



Gitahi v Independent Electoral and Boundaries Commission & another (Election Petition E001 of 2022) [2022] KEMC 16 (KLR) (22 December 2022) (Judgment)

Neutral citation: [2022] KEMC 16 (KLR)

**REPUBLIC OF KENYA
IN THE NYERI LAW COURTS
ELECTION PETITION E001 OF 2022
JM MURIUKI, SPM
DECEMBER 22, 2022**

BETWEEN

MWANGI SIMON PETER GITAHI PETITIONER

AND

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST
RESPONDENT**

KANYI PATRICK WACHIRA 2ND RESPONDENT

JUDGMENT

“The spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself.” Lord Radcliffe.

1. The Petitioner in this case Mwangi Simon Peter Gitahi has filed this petition dated September 8, 2022 against the 1st and the 2nd Respondents herein namely:
 - i. Independent Electoral and Boundaries Commission – 1st Respondent
 - ii. Kanyi Patrick Wachira – 2nd Respondent
2. The Petitioner prays for the following orders:
 - a. A Declaration that the 2nd Respondent Kanyi Patrick Wachira was not validly elected as the Member of County Assembly of Thegu River Ward.
 - b. A Declaration that Mwangi Simon Peter Gitahi was validly elected as the Member of County Assembly of Thegu River Ward.



- c. An order for scrutiny of votes and audit of the KIEMS KIT used by the 1st Respondent and a further scrutiny and audit of Forms 36A, 36B and 36C subsequent Recount of Votes in the following Polling Stations in Thegu River Ward:-
- i. Maragima Primary School Polling Station(1 of 2)
 - ii. Maragima Primary School Polling Station (2 of 2)
 - iii. Chaka Primary School Polling Station (1 of 5)
 - iv. Chaka Primary School Polling Station (2 of 5)
 - v. Chaka Primary School Polling Station (3 of 5)
 - vi. Chaka Primary School Polling Station (4 of 5)
 - vii. Chaka Primary School Polling Station (5 of 5)
 - viii. New KCC Ground (Chaka) Polling Station (1 of 4)
 - ix. New KCC Ground (Chaka) Polling Station (2 of 4)
 - x. New KCC Ground (Chaka) Polling Station (3 of 4)
 - xi. New KCC Ground Chaka Polling Station (4 of 4)
 - xii. Karundas Secondary School Polling Station (1 of 2)
 - xiii. Karundas Secondary School Polling Station (2 of 2)
 - xiv. Karundas Primary School Polling Station (1 of 2)
 - xv. Karundas Primary School Polling Station (2 of 2)
 - xvi. Ngatha Nursery School Polling Station (1 of 1)
 - xvii. Gatei Primary School Polling Station (1 of 1)
 - xviii. Gathathini Dam offices Polling Station (1 of 1)
- d. That the costs of the Petition be awarded to the Petitioner
- e. Any other order the Court may deem fit to Order on whether an electoral malpractice of criminal nature may have occurred in the election of Member of County Assembly Thegu River Ward.

Grounds of petition

- i. That the 1st Respondent failed in ensuring that the appropriate structures and mechanism to eliminate Electoral malpractice were in place and effective.
- ii. That the 1st Respondent abdicated their duty to administer the election in a neutral efficient, open fair and impartial manner as required by Article 81 of the *Constitution* as read together with Section 39, 44 of the *Elections Act 2011*.
- iii. That the Electoral process was conducted in such a way and manner that it was open to manipulation malpractices and inaccuracies resulting in a shambolic and invalid outcome.



- iv. That election was attended by illegalities and irregularities on the part of the both the 1st and 2nd Respondents conjunctively and also singularly.
- v. That the Tallying of the Ballot Papers was not fair and transparent resulting in the outright suppression of the Petitioner's votes and inflation of the votes of the 2nd Respondent.
- vi. That the Form 36A forms were riddled with and markedly consisting of errors omission and unexplained and un-countersigned amendments.
- vii. That the election was marred by malpractices and irregularities that shammed the electoral process with differing entries of the ballots on the same Form 36 As calling into question the veracity and verifiability of the said entries.
- viii. That the Election as whole was graduated beyond contumacious disregard of the Electoral Process.

Facts in support of petitioner's evidence

- a. That at Maragima Primary School Polling Centre comprising of 2 Polling Stations, Maragima primary school 1 and Maragima Primary School 2 there was massive breach of the electoral process by the 1st Respondent issuing ballot papers to voters who had not gone through and/or had bypassed by the KIEMS KIT verification process that resulted in voters acquiring more than one ballot or some voters having the unlawful benefit of casting more than one ballot paper for the Member of County Assembly ballot box Thegu River Ward in favour of the 2nd Respondent resulting in unlawful inflation of the 2nd Respondents votes by about 200 votes.
- b. That the 1st respondent's Presiding Officer in a cover up of the above electoral malpractice and fraud did unlawfully eject and or evict the Petitioner's Agent at one of the 2 polling stations at Maragima Primary School for raising a Red flag against the ongoing aforementioned electoral fraud.
- c. That the 1st Respondent in reckless abandon of its duty to be neutral open and fair in various other Polling Stations other than the aforementioned Maragima Primary Polling Station 1 and 2 denied the Petitioner the opportunity to have his agents present both during the voting and most importantly during the tallying of the Member of County Assembly votes for Thegu River Ward in the following other polling stations:-
 - i. Karundas Secondary School Polling Station 1 of 2
 - ii. Karundas Secondary School Polling Station 2 of 2
 - iii. Chaka Primary School Polling Station 1 of 5
 - iv. Chaka Primary School Polling Station 2 of 5
 - v. Chaka Primary School Polling Station 3 of 5
 - vi. Chaka Primary School Polling Station 4 of 5
 - vii. Chaka Primary School Polling Station 5 of 5
 - viii. New KCC Ground Chaka Polling Station 1 of 4
 - ix. New KCC Ground Chaka Polling Station 2 of 4
 - x. New KCC Ground Chaka Polling Station 3 of 4
 - xi. New KCC Ground Chaka Polling Station 4 of 4



