



REPUBLIC OF KENYA

IN THE SENIOR PRINCIPAL MAGISTRATE'S COURT AT KAPSABET

ELECTION PETITION NO. 2 OF 2017

SHADRACK KIRWA TARUSPETITIONER

=VERSUS=

JACKSON SWADI KEDOGO ... 1ST RESPONDENT

I.E.B.C. 2ND RESPONDENT

JUDGMENT

The Petitioner herein is an adult of sound mind and his address of service for purposes of service is through the Petitioner's Advocate. The second Respondent is a Public Institution created by the Constitution of Kenya and mandated to conduct elections and related purposes in Kenya and its address of service for purposes of initial service of this Petition shall be effected through the Petitioner's advocates for the 1st instance.

The Petitioner states that the elections were held on the 08/08/2017 where the following persons were the candidates:

1. Jackson Swadi Kedogo
2. Shadrack Kirwa Tarus
3. Aggrey Sakwa Mwashii
4. Nelson Ongara Madagwa
5. Josephine Yayo Mukenye
6. Joseph Mukhwana Butiko
7. Walter Kiradze Lutaza and
8. Joseph Mwangale Lidembo

The Petitioner avers that the Returning Officer declared one Jackson Swadi Kedogo as the duly elected member of County Assembly Ward on the said elections with a total of 3135 votes. That the Petitioner further states that elections were void since they were marred with fatal irregularities, several elections offences, malpractices and as such the results declared do not reflect the true will of the voters of Kibwareng Ward for the following reasons:

That at Chebara and Legemet Primary School Polling Stations, the Presiding Officer **blatantly and without any colour of right allowed voters who were not on the Polling Register to vote and the same manifested itself at the counting where it emerged that the number of votes cast were more than the number of persons identified by the K.I.E.M.S machine;**

That the Petitioner herein avers that in an attempt to remedy the unidentified voters, the Presiding Officers in the two stations in collusion with their Polling Clerks and the Agents of Jackson Swadi Kedogo **decided to deliberately spoil votes per elective position and more particularly for the member of the County Assembly Ward which action substantially affected the Petitioner's tally.**

The Petitioner further states that in **an attempt to remedy the unidentified voters, the Presiding Officers in the said stations decided to pull out and intentionally spoil casted votes which were casted in favour of the Petitioner Tarus Shadrack Kirwa, by intentionally marking in more than one Aspirant, putting signatures against more Aspirants and or putting dotes against more than one Aspirant names despite complaints from the petitioner's Agents as follows:-**

- a. Chebara Primary School Polling Station Stream 2 of 2 – 10 votes were intentionally spoiled;
- b. Legemet Primary School Polling Station Stream 1 of 1, 26 votes were intentionally spoiled.

The Petitioner further states that one **Mr. Nelson Ligaga who was one of the 2nd Respondent's Voter Education Official as well as the relative of the "second Respondent" and his Campaigner on the Voting day which action unfairly affected the outcome of the results.**

The Petitioner avers that the Officer Chebara Polling Station **illegally amended the results in favour of the 1st Respondent prompting the Returning Officer to hand her over to the D.C.I.O Nandi Hills Police Station for further investigations.**

The Petitioner avers that the **1st Respondent directly and through his Agents and Campaigners engaged in open and outright illegal bribery and campaigns on the polling day at the following stations: Musasa, Koibarak, Kaptwai, Chebara, Legemet and Koitabut which cash was largely transmitted through Mpesa.**

The Petitioner prays for the declarations and orders that:

- a. It be determined that the said Jackson Swadi Kedogo was not duly elected and the elections was void;
- b. There be Scrutiny of Votes in the following stations: **Koibarak, Kaptwai, Chebara, Legemet, Musasa and Koitabut** be done to establish the alleged malpractices;
- c. Those costs of this Petition be borne by the Respondents jointly and severally.

The 1st Respondent herein admits the description of the parties to this suit save for the 1st Respondent's address.

The 1st Respondent admits that the 2nd Respondent declared him the winner of election for the **Kibwareng Ward Member of the County Assembly during the general election held on 08/08/2017.**

The 1st Respondent states that the elections held on 08/08/2017 in respect of Kibwareng Member of the County Assembly **were free, fair and credible and the 1st Respondent was lawfully elected.**

The 1st Respondent **denies the allegations of the Petition and denies specifically that voters who were not at the Polling Register were allowed to vote at Chebara and Legemet Polling Station and the Petitioner is put to strict proof.**

In a nutshell, the 1st Respondent prays that the Petition be dismissed with costs.

The 2nd Respondent admits the address save for what it denies all and every allegation in the Petition. **The 2nd Respondent avers that the 1st Respondent was validly elected by the voters of Kibwareng Ward as the Member of County Assembly and the role of the 2nd Respondent was merely to declare the choice of the said voters which she did.** The sovereign will of the voters was duly respected.

The 2nd Respondent confirms that the elections held on **08/08/2017 respected the sovereign will of the people of Kabwareng Ward and upheld the Constitutional Principles of the free and fair elections as they were administered in an impartial, neutral, efficient, accurate and accountable manner.**

The 2nd Respondent confirms that indeed after the tallying process, the following results were declared:-

- | | |
|----------------------------|------|
| a. Jackson Swadi Kedogo | 3135 |
| b. Shadrack Kirwa Tarus | 2797 |
| c. Aggrey Sakwa Mwashu | 562 |
| d. Josephine Yayo Mukenye | 115 |
| e. Joseph Mukwana Butiko | 57 |
| f. Nelson Ongawa Madagwa | 80 |
| g. Joseph Mwangale Lidembo | 11 |
| h. Walter Kivadze Lutaza | 30 |

The 2nd Respondent **denies that the said elections were void or marred with fatal irregularities, election offences or malpractices and avers that the election was conducted substantially in accordance with the dictates of the Constitution and Election Act.**

The 2nd Respondent **denies that it committed any election irregularities or malpractices and affirm that the election was free, fair, transparent and credible and the results declared were a true reflection of the people's choice based on universal suffrage.**

The 2nd Respondent responds that:-

- a. No unregistered voters were allowed to vote at Chebara and Legemet Primary School Polling Stations. Only registered voters identified through KIEMS Kit were allowed to vote. There was no overcasting of votes in the said Polling Stations as the number of total votes cast did not exceed total number of registered voters,*
- b. There were no cast ballots which were intentionally pulled out of the ballots boxes and spoiled in favour of the 1st Respondent and to the determinant of the Petitioner. All the ballot papers that were cast were duly accounted for,*
- c. The 2nd Respondent denies the allegation of results having been altered in favour of the 1st Respondent and avers that no votes were stolen, added, padded or misallocated to the 1st Respondent or any other candidate hence the process was credible and accurate. The 2nd Respondent avers that none of its Presiding Officers marked ballot papers for any voters save for assisted voters in the presence of all Agents upon request by the voters. The 2nd Respondent denies*

that the 1st Respondent committed any electoral offence or malpractices, particularly bribery of voters or campaigning at the polling station as alleged by the Petitioner as no such report was made to its officers. The 2nd Respondent avers that scrutiny of all votes cast was done methodically in strict compliance with the electoral laws and the Constitution. No erroneous result was declared in any polling station.

