



**Sanaet v Mateya & 2 others (Election Petition E001 of 2022)
[2023] KEMC 5 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEMC 5 (KLR)

**REPUBLIC OF KENYA
IN THE NAROK LAW COURTS
ELECTION PETITION E001 OF 2022
SM MWANGI, CM
FEBRUARY 15, 2023
THE ELECTIONS ACT, 2011
ELECTIONS (PARLIAMENTARY AND COUNTY ELECTIONS) PETITION RULES, 2017
ELECTION PETITION NO. E001 OF 2022**

BETWEEN

TAMOOH EMMANUEL SANAET PETITIONER

AND

MUGUYA WILSON MATEYA 1ST RESPONDENT

**JULIUS OKWETO, CONSTITUENCY RETURNING OFFICER, NAROK
NORTH CONSTITUENCY 2ND RESPONDENT**

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

JUDGMENT

1. The petitioner lodged this petition dated September 2, 2022 seeking the following orders and declarations:
 - a. Scrutiny and recount of all ballots cast at Enabatat Awuaru Primary School Polling Station, Topoti Primary School Polling Station Stream 1 and 2 for the position of the Member of County Assembly of Olorropil Ward, Narok North Constituency, Narok County
 - b. Scrutiny of the ballot boxes and recounting of all ballots cast at Enabatat Awuaru Primary School Polling Station, Topoti Primary School Polling Station Stream 1 and 2 for the position of the Member of County Assembly of Olorropil Ward, Narok North Constituency, Narok County



- c. An order directed at the 3rd Respondent to avail a report of the number of people positively identified during the election day by the Kenya Integrated Election Management System (KIEMS) device used at Enabatat Awuaru Primary School Polling Station, Topoti Primary School Polling Station Stream 1 and 2
- d. Upon the scrutiny of all ballots cast at Enabatat Awuaru Primary School Polling Station, Topoti Primary School Polling Station Stream 1 and 2 the court to order the 3rd respondent to issue the petitioner a certificate of election as Member of County Assembly of Olorropil Ward pursuant to Section 84(4) of the [Elections Act](#) No 24 of 2011
- e. A determination that the 3rd respondent was not validly and duly elected as Member of County Assembly of Olorropil Ward

In the alternative:

- f. A determination that the 1st respondent was not validly and duly elected and the election was void
 - g. An order directing that a fresh election for Member of County Assembly of Olorropil Ward be held
 - h. Costs of the petition
 - i. Any other orders the court deems just and appropriate
2. The 1st respondent filed his response to the petition and affidavit in support of his response dated September 15, 2022 urging the court to hold and find that; -
 - a. The respondents were not in breach of and did not contravene the provisions of the [Constitution](#), the [Elections Act](#) or of any other statute;
 - b. The election of the Member of County Assembly of Olorropil Ward was conducted in accordance with the [Constitution](#) and the [Elections Act](#) and all other relevant statutes and a valid declaration of the outcome of the election was made;
 - c. The 1st respondent was validly elected as a Member of County Assembly of Olorropil Ward;
 - d. The petition lacks merit and should be dismissed; and
 - e. The petitioner should bear the costs of the petition
 3. The 2nd and 3rd respondents filed a response dated September 20, 2022 which was supported by the affidavit sworn by the 2nd respondent on even date on their behalf where they urged the court to dismiss the petition and find that the election and declaration of the 1st respondent as the Member of the County Assembly for Olorropil Ward, Narok North Constituency was valid and uphold it and award them the costs

Petitioner's Case

4. PW1 -the petitioner, testified that he was cleared to contest the Olorropil MCA Ward seat by the United Democratic Party in the general election held on August 9, 2022 with other contestants namely Kuluo Raphael Kolesh, Murguya Wilson Mateya, Ntimama Evanson Mwangi, Salaon Danson Kupere



and Taga Robert Saruni and on August 11, 2022 the 2nd respondent declared the 1st respondent the winner. The results were that Kuluo Raphael Kolesh garnered 1,421 votes, Murguya Wilson Mateya 2,702, Ntimama Evanson Mwangi 33, Salaon Danson Kupere 1,702, Taga Robert Saruni 2,180 and himself 2,674

5. He said he had appointed Fredrick Molto his agent at Enabat Awuaru Primary School polling station who was denied entry as his letter was not stamped and he never therefore witnessed the voting, counting and the tallying of the votes cast. He said he had appointed Leina Ikayo and Benson Kipukel as his agents to Topoti Primary School Stream 1 and 2 respectfully who told him that there was a disturbance occasioned by the supporters of the 1st respondent and this occasioned a stoppage in the counting of the votes but after some time he was told that the counting had resumed
6. He was also called by one of his supporters who informed him that his agents had been compromised to allow for rigging to take place and he was unable to reach his agents. He then proceeded to the Constituency tallying office and complained to the constituency returning officer but he was ignored and his request for a recount was denied. He proceeded and reported at Narok police station but was informed that this was an election matter and he was referred to the IEBC office which he found closed. He then wrote to the returning officer requesting for information on the subject polling station but was asked to obtain a court order
7. He said he was leading the election and Topoti Stream 1 was the last polling station to be tallied and the presiding officer upon realizing that the difference was insurmountable in collusion with the 1st respondent opted to engage in electoral malpractice to overturn his election including switching votes between Taga Robert Saruni and the 1st respondent