- xii. Ngatha Nursery School Polling Station 1 of 1
 - xiii. Gatei Primary School Polling Station 1 of 1
 - xiv. Gathathini Dam Offices Polling Station 1 of 1
 - xv. Karundas Primary School Polling Station 1 of 2
 - xvi. Karundas Primary School Polling Station 2 of 2
 - xvii. That at Karundas Secondary School Polling Station Centre comprising of 2 polling stations the 1st Respondent failed in ensuring that the appropriate structures and mechanism were in place to eliminate electoral malpractices prior to the tallying of the Member of County Assembly ballots for Thegu River Ward allowed and entertained commotion caused by supporters of the 2nd Respondent targeting Agents of the Petitioner which commotion resulted in the ejection of the agents of the Petitioner and tallying proceeded in their absence.
- d. That the above failure to ensure appropriate structures and mechanism to eliminate electoral malpractices was also manifested at the Polling Stations of Chaka Primary school and New KCC Ground (Chaka) Polling Stations.
- e. That the Form 36As from various polling stations within Thegu River Ward were riddled and markedly consisting of errors omissions un-countersigned amendments which are not verifiable thereby resulting in the final tally being a sham as evidenced hereunder:-
- i. In Ngatha Nursery school polling station 1 of 1 the total number of valid votes obtained remarkably differs with the Polling Station Counts and the remarks/comments of the Presiding Officer.
 - ii. That in the same Ngatha School the remarks of the Presiding Officer predate the date declaration.
 - iii. In New KCC Ground (Chaka) Polling Station 2 of 4 the form 36A issued the 2nd Respondents through an amendment on the form have been inflated from 007 to 137 without any countersigning or remarks by the Presiding Officer there is also an inflation of another candidates votes from 001 to 027 through an amendment that has not been countersigned and/or explained and/or commented upon by the Presiding Officer.
 - iv. In Karundas Secondary School polling station 1 of 2 the Polling Station counts in the Form 36A is not verifiable.
 - v. In New KCC Grounds (Chaka) Polling Station 4 of 4 the Form 36A is also amended without any countersigning and without any remark from the Presiding Officer. The same position applied in form 36A of Chaka Primary School Polling Station 1 of 5 and Gathathini Dam Offices Polling Station 1 of 1 thereby making the results therein unverifiable.
 - vi. That in some form 36As from various polling stations within Thegu River Ward the column of Agents or candidates are in one writing of the official of the 1st respondent thereby raising an issue of impartiality on the part of the 1st respondent.
 - vii. In Chaka Primary School Polling Station 5 of 5 the number of valid votes obtained in Form 36A and that of Polling Station counts are varying by about 100 votes.
3. The 1st Respondent Independent Electoral and Boundaries Commission filed its response dated September 19, 2022 in which the 1st Respondent prays for orders that:



- a. This Petition be struck out and/or be dismissed with costs
- b. A determination that the 2nd Respondent was duly elected as the Member of County Assembly for Thegu River.
- c. Any other orders that the court may deem just and fit to grant.

The first respondent contends as follows:-

- i. The 1st Respondent holds that indeed Article 81 (e) of the Constitution of Kenya, 2010 is the yardstick against which all elections are measured.
- ii. It is indeed correct, as stated in the election petition that 9 candidates vied for the position of member of county assembly Of Thegu River Ward-nyeri County Assembly where the results were declared as follows:-

no	Name of Candidate	Votes
1.	Kabue Kelvin Munuhe	238
2.	Kanyi Patrick Wachira	3282
3.	Kariuki Antony Gachanga	70
4.	Karue Richard Kamuhia	1660
5.	Munuhe Stephen Maina	205
6.	Mwangi Elizabeth Nyaguthii	1004
7.	Mwangi Simon Peter Gitahi	3126
8.	Thirikwa Francis Maina	745
9.	Wanjohi Savannah James Kinyua	605
Total		10,935

- iii. It is indeed Correct, under the said Election Petition that the 1st Respondent's employee (Returning Officer) declared the 2nd Respondent winner after gaining a total of Three Thousand, two hundred and eighty two and was declared Member Of County Assembly of Thegu River Ward by voters of Thegu River ward upon exercising their right to vote under the *Constitution of Kenya 2010*.
- iv. The rest of the candidates who vied for the same position managed to garner a total number of votes displayed in the table herein above and the same is shown in Form 36C.
- v. The 1st respondent thus totally denies the unsubstantiated allegations of malpractices alleged in the said election Petition and avers that they were not involved in any malpractices, irregularities and/or unlawful acts in the entire election period.



- vi. The 1st Respondent reiterates that the election conducted on the August 9, 2022 was in conformity with articles 86, 81 (e) of the Constitution and that there were no recorded or reported flaws, fraud, illegalities and irregularities committed by any of the 1st Respondent's employees.
- vii. That there were no fundamental contraventions and objects of the Constitution of Kenya and that the 1st Respondent followed the statutory framework laid to ensure that the August 9, 2022 Election for Nyeri County was secure, free, fair and credible and was conducted as per the will of the people.
- viii. That further, the 1st Respondent while conducting the August 9, 2022 General Elections complied with the stipulated laws by ensuring that the technology used was simple, accurate, verifiable, secure, accountable and transparent.
- ix. The 1st Respondent herein thus totally denies the unsubstantiated allegations of grave error, flaws, fraud, illegalities and irregularities alleged in the said election petition held on the August 9, 2022 in accordance to the objects of the constitution of Kenya and the statutory framework governing elections in Kenya.
- x. The 1st Respondent states that the Constitution of Kenya, 2010, the Elections Act, 2011 and the %2065/ Elections (General) (Amendment) Regulations 2017 demands that elections materials should be secured before, during and after election.
- xi. The 1st Respondent avers that security agents duly provided security before, during and after the elections exercise in various Polling Stations and Tallying Centres around Thegu River Ward and at no time was the security of the ballots compromised across all the polling station in Thegu River Ward.
- xii. That the allegation of some voters having been issued with ballot papers before been verified by the KIEMS kit is unfounded and the petitioner has failed to prove this allegation in any way. The petitioner also alleges that some voters received more than one ballot paper solely for the position of Member of County Assembly which is also an allegation that is unfounded and unproven.
- xiii. That all the agents for all the candidates in the six elective seats and observers have not and did not raise any complaints as to the alleged voters having the benefit of casting more than one ballot paper for member of County Assembly Ballot Box Thegu River Ward in favor of the 2nd Respondent.
- xiv. In this regard, the 1st Respondent contends that there were no objections raised as regards to insecurity of ballot papers or the bypass of KIEMS kit verification by any accredited agents present during the exercise in all the polling stations let alone Maragima Polling Station.
- xv. That the above allegation is unfounded and baseless as the 1st Respondent requested all the candidates to provide them with names/list of their agents and that no agent was denied access to any polling station if they had complied with the laid down rules of how accreditation of agents is done.
- xvi. Further, there is no evidence to prove that the petitioner's agents were ejected from Maragima Primary School or any other polling station mentioned in the petition. The identity of the agents chased out and the circumstances under which they were chased out are not established or proved.
- xvii. That no agent was denied entry to the polling station by either police officers or any election official as alleged.
- xviii. That in response to the allegation of Form 36A's having errors and omissions that are not countersigned is untrue as all the Form 36As do not have any errors or omissions and all of them are countersigned where necessary.



- xix. The 1st respondent admits that there were errors in the form 36As in some polling stations mentioned in the petition as the election process is prone to human error. However, the 1st respondent avers that the errors were not significant enough to alter the result of the election.
- xx. The errors were further not intended to favour any particular candidate as can be seen in the form 36A attached by the petitioner.
- xxi. Further, the forms 36As have signatures from present Agents appended on them approving the results displayed.
- xxii. The 1st respondent states that the petition is not proved to the required standard as no substantial errors were proved to vary the outcome and the petition should be dismissed with costs.
- xxiii. The 1st respondent further avers that the Elections Act no 24 of 2011 under Section 83 provides that; "No election shall declared to be void by reason of non-compliance with any written law relating to that election if it appears that the election was conducted in accordance with the principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election.
- xxiv. The 1st Respondent states that the election for Member of County Assembly for Thegu River Ward was free, fair and transparent and administered in an impartial, neutral, efficient, accurate and accountable manner as there were no irregularities and election malpractices reported to the Independent Electoral and Boundaries Commission or any other statutory body before, during and after the election for the Member of County Assembly for Thegu River Ward.
- xxv. The 1st Respondent avers that the Petitioner have grossly failed to prove his case in any manner and have failed to demonstrate that the irregularities, illegalities and election malpractices, if any, have an effect on the election results.