The 2nd Respondent denies that the Presiding Officer at Chebara Polling Station 2 illegally amended the results in favour of the 1st Respondent and avers as follows:-

- a. Chebara Polling Centre had two polling stations, Chebara Station 1 and Chebara Station 2,
- b. There were no issues in respect of Chabara Polling Station 1,
- c. In respect of Chebara Polling Station 2, the Presiding Officer did some minor alterations and overwriting on the total number of votes cast though the results for respective candidates was not interfered with,
- d. The said results were signed by all agents including the Petitioner's agents,
- e. In as much as there was no problem with the said results apart from overwriting by the Presiding Officer, the Returning Officer omitted the said results in the final tally. In the said results, the Petitioner garnered 104 votes while the 1st Respondent garnered 164 votes,
- f. The amendment done by the said Presiding Officer was a typographical error in computation on total number of votes cast not only in the Member of County Assembly Election But also in other elections, forcing the 2nd Respondent to omit the said results altogether in the final tally,
- g. Scrutiny and recount of votes cast in the said Polling Station would reveal that the 1st Respondent validly won in the said Polling Station as the results were not disputed by any candidates as confirmed by Agents signing on the results in Form 36A.
- h. If the results in the said Polling Station had been tallied into the final results, the effect would have been that the 1st Respondent's margin of victory over the Petitioner would have increased further by an extra 60 votes.

In a nutshell, the 2nd Respondent avers that the entire electoral process giving rise to the declaration of the 1st Respondent as the validly elected Member of the County Assembly for Kabwareng Ward was **free, fair, transparent and credible and complied with the Constitution, the Election Act and all other laws and regulations regulating the conduct of elections.**

The 2nd **Respondent prays that the Petitioner's Petition be dismissed with costs and that it be determined that the 1st Respondent was duly elected and the election was valid.**

P.W.1 adult/sworn/states adult male Christian English. **Shadrack Kirwa Tarus.** This was the Petitioner. He testified that he lives in Kibwareng Ward and is a farmer. He testified he was a Contestant in the just concluded election of **08/08/2017** as a MCA Aspirant. He testified of having an affidavit sworn on **18/08/2017** by himself and adduces it as evidence in chief. He testified he wrote a letter of complaint to IEBC on **09/08/2017** complaining about **Koitabut, Koibarak and Chebara Polling Stations.** He testified he gave it to the Returning Officer who received it and rubber stamped it at 10.06 p.m. on **09/08/2017** - PExhibit 1, Letter to Returning Officer.

The Returning Officer wrote a letter to D.C.I.O dated **09/08/2017** over anomalies. The Presiding Officer was arrested over the same and charged. P.W. 1 testified his **10 votes were missing.** P.W. 1 further testified that one **Nelson Ligaga** works for IEBC and that his Agent (P.W.1.s) told him he was

campaigning for the 1st Respondent herein. P.W.1's avers he told his Agent to take action to hold the said Nelson culpable. One **Sarah Ludiso** wrote her statement to the Police. She was an agent to one of the Candidates. P.W.1 avers that Sarah told her that Nelson was **openly campaigning for the incumbent.** Sworn statement by one Sarah Ludiso on **13/08/2017.**

P.W.1 avers he followed the IEBC portal and that the **portal was different with the transmission.** He avers that he had gotten 2700 votes and 1st Respondent had 2599 votes i.e 9 days later. P.W.1 avers he **mentioned bribery in Kapchwai.** He avers being told that there was bribery along the queue. The mobile numbers being used was **0718 – 184-115** yet campaigns were over on 08/08/2017. He further testified that **campaigns continued on election date by the 1st Respondent and bribery was done by one Thomas Makotso** who is a Campaigner to the 1st Respondent and an Agent at **Legemet primary School.** He avers that his Agent told him his votes had been **reduced by 26 votes.**

He further avers **he lost 10 votes at Chebara.** He also avers that Koibarak **had also discrepancies and he also lost votes at Kaptwai and that there was a racket in tallying.** He avers he got a report that his **votes were being altered.** He further avers that **Koitabut results did not tally, the number of votes cast were more than voter turnout.** He testified that he suspected that **voters were bribed vide mobile numbers** in his affidavit.

P.W.1 prays for Re-count and Scrutiny in:

- 1) Koibarak;
- 2) Kaptuwai
- 3) Chebara
- 4) Ligemet
- 5) Musasa
- 6) Koitabut

In Cross-examination, P.W.1 avers that the said phone no. **0718-184-115** belongs to the 1st Respondent though he never annexed any ownership data to prove that the number belongs to the 1st Respondent or any of the 1st Respondent's "team".

P.W.1 testified in cross-examination that he never saw any bribery with his own eyes.

P.W.1 further testified that the Returning Officer did **not note any problem at Legemet, Masasa or Koitabut.** He only had a problem in Chebara Polling Station and the Presiding Officer was charged. The Returning Officer cancelled Stream 2 results and all other elective posts in this Polling Station were equally affected. P.W.1 testified he was contesting under the Jubilee Party. 1st Respondent was a candidate under ANC. P.W.1 testified that he voted at Kasugai Primary School at 8.00 a.m. He further testified on Cross-Examination that he never saw **1st Respondent campaigning nor did he too campaign** as this he avers is a culpable electoral offence.

P.W.1 avers that he was told that his Agents were campaigning Joseph Buhasio and was never arrested nor charged in any Court of Law But he never saw any of these Agents campaigning save on what he was told by one Sarah from NVP.

The Returning Officer was never sued. The 1st Respondent beat him (P.W.1) by 338 votes. The results exclude Chebara 2 results. In Legemet, P.W.1's Agent called Gilbert signed the results.

His Agent for Masasa was Christopher Kemei but he P.W. 1 have no letters of complaints from his

Agents. Rose Lwahi was P.W.1's Agent at Kaptwai Primary School and she signed as an Agent. P.W.1 further testified that he had an Agent at Koibabut but he couldn't remember his name.

P.W.1's evidence is that he was told about bribery allegations by his Agents but that the 1st Respondent never bribed and that he P.W.1 never witnessed the bribery.

In further cross-examination by Counsel Chanzu for IEBC, P.W. 1 affirmed that he had Agents in various wards and streams and he further testified that his voters were educated on electoral process.