1st Respondent's Case

8. The 1st respondent Murguya Wilson Mateya-RW1 testified that he contested the Olorropil MCA Ward seat and was declared the winner and he produced the Form 32B as his Exhibit No 1, the poll station diary for Enababat primary school and Topoti primary school polling station diary as his Exhibit No 2 and 3 respectfully. His evidence was that the election was conducted in a free and fair manner. There was no disruption or dispute in the conduct and the declaration of the results and the law was complied with. During cross examination he said he voted at Enababat primary school polling station and his agent there was Erick Sankale
9. He called Fredrick Sankale- RW3, who testified that he was the appointed agent of the 1st respondent at the said polling station. His evidence was that no agent was turned away, he signed the form 36A and examined the ballot boxes and ballot papers

2nd & 3rd Respondents' Case

10. The first and second respondents called the 2nd respondent Julius Okweto-RW3, who testified that he was the returning officer of Olorropil Ward within Narok North Constituency and started by explaining the mandate of IEBC in the conduct of elections. He then gave details of the preparations which they conducted before the election on 9/8/2022 which included meeting the candidates and training their staff and the chief agents. He then proceeded to give evidence of how they conducted the election on the material day assisted with his staff on the ground after the election materials were dispatched, the counting, tallying and declaration of the winner at the County tallying centre. His evidence in a nutshell was that the election was conducted in a free and fair manner as spelt out by the law and he declared the results of Olorropil Ward after tallying the results in Form 36A and he then issued the winner with the certificate declaring him the Member of County Assembly-the MCA.



11. The 2nd and 3rd respondents then called Ezekiel Kores Ketere-RW4, who was the presiding officer at Enabatat Awuaru Primary School Polling Centre who adopted his statement as his evidence in chief. He then stated that all the agents who had the necessary documents were allowed to access the centre adding that he was not affiliated to any party and he was categorical that no votes were switched. He said there were no incidents or challenges which arose and no agent was chased away adding that the declaration was signed at the tallying centre
12. Their next witness was Josphat Keswe Ketere- RW5, who was the presiding officer at Topoti Primary School Stream 1 and his evidence was that he did not know any of the aspirants personally and no commotion was witnessed at the station. He testified further that there was no delay in the voting and counting and no votes were switched. The last witness who was called by the 2nd and 3rd respondents was Josphine Kuiyoni Musul-RW6, who was the presiding officer at Topoti Primary School Stream 2 and her evidence was that no unauthorized person was allowed to access the station. She testified that she was not biased as she did not know any of the candidates and ruled out any switching of the votes. She was emphatic that there was no commotion at the station and all the ballot boxes were in good condition when they were delivered to the returning officer

Petitioner's Submissions

13. The petitioner reiterated his prayers and relied on his petition, his application for scrutiny and supporting affidavit and set out the issues for determination as:
 - a) whether the court should order for scrutiny and/or recount of the ballots,
 - b) whether the election carried out in Olorropil Ward was free and fair and
 - c) what consequential order should this honourable court make.

He submitted that the basis for scrutiny is discretionary but should be judiciously applied to the ends of justice adding that a scrutiny does not prejudice any of the parties. He submitted “that the margin was 28 votes, against a total of 10,722 votes cast, it should not be rocket science, even before a kangaroo court to make an easy determination on that basis” after citing the case of *Hassan Ali Joho v Hothman Nyange & Anania Mwasambu Mwaboza* (2008) 3 KLR EP 188 where Maraga, J (as he then was) held that where the margin of error was very low, then justice will be done and will be seen to be done if scrutiny and recount are ordered as it may unearth errors (inadvertent or deliberate) that would wipe out the small margin.

14. He then referred to the case of *Phillip Munge Ndolo v Omar Mwinyi Shimbwa & 2 others* [2013] e KLR where the court sated that:

“The underlying mandate of any Election Petition Court is to ensure that justice is done to both sides and that any discrepancies and/or irregularities are closely interrogated in order to reach a just decision in the case.”

15. He submitted that the counting of the votes in Topoti Stream 1 and 2 was inordinately delayed without logical, logistical or legal justification while the votes from all the other stations were received earlier which adding that such delay and this presented an opportunity to manipulate an election to favour a specific outcome. He said the 3rd respondent never provided a valid reason and the PSD collaborates the petitioner's pleading
16. He also submitted that there was contradiction between the evidence of the presiding officer at Enabatat station and the PSD on the time of closing and referring to the supporting affidavit of the