The 2nd Respondent

4. The 2nd Respondent filed his reply dated September 21, 2022 in which he prays for orders that it be determined that the said Kanyi Patrick Wachira was duly elected and that the election was valid and consequently, this Petition be dismissed with costs to the 2nd Respondent:

The 2nd respondent's grounds of objection

- a. That the 1st Respondent which was responsible for the conduct of elections conducted the aforesaid elections as mandated under the Constitution written law and legislation.
- b. That after the elections were carried out in the manner as described above, in full compliance with the obligations placed to the 1st Respondent as enshrined in Article 86 of the Constitution, the ballots were counted after which Form 36 A's were filled and later Form 36 B was generated. The Form 36 B was duly signed by the agents who were present and willing to witness. Subsequently, Form 36 C was generated and the Constituency Returning Officer duly declared the 2nd Respondent as the duly elected Member of County Assembly for Thegu River Ward having garnered a total of 3,282 votes.
- c. That the election conducted on August 9, 2022 for Member of County Assembly for Thegu River Ward met the constitutional threshold of a free fair and transparent election conducted in strict conformity with the Law.
- d. That the Petition as presented has set forth a plethora of allegations in all manner and design against the Respondents but has blatantly failed to establish any form of irregularity that would lead to the



declaration of the just concluded elections not to be in compliance with Articles 81 and 86 of the Constitution.

- e. That the present Petition lacks merit as it does not meet the minimum threshold of an Election Petition, the same is baseless and a total abuse of the Court Process.

Facts in support of the grounds of opposition and in response to the petition

- a. That in response to Paragraph 1 of the claim on the alleged breach of electoral process at Maragima Primary School Polling Centre, the 2nd Respondent avers that no breach of the electoral process was occasioned and the allegation of inflation of the 2nd Respondent's votes by 200 is mere speculation.
- i. Maragima Primary School Polling Centre comprised of two Polling Stations;
Maragima Primary School Polling Station 1 which had a total number of 420 registered voters and Maragima Primary School Polling Station 2 which had a total number of 419 registered voters.
- ii. The total number of valid votes cast in Polling Station 1 were 318 with 3 rejected ballots (total votes cast 321) whereas the total number of valid votes cast in Polling Station 2 were 304 with 2 rejected ballots (total votes cast 306). As it is well tabulated in Form 36 A, the total number of votes cast are in tandem with the number of votes that each of the 9 Candidates in the Member of County Assembly race attained.
- iii. In Polling Station 1, the 2nd Respondent garnered 175 votes against the Petitioner who garnered 21 votes whereas in Polling Station 2 the 2nd Respondent led with 144 votes against the Petitioner's 17 votes.
- iv. In his claim, the Petitioner does not specify the Polling Station that had malpractices as he alleges in his petition and further does not specify the magnitude of such malpractice.
- v. As it is clearly exhibited in Form 36 A, the Petitioner had an Agent in Polling Station 1 by the name Beatrice Kamunya of ID No 13464417 who duly witnessed the Counting and announcement of the results, she duly signed Form 36 A.
- vi. Needless to say, a comparison with the other elective posts at the Maragima Primary School Polling Station indicates that there was no inflation of votes and/or interference of the ballot papers as outlined hereunder; (The small variance as may be noted is as a result of spoilt votes across the board)

Maragima Primary School Polling Station 1



Position	no of valid votes cast
Women Representative	309
Governor	321
Member Of National Assembly	321
Presidential	319
Senator	322
Member Of County Assembly	318
Women Representative	304
Governor	305
Member Of National Assembly	305
Presidential	302
Senator	305
Member Of County Assembly	304

- b. That in response to Paragraph 2 of the claim that the 1st Respondent's Presiding Officer unlawfully ejected the Petitioner's Agent at one of the two polling stations at Maragima Primary School, the 2nd Respondent avers that this allegation is untrue as it is exhibited in Form 36 A, in Polling Station 1 the Petitioner's Agent by the name Beatrice Kamunya was present throughout the whole exercise. Further that, this allegation is flimsy and is crystal clear that the petitioner is on a fishing expedition as he has failed to give the specific particulars of the polling station' in question and has further failed to establish how such an action (which is denied) affected the results as announced in that Polling Station.
- c. That in response to Paragraph 3 of the Petition, the allegations set forth are denied in toto. The 2nd Respondent avers that the Agents of the Petitioner were not in any way denied the opportunity to be present and that in stations where they were absent, the same was out of their own volition, needless to say that neither their absence nor presence affected the final results.

As it is exhibited in the Form 36 A's the Petitioner's Agents were present in the following stations contrary to the allegations of their absence;

- i) Karundas Secondary School Polling Station 2 of 2- Misheck Kigara
- i) Chaka Primary School Polling Station 2 of 5- Martha Wangechi
- iii) Chaka Primary School Polling Station 3 of 5 Keziah Kamunya
- iv) Chaka Primary School Polling Station 4 of 5- Benson Chege
- v) New KCC Ground (Chaka) Polling Station 3 of 5- Rosemary Njuma



- vi) New KCC Ground (Chaka) Polling Station 4 of 4- Douglas Mwai
 - vii) Karundas Primary School Polling Station 1 of 2 - Ephraim Maina
 - viii) Karundas Primary School Polling Station 2 of 2- Rose Njoki
 - ix) Gatei Primary School Polling Station 1 of 1- George Wambugu
- d. That in response to Paragraph 4 of the Petition, the 2nd Respondent denies the allegations of electoral malpractices as stated therein and in further response avers that the Petitioner is misleading this Honourable Court with falsehoods as the Agent of the Petitioner by the name Meshack Kigara was present at Karundas Secondary School Polling Station 2 of 2 as it is clearly exhibited in Form 36 A which he duly signed. The absence of the Petitioner's Agent in Karundas Secondary School Polling Station 1 of 1 was not in any way influenced by the Respondents but rather out of the free will of the Petitioner and/or his Agent (if any appointed) his absence therefore does not amount to a malpractice.
- e. That in response to Paragraph 5 of the Claim as petitioned, the 2nd Respondent avers that there were no malpractices at Chaka Primary School and New KCC Ground (Chaka) Polling Stations and wishes to reiterate the averments as contained in Paragraph 3 of his Response to the Petition to effect that the Petitioner had Agents in the disputed Polling Stations and they duly executed Form 36 A in full satisfaction of the electoral process.
- f. That in response to Paragraph 6 of the Claim, the 2nd Respondent appreciates the working environment, the work load and acknowledges that the Officers of the 1st Respondent while filling the statutory forms could have made errors, which in case be, they countersigned on the form and any omission as to countersigning was humanly possible. Nevertheless, the 2nd Respondent avers that any errors were duly rectified by the filling of Form 36 B and as such, did not in any way interfere with the final results as announced.