He further alludes to the fact that he knows what a Polling Station Diary is and that his Agents signed the Certificate after everything is finalized and that his Agents signed all the documents. He avers that he nominated his Agents but they did not appear. P.W.1 testified that all candidates did not benefit from Chebara B results. He avers that he complained on 09/08/2017 but he did not have the letters he wrote complaining about being denied access. He testified that his Agents complained to him and not in the diary.

P.W.1 further confirmed that in Legimet Polling Station, there was no rejected vote. P.w.1 further confirms that Chebara 2 "results" cannot change anything by the will of the people.

He further avers that his Agents were convinced to sign the tallying sheets before data was entered but he testified and confirms that he did not plead in his petition. At Koibarak Polling Station, he confirms that his Agent Boaz Auma Savanyi signed on opening and closure at 0602 hours and closed at 0502 p.m.

He never reported any anomalies to the police but to IEBC and there is also no allegation of IEBC Officials being bribed.

P.W.2/adult/sworn/states adult male Christian Kiswahili Silas Madegwa Matata. He testified that he lives in Chebara, Kibwareng Ward and is a businessman and a farmer. His statement is dated 13/08/2017 and he wishes to have it adopted as evidence in chief. He confirms being the NVP Agent at Chebara Polling Station Stream 2. He confirms that there were police officers who were ensuring scrutiny. The election equipments were intact. There were anomalies in Chebara 2 Polling Station and that the votes were never tallied but he doesn't know where the votes went to.

In Cross-examination, he affirms that he is a voter at Chemongo. His ID Number 22510885. He avers that the Presiding Officer Mary said that there was an anomaly with more transmission but he confirms not reporting any of these anomalies. P.W.2 confirms being turned as a Civic Educator and that he signed Form 36(A). He also signed Polling Station Diary in the morning. He avers he is in Court to adduce evidence as a Voter not to give evidence on behalf of Shadrack Tarus. He further confirms that the Presiding Officer in Chebara 2 was arrested and charged which he confirms that the decision taken by the Returning Officer was quite lawful.

P.W.3 adult/sworn/states adult Christian Kiswahili Gilbert Kipkeino ruto from Koibarak Sub-location. He testified that he is a farmer and an Agent for Jubilee on the 08/08/2017 elections. He recorded his statement on 13/08/2017 and he put his thumb print as signature. He averred that he wishes his statement be adopted as examination in chief. He further avers that he recorded his complaint on bribery by Thomas Makotze. That the latter was taking people from the line to the booth. He further avers that a group went and attacked him. He avers reported this to the Presiding Officer but nothing happened. He named that as Patrick Ayodi, Wycliffe Bulumo, Geoffrey Anyero and Thomas Makotswe. He avers writing his complaint but says that the Presiding Officer refused to stamp his written complaint Exh. 2.

In Cross-Examination, P.w.3 confirms that he was an agent at Legemet but he never recorded his statement that there was violence in the Polling Station. He testified that he recorded his statement at "11 p.m". he avers he wrote his statement in the day and not night. He further alludes that there were no campaigns going on at 10 p.m. He confirms that Makotswe was a former area Councilor. P.w.3 confirms further that it is an offence to campaign during election day but he never reported matter to the police station of these anomalies nor made a formal report over these matters but addressed the

complaint to the Presiding Officer but the letter was not addressed to the Presiding Officer.

P.W.3 confirms that bribery was not mentioned in his statement. P.w.3 confirms voting in Legemet where Swadi got 294 and Petitioner Tarus got 12 votes. P.W.3 confirmed that there was a police officer. One Silas Songok was the Presiding Officer for Legemet Primary. P.w.3 testified that Thomas was dishing out 200/= as bribe. The Police were present as per P.W.3's evidence but he avers he did not know the Clerk's name by name so he never mentioned him by name. P.w.3 further alludes that his complaint had not IEBC stamp. P.W.3 further testified that he was at home when Swadi was announced winner. He Swadi got 3135, Tarus got 2797. P.W.3 however confirms that voting was peaceful at Legimet on 08/08/2017 yet in a quick rejoinder testifies that he was threatened by one Thomas but he never (P.W.3) complained about it. He further avers that he gave the letter to the Presiding Officer but it was not addressed to him. He further confirms that there were 2 police officers at the Polling Station. He testified that he signed in as a Jubilee Agent at 6 a.m when seals were being put. He signed them and affirms as a valid Agent. The seals were numbered. P.W.3 signed on behalf of Jubilee Party. He testified that he was there during the counting of votes. He testified that he is a Jubilee Agent to enable her being paid.

P.W.3 confirms he is literate. He signed as an Agent of Jubilee. P.W3. avers he was forced to sign. He signed Form 36 on 08/08/2017. He avers signing knowing that he had finished his work. He avers he never knew it was an offence to sign a blank form without entries. Swadi got 3135 votes, Tarus got 2795 votes, Difference was 338 votes.

P.W. 3 avers he is only complaining of Legimet Ward only. He testified voter bribery happened at 10 a.m and he P.W.3 wrote a complaint letter. He avers he never wrote any spoilt votes. He avers he signed the blank 36(A) forms.

P.W.4 adult/sworn/states adult male Christian Kiswahili Samuel Kigame Asui. He testified he hails from Kibwareng Ward. He avers that he was a businessman. He further avers that he was an agent at Koibarak Polling Station during 08/08/2017 election. He testified he is a Jubilee Agent and that he recorded his statement and sworn by him dated 13/08/2017 and he affirms he wishes to rely on it as evidence in chief. He testified he wrote this letter on 08/08/2017 on the election date at 1.00 a.m. and finished it on 09/08/2017. He avers he was dissatisfied how election was being conducted. He testified that the Presiding Officer allowed the NASA Agents to talk to the voters to benefit the 1st Respondent herein. He P.W. 4 testified that the Presiding Officer did not use the KIEMS to transmit results Exhibit 3. P.W.4 testified that voting was not as smooth as per what he saw. He signed Form 36(A). He further avers he was present during counting and during the result announcement. He alludes to the fact that Hon. Swadi won by 3135 against Tarus 2797.

In Cross-examination, P.W.4 affirms that he was an Agent at Koibarak Stream 2 as an Agent but he never used the KIEMS Kit to vote and he never voted. The voting was by secret voting. The aged were assisted to vote which is legal. He further testified that the station's voting diary was signed before voting commenced and when it was finalized, the seals were brought and sealed. He confirms witnessing the vote counting and he signed after counting. He avers he was coerced to sign. He confirms having taken oath as an Agent but doesn't know the consequences of oath. He signed Form 36(A) after results were announced. The votes he confirms were counted in his presence. P.W.4 avers that the presiding officer did not transmit results to IEBC. The results were taken to Kobujoi. He avers he recorded his statement for Court purposes and avers that the Presiding Officer refused to stamp. He testified that he was a Jubilee Agent where Tarus got 41 votes, Swadi got 190 votes. No votes were scattered. Valid votes were 265 votes. The gap was 338 between Tarus and Swadi. No one disputed that they were denied to vote. He further avers he never knew the voters who voted by name.

