 2014; [2014] eKLR [Munya 2B], in a concurring opinion at paragraphs 247, 248, and 249, Mutunga CJ & P (as he then was), expressed this view in the following terms:

“Constitutional provisions are by themselves not enough. The duty-bearers, be they individual voters, political parties, agents, the media, IEBC, the Registrar of Political Parties, the Constitutional Commissions, the arms of the State, must all invest in emancipating and protecting the vote.... Every party in an election needs to pull their own weight, to ensure that the ideals in Article 86 are achieved: that we shall once and for all have simple, accurate, verifiable, secure, accountable, transparent elections. The election belongs to everybody, and it is, therefore, in everybody’s collective interest, and in everybody’s collective and solemn duty, to safeguard it”

96. The Supreme Court of Ghana, in *Nana Akufo-Addo & 2 Others v. John Dramani Mahama & 2 Others*, Writ No. J1/6/2013 held that: “beyond the individual’s right to vote is the collective interest of the constituency and indeed of the entire country in protecting the franchise.”

97. On the same line of principle, the Inter American Court on Human Rights stated in the case of *Velasquez Rodriguez v. Honduras*, Inter-Am. Ct. H.R. (Ser. C) No. 4 (1988), that “the Court’s task is to determine whether the [alleged] violation is the result of a state’s failure to fulfil its duty to respect and guarantee those rights....” Thus, the question in the instant case is whether the State, IEBC and other State Organs, failed to take necessary action to ensure that the electorate voted in the affected areas.

98. It is not in dispute as earlier stated in this judgment that the election was disrupted due to two incidences of violence and two instances when the KIEMS kit failed. This indicates that several hours of voting was lost. It was later announced by the officials of 1<sup>st</sup> Respondent that voting time would be extended beyond 5.00pm to cater for the time that was lost. However, when the second incident of violence was experienced, the doors to the polling station was locked enabling only those who were inside the polling station to vote, the rest were locked out. The Petitioner presented witnesses to confirm this position.

99. Article 81 of *the Constitution* of Kenya, 2010 envisages an election free from violence and intimidation. It is the duty of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to secure the polling station to ensure that this Constitutional provision is safeguarded, in this particular election the 1<sup>st</sup> and 2<sup>nd</sup> Respondents failed. They failed by allowing people to disrupt the elections, destroy election materials, allow smuggling of unauthorized election materials into the voting hall. And further breaching of Regulation 63 of the Election (General) Regulations, 2012. And further they failed to secure the polling station from aggression in regard to Regulations 66“(6) The power conferred on a presiding officer and a police officer under sub regulation (5) shall not be limited to the area covered by the polling station only but shall extend to a radius of not more than four hundred meters from the centre of the polling station.”

**4<sup>th</sup> Issue: Whether there was a commission of electoral offences during the election of the Member of the County Assembly for Tudor Ward.**

100. It is not in dispute that the elections held on the 9<sup>th</sup>, August 2022 was marred with violence, destruction of voting materials, where the 3<sup>rd</sup> Respondent has been charged alongside others for the offence



of destroying election materials, use of violence, being in possession of counterfoil ballot papers, removing election materials from polling station and the offence of assault to one Daniel Ondoro Mochama. The case is still pending before the Election Offences court as MCEO Case No. E002 of 2022. This in itself is prima facie evidence of commission of an electoral offence which the court is currently handling, not to mention presumption of innocence against those concerned.

101. Section 87 of the *Elections Act* states:

“Report of Court on electoral malpractices

- 87(1) An election court may, at the conclusion of the hearing of a petition, in addition to any other orders, make a determination on whether an electoral malpractice of a criminal nature may have occurred.
- (2) Where the election court determines that an electoral malpractice of a criminal nature may have occurred, the court shall direct that the order be transmitted to the Director of Public Prosecutions.
- (3) Upon receipt of the order under subsection (2), the Director of Public Prosecutions shall —
  - (a) direct an investigation to be carried out by such State agency as it considers appropriate; and
  - (b) based on the outcome of the investigations, commence prosecution or close the matter.”

102. I believe the position presently is that the relevant state authority, the ODPP is seized with the matter and being that it is before court, no further indulgence should be carried on at this instance. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents on the other hand failed to ensure the electorate exercised their political right of voting in an environment free from violence and intimidation.

#### **5<sup>th</sup> Issue: What consequential declarations, orders and reliefs should this Honourable Court grant?**

103. As stated earlier in this judgment the rights protected by Article 38 are realized through the electoral system set out in Chapter Seven titled, “Representation of the People.” Under Article 81(e), the electoral system should comply with the principle of free and fair elections. According to this provision, elections are free and fair when they are by secret ballot, free from violence and intimidation, improper influence or corruption, conducted by an independent body, transparent and administered in an impartial, neutral, efficient, accurate and accountable manner. From the evidence so far in record, this was not the case in this election. The election was marred with bouts of violence disrupting the voting process, destroying the voting materials coupled with malpractices see the case of *Morgan & Others-v-Simpson and Another* (1974) 3 All ER 772., Martin Luther King Jr said “Non-violence is the answer to the crucial political moral question of our time”

104. In concluding I must express my profound gratitude to all counsel who appeared before me in this case, for their submission which was rich and assisted this court in reaching the present conclusion.

105. Thus, having analyzed the evidence on record together with the applicable laws, it is clear that the petitioner has discharge the legal burden placed on him. And specifically, that the election for Member of County Assembly, Tudor Ward held on 9<sup>th</sup> August, 2022 was conducted in accordance with the principles laid down in *the Constitution* and in conformity with the provisions of the *Elections Act* and the Regulations made thereunder and all other relevant laws.



106. Having made the foregoing findings, I make the following orders; -

- a. A declaration that the illegalities and irregularities exhibited and witnessed in the Elections held on 9<sup>th</sup> august 2022 for the position of Member of County assembly for Tudor Ward within Mombasa County affected the results and the validity of the said elections.
- b. A declaration that the election of the 3<sup>rd</sup> Respondent herein, SAMIR GULAM ABBAS BALOO was not validly elected as Member of County Assembly for Tudor Ward in Mombasa County and the 2<sup>nd</sup> Respondent's declaration of the 3<sup>rd</sup> Respondent as elected is illegal, null and void and the said declaration be revoked, cancelled and nullified forthwith.
- c. An order be issued directing the 1<sup>st</sup> Respondent to conduct fresh elections for the position of Member of County Assembly, Tudor Ward in Mombasa County in conformity with the Constitution of Kenya, the Elections Act, 2011 and the Regulations thereunder.
- d. The Respondents shall bear the cost of the Petition which is hereby capped at Kshs. 500,000/ = not subject to any further taxation and shall be divided equally between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents on one hand and the 3<sup>rd</sup> Respondent on the other hand.
- e. Certificate pursuant to section 86(1) of the Elections Act do issue to the Hon. Speaker, Mombasa County Assembly.

**Judgment dated signed and delivered virtually in Mombasa on the 28<sup>th</sup> February 2023.**

**Signed**

**V. O ADET**

**PRINCIPAL MAGISTRATE**

28/2/2023

In the presence of

1. Mr. Oluga, Mr. Obonyo and Ms. Kinuva for the Petitioner
2. Mr. Mohamud for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent
3. Mr. Koitamet as Court assistant