A. Petitioner's case

5. The Petitioner's case is that he came second in the elections for Thegu River Ward after the 2nd Respondent was declared the winner. The Petitioner adopted his statement and the list of documents as evidence. He contended that there was massive breach of electoral laws. That extra ballot papers were being issued a fact he was informed by his agent Galgalo. That his agents were denied access to polling stations. He averred that there was commotion caused by supporters of the 2nd Respondent during the tallying process, and his agents were thrown out.
6. The Petitioner further argued that the 1st Respondent failed to ensure appropriate mechanisms were put in place during voting. The Petitioner argued that there were discrepancies on the total number of valid votes and that form 36A had errors and were altered without countersigning. It is the Petitioner's case that due to the errors the result was not verifiable and accountable. The Petitioner took issues with 18 polling stations. He contends that the tallying process had errors and irregularities in the mentioned polling stations.
7. PW II Galgalo who is Petitioner's witness testified that he was the Petitioner's agent and that he was ejected from Maragima Polling Station. He told the court that he did not sign the polling station diary, and was ejected from the polling station. PW III Benedict Warui told the court that he was the agent for Presidential election at New KCC Grounds Chaka. That he went to other polling stations and sensed there was problem. That the 2nd Petitioner votes were announced as 007 yet it was indicated he got 137 votes in form 36A. That he was not the agent for the Petitioner. That PW II told him he had been chased away as he is not a Kikuyu.



8. PW IV Simon Gitonga told the court that he was the agent for Women Representative on TSP party and not the Petitioner's agent. That he did not sign the polling station diary as he was told it was not necessary. He told the court that there was no problem during voting and that there was some commotion outside. He told the court that UDA agents were ejected and Member of County Assembly ballot papers were not being shown openly. That police intervened and calmed the situation.
9. PW V Margaret Wahu told the court that she was the chief agent for UDA presidential candidate at Chaka and New KCC Grounds. That there was fear that 1500 voters had been transferred to the polling station by the area Member of Parliament but did not have evidence. She testified that she was only focusing on presidential votes. That votes were changed to favour the 2nd Respondent and inflated from 001 to 027 and from 007 to 137.

B. Respondent's case

10. DWI David Muthuri Mbui testified that he was the Returning Officer in Kieni Constituency. That he ensured that all structures and mechanisms were put in place, such as security, voting process, that KIEMS Kit were working and in case of failure the Alpha numerical search was done. He told the court that there was a register which was only complimentary but that the same was never used as the Kits were all functional. That the clerks were assigned their respective roles which they performed well. He explained the roles played by the clerks.
11. That he never received any bad reports of electoral malpractices in Thegu River Ward. The polling station diary did not have a report or reports of any incidence reported. He told the court that voting was peaceful that no agents were ejected from polling stations and that no such incidences were reported. That all agents were allowed into polling stations and none of the agents for the nine candidates for Member of County Assembly, Thegu River Ward elections complained of any malpractices. That one cannot bypass the KIEMS kit at all. He told the court that all ballot papers are accounted for even rejected and spoiled ones and stray ballots.
12. That form 36A is used to generate form 36B and form 36B is used to generate form 36C. That the excel sheet used in form 36B picks the totals automatically and it can differ with form 36A which is handwritten but any anomalies are detected and corrected by form 36B. That form 36C is used to declare the results. That all agents must sign polling station diary and if they did not sign it means they were absent. That the agents also sign for the results but it is not mandatory.
13. He conceded that there were forms 36A which had been altered without counter-signing which is a human oversight and error. That in any case these errors did not have any effects on the total number of votes each candidate got and also on the final outcome of the result. He further conceded some few irregularities in counting and tallying which was not material to affect or change the election result. That form 36B correctly captured all the tallies in form 36A. That form 36B is an Excel sheet formula and provides the correct and accurate data.
14. That he was satisfied with the explanations given by the presiding officer in the altered votes which are not counter-signed. That the tallies were correct despite the cancellations not being counter-signed. That the counterfoils also show the number of ballot papers used and give the correct data.
15. DW II Patrick Kanyi testified that he was validly declared the winner in the election for the Member of County Assembly for Thegu River Ward. That no incidence were reported and that the Petitioner led in some stations that the 2nd Respondent did not have agents and the vice-versa.
16. That in some stations he had agents but the Petitioner did not have and the Petitioner defeated him with a big margin eg Gatuamba Station. That in Luisoi station none of them had agents but the Petitioner



led by a big margin. He also mentioned Karicheni station, Milimani, Nyange. That he had an agent at Karicheni and the Petitioner did not have an agent and the Petitioner led by a big margin.

17. In Nyange station the Petitioner did not have an agent but led, while the Respondent had an agent. That the presence or absence of agents does not determine a winner in a polling station. That the voting was peaceful and the election was free, fair verifiable, accurate and transparent. That there was no commotion or any electoral malpractices such as inflation of votes and that the minor arithmetic errors did not have any effect on the result of the elections and the tallying was accurate. That the Petitioner is only interested in the polling stations that the 2nd Respondent won.
18. DW III Michael Nyuguto testified that he was an observer of the elections in Kieni Constituency and that the same was free, credible and transparent. There were no anomalies detected. DW IV James Ngunjiri also testified that he was an agent for the 2nd Respondent and that there was no any commotion as alleged at Chaka polling station. DW V Victor Muriithi testified that he was an agent for the 2nd Respondent at New KCC Grounds and that they were 4 agents and all signed for the results. That the cancellations on the forms were done at the polling stations and they had no issue at all. That there was no commotion or malpractice.

Issues for Determination

19. I have carefully considered the evidence adduced by the parties in this case. The parties filed their issues for determination in this case which I wish to collate as follows:
 - i. Whether the Election of the Member of County Assembly for Thegu River Ward was conducted in a free, fair, accurate, verifiable and transparent manner and in accordance with the constitution, *Elections Act* and Legislation.
 - ii. Whether there were any illegalities and irregularities, and if so, did the same impact on the integrity and outcome of the election of the Member of County Assembly of Thegu River Ward.
 - iii. Whether the Petitioner discharged the burden of proof for nullification of the said election.
 - iv. Whether the 2nd Respondent was validly elected as a Member of County Assembly of Thegu River Ward.
 - v. Which party bears the costs of this Petition.

Analysis of the evidence adduced by the parties

20. I note that the Petitioner had issues with 18 polling stations for which he prayed for an order of scrutiny and re-count. The court narrowed to only 5 polling stations after hearing the oral evidence of the parties and their witnesses.
21. The court delivered its ruling on November 18, 2022. In the said ruling the court reserved its decision on some polling stations for final determination of the petition, while it dismissed order for recount and scrutiny in other polling stations for reasons given in the said ruling. On the issue of inflation of votes and lack of countersigning, the scrutiny and recount report discredits these allegations.
22. PWI the Petitioner in this case Simon Gitahi garnered 3126 votes whereas the 2nd Respondent garnered 3282 votes and was therefore declared the winner. The Petitioner contended that extra ballots were issued and that his agent Galgalo was told to get out of the polling station at Maragima Primary School polling station 1 out of 2.