P.W.5/adult/sworn/states adult female Christian Kiswahili Caroline Chepchumba. She testified that she lives in Kibwareng Ward and is a farmer. That on 03/08/2017, she recorded her statement at the Advocate's office which she wishes to adopt as her examination in chief. She affirms that she was a voter at Kibwareng Ward, Koibarak Stream 1. She testified she was not happy how elections were conducted. That elections were marred with malpractices, that campaigns were ongoing during the

election day, that one Victor Musungu conducted campaigns on the fateful day, that when she P.W.5 went in to vote, Victor went to her and wanted to give her 200/= which she refused. P.W. 5 avers she reported matter to the police station but no action was taken. She voted and then she heard noises. That the said Victor started harassing P.W.5 because she refused to take 2000/=. P.W. 5 avers she was saved by people of good will. She confirms having voted but the said Victor continued stalking her.

P.W.5 confirms that campaigns and voter bribery are irregularities during elections. She refused to take the 200/=. She never reported matter to the police station. She testified she knows the youths by name as one Justus and Cheruiyot though she never named them in the statement nor did she report them to the police station. She saw the Presiding Officer. Agents were present. She never saw the 1st Respondent campaigning on the fateful day. She voted at 2.00 p.m. She avers she was to vote and go home but she never went home because the Youth threatened her. She confirms taking 10 minutes to vote but she was thereafter held hostage for 15 minutes. She avers she left at 7 p.m.. She was at the roadside with other voters and with Victor but not at the Polling Station. Victor had voted but P.W. 5 avers she was not there when results were being announced. She avers no action was taken by police therein.

In Cross-Examination, P.W.5 testified that the said Victor was outside the Polling Station. She avers she complained to the Police and not the Polling Officer. The alleged bribery was outside the gate of the Polling Station but she never reported these malpractices to the police station.

P.w.5 avers that the said Victor was 1st Respondent's campaigner. All these anomalies happened outside the gate after voting and P.W.5 was outside the gate. She avers she was not fighting outside the gate. Jubilee Party had agents. She avers she was not present when votes were being counted. Swadi got 3135. Tarus 2797. She confirms she did not report these anomalies because the police station was far and she had been surrounded. She avers she left the Polling Station after voting.

D.W. 1/adult/sworn/states adult male Christian English/Kiswahili Jackson Swadi Kedogo. This was the 1st Respondent and the current MCA Kabwareng Ward. He opposes this petition. He swore an affidavit dated 29/08/2017 and filed on 30/08/2017 and wishes to adopt the statement as his evidence in chief. He further avers that he won the elections with 3135. He testified that the Petitioner lost the election. There were 23 Polling Stations. He avers that he visited Kapkering, Koibarak, Koitabut, Musasa and avers that the elections were peaceful in the stations that he visited. He testified that voters turned up to vote. He denies there being any bribery in the Polling Stations he visited. He further testified that there were police officers in the Polling Stations. He testified he never saw any violence in Legimet and that his Agents never reported any violence to him in any of the Polling Stations. He testified that Alex Imodi was his Agent in legimet and the latter told him that the election was free fair and transparent.

D.w.1 denies that 0718-184-115 was not his number. D.w.1 denies that his campaigners never campaigned on the voting day. He further avers that campaigning on the Election Day is a very serious offence. No report was ever made to any police station as averred by D.W.1. He avers that in all the stations he visited, IEBC Clerks were working well on 08/08/2017 and he avers he was declared the winner on 09/08/2017 by the Returning Officer at 12.00 a.m. D.W.1 denies any knowledge of IEBC Polling Clerks spoiling votes. He testified he was declared winner with 3135 votes. The KIEMS machine he avers were working. He denies that one Nelson Ligaga was an IEBC Official and not his campaigner and he does not know of any electoral malpractices the said Nelson committed. D.W.1 further testified that one Thomas Makotsi was a Councilor for last 15 years for 3 consecutive terms and D.w.1 further testified that the said Thomas has never been arrested or charged for any electoral malpractices if any. D.W.1 denies of any reported bribery allegations to any police station or Polling Officials and that there is no evidence to support the same.

D.w.1 further testified that his Agent Alex of Legimet Polling Station signed Form 36 (A) without any malice influence. He further testified that he never saw Thomas campaigning for him nor bribing anyone. He further testified that no names were named of any voter bribed. The said Magotsi was at the Polling Station as a Voter. The results of Chebara Stream 2 were cancelled due to writing and overwriting and the Presiding Officer eventually charged. Elections were on 08/08/2017 and not

17/08/2017. There were Election Observers in all the stations he visited.

D.W.1 testified he voted on 08/08/2017 at Musasa Polling Station. He confirms that there were Security Personnel therein within 6am – 5pm and the Polling Stations opened on time and closed on time. D.W.1 confirms he had an accreditation card. D.W.1 avers that he had Agents in all the 23 Polling Stations and they were all accredited. He denies ever receiving any reports of bribery, voter tampering at all. He confirms that all his Agents signed the Polling Diary and forms as legally stipulated.

He confirms that his Agents signed Form 36 (A) after the required activity and not vice versa. He confirms that he signed the Electoral Code of Conduct and affirms that this barred him in any malpractices against electoral code nor his Agents who went through voter education training and they signed an oath and their job description. He further avers that the station he visited the KIEMS kit were working But in Chebara 2, all results were cancelled and a letter was written to D.C.I.O. He avers losing 60 votes in Chebara. He denies one Nelson Lugaga as his Campaigner and that he was an IEBC Temporary Educator and that he had a right to vote and he denies that the latter ever campaigned for him.

He further testified that there were Election Observers therein and that IEBC sealed boxes in the presence of his Agents and other Agents. Action was taken in Chebara 2 where there was a problem.

D.W.1 confirms that the voting process was free, fair and transparent and very peaceful. He confirms that he was declared winner vide 36B and won the Petitioner with 338 votes. There was a 72.6% voter turnout and he D.W.1 avers he was satisfied with the election in Kibwareng Ward and his Competitors.

D.W.1 confirms that neither he nor any of the other candidates benefitted from Chebara Poll 2 neither him nor other candidates. The ballots were sealed at the Polling Station. He agrees with the Returning Officer cancelling the results as she was mandated in law and that the elections were fair and credible.