- 2nd respondent he said that it is not known whether the 9 voters on the queue including others who were inside voted for four (4) hours after the polling station was closed. He said that is why he is asking for printed register of voters who were positively identified and voted there as the supporting affidavit of the RO indicated the record of voters identified by the printed register where the KIEMS technology failed was 16 and the ones who were validated were 10. However it is not clear how long this process took considering there were 9 voters allegedly at close of the polling station. He added that he is therefore seeking for scrutiny and recount of the votes for the reason that the number of voters who were positively identified to vote is will not tally with the votes as counted as counted in the polling station. He said the inconsistencies is not a coincidence as the PO would not indicate a time different from what was indicated in the PSD adding that this points towards lack of transparency and verifiability
17. Turning to the damage of ballot seal and different serial number he said the process of resealing the ballot box is itself a scrutiny and stated that when the three ballot boxes were brought to court two had apparent issue of tampering referring to the broken seal and the different serial number
 18. The petitioner cited the case of *Robinson Simiyu Mwangi & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR where the term Scrutiny is defined thus: the close and thorough examination, observation or study while recount is to count again citing the definition given in *The Concise English Dictionary* (2011) 12th Edition (OUP) while the legal definition is quoted from *The Halsbury's Laws of England*, (1990) 4th Edition, 12;454 where scrutiny is defined as a court supervised forensic investigation into the validity of the votes cast in an election.
 19. He stated that from the external scrutiny evidence of tampering was unearthed which justify the opening of the ballot boxes and scrutiny to be done which includes a recount and if the court is so inclined it can order a recount only. He said there was no cogent evidence by the 2nd and 3rd respondents on how the seal was broken and the same can only be done by human agency and not some random act
 20. He then submitted that an unknown person Pauline Parsulan not entered into the diary when entering appears to have signed as an agent representing ODM at the sealing of packets and the PO was unable to explain how her name was not entered in the PSD adding that the PSD has many missing, unexplained and unjustified entries
 21. He then referred to the seal affixed to the ballot box at Topoti Stream 2 which is different from the one on the ballot box adding that the explanation that there was an inversion was only convenient and could not be explained as a human error but a deliberate attempt to interfere with the ballot and its contents thus extending to the integrity of the ballot. He added that the other inconsistencies in the entries in the PSD collaborate the manner the election was conducted with illegalities and irregularities
 22. Turning to the storage of the poll station diaries he referred to Regulation 86(2)(a) of the Election Regulations and said that the 2nd respondent never put the polling station diaries in a sealed and labelled separate box and there is a question on whether they were the ones recorded at the polling station. He added that the 2nd respondent denied the petitioner access to the PSD but freely granted the 1st respondent access who even attached it as his evidence in court which indicates concert and collusion between the two respondents. He submitted that the interference with the ballot boxes are clear evidence of illegal acts of the 2nd and 3rd respondents which brings into disrepute the contents of the ballot boxes at Topoti Stream 1 and 2
 23. The petitioner proceeded to cite the case of *Twaber Abdulkarim Mohamed v Independent Electoral and Boundaries Commission & 2 others* [2014] eKLR where the High Court sitting on appeal stated that in cases of illegality the court will investigate an issue even when such an issue has not been



specifically pleaded and added that all issues raised in a petition, and those which crop up during the hearing whether pleaded or not and which had the potential to affect adversely the final result and the will of the voters in a constituency must come under spotlight, scrutiny and interrogation and determination made thereon

1st Respondent's Submissions

24. He submitted that although the petitioner attached documents to his affidavit which were letter of appointments of his agents and a letter to IEBC the same are of no evidential value as they were not sealed, marked and signed citing section 15(8) of the [Elections \(Parliamentary and County\) Petition Rules 2017](#) which provides that the provisions of order 19 of the [Civil Procedure Rules, 2010](#) and the [Oaths and Statutory Declarations Act](#) shall apply to the affidavit under that Rule. Turning to the [Oaths and Statutory Declarations Act](#) he stated that under Rule 9 all exhibits to affidavits shall be securely sealed under the seal of a commissioner and shall be marked with serial letters of identification. He cited the case of [Galaxy Paints Co. Ltd v Falcon Guard Limited](#) CA No 219 of 1998 and [Abraham Mwangi v SO Omboo, Joseph Lijulu, Daniel Bogonko](#) [2003] eKLR which emphasized the need to comply with the rules
25. Turning to the standard of proof in election dispute cases he submitted that the same is higher than the balance of probabilities but lower than beyond reasonable doubt and where allegations of criminal or quasi-criminal nature are made, the proof is beyond reasonable doubt pegging his submissions on the decision in the case of [Raila Odinga and another v The Independent Electoral and Boundaries Commission](#) [2017] e KLR, [Emmanuel O Achayo v Orange Democratic Movement & 4 others](#) [2017] eKLR and [Khatib Abdallah Mwashetani v Gideon Mwangangi Wambua](#) [2014] eKLR. He proceeded to state that the burden is the petitioner to prove that there was non-compliance with the [Constitution](#) and the Electoral Law and the same affected the outcome of the election as held in the case of [Raila Odinga v IEBC and 3 others](#) [2013] eKLR where the court held that:
- “Where a party alleges non-conformity with the electoral law, the petitioner must not only prove that there has been non-compliance with the law but that such failure of compliance did affect the validity of the elections.
- It is on that basis that the Respondent bears the burden of proving the contrary. This emerges from a long standing common approach in respect of alleged irregularity in acts of public bodies, *omnia praesumuntur rite et solemniter esse ecta*; all 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 authority's departures from the prescriptions of the Law”.
26. The 1st respondent then cited section 107 of the [Evidence Act](#) adding that the duty of the court is to examine the basis of the grounds raised by the petitioner under articles 1, 38, 81, 83 and 86 and the Electoral Law and determine whether the election was free and fair. He cited Section 82 of the [Elections Act](#) and Rule 31 of the [Election Petition Rules](#) which deal with the issue of scrutiny and the instances when it can be granted adding that there must be sufficient reason to warrant an order for scrutiny to give the proper and lawful results. To this end he cited the case of [Richard HA Amana v IEBC & 2 others](#) Malindi EP No 6/2013
27. He went further to submit that the petitioner did not adduce a single document as exhibit and as he was not an eye witness and never called any eye witness, he did not lay any basis for requesting the scrutiny and recount. He said that the petitioner never called the witnesses whose affidavit he had filed adding that the 2nd and 3rd respondents called witnesses who countered the assertions by the petitioner. He went further to state that as the petitioner is seeking orders of both scrutiny and recount praying to