23. That some of his agents were not allowed in some polling stations which he indicated among the 18 he seeks scrutiny and recount. That the 1st Respondent failed to ensure that appropriate mechanisms were put in place to avoid electoral malpractices. The Petitioner further had issues with the 18 polling stations and this court gave a ruling on the same and ordered that the Executive Officer/Senior Court Administrator to avail his report that was also shared to the parties for purposes of submitting on the same. The court shall shortly address the said report.
24. The Petitioner averred that there was also commotion by supporters of the 2nd Respondent and that his agents were thrown out. That he tried to call the Returning Officer on this but could not reach him and that IEBC officials were compromised. However, I note in cross examination PW I told the court that he was told there was only one police officer who intervened after the commotion. So at what time did the tallying stop? Why were his agents the only ones thrown out? In what way were the IEBC officers compromised and by who? Was a report made to the police or the Presiding Officer? Is it credible to believe that only his agents were thrown out?
25. I note that the Petitioner told the court that he had agents in the 35 polling stations but it is curious that only one agent came to testify. The result of this is that the allegations have not been proved as required by law and the same amount to hot air and unsubstantiated. It's clear that from the polling station diary other agents were present for different candidates even for independent candidates and it is only a foul cry. The cross examination by the Respondents rendered his testimony unbelievable and mere speculation.
26. PW II Jillo Galgalo told the court he was told to get out of the polling station. I note that he did not even sign the polling station Diary. He even had difficulties in remembering the polling station in which he was an agent. He is the one who told PW I about issuance of extra ballots. Which ballots were these? Were they for the same election of the Member of County Assembly? Could this happen when other agents of the other candidates were present and fail to raise an alarm. The Returning Officer told the court that the 3rd clerk was being issued with ballot papers for Presidency and Member of Parliament while the 4th clerk was being issued with ballot papers for member of County Assembly and the Senate. So did the agent mean these ballots? His contention was just a speculation.
27. The Returning Officer explained how the voting was being conducted and that all mechanisms required were put in place such as security, training of officials, opening and closing of the polling stations, registration capturing details of voters through the KIEMS Kit and therefore this allegation was not substantiated and is a red herring. Indeed there were no issues raised with the other elective seats at the said polling stations.
28. PW III was ward Manager for UDA party for the Presidential election and not the Petitioner. She had said that at KCC Ground Chaka polling station she heard that the Petitioner got 007 votes and not 137. This issue is addressed by the scrutiny and recount report for that polling station which of course counters this allegation.
29. PW IV testified that he was the agent for Women Representative TSP party, at Karundas polling station 1 out of 2. He conceded he did not sign the polling station diary. That there was commotion outside the polling station targeting the Petitioner saying that votes had been stolen. That the votes for Member of County Assembly were not shown openly. How did the outside commotion affect the tallying of the votes? Could the other agents who were present fail to complain about votes not being shown openly?
30. Furthermore he was only concerned about Woman Representative election as his agent and could not therefore be a credible witness to talk about Member of County Assembly election. This evidence is



without basis at all. The said agents of UDA for Petitioner who were being ejected as alleged did not swear any affidavit apart from one Jillo Galgalo.

31. PW V was the chief agent for UDA presidential candidate and dwelt only with New KCC polling station. That voters were being transported to vote by the area Member of Parliament. So how did this affect the election for MCA for Thegu River Ward. Was any report made to the police? Who were these voters who were transported? Again this allegation is without any merit and a mere speculation.
32. Did these voters who were transported vote? This evidence is not credible at all. In any event the court notes that there were other UDA agents who signed the polling station diary and who did not give evidence as to this allegation. There is no credible explanation as to why this witness did not sign the diary yet other agents are seen signing. In any case she was not an agent for the Petitioner and her evidence is not credible. She told the court that there were no problems with other polling stations which information contradicts the evidence of PW I.
33. On the issue of inflation of votes and lack of countersigning this has been dealt with by the scrutiny and recount report which counters this allegation. The arithmetic errors were also adequately explained by the Returning Officer and also confirmed by the scrutiny and audit report to have been minor arithmetic errors. The Form 36B and 36C also corrected the arithmetic errors on the Form 36A and also on the total number of valid votes cast.
34. DWI the Returning Officer told the court that all proper mechanisms during and prior the elections were put in place including training of election officials, use of KIEMS Kit, voting arrangements, security etc. This was not challenged by the Petitioner and he only made a general statement without any evidence. He explained in details how voting was happening and the role of each clerk and the electoral and voting mechanisms put in place. He explained how agents were being identified and the procedure for allowing them in. He explained about Form 36A, 36B and 36C and their use.
35. All agents were supposed to be present and sign for their candidates. He explained the cancellations and the lack of countersigning and that the corrections were made on the respective polling stations in presence of the agents/parties. Asked about the errors on the forms he termed the same human and in any event form 36B correctly captures all the total number of valid votes cast as well as the actual sum total as the form is set on excel format and is self-tallying and gives correct totals as opposed to form 36A which is filled by hand.
36. The witness produced the form 36B and the total tallied except with some which had a small margin of between 1 – 3 votes, which was not significant or material to affect the integrity of the election. He told the court he talked to his Presiding Officer on the cancellation which they explained to his satisfaction. The errors were human and in any case did not affect what each candidate garnered in the various respective polling stations.
37. That arrangements were made on how the agents were to be present and that Presiding Officers were from different regions and not the region where they were presiding over. As such the issue of being compromised could not and did not arise. He never received any concern either from the Petitioner or any candidate in respect of the elections of the Member of County Assembly for Thegu River Ward. That all the votes that each candidate garnered were correctly captured in the forms 36A and also 36B which tally.
38. DW II told the court that he monitored what was happening in the polling stations. That indeed contrary to the assertions by the Petitioner, he had agents in various polling stations, in which he is contesting the results, who even signed for him and he cannot turn back and disown them. That there was no any inflation of votes and infact the Petitioner took lead in some polling stations where the 2nd