D.W.1 testified that he only has one cell phone number. He testified that he visited Koibarak at 11 a.m. and he was with his driver Edwin. He denies ever getting Gilbert at Legemet. He affirms visiting Legemet at noon. He also acknowledges knowing Thomas but never saw him at Legemet. He confirms knowing Ayodi, Wycliffe, Geoffrey but never saw them at Legemet Primary School. The transmissions were all sent to National Tallying Centre.

Conclusively, he affirms that the elections were free, fair and credible. D.W.1 prays that this case be dismissed with costs.

D.W.2 adult/sworn/states adult male Christian Kiswahili Thomas Magotsi. He testified that he lives in Koibarak South Nandi, Kibwareng and that Swadi is his current MCA. He affirms to adopting his affidavit as evidence herein. He confirms voting at legemet at 10 a.m. and went home thereafter which is 400 metres away from the Polling Station. He denies bribing anybody as this is an illegality. He testified he has never been charged for any electoral malpractice. He further denies coercing anyone to vote in any particular manner. He confirms that there were police officers to ensure security and generally elections was peaceful.

D.W.2 confirms that he is educated and was not an assisted voter. He denies any claims of bribery nor campaigns on the fateful day. He denies bribing anybody on the election date. He testified that voter bribery is an offence and he has never engaged in it and only got to hear of those allegations through the Lawyer on 28/08/2017. D.W.2 confirms he voted peacefully on the fateful day and went home.

D.W.3 adult/sworn/states adult male Christian Kiswahili Markson Kitenya. He testified he lives in Koibarak and he swore an affidavit and signed it and he adduces it as his statement. He testified he went to the polling station at 6 a.m. He testified he was an Agent for 1st Respondent. He confirms signing an oath of secrecy and that he was trained as an Agent. He denies seeing anyone being bribed and that all the seals were put in his presence and signed. He testified he knows Caroline Chepchumba (P.W.5). He further confirms that all Agents signed Form 36(A). D.W.3 testified that he voted at Koibarak Stream 1.

Officers from IEBC were present and armed security in uniform. He voted after being identified using biometric Kiems Kit.

Other voters were equally identified. D.W.3 confirms taking oath of office. He avers having a letter from his party as an Agent. He confirms knowing a polling diary. He confirms having an accreditation badge. He also confirms signing the polling station diary on arrival and his co agents too. The Polling Station was closed at 5.02 p.m. and all agents confirmed seals were confirmed before and after closure. D.W.3 confirms observers were present during the counting. No one was coerced to sign before counting. They were trained in the process on the do's and don't's. Form 36A was signed after the counting. P.W.4 signed after counting. D.W.3 confirms no one was threatened or coerced at Koibarak 2. He denies that no campaign took place during election. The security details were there on the fateful day.

D.W.3 confirms that the elections were competitive and bribery was not part of the game. He was in room 2. He testified that counter foils were taken by The presiding officer. Spoilt votes were put in an envelope. Form 36A was signed by Agents and they were given a copy.

D.W.3 testified that if there was a problem, an agent raises an alarm through the presiding officer and security agents. D.W.3 testified that they were not allowed to cause any mayhem in the polling station. The electoral challenges were noted and worked on by IEBC. D.W.3 denies any bribery.

D.W.4 adult/sworn/states adult male Christian Kiswahili. Alex Lunoli, ID Number 21974679. He testified that he filed his replying affidavit dated 29/08/2017 and wishes to adopt the same as his evidence in chief. He further testified that on 08/08/2017, he was an agent at Legemet Polling Station. He confirms being an agent for Honorable Swadi and that he was at the Polling Station at 6 a.m. Elections were peaceful, election observers were present. The KIEMS machine was functional according to D.W.4. He denies that Patrick Ayodi and Wycliffe Bulimo were known to him but they were not at the Polling Station. He confirms signing Form 36A. He avers he was at the Polling Station. Election was peaceful.

D.W.4 testified that he was identified by the KIEMS kit and he was an agent for 1st Respondent for ANC. He confirms signing the oath of secrecy and was given an accreditation card. The polling station was opened at 6.00 a. – 5 pm. He testified he signed the diary and Gilbert Kipruto also signed. They signed the diary in the morning and after every activity e.g. placing of seals. He confirms signing Form 36A. He denies being coerced to sign anything before the election results. He confirms that they were trained as Civic Education. He confirms being in the station from 6 a.m. – 5 p.m.. he denies any incident of bribery or any hijacked voters. There were two police officers to maintain security. There were 2 polling booths.

D.W.4 testified that there was no way D.W. 2 would have bribed anyone under the security eyes. He D.W. 4 was an agent at a polling station. If there was any anomalies, D.W.4 testified that the Agents would be notified. He testified that P.W.2 was never chased away by the Presiding Officer and that there was never a meeting amongst Agents to spoil votes as this is an illegality.

D.W. 4 testified that they signed for all seals before and after election. D.W.4 denies of any campaigns in and out of the polling station. D.W.4 confirms being an agent for 1st Respondent and not his campaigner. He confirms he never left the Polling Centre on 08/08/2017. D.W.2 left after voting. D.w.4 confirms taking an oath of secrecy two days before the election date. He testified that he left the polling station after the station was closed. He confirms that there is a place to give reasons why he or she does not sign for both agent and Presiding Officer. He confirms there was no complaint or on behalf of ANC. Campaigns ended on 05/08/2017. He testified that all Agents signed form 36A meaning that they were satisfied with the results fo the voting on 08/08/2017.

D.W.4 testified that the Agents signed on behalf of their respective candidates and parties.

D.w.5 adult/sworn/states adult male Christina Kiswahili Songok Silas Kiprotich. He testified he is a

teacher at Sikimwai Primary School. ID No. 10220535. He testified that he participated on 08/08/2017 as a Presiding Officer for Legemet Polling Station. His Deputy was Philip K. Chepkwony. He testified that he had 6 clerks and 2 armed security personnel. D.w.5 received voting materials for all the electoral candidates and electorate materials. Polling Station Diary D.w.1 Legemet Polling Station Diary. D.W.5 testified that he wishes to adopt his replying affidavit dated 18/09/2017 as his evidence in chief.

He testified that the Polling Station opened at 6 a.m. – 5 p.m.. P.W.3 was present when the following station was opened. P.W. 3 was a Jubilee Agent. Agent for ANC was Alex Imoli. D.W. 4 No. 21974679 ANC. He confirms that he saw D.w.4 sign his Agent form for 1st Respondent herein and D.w.5 gave them accreditation and I.D. they also took oath of secrecy. D.W.5 then gave him and other legal agents badge. Without the above they cannot be Polling Station Agents. D.W.5 confirmed that they put seals after confirming there is nothing in the boxes. They then append their signatures. He confirmed that identification is by fingers either by KIEMS kit or Identity Card. There were 6 clerks to assist the process.