be declared the winner he cannot challenge the election process as being marred by irregularities and still seek to benefit from the same process. He buttressed his submission by referring to the decision in the case of *Justus Gesito Mugali M'baya v IEBC and 2 others* where the court stated that it would be illogical to conduct the two processes in one petition since the outcomes are different

28. He also cited the case of *Wavinya Ndeti v The Independent Electoral and Boundaries Commission & 4 others* [2013] eKLR and *Philip Osore Ogutu v Onyura Aringo & 2 others* [2013] eKLR, *Joseph Amisi Omukanda v Independent Electoral and Boundaries Commission (IEBC)* [2014] eKLR, *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* where the court held that the electoral process should comply with the principles of free and fair elections which are protected by article 38 and 81(e) of the *Constitution*

2nd & 3rd Respondents' Submissions

29. They submitted that this court has jurisdiction to hear and determine this election petition and relied on section 75 (1A) of the *Elections Act*, the definition of jurisdiction in *Halsbury's Law of England* 4th Edition, Vol 10, and the decisions in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, Election Petition Appeal No 3 of 2018 *Mwathethe Adamson Kedenge v Twaher Abdulkarim Mohamed & 2 others* (2018) eKLR and *Richard Hamid Ahmed Amara (supra)*, Nyeri Civil Appeal No 38/2013 *Dickson Mwandu Githungi v Gatirau Peter Munya & 2 others* which dealt with irregularities and their impact on the outcome of elections
30. They maintained that the electoral process was conducted according to the *Constitution of Kenya, 2010* the Election Act and IEBC Regulations and relied on the case of Judicial Review Misc Application No 447 of 2017 *Republic v Independent Electoral and Boundaries Commission & others ex parte Gladwell Otieno* and while arguing that the petitioner is relying on hearsay complaints with no concrete or cogent proof as his agents never appeared to testify cited the case of *Harry Okello Nadimo v IEBC & 2 others* [2013] eKLR where the court spelt out the role of agents in an election process
31. They also cited the case JR Misc Application No 628 of 2017 *Republic Independent Electoral and Boundaries Commission & others ex parte Khelef Khalifa & another* [2017] eKLR which emphasized that the electoral process must meet the Constitutional threshold of free and fair; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner. They argued that the 2nd respondent announced the results and declared the winner herein who was the 1st respondent who garnered the highest number of votes upon receipt of the results from each polling station in the constituency and discharged his mandate according to Election Regulations, Legal Notice 72 pursuant to Regulation 83(i).
32. They further cited the case of *Hassan Ali Jobo & another v Suleiman Said Shabbal & 2 others* [2014] eKLR in the Supreme Court which was quoted in the case of Mwathethe Adamson Kedenge (*supra*) which held that declaration of results is done in various stages with the final one presenting the instruments of declaration under article 87(2) of the *Constitution of Kenya*.
33. They argued further that it is upon the court to determine the credibility of the witnesses and their competency as required by the *Evidence Act* again citing the holding in the case of *Gatirau Peter Munya (supra)* and the decision of the Court of Appeal in the case of *Kiilu & another v Republic* [2005] eKLR 174 where the court held that a witness on whose evidence it is relied should not impress the court as not being straight forward or raise suspicion about his trust worthiness casting his integrity in to doubt which him unreliable and unsafe to rely on is evidence



On the issue of legibility errors on the PSDs they argued that the same does not stand as a matter of dispute to void the election results citing the holding in the case of *Wavinya Ndeti (supra)* and *Richard Hamid Ahmed Amara (supra)*

34. On the question of the delay in the tallying they contended that it was tasking and done by hand to promote transparency and no suspicious activity was alluded to. They argued that the petitioner was not on the ground and received no complaints of any issue other than the two cases of the KIEMS kit which was not within Olorropil Ward so the petitioner's allegations are baseless and lack legal and factual basis or merit
35. The 2nd and 3rd respondents also quoted the Dean of the Kabarak University School of Law Elisha Z. Ongonya in his article in the book *Balancing The Scales of Justice* edited by Dr. Collins Odote and Dr Linda Musumba where he stated;

“With proof an election petition succeeds, without proof an election petition fails” and added that Section 109 of the *Evidence Act* is clear that he who alleges bears the burden of proof