- Respondent did not have agents eg Gatuamba Primary School the Petitioner had 164 votes and the 2nd Respondent had 007 votes.
39. That at Luisoi Primary School the Petitioner had 102 and the 2nd Respondent garnered 61 votes and that none of them had agents.
- In Milimani polling station the Petitioner had 128 votes while the 2nd Respondent garnered 115 votes, and none of them had agents. In Karicheni the Petitioner had 172 votes and had no agents while the 2nd Respondent garnered 32 votes and the 2nd Respondent had an agent. In Nyange Primary School the Petitioner had 63 votes and the 2nd Respondent garnered 62 votes and the Petitioner did not have an agent.
40. The 2nd Respondent demonstrated that presence or lack of an agent does not determine who wins in a polling station. He explained that there was no commotion as alleged or inflation of votes. That he was present with his agents. That the total tally in the Form 36A at Maragima Primary School polling station 1 out of 2 was 318 which differs slightly with the number of the total votes count with a margin of about 2 or 3 votes.
41. In Maragima Primary School 2 out of 2 the valid votes cast (total) for other elective votes were almost similar with a difference of 2 to 3 votes. The difference is explained by the spoilt votes. That he was at New KCC Grounds during counting of votes and it was peaceful. That the election was free, fair, transparent and verifiable and credible. He told the court that the Petitioner is only interested in the polling stations that the 2nd Respondent won having won in 17 out of the 18 polling stations, which the Petitioner sought recount/scrutiny.
42. DW III told the court he was contracted as an observer by Royal Media Services to go to as many polling stations as possible and give a report on the elections in Kieni Constituency and also visit the tallying centre. He visited New KCC Grounds, Milimani, Chaka Primary School and Karundas Primary School. That the exercise was free, transparent and credible without discrepancies. I found his testimony credible and unchallenged. That he also went to the Constituency tallying centre at Mweiga and everything was open and transparent. His testimony was not challenged or any doubt cast on the same.
43. DW IV testified that he was an agent for the 2nd Respondent at Chaka Primary School 2 out of 5 and that there was an UDA agent for the Petitioner and there was no commotion. His testimony was also not countered.
44. DW V testified he was an agent of the 2nd Petitioner at New KCC Grounds 4 out of 4. That an agent by the name Douglas Mwai signed for the Petitioner. That they were 4 agents. His testimony was also not shaken or challenged. He told the court that the cancellations on the Form were in order and there were no issues. He was present during the counting.
45. Having considered and analysed the evidence for the parties and their witnesses I turn now to the scrutiny/recount report and to which the Petitioner herein heavily relies to have the election for the Member of the County Assembly Thegu River Ward annulled and/or overturned. The Petitioner had asked this court to have 18 polling stations scrutinized and an order for recount made as well as audit of the KIEMS Kit.
46. The court declined to have all the said polling stations done a scrutiny or recount on the basis that he was on a fishing expedition as some of the polling stations that issues were raised were meant for the main petition being electoral malpractices. Further the Petitioner having admitted that he did not have



any issue with some of the said polling stations but only wanted a scrutiny and recount, again was a clear case of fishing expedition.

47. The reason for this is well founded in the report dated November 18, 2022. The court allowed the application partly and narrowed only to 5 polling stations as follows:-
- a. New KCC Grounds Chaka polling station 2 out of 4
 - b. Karundas Secondary School polling station 1 out of 2
 - c. Chaka Primary School polling station 5 out of 5
 - d. New KCC Grounds polling station 4 out of 4
 - e. Chaka Primary School polling station 1 out of 5
48. The court found that there were cancellations of the form 36A which were not countersigned and also there were arithmetical errors that needed clarification which was only possible through recount and scrutiny. The court also wanted to see if there was indeed inflation of votes as alleged by the Petitioner. The Executive officer/Senior Court Administrator was ordered to supervise the said exercise which was done and a report availed to this court and the parties.

I will analyse each and every report as follows:

49. All the parties attended the exercise as indicated on the said report which I need not reproduce here as the same is self explanatory. The forms 36A, 36B and 36C were also availed. The full report was shared to the parties with an opportunity to make their submissions on the same as well as submissions on the Petition.

All the seals for the said ballot boxes were intact.

i. New KCC Grounds (Chaka) polling station 2 out of 4.

The form 36A had been cancelled without alterations as follows: 007 to 137 and 001 to 027. The same was not counter-signed. The Petitioner contended that the votes were inflated to favour the 2nd Respondent. After scrutiny and recount the total number of votes garnered by all the candidates came to 330.

The recount confirmed this and also form 36B and form 36C correctly captured the total number of valid votes. As such the allegation by the Petitioner had no merit as the number of votes each candidate got tallied. The cancellation was a genuine mistake that did not affect the outcome after the exercise. All the security features were visible and in order. The scrutiny and recount matched the results in the form 36A.

The total number of votes each candidate got matched with the recount and therefore the cancellations were a human error and genuine.

ii. Karundas secondary school polling station 1 out of 2.

The security features were visible and in order. The station had an issue with the total number of valid votes cast as form 36A indicated 309. However after tallying the total number of the votes garnered came to 308. The form 36A also captured 309. So there was an error of one vote which in any event was not significant. However form 36B correctly captured the total as 308. The same was



also captured in form 36C. This did not affect the votes garnered by each candidate as the recount properly tallied the same.

iii. Chaka primary school polling station 5 out of 5.

The security features were visible and in order. There was a difference in total number of valid votes cast. Form 36A indicated 227 whereas in actual arithmetic summation the total votes came to 327.

However upon recount and scrutiny the total number of the votes garnered by each candidate does not change. In any event form 36B correctly captures the total number of valid votes as 327.

As such, this was a human error with no any significant finding which did not affect the outcome of the votes garnered by each candidate.

The form 36A also found on the ballot box was not stamped but the one that IEBC submitted was stamped and certified. Subsequently nothing turns on this.

Form 36B also captured the correct details on the number of votes garnered by each candidate. So the total summation was a human error and was explained and correctly captured in form 36B.

iv. New KCC grounds polling station 4 out of 4.

There was no form 36A inside the ballot box to be scrutinized and re-tallied. I note however there is a copy supplied by the IEBC on the same which was also attached to the pleadings. There is cancellation of votes of a candidate Mr. Richard Karue indicated as 037.

The form was not in any way disputed by the Petitioner and in any case relied on the same to ask for scrutiny and recount. Form 36B captures the votes as 038. The totals are also captured in form 36C.

I note that there is a difference of one vote which was explained by one stray vote. As such nothing turns on this.

In any event the figures for Karue Richard have no any significance or bearing on the votes garnered by the Petitioner. He did not demonstrate how the said cancellation affected the outcome of the votes garnered by him or other contestants.

The form 36A provided by the IEBC is authentic, bears all security features, has not been challenged by the Petitioner and I find it authentic. The cancellations were in my view a human error which was sufficiently explained by the returning officer.

v. Chaka Primary School polling station 1 out of 5.

The security features were visible and in order. The form 36A had one stamp but the one presented by IEBC had 2 stamps. The form also has no signature and comments by Presiding Officer whereas the one submitted by IEBC has. Also, unused forms were found. There was cancellation on the votes garnered by Elizabeth Nyaguthii.

However the total number of votes garnered by each candidate tallies with form 36A and also 36B. In any event the Petitioner did not prove or show the court how the cancellation of votes of another candidate affected the results or his votes. In any event the said candidate has not lodged any complaint and therefore the scrutiny and recount matched correctly with what was in form 36A.

50. In summary the findings are as follows:

- a. New KCC Grounds (Chaka) 2 out of 4 the total number of votes garnered by each candidate tallied with form 36A.