D.W.5 testified that he never witnessed any voting bribery and there was ample security. D.W.5 denies any malpractice nor did he receive any written complaint. PExhibit 2 was never addressed to anyone. D.w.5 closed the voting station at 5 p.m.. At 10.45 p.m., he confirms that they were counting votes. D.W.5 confirms that he had an official stamp as a Presiding Officer. He testified that he never saw any fiasco in his Polling Station and that no one was ever arrested in his Polling Station or charged after 08/08/2017.

D.W.5 testified that they take 15 minutes health break before they start counting votes. D.Exhibit 1 Polling Diary Legemet 26 votes were spoilt votes and were never entered in the ballot boxes. D.W.5 confirms that final tally was entered in Form 36(A).

Swadi 295 votes

Tarus 12 votes

70% voter turn-out. D.W.5 testified that voting went on smoothly and he declared the winner vide Form 36 A and Agents seal the ballot boxes. Ballot boxes are transparent. D.W.5 testified that he never knew Patrick Ayodi, Geoffrey nor Wycliffe and he denies any voting at his Polling Station. He confirms he did his work with due diligence. He denies any collusion to commit any malpractice. He further denies seeing D.W. 4 bribe anyone nor tamper with the votes.

D.W.6 adult/sworn/states adult female Christian English – Doreen Wawire. This was the Returning Officer for Aldai Constituency on 08/08/2017. She testified that election took place for MCA position in 23 Polling Stations. She testified that IEBC responded to this Petition on 18/09/2017 and filed on 19/09/2017. She testified that her tallying centre was Kobujoi Institute. That both the 1st Respondent and Petitioner were Contestants in her ward. She avers that one of her job description is to tally and announce votes. She testified she tallied 22 Polling Station out of 23. She confirms receiving all forms 36A and tallied Form 36B.

D.W.1 - 3135 votes

P.W.1 - 2797 votes

Voters who voted - 6787 on 08/08/2017.

Voter turn-out 72.6%. Voter turn-out was good. She avers she never tallied Chebara Polling Station 2 as there was anomalies. Ballot boxes were transparent and plastic in nature. She testified she is not allowed to open ballot boxes. Chebara 2 results were cancelled and it affected all 6 elective positions. She received first complaint on 09/08/2017 during the day and she reported matter to DCIO Nandi Hills South on 09/08/2017. There was overwriting and rubbing. She was arrested and charged for an election

offence.

D.W.6 testified that a Returning Officer has to monitor and receive calls, receive complaints from Agents/Candidates/Parties or Officials in the field. D.W.6 testified that she never got any report of bribery or violence. D.W.6 testified that there were armed security officers in all the Polling Stations. Campaigns ended 48 hours before election date. She testified she was not aware of anyone charged for bribery or campaigning during election date. Spoilt votes are not votes and IEBC stamps them as spoilt votes. These do not get in the ballot boxes. The Presiding Officer and Clerks take oath of secrecy. They are trained and D.W.6 confirms training them personally and thereafter were sworn by a Commissioner of Oaths and consequences were meted to them. Presiding Officers eventually issues them with Identification and Credibility. An assisted voter can be assisted by someone of their choice or the Presiding Officer in the presence of Agents.

D.W.6 testified that she never received any complaint that one Nelson Ligada was campaigning with 1st Respondent. He was a temporary IEBC Employee thus he has a right to vote. The main challenges of KIEMS machine were network issues which were tackled by the ICT Officers. D.W.6 testified that she was in charge of 170 Polling Stations in Aldai Constituency. She further testified that Elections were free and fair in Kibwareng Ward.

D.W.6 testified that as a Returning Officer, she disregarded results of votes where votes exceeds the number of registered voters as the case of Chebara 2.

D.W. 6 testified that election is a process. It begins with registration of voters. D.w.6 testified that each station has its own challenges variedly. Assisted voters have records. Literacy levels are different in all areas. D.W.6 testified that basis was not laid on bribery, campaigning etc.

D.W.7 adult/sworn/states adult male English Christian Julius Kipkemboi Mosiva I.D. No. 22516838. He testified he lives in Kimerek, Nandi County. He testified he is a teacher at Kamalambei Primary School. He testified that he was a presiding Officer at Koibarak Polling Station in Stream 2 and his Assistant was one Sarah Kipchirchir. He testified he had 6 Polling Clerks, Deputy Presiding Officer and Election Observers.

D.W.1 was vying vide ANC. D.W.3 was Party Agent for ANC and 1st Respondent. D.W.7 testified they put seals in the boxes and confirmed by Agents. They opened at 6 a.m. and closed at 5.02 p.m. All agents were present. D.W. 7 testified that ballot boxes, all Agents assembled so that they are aware of rejected, spoilt and valid votes before they start counting the votes. He testified that before this begins, they record seals in the morning in the presence of Agents. Properly marked ballot and stamped of IEBC should be a valid vote and everyone in the room can see. The diary is filled and Agents sign.

D.W.7 then fills form 36 A which results are entered.

D.Exhibit 10 Fourm 36 A

Koibarak 2

Tarus 41

Swadi 190

P.W.1's Agent signed.

P.W.4 signed as Agent.

D.W.7 confirmed this leads to articulated entry. D.W. 7 denies signing of anything before activity. He denies receiving any complaint from P.W.5 or any other person. Security was a ample. No arrests were ever made. D.W. 7 testified he closed the Station at 5.02 p.m. He conclusively affirmed that election was

free, fair and transparent. There was no threat nor violence nor bribery. D.W. 7 testified that KIEMS machine was for identifying gadget. It was serialized in his log book. Form 36 A and PJO has no discrepancies.

He denies seeing any money changing hands. Conclusively, he testified that everything was peaceful at his Polling Station.

This Court appreciates the evidence herein adduced by all the 12 witnesses on either divide. Issues for this Court thereafter for decision are as follows:-

1. Was there evidence of bribery
2. Was there evidence of violence
3. Did scrutiny and recounting decide otherwise in analyzing the situation
4. Was the election in Kibwareng Ward carried out on 08/08/2017 free, fair and transparent?

Having analyzed the evidence adduced herein by both the Petitioner and Respondent witnesses herein, a few legal issues must be addressed in analyzing the matter herein. The first issue alleged by the Petitioner was bribery. **Under the Election Offences Act No. 37 of 2016, Section 9** defines bribery as following:

1. A person who during an election period;

a. *Directly or indirectly offers a bribe to influence a voter to;*

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

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

b. *In any manner unlawfully influences the results of an election;*

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

2. *A Person who during an election period accepts or agrees to accept a bribe that is offered in the circumstances in subsection 1 commits an offence*

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

Under Section 21, the director of Public Prosecution shall have the power to order investigations and to prosecute offences under this Act.