Petitioner's Supplementary Submissions

36. The petitioner reiterated his submissions dated January 3, 2023 and added that a petition is sui generis and its decision affects the choice of people's election choices as well as determining the course of democratic rights adding that the court should not consider the special circumstances of this petition and trump the course of justice. He submitted that contrary to the submissions by the 1st respondent that the evidence and affidavit of Henry Molto be expunged from the record the petitioner, it is not the only documentary evidence since did present oral evidence under the rules of evidence. He also urged the court to disregard the evidence and witness statement of the said Fredrick Molto. He urged the court to disregard the submissions by the 1st respondent that he failed to comply with Order 19 of the *Civil Procedure Rules, 2010* as the rules are based on matters of procedure and not substance and they should not be elevated above Article 169 of the *Constitution*.
37. He cited the case of *Mbayi Sayeed Omsiritsa v Nancy Ivadi & 2 others* [2018] eKLR, *William Kinyanyi Onyango v IEBC & 2 others* [2013] eKLR (Election Petition Appeal No 2 of 2013) and *Hon. Martha Wangari Karua v IEBC & 2 others* [2014] eKLR where the court emphasized the need to attain the overriding objective of the court to do substantial justice. He went further to state that in his affidavit and evidence on oath he adduced evidence that substantially lays ground for scrutiny. He reiterated his submissions on the delay in counting and tallying in the three polling stations, the different numbers of the seal on the ballot box and PSD and the broken seal

Determination

38. The following issues are for determination:
- a. Whether the court has jurisdiction to determine this election petition
 - b. Whether there should be an inspection of ballot boxes, scrutiny, recount and re-tallying of the votes cast and the KIEMS kit tool
 - c. Whether there were irregularities in the election carried out in Olorropil Ward to warrant a declaration that the same were not free and fair
 - d. Whether the petitioner has proved the commission of any election related offence



- e. Whether it is open to the petitioner to seek both orders of scrutiny and recount
- f. Whether the petitioner should be declared the validly elected Member of County Assembly of Olorropil Ward pursuant to Elections of August 9, 2022
- g. Who pays the costs

Burden and Standard of Proof

39. The burden of proof lies on the petitioner to prove that he deserves the orders which he is seeking as stipulated by Section 107 of the *Evidence Act* which states that:

- (a) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist
- (b) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person

Section 109 and 112 of the *Evidence Act*

Section 109:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence”

Section 112:

“In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him”

40. The case of the *Raila Odinga & 2 others v IEBC & 3 others* Petition Number 5 of 2013 (*supra*) clarified the position in election petitions on who bears the burden of proof and the degree of the proof when it pronounced itself thus:

“...a Petitioner should be under obligation to bear the initial burden of proof before the respondents are invited to bear the evidential burden. The threshold of proof should in principle be above the balance of probabilities, though not as high as beyond reasonable doubt. Where a party alleges non-conformity with the electoral law, the Petitioner must not only prove that there has been non-compliance with the law, but that such failure of compliance did affect the validity of the elections. It is on that basis that the respondents bear the burden of proving the contrary”

41. I concur with the petitioner that this court should proceed and discharge its mandate as held in the case of *Twaber Abdulkarim Mohamed* (*supra*) that

“The underlying mandate of any Election Petition Court is to ensure that justice is done to both sides and that any discrepancies and/or irregularities are closely interrogated in order to reach a just decision in the case.”

Jurisdiction of the Court

42. Although the 1st respondent has highlighted the same as one of the issues for determination this court has jurisdiction to hear election petitions arising from the election of a member of a County Assembly



by dint of Article 169 of the Constitution of Kenya and Section 75(1)(A) of the Elections Act after been designated and gazetted by the Honourable Chief Justice to determine election disputes. As regards to this petition this court has been specifically gazetted to hear and determine it

43. In the case of Orange Democratic Movement v Yusuf Ali Mohamed & 5 others [2018] eKLR the superior court held that this court has original jurisdiction to hear and determine disputes from post-gazettement election disputes on membership of County Assemblies and these includes where the substance of the dispute arises from or is related to nomination or elections. This position is also echoed by the Court of Appeal in the case of Rose Wairimu Kamau & 3 others v IEBC, CA No 16 of 2013 and Jaldesa Tuke Debalu v IEBC & another [2016] eKLR
44. In the case of Moses Mwicigi & 14 others v IEBC & 5 others [2016] eKLR the Supreme Court stated and I quote:

“[106] The Gazette Notice in this case, signifies the completion of the “election through nomination” and finalizes the process of constituting the Assembly in question. On the other hand, an “election by registered voters”, as was held in the Joho Case, is in principle, completed by the issuance of Form 38, which terminates returning officer’s mandate, and shifts any issue as to the validity of results from IEBC to the Election Court.