- b. Karundas Secondary School polling station 1 out of 2 total number of votes garnered by each candidate tallied with form 36A.
 - c. Chaka Primary school polling station 5 out of 5. Total number of votes garnered by each candidate tallied with form 36A.
 - d. New KCC Grounds polling station 4 out of 4 (There was no form 36A found inside the box but this has been explained herein).
 - e. Chaka Primary School polling station 1 out of 5 the total number of votes garnered by each candidate tallies with form 36A.
51. The scrutiny was done in details to ascertain number of spoiled ballot papers, number of rejected ballot papers, number of rejection objection, disputed votes, total number of votes cast, total number of valid votes cast and number of counterfoils used.
52. With regard to form 36C the following were noted:
- a. New KCC Grounds polling station 2 out of 4. The total on form 36A tally with valid votes cast. There was no indication as to why a vote in favour of the 2nd Respondent was rejected and the same applies for Francis Maina.
 - b. Karundas Secondary School polling station 1 out of 2. Form 36A indicated there was one rejected ballot paper which was not found on the ballot box. One vote for Richard Karue was given to the 2nd Respondent. 2 ballot papers were not accounted for.
 - c. Chaka Primary school polling station 5 out of 5. The votes garnered by all candidates tally with the ones recounted. All the form 36A were used. A ballot paper for the 2nd Respondent was found among rejected ones without any explanation. One stray ballot for Member of Parliament found.
 - d. New KCC Grounds polling station 4 out of 4. The total number of valid garnered votes by the candidates add to 343 votes. One ballot was marked twice for the 2nd Respondent Richard Kamuhia. One stray ballot found for Woman Member of National Assembly. One ballot paper marked for the 2nd Respondent given to the Petitioner. One rejected vote marked for the Petitioner and no reason given as to why it was rejected. As such the anomaly of the votes clearly explain the difference between 343 and 347 votes.
 - e. Chaka Primary School polling station 1 out of 5. The total number of valid votes cast add to 347. A ballot paper marked for Anthony Gachanga found in the tally of the 2nd Respondent. The total number of valid votes cast in the form 36A is indicated as 347. The total number of rejected votes in form 36A is indicated as six (6) giving the total number of valid votes cast in form 36B as 353 which is correct. The only anomaly being the vote found in the 2nd Respondents tally.
53. After the scrutiny and recount exercise the court is now called to consider the various issues narrowed down for determination in this Petition as well as the applicable case law on the same. So from the foregoing it's clear that the Petitioner has failed to prove that the irregularities noted, which of course affected both the Petitioner and the 2nd Respondent, in any way substantially affected the result of the election. Some votes in favour the Petitioner as well as the 2nd Respondent were rejected without any explanation. These irregularities were so minor to affect the results comparing even the margin that was there between the Petitioner and the Respondent.



54. The petitioner had agents present in some polling stations and cannot come and disown them now. They signed for him and in any event only one agent (Jillo) who came to testify. Why didn't the other agents testify? Can he turn back now and start crying foul? The Petitioner was not able to substantiate that there was commotion, transportation of voters, that the IEBC officials were compromised, that there was inflation of votes in favour of the Petitioner, that the agents for the Petitioner were thrown out, that there were breaches of the electoral laws and the *Constitution*. He failed to discharge the burden of proof. Though the scrutiny and recount noted some few irregularities, the same did not have any significant effect on the outcome of the election.

55. I now turn to the case law applicable in this petition.

One of the guiding case in this is the Supreme Court decision on *Gatirau Peter Munya v Dickson Mwenda Kitbinji & 2 Others* (2014) eKLR.

Article 81 (e) (v) of the Constitution provides:

“The electoral system shall comply with the following principles.....

- e. free and fair elections, which are
- (v) administered in an impartial, neutral, efficient, accurate and accountable manner.”

Article 86 further provides:

“At every election, the Independent Electoral and Boundaries Commission shall ensure that

—

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

56. These two Articles establish the constitutional threshold against which the conduct of elections is to be measured, to determine whether it meets established standards of a democratic franchise. Article 88 (5) of the *Constitution*, on the other hand, provides that the Independent and Electoral Boundaries Commission, as the agency charged with the mandate of managing the conduct of elections, is to:

“exercise its powers and perform its functions in accordance with this Constitution and national legislation.”

Section 83 of the *Elections Act, 2011* provides:

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



principles laid down in the Constitution and in that written law or that the non-compliance did not affect the result of the election” [emphasis supplied].

57. In this case, as in other election matters coming up before the Courts, the question as to the nature or extent of electoral irregularities, and as to their legal effect, repeatedly arises. The crisp issue is: how do irregularities and related malfunctions affect the integrity of an election?

In *Morgan v Simpson* (1975) 1 Q.B 151, Lord Denning summarized the essence of Section 37 of *Britain’s Representation of the People Act, 1949* (which is couched in similar language to Section 83 of Kenya’s *Elections Act*) in three propositions:

- a. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.
- b. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by breach of the rules or a mistake at the polls-provided that it did not affect the results of the election.
- c. But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls- and it did affect the result- then the election is vitiated.

58. 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.

59. Further the Supreme Court of Kenya variously applied the test of “effect of the election result” in its decisions as discussed herein.

On the same principle, the Supreme Court thus held in *Kidero and Four Others v Waititu and four Others*, Sup Ct Petition No 18 of 2014 [2014] KLR – SCK (para 341):

“.....generally, an election can only be declared void if that election did not substantially comply with the written law.... – in this regard, the Constitution, the Election Act, and the Regulations made thereunder, and any other relevant law; and where there is substantial compliance with the written law in an election, the irregularities must indeed have affected the result of the election for that election to be invalidated.”

60. Yet another authoritative decision of this Court is *Obado v Oyugi and two others*, Sup Ct Petition No 4 of 2014; [2014] KLR – SCK, in which it was thus held [para 139]:

“Although the Court of Appeal cited the decision of this Court in the Raila Odinga case, it did not apply the principle that a Court should consider the effect of the irregularity in the contested results. This principle holds that irregularities in the conduct of an election should not lead to annulment, where the election substantially complied with the applicable law, and the results of the election are unaffected” [emphasis supplied]

61. The Supreme Court ever so clearly defined the operative electoral law, on the basis of the Raila Odinga petition of 2013, in the subsequent petitions. The Court was scrupulously affirming the synchrony of two express edicts of the *Constitution of Kenya, 2010* – in Article 1 (3) and Article 159 (1): the



first defining the “sovereignty of the people”, and the second delimiting the judicial authority. By Article 1 (3), the people’s sovereign power is partly delegated to “the Judiciary and independent tribunals” [Article 1 (3) (c); while Article 159 (1), which constitutes the judicial authority, thus provides:

“Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.”

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62. The foregoing principle was constantly reflected in the Supreme Court’s decisions rendered in 2013 and after – as is exemplified in *George Mike Wanjohi v Steven Kariuki and Two Others*, Sup Ct Petition no 2A of 2014, [2014], eKLR. In that case the court thus pronounced itself [para 131]:

“This Court should in principle, not substitute a sitting [elected representative] with another, without allowing the people to execute their political rights, as enshrined under the Constitution. To do otherwise would be to undermine the values and principles of democratic governance that bind us, in the execution of our judicial authority. It would also lead to an upset in the composition of the elected [office-holders] who bear the people’s sovereignty, and would stand out as a clear disregard of the founding provisions of the Constitution” [emphasis supplied].

63. In hindsight, the foregoing passage in the Mike Wanjohi Case touches on the very nub of judicial responsibility, as it relates to the sovereignty of the people, who established the totality of the current governance system, through the *Constitution of Kenya 2010*.

64. It hence follows that the general guiding path for the disposal of electoral disputes such as the instant one, could not have been stated more conscientiously and more effectively than it was in that case, thus [para.110]:

“By the design of the general principles of the electoral system, and of voting, in Articles 81 and 86 of the Constitution, it is envisaged that no electoral malpractice or impropriety will occur that impairs the conduct of elections: This is the basis for the public expectation that elections are valid until the contrary is shown.....”