As the case herein by the Petitioner, the Legal burden of proof in election disputes was on and remains with the Petitioner throughout the case. In ***Raila Odinga -Vrs- IEBC and 3 Others***, the Supreme Court Petition **No. 5 of 2013**; the rationale for this rule is that the Petitioner is the one who seeks relief from the Court and in particular the nullification of an election. (S. 107 (1) of the Evidence Act. The evidential burden of proof in election matters initially was upon the party bearing the legal burden i.e the Petitioner). The evidential burden, However may Shift and Often Shifts, between the parties as the weight of evidence given by either side during the trial varies as the weight of the evidence given by

either side during the trial varies (*Raila Odinga –vrs– Independent Electoral and Boundaries Commission and 3 others*) *Supreme Court Petition No. 5 of 2013*). Generally, the evidential burden will shift to the Respondent once the Petitioner proves:

- (i) The incidence of electoral irregularities or malpractices;
- (ii) That the electoral irregularities or malpractices have affected the result of the election (*Raila Odinga –vrs– Independent Electoral and Boundaries Commission & 3 Others, Supreme Court Petition No. 5 of 2013*)

It should also be noted that the standard of proof in election petition as referring to the extent the Petitioner is to go to sufficiently persuade the Election Court to interfere with the election results declared in favour of the candidate who scored victory.

In High Court in *Hassan Mohammed Hassan & Another –vrs Independent Electoral and Boundaries Commission and 2 Others, Election petition (Garissa) No. 6 of 2013*.

“The Court observed that Section 83 of the Election Act 2011 lays down the standard of proof required in Election Petitions in Kenya.

Section 83 stipulates:-

“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”.

Generally, the standard of proof required in election disputes is higher than the Civil Standard of balance of probabilities but lower than the Criminal Standard of proof beyond all reasonable doubt (*Raila Odinga –vrs– IEBC & 3 others Supreme Court Petition Court Petition No. 5 of 2013*).

There are two exceptions to this rule; First, a party who alleges the commission of election offences MUST prove such offences beyond all reasonable doubt (*Moses Masika Wetangula –vrs– Musikari Nazi Kombo & 2 others – Supreme Court Petition No. 12 of 2014*).

The rationale for this exception is that election offences approximate criminal offences and accordingly an election Court ought not to enter a finding of guilt in the absence of specific, satisfactory, definitive, cogent, and certain evidence as the case herein and as per one cogent issue for this Court to determine, was this particular election of Kibwareng Ward marred with bribery?

P.W.1 in his evidence as Petitioner testified that he never saw the 1st Respondent bribe anyone. He consistently adduced his evidence that his agents informed him that voters were being bribed. Unfortunately as the case maybe, the question this election Court beckons as per Sec. 9 (1) (2) and (3) as read with Sec. 21 of the Election Offences Act, were these election offences act ever reported to the relevant authorities, yet almost in either side of the Petitioner and Respondent, they argue that the Polling Station named by the Petitioner herein were ably manned by Security Officers. Section 21 can then be implored herein if formal complaints were reported to the said Security Agencies.

As a Petitioner generally on bribery allegations, he thus relied on hearsay evidence. The burden of proof lay upon him generally to prove these allegations but as per the analysis of the Petitioner’s Evidence and his witnesses lay squarely on him to prove these allegations. Hearsay evidence and his own admission that he was told of bribery allegations, yet no report to the authorities have been evidently substantiated as herein.

P.W.2 avers that he never reported these illegalities to the police station. P.W.3 testified that one Thomas Magotse was “taking people from him to the booth. He testified a group attacked him. Question is, were

these incidents ever reported as legally stipulated to the police? P.W.3 testified he reported to the Presiding officer and also the said Presiding Officer “refused to stamp his written Complaint” Yet in cross-examination, he avers he never recorded in his statement that there was violence in the Polling Station. The said Complaint Letter P.W.3 alludes that he never addressed it to the said Presiding Officer, even the fact that Thomas Makotswe was bribing voters, P.W.3 affirms he did not mention in it anyone in his complaint.

P.W.3 avers that Thomas was dishing out 200/= bribe which the said Thomas denied in his sworn affidavit.

P.W.4 also testified in his evidence that he never mentioned those voters who were convinced to vote. He also confirms he did not state the mentioned anomalies. P.W.5 avers that campaigns were ongoing during the election day and bribery. He P.W.5 avers he said Victor gave him 200/= but he declined and he reported to the police but did not mention those who tried bribing him with 200/= in his statement. He also gave evidence that he never saw 1st Respondent campaign on the fateful day.

In a nutshell, Sec. 9 (1) – 3 elaborately defines the ingredients of bribery. In the evidence adduced by the Petitioner and his witnesses, the burden of proof remained with Petitioner/ and his witnesses herein as the case may be but analyzing the evidence above, the evidential burden has not shifted and this Court finds that the evidence did not meet the threshold nor the burden of proof never shifted.

2. The second issue for this Court to determine is if there was evidence of violence. Section 11 of the Election Offences Act, a Person who directly or indirectly in person or by any other person on his behalf inflicts or threatens to inflict injury, damage, harm or loss on or against a person:-

- (a) So as to induce or compel that person to support a particular candidate or political party,
- (b) On account of such person having voted or refrained from voted, or
- (c) In order to reduce or compel that person to vote in a particular way or refrain from voting commits an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding six years or to both.

The Election Laws (Amendment) Act 2017 took away the power of Election Courts to find a person guilty of an Election Offence. Instead an Election Court is now only required to determine whether an Electoral Malpractice of a Criminal Nature may have occurred (Section 87 (1) of the Elections Act, 2011). The phrase “may have occurred” as used in Section 87(1) of the Election Act, 2011 suggests the Courts should use the Civil Standard of proof in determining whether such malpractices have affected the validity of an election. Where an Election Court determines that an Electoral Malpractice of a Criminal Nature may have occurred, it must direct that an order to that effect be transmitted to the Director of Public Prosecution (Section 87 (2) of the Elections Act, 2011). Once the Director of Public Prosecutions (“the DPP”) receives the order, he or she must direct that an investigation be conducted by such state agency as he or she considers appropriate and based on the outcome of the investigation, either prosecute the offender or close the matter (**Section 87(3) of the Election Act, 2011**).

Allegations of Electoral Irregularities must be proved to the satisfaction of the Court. The standard of proof for electoral irregularities is higher than the Civil Standard of balance of probabilities but lower than the Criminal Standard of proof beyond all reasonable doubt (***Raila Odinga –Vrs- IEBC & 3 Others, Supreme Court Petition No. 5/2013; Bernard Shiwali Masaka -Vrs- Boni Khalwale & 2 others, Election Petition (Kakamega) No. 2 of 2008.***

The mere proof of admission of electoral irregularities without more, will not automatically vitiate an election. This means a Petitioner who seeks to nullify an election on the ground of irregularities must show that the irregularities were of such a nature a magnitude as to substantially affect the result or integrity of the election.