[107] It is therefore clear that the publication of the Gazette Notice marks the end of the mandate of IEBC, regarding the nomination of party representatives, and shifts any consequential dispute to the Election Courts. The Gazette Notice also serves to notify the public of those who have been “elected” to serve as nominated members of the County Assembly.” (Emphasis)

Irregularities of voting at Enabatat Station

Barring of Agent

45. The petitioner has pleaded that his agent Fredrick Molto was barred from accessing Enabatat Station by the presiding officer of the 3rd respondent. His pleading and evidence in court was that he was informed by the said agent that he had been denied access even after complaining that he had all the required credentials like the other agents of the other candidates who were allowed access to the station to execute their duties of ensuring that the election was carried out in a free and fair manner. The petitioner had pleaded in his supporting affidavit that the evidence of an agent can assist the court to assess the credibility of the election
46. This was confirmed in the case of Harry Okello Nadimo (*supra*) it was held that:

“For these reasons, how the Agent carries out his duty, conducts himself, treats, or is treated by the polling officials is important. An agent who accepts who accepts or acquiesces to an outcome but wishes to recant it must give plausible reasons for the change of heart. Where at the hearing an Agent raises complaints about the conduct of the Election the Agent must be asked about the action taken by him or her to seek intervention when the issue arose. Where the Agent is guilty of inaction, then the Agent will be hard put to explain the inaction. On the converse the court may take a benign view of the evidence of the Agent who raises a legitimate complaint or query in a formal and timeously fashion. These are but a few instances of how the evidence of an agent can assist the court to assess the credibility of the election process. The point to be made is that the evidence of Agents can turn out



to crucial in aiding the court to get a true impression of how the election was managed and conducted.”

47. The above notwithstanding the petitioner did not call the said agent to come and testify and give details to establish that indeed he was actually barred from accessing the said polling station. The petitioner testified that the said agent was barred from accessing the polling station from 5.30 a.m. until the time when the station was closed begging the question of why the said agent or himself for that matter did not deem it fit to take action and seek intervention when the denial persisted. The petitioner did not state categorically at what time the said agent contacted him and reported that he had been denied access and this is compounded by the fact that the said agent was never called to testify. The petitioner did not call any other witness who would have confirmed that indeed the agent was denied access the whole day when the voting was proceeding. The petitioner and his agent are therefore hard put to explain their inaction from morning to evening when the alleged denial took place. On the other hand, the respondents who were in any case under no obligation to rebut what had not been established, by the evidence presented by RW1, RW2 and RW5 denied the averment by the petitioner.

Unauthorized Agent Allowed Access

48. The petitioner submitted that one Pauline Parsulan was allowed to enter the Polling station and witnessed the tallying of the votes. RW6 explained that the person was an agent of ODM and he even revealed her identification card number as xxxxxxxx. He went further to explain that her failure to sign the PSD could have been occasioned by her arriving late. He also referred to the PSD and other materials which confirmed that indeed the lady was an agent of ODM. No evidence was tendered by the petitioner to rebut or contradict the evidence of RW 6 on this issue

Delay in the Counting of Votes at Topoti Stations

49. The petitioner has averred that there was calculated delay in the counting of votes at the said polling stations which provided an opportunity for the manipulation of the results in favour of the 1st respondent by the 2nd and 3rd respondents. He however never tendered any tangible, credible and reliable evidence evidence to prove that the delay was deliberate and orchestrated by the respondents with the sole aim of benefitting the 1st respondent. He was not at that stations and he never called any witness to attest to that fact but on the other hand the respondents through the evidence of RW1, RW2, RW3, RW4, RW6 and RW7 denied that there was such calculated delay and their evidence stand unrebutted

Voters denied to vote

50. The petitioner had pleaded that there were voters on the queue at 5.00 p.m. who were denied the opportunity to vote and were even chased away by the 2nd and 3rd respondents with the assistance of the security officers. He did not call any eye witness to establish those facts and he was clear in his evidence that this information was relayed to him by his agents and supporters. He did not disclose the name of even the one supporter who he said he knew and he never called the agents or any of these supporters to prove these pleaded facts. On the other hand, all the witnesses called by the respondents denied that any of the voters was turned away adding that where there were voters on the queue at 5.00 p.m. and the time for voting was extended to accommodate all of them

Disturbance at Polling Station

51. The petitioner pleaded that there were disturbances at Topoti Polling Station 1 and 2 which occasioned the halting of the counting of the votes adding that the information was relayed to him by one of his



supporters. He said that he called his agents there who confirmed that indeed the supporters of the 1st respondent had caused the voting to be stopped but like in the other instances aforesaid he never called a single witness to confirm that indeed there was such a fracas. This was disputed by the respondents in their pleadings and their testimony in court

Switching of Votes

52. The petitioner's case was that votes were switched to favour the 1st respondent at the Topoti Stations. He however never called any witness to prove the allegation which he said was reported to him by his agents and supporters. He did not witness the alleged switching since he was not at the scene and this reduces his evidence to mere hearsay. The respondents were categorical in their evidence which was presented by RW1, RW2, RW3, RW4, RW5, RW6 and RW7 that nothing of the sort took place and their evidence stand unchallenged

Failure of Votes to Tally

53. The petitioner also pleaded that the votes in Form 36A do not tally with the votes which were cast but he did not present any tangible evidence to prove the fact for example by calling a witness who was present when the tallying was been carried out. He was not present when the tallying was been conducted and since this was denied by the respondents in their pleadings and evidence in court these averments by the petitioner are reduced to mere unsubstantiated allegations.