65. In this case, as in other election matters coming up before the Courts, the question as to the nature or extent of electoral irregularities, and as to their legal effect, repeatedly arises. The crisp issue is: how do irregularities and related malfunctions affect the integrity of an election.

66. In *Morgan v Simpson* (1975) 1 QB 151, Lord Denning evaluated cases that had been cited by counsel and that had impacted upon the duty of Courts in making declarations upon hearing election petitions. He summarized the law in three propositions:

- i. If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not. This proposition came out of a case where 2 out of 19 polling stations were closed all day thereby disenfranchising more than 5000 voters (re Hackney Election Petition, Gill v Reed (1874) 2 O’M & H77)



- ii. If the election was so conducted that it was substantially in accordance with the law as to elections, it is not vitiated by a breach of the rules or a mistake at the polls-provided that it did not affect the results of the election.
 - iii. But even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls-and it did affect the result – then the election is vitiated.
67. Although the Majority claims the maiden privilege of interpreting the provisions of Section 83 of the *Elections Act*, this Court in the Munya case had already settled this issue in 2014. The ultimate decision of this Court in the Peter Munya (2B) Case was summarized in four paragraphs.

The Court observed that the practical realities of election administration are such that imperfections in the electoral process are inevitable; and on this account, elections should not be lightly overturned, especially where neither a candidate nor the voters have engaged in any wrongdoing.

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.

68. This interpretation was upheld in subsequent consistent decisions of the Supreme Court thus: *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others* [2017] eKLR
- In *Nathif Jama Adam v Abdikhan Osman Mohamed & 3 Others*, Supreme Court Petition No 13 of 2014,

Section 83 of the *Elections Act* is the definitive statement of the standard that an election Court must apply, in verifying the election results. That Section is, at the same time, a statement of the burden of proof resting upon the petitioner, in an election petition.

As to the effect of irregularities, and the point at which the Court should overturn an election, we stated that Courts must only act on ascertained facts, not conjecture, and must demonstrate how the final statistical outcome has been compromised.

69. In my concurring opinion in *Evans Odhiambo Kidero v Ferdinand Waititu & 4 Others* Pet. No 18 of 2014:

Having examined the electoral code, and the emerging jurisprudence on elections, it is my considered opinion that when a court of law is faced with the question whether or not to annul an election the following are the fundamentals as can be deduced from Munya:



- i. If it is demonstrated that an election was conducted substantially in accordance with the principles of the Constitution and the Election Act, then such an election is not to be invalidated only on ground of irregularities.
- ii. 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.
- iii. Mere allegations of procedural or administrative irregularities and other errors occasioned by human imperfection are not enough, by and of themselves, to vitiate an election. [emphasis added.]

70. The Supreme Court has consistently applied the test in Section 83 with the result of the election in mind. 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.
71. By way of example, if there would be counting or tallying errors which after scrutiny and recount do not change the result of an election, then a trial Court would not be justified, merely on account of such shortfalls, to nullify such an election. However, a scrutiny and recount that reverses an election result against the candidate who had been declared a winner, would occasion the annulment of an election. Examples of irregularities of a magnitude such as to affect the result of an election, are not however, closed.
72. 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.

In the case of *Victor Robert v IEBC and 2 others* [2018] eKLR the court held as follows;

“It cannot be gain said that the role of an election court in a democratic process is guided by the legal proposition that:-

“The golden thread running through the Constitution is one of sovereignty of the people of Kenya articulated in Article 1 of the Constitution. The exercise of this sovereignty of the people as anchored by other rights and fundamental freedoms such as freedom of expression, association and freedom of access to information ----- Article 38, articulates political rights which are given effect through the electoral system set out in Chapter Seven titled “representation of the people. Under our democratic form of government, an election is the ultimate expression of sovereignty of the people and the electoral system is designed to ascertain and implement the will of the people. The bedrock principle of election dispute resolution is to ascertain the intent of the voters and to give it effect whenever possible.” (see, *Richard Kalembe Ndile & Another –v- Patrick Musimba Mweu & Others Machakos election petitions no 1 and 7 of 2013*).

These principles were also enunciated in the case of *Raila Odinga & 5 Others v IEBC and 3 Others* [2013] eKLR

The Supreme Court stated:

With respect to the allegations of bias and discrimination that were levelled against them, the 1st and 2nd respondents submitted that the appellant was under an obligation to prove these assertions to the



required standard. In support of this submission reliance was placed on the decision of Raila Odinga, 2013 at paragraph 195 wherein it was held that:

“the legal burden rests on the petitioner, but, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting. Ultimately, of course, it falls to the Court to determine whether a firm and unanswered case has been made.”

73. As such likewise in this petition the burden of proving bias and electoral malpractices such as inflation of votes, issuance of extra ballots, transportation of voters, ejection of agents from polling stations and other electoral malpractices, rests with the petitioner. Indeed the irregularities that occurred affected both the petitioner and the 2nd respondent. Some votes marked in favour of the 2nd respondent were found in the petitioner’s ballot. Some votes for the 2nd petitioner were also rejected without any explanation. There were about 10 votes affected on both sides which did not affect the final result on the outcome of the election.

In *Raila Amolo Odinga* 2013 (Supra) the court further held;

“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 in 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 these irregularities were of such nature, or such 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”

74. Having considered the evidence adduced by the parties and the law applicable I now answer the questions framed by this court.

- a. Whether the Election of the Member of County Assembly for Thegu River Ward was conducted in a free, fair, accurate, verifiable and transparent manner and in accordance with the constitution, *Elections Act* and Legislation.

The answer is yes

- b. Whether there were any illegalities and irregularities, and if so, did the same impact on the integrity and outcome of the election of the Member of County Assembly of Thegu River Ward.

The answer is that there were minor errors and irregularities noted during tallying of votes BUT the same did not affect the result of the election. The same were not substantial enough/ significant to affect the validity of the elections.

- c. Whether the Petitioner discharged the burden of proof for nullification of the said election.

The answer is no

- d. Whether the 2nd Respondent was validly elected as a Member of County Assembly of Thegu River Ward.

The answer is yes

- e. Which party bears the costs of this Petition.



Let me turn to the issue of costs. Section 84 of the [Elections Act](#) provides that;

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

As such costs followed event and the respondents are awarded costs for the petition to be assessed. The deposit of Ksh 100,000 be utilized in payment of costs.

75. The court now issues its final orders:
- a. The court hereby issues a declaration that the 2nd Respondent herein Kanyi Patrick Wachira was validly elected as the Member of County Assembly, Thegu River Ward in Nyeri County.
 - b. This Petition be and is hereby dismissed with costs.
 - c. A certificate to issue under Section 86(1) of the [Elections Act 2011](#)
 - d. Costs to the Respondents to be assessed.

HON. J. MACHARIA

SENIOR PRINCIPAL MAGISTRATE

JUDGMENT READ, DATED AND SIGNED VIRTUALLY IN NYERI IN THE PRESENCE OF COURT CLERK MARK, MR. MUHOHO FOR THE PETITIONER, MISS KARANJA FOR 1ST RESPONDENT AND MR. KABURU FOR THE 2ND RESPONDENT. THIS 22ND DAY OF DECEMBER, 2022.

HON. J. MACHARIA

SENIOR PRINCIPAL MAGISTRATE