The rule, commonly referred to as “the materiality test” requires an Election Court to strive to give effect to the will of the Electorate and present an Election. It applies even where there are significant breaches of the rules or duties of the election officials, if the irregularities in question have not affected the result of the election, **Section 83 of the Elections Act 2011. Fitch -Vrs- Stephenson (2008) EWHC 501 (Q.B.)**. Electoral irregularities often revolve around errors and omissions in the filling, signing and transposition of Election results, and alterations, cancellations or overwriting or such results. Ideally every alteration, cancellation and / or overwriting with respect to election results should be countersigned and stamped by the Presiding Officer (**William Odhiambo Odud =Vrs- I.E.B.C. & 2 Others. Election Petition (Kisumu) NO. 2/2013**).

Generally, Election Courts are reluctant to uphold Election results which have multiple cancellations, alterations or overwriting unless the Presiding Officer countersigns them.

In **Jared Odoyo Okello - Vrs- I.E.B.C. & 3 Others, Election Petition (Kisumu) No. 1 of 2013**, the Court opined as follows:-

..... “ although the regulations do not explicitly state that every cancellation or alteration to the results declaration form has to be counter-signed, it should always occur to the Presiding Officer that a form containing results is a sacred document. He has to own the contents therein and to justify them in any litigation. A Petition may be won or lost on the basis of such a declaration. The Law requires him to complete it and sign it together with his deputy and candidates/agents present. If he has to correct any entry thereon, this has to be brought to the attention of the candidates/agents present just for them to appreciate the need for the correction. Such correction has to be counter-signed, dated and stamped”

As the case herein maybe on irregularities and alleged violence, just as the bribery allegation, no witness gave a candid report as per required thresh-hold to uphold the violence. P.W.1 avers that he never saw 1st Respondent engaged in violence and/or bribery. The agents and /witnesses aver that there were Security Officers in all the named Polling Station. Question is how did they report the bribery and violence? Was it reported? I have quoted various Superior authorities on the above.

Sadly, the 2nd issue for this Court to determine fails the evidential thresh-hold as per the Election Dispute Laws and the same is supported by the above Superior Courts’ Authorities.

On Scrutiny and Recount,

Section 82(1) Scrutiny of Votes Election Act No. 24/2011:-

1. An Election Court may, on its own motion or on application by any party to the Petition, during the hearing of an Election Petition, order for a scrutiny of votes to be carried out in such a manner as the Election Court may determine.

2. Where the votes at the trial of an Election Petition are scrutinized, only the following votes shall be struck off:-

- a. The vote of a person whose name was not on the register or list of voters assigned to the Polling Station at which the vote was recorded or who had not been authorized to vote at that station;
- b. The vote of a person whose vote was procured by bribery, threatening, or undue influence,
- c. The vote of a person who committed or procured the commission of personation at the election,
- d. The vote of a person proved to have voted in more than one constituency,

e. The vote of a person, who by reason of conviction for an election offence or by reason of the report of the election Court, was disqualified from voting at the election, or

f. The vote cast for a disqualified candidate by a voter knowing that the candidate was disqualified or the facts causing the disqualification, or after sufficient public notice of the disqualification, or when the facts causing it were notorious;

3. The vote of a voter shall not except in the case specified in subsection (1) (e) be struck off under subsection (1) by reason only of the voter not having been or not being qualified to have the voter's name entered on the register of voters.

On 20/12/2017, this Court did a recount in this matter for 4 polling stations, Koibaraka, 1 and 2, Koitabut 1 and 2.

The recount for the 4 polling stations as per this Court's ruling dated 15/12/2017 was conducted very well and the results confirmed the same results as per the Elections results of 08/08/2017. This was conducted in the presence of the agents of either sides or their respective lawyers. There was no anomaly found and the results on recount and partial scrutiny confirmed that the election results especially for the sampled 4 polling stations was intact. These results were accepted by the Petitioner and Respondent respectively.

Having analyzed the evidence on record and perused and carefully studied the submissions, annexed authorities and final submissions, this Election Court as provided under Section 85 of the Election Act having heard this Petition within the period legally stipulated in the Constitution finds that the Petitioner herein **Shadrack Kirwa Tarus** especially after the prayers for scrutiny and recount granted and the findings made this Court better understand the vital details of the Electoral Process and gain impressions on the integrity of the Electoral Process. This also assisted the Court in determining the valid votes cast in favour of each candidate. This also made the Court investigate of the allegations of irregularities and breaches of the law complained of are valid.

Even when the margin of Victory is wide, Scrutiny and recount may still be ordered if it would facilitate the expeditious disposal of the election petition - *Hassan Ali Joho - Vrs- Hothan Nyange & Another – Election Petition – Mombasa No. 1 of 2005*.

Conclusively, this Court finds that the Petitioner has not proved his case beyond the required thresh-hold to seek prayers to nullify this election as such this Petition fails and the **Court upholds that the 1st Respondent was validly elected in a free and fair election in accordance to the Constitution of Kenya Laws 2010 and all the Electoral applicable Laws stipulated.**

As for IEBC, this Court recommends upon observation to take the Leadership and Integrity Act more seriously with the seriousness it deserves especially in training the I.E.B.C Personnel to conduct the Elections. Trainings should also be carefully and conclusive time scheduled for training to avoid the rush in such trainings yet very integral part of any Country's Democracy and Good Governance.

Elections in any Country are emotional and emotive and in replica the trainings and those selected to be trained for the exercise should be well vetted to perform and in sync the Leadership and Integrity Act.

This Petition has equally been a great learning process, the Counsels on either side have done an excellent job in enhancing Electoral Jurisprudence in this nation.

Costs to the Respondents herein.

JUDGMENT READ AND DELIVERED IN OPEN COURT

THIS 3RD DAY OF JANUARY, 2018.

DOLPHINA ALEGO

SNR. PRINCIPAL MAGISTRATE.

In the Presence of:

Sang for Rotich for Petitioner

Kitur for 1st Respondent

Chanzu for 2nd Respondent: Our respective clients are in Court

Language - English

Chanzu: Per Rule 32 of Election Petition Rules, we pray Court caps instruction fees. We pray that the capping costs be determined by the discretion of the Court considering work done.

Kitur : Sec. 32, the costs of instructions be capped by the Court. There is money deposited in Court, can be started herein.

Sang holding brief for Rotich for Petitioner: Capping of costs is in order and pre-mature to release.