Difference in the Seal in PSD

54. It is not disputed that the number indicated in the PSD is different from the one which was on the ballot box. It was the evidence of the petitioner that the same was switched after the ballot box was opened and the ballots inside were tampered with. The petitioner did not call any person to testify who witnessed the interference with the ballot and its contents. However, based on the observation alone it was incumbent upon 2nd and 3rd respondents to rebut the allegation that there was any tampering with the ballot boxes. They denied the existence of such interference through the evidence of RW4 who is the 2nd respondent and his presiding officers; namely RW4, RW5, RW6 and RW7. RW7 gave details of how the votes were counted, the packets were sealed and the ballots were sealed. She clarified that she was assisted by her deputy and the polling clerks to record the numbers of the seals and when she was put to task on the switching of the serial numbers, she stated that this could have arisen through a mistake in recording of the numbers which were inverted. The evidence of the witnesses called by the 3rd respondent was corroborated by the 1st respondent and his agents namely RW2 and RW3 who witnessed how the exercise was conducted
55. The petitioner did not adduce any evidence to challenge their evidence and the same therefore is not contradicted or challenged. In the case of *Wavinya Ndeti (supra)* the court was categorical that

“An election is a human endeavour and is not carried out by programmed machines. Perfection is an inspiration, but allowance must be made for human error”

while the court in the said case of *Rashid Hamid Ahmed (supra)* the court went ahead to state that:

“This court is not persuaded that an arithmetical error that does not fundamentally alter the outcome of the results can constitute an irregularity that the court should take in to consideration as being a material factor, in the absence of other evidence of the irregularity which would lead to the nullification of an election results.”



Broken Seal

56. There is no dispute also on the fact that when the ballot boxes were availed in court one had a broken seal and the petitioner has submitted that it was evidence of tampering. He however never called any eye witness to attest to that fact nor did he adduce any evidence to establish that there was tampering of the seal with ulterior motive by the 3rd respondent or its staff and/or agents. Regarding the damage of the ballot seal and the different serial number Josphine RW7 who was in charge of the Station testified that all the ballot boxes were sealed properly and the exercise was witnessed by the agents and the observers and no complaint was raised on the same at the station. Her evidence was echoed by Josphat RW6 who averred that there was no complaint raised regarding the ballots at his station. Their evidence was also echoed by the returning officer RW4 who averred that no complaint was raised on the issue by any candidate, agent, voter or any other person and none was recorded in the PSD.
57. In the case of *Rishad Hamid Ahmed (supra)* the court held that:

“A petitioner is not only required to establish that there were irregularities which were committed during the elections, he must also establish that such irregularities (non-compliance with the law) were of such magnitude that it affected the outcome of the results. This is what is referred as the materiality test. Apart from that, the petitioner is required to establish that the errors and irregularities were either occasioned by outright negligence or deliberate inaction on the part of the guilty party.

Irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result”

Storage of the Ballot

58. Although the petitioner pleaded that the poll station diaries-PSDs- were not put in a separate ballot box he did not disclose where it was stored and how this affected the election results. He did not suggest that the same was not stored in safe custody with the rest of the election materials as stipulated in the said Regulation 86(2)(b). The 2nd respondent was categorical that all the materials were properly secured and no complaints was raised on the storage. He added that no agent was denied access to the materials and no candidate was accorded special favours ruling out any concert or collusion between the 2nd and 3rd respondents and the 1st respondent

Whether the petitioner can plead for scrutiny and recount

59. The petitioner is pleading for orders that upon the scrutiny and recount, he be declared the Member of the County Assembly of Olorropil Ward and a certificate to that effect be issued to him. In the alternative he is praying that the court makes a declaration that the 1st respondent was not validly and duly elected as the Member of the County Assembly of Olorropil Ward and the election was void and fresh election be held. Since on the one hand the petitioner is contending that the election in the said ward was marred by illegalities and irregularities he cannot in the same breath plead to be allowed to benefit from the same since he would end condoning the same illegalities as held in the case of *Justus Gesito Mugali (supra)* where the court held and I quote:

“...Moreover, a petitioner cannot on the one hand loath an election process for being flawed and perform a recount or tally of the same process with the aim of being declared the winner if he/she emerges victorious pursuant to Section 80(4)(a) of the *Elections Act*.”



Whether the petitioner has proved his case

60. I reiterate the decision in the case of Rishad Hamid Ahmed (*supra*) the court held that on the

“A petitioner is not only required to establish that there were irregularities which were committed during the elections, he must also establish that such irregularities (non-compliance with the law) was of such magnitude that it affected the outcome of the results. This is what is

referred as the materiality test. Apart from that, the petitioner is required to establish that the errors and irregularities were either occasioned by outright negligence or deliberate inaction on the part of the guilty party.

Irregularities which can be attributed to an innocent mistake or an obvious human error cannot constitute a reason for impeaching an election result”

61. In his petition which is buttressed by his affidavit the petitioner has averred that Articles 81 and 86 Constitution of Kenya were violated because there was a systematic pattern of electoral malpractices which benefitted the 1st respondent. He said the counting of the votes was marred by favouritism, improper motives, deliberate misallocation of ballots/votes and switching of votes. He pleaded and swore in his affidavit that there was collusion between the 1st respondent and the 3rd respondent through its officers led by the 2nd respondent to commit irregularities and illegalities which favoured the results in favour of the 1st respondent. However, he never tendered an iota of evidence to prove the averment and it is worth repeating that he never called a single person who witnessed the commission of the pleaded irregularities and illegalities at the polling stations in question.
62. Having failed to establish through evidence any conspiratorial nexus between the 1st respondent on the one hand and the 2nd and 3rd respondents and their presiding officers on the other to manipulate the elections in the named polling stations, the evidence tendered by the 1st respondent and his witnesses qualify as the evidence of independent witnesses. They corroborated the evidence of the 3rd respondent confirming that there was no evidence of irregularities or illegalities at the various stages of the declaration of the results of this petition which were envisaged in the case of Hassan Jobo (*supra*)
63. To quote the case of Wavinya Ndeti (*supra*) and Rishad Hamid Ahmed (*supra*) the existence of arithmetic errors and other mistakes does not per se establish that the same to be evidence of manipulation but the onus still lies on the petitioner to prove the same once the respondents like in this case offer evidence which rebuts the claim by the petitioner that the errors and mistakes were deliberate and calculated to benefit the candidate who was declared the winner. The respondents discharged the evidential burden throwing the ball back to the petitioner to prove that indeed the errors and mistakes suffice to warrant the nullification of the election. The petitioner must demonstrate that the irregularities were not obvious human errors or innocent mistakes but a conspiracy between the named respondents.
64. In the instant case the error referred to an insertion of a wrong number of the seal which the 3rd respondent contends was inverted. Their evidence that there was no collusion was corroborated by the 1st respondent and his witnesses who were present when the events complained of were taking place. There were other candidates, agents and observers but none raised any complaint regarding how the votes were been counted. The 2nd respondent and his officers referred to the PSDs where any complaint would have been recorded from any quarter but none was raised. Although the petitioner had pleaded



that his party of UDA had no agents at the contested polling stations the evidence and the materials presented by the respondents confirmed that all the participating parties had agents.

65. There is no cogent and sufficient evidence presented by the petitioner to prove that his agent was barred from accessing the polling station, that any voter was barred from voting and that there were disturbances which interfered with the vote counting. He also failed to adduce evidence to prove that the votes were either switched or failed to tally
66. Whether he admits it or not this petition was anchored very substantially on the information which was passed to him by his agents especially Fredrick Molto and his unnamed supporters. His evidence on the occurrences at the polling station is therefore reduced to mere hearsay after the said witnesses were compromised to quote his words. He did not disclose who compromised them but their action of turning their backs on him at the very critical moment dealt a major blow to his petition
67. The upshot of all the above is that the petitioner has not proved that there were irregularities and illegalities committed during the pleaded election by the respondent jointly or severally which would then require this court to proceed to the next stage to determine whether the same were of such magnitude as to affect the outcome of the election to the extent of warranting an order nullifying the same as held in the case of *Raila Odinga & 2 others v IEBC & 3 others* Petition Number 5 of 2013 (*supra*). Having failed to discharge the legal burden aforesaid his petition must therefore collapse and it stands dismissed

Reliefs and Orders of the Court

68. The prayer for scrutiny and recount by the petitioner is disallowed
69. The prayer for the scrutiny of the ballot boxes and recounting of the ballots cast is denied
70. The prayer for a certificate to be issued to the petitioner is disallowed
71. A declaration is issued that the 1st respondent was validly elected as the Member of County Assembly Oloropil Ward, Narok North Constituency

Who bears the costs of this Petition

72. Section 84 of the *Elections Act* provides;

An election court shall award the costs of and incidental to a petition and such costs shall follow the cause
73. Rule 30(1) of the *Election Petition (Parliamentary and County Elections) Petition Rules, 2017* provides:

30(1) The election court may, at the conclusion of a petition make an order specifying-

 - a. the total amount of costs payable;
 - b. the maximum amount of costs payable;
 - c. the person who shall pay the amounts in (a) and (b); and
 - d. the person to whom the amounts payable under paragraphs (a) and (b) shall be paid
74. On the issue of costs, the petitioner submitted that the costs as established jurisdiction of the election costs is borne from the security deposit paid into the court and not more. The 1st respondent submitted



that the sums deposited by the petitioner as security for costs should be equally shared between the respondents' advocates on record as they await to pursue the balance of the costs. The 2nd and 3rd respondents pleaded for the costs to them by dint of Section 84 of the [Election Act](#) and Rule 30(1) of the [Election Petition \(Parliamentary and County Elections\) Petition Rules, 2017](#)

75. Guided by the law on costs as specified above I proceed to find and direct that as the costs follow the cause the costs are awarded to the respondents who are the successful parties in this petition. I do not find any reason whatsoever or justifiable ground to deny them the same. The practice in election petitions is that being public litigation the same should not be stifled by award of huge amounts of costs hence the practice of capping the costs
76. To this end I direct that the costs awarded to each respondent are capped at Kshs 100,000/= and the deposit of Kshs 100,000/= to be equally shared by the three respondents pending taxation of their respective costs

RULING DELIVERED DATED AND SIGNED IN OPEN COURT VIA TEAMS LINK THIS 15TH FEBRUARY, 2023 IN THE PRESENCE OF:

SAMWEL M.MUNGAI

CHIEF MAGISTRATE NAROK

Petitioner-Absent rep. by Manyange

1st Respondent-Absent rep. by Okiri

2nd Respondent and 3rd Respondent- Absent rep. by M/s Mouti

Crt. Asst.-Dennis